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Universal Jurisdiction not so Universal: A Time to Delegate to the International Criminal Court

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*UNIVERSAL JURISDICTION NOT SO UNIVERSAL: A TIME TO DELEGATE
TO THE INTERNATIONAL CRIMINAL COURT*

ABSTRACT

The exercise of universal jurisdiction in cases involving crimes under international law remains highly debated and underlines a certain number of legal and political issues in its implementation. Because the principle of universal jurisdiction relies on national authorities to enforce international prohibitions, pivotal decisions are expected to reflect domestic decision-makers' positions as to the interests of justice, the national interest and other criteria. In many States, the legal system lacks the means to investigate or prosecute on the basis of universal jurisdiction. Indeed, many legal systems do not define the term "crimes" that can be prosecuted under the principle and continue to apply domestic criminal law. The purpose of this article is to discuss the scope of universal jurisdiction and the risks that are associated with its application. In particular, this article highlights the various obstacles that may explain why universal jurisdiction has yet proven to be an effective tool to combat impunity. Finally, this article proposes the optimal solution that may remedy the current inadequacies associated with the implementation of the principle of universal jurisdiction and will ensure peace and justice within the international community against heinous crimes. Considering the obstacles and risks associated with the scope and application of universal jurisdiction, the best way to protect the international community from being affected by crimes left unpunished is to "remove" the exercise of universal jurisdiction from the States and confer it on the International Criminal Court so that these crimes are punished fairly and according to uniform laws.

I. INTRODUCTION

In the fall of 1998, the world witnessed in shock the capture of Chilean dictator and former head of State Augusto Pinochet while in London in response to an arrest warrant charging Pinochet with human rights violations committed during his administration between 1973 and 1990.¹ Brought by a magistrate in Spain and involving an extradition request to the United Kingdom, the case never came to trial on the ground that Pinochet was not medically fit to stand trial.

In June 2001, four Rwandan Hutus² were convicted in a Belgium court of committing genocide in Rwanda in violation of a Belgian universal jurisdiction statute.³ The success of the case which marked Belgium's first application of its universal jurisdiction laws resulted in a profusion of complaints. A group of twenty-three Palestinian refugees and survivors, for instance, initiated an action in Belgium seeking to have Prime Minister Ariel Sharon tried for his alleged involvement in the massacre of Palestinians in Sabra and Shatila refugee camps in 1982 while the camps were under Israeli control.⁴ A group of Israelis returned the favor by seeking to have Palestinian leader Yasser Arafat tried in Belgium for his alleged role in terrorist attacks in Israel. Instead of rendering justice, Belgium's courts sole retribution created an unprecedented judicial chaos which materially impacted on the international community.

The explosion of lawsuits against official leaders spread throughout Europe. In 2006, Spain launched a criminal case against former Chinese President Jiang Zemin and his Prime Minister Li

¹ See *Regina v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 1)* (1998) 3 W.L.R. 1456 (H.L.).

² See Luc Reydam, Belgium's First Application of Universal Jurisdiction: The *Butare Four* Case, J. INT. CRIMINAL JUSTICE (2003) 1(2): 428- 429 doi:10.1093/jicj/1.2.428.

³ See Agence France Press, *Belgian Jury Convicts 4 in 94' Rwanda Massacre*, N.Y. Times A3 (June 6, 2001); see also, Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008*, 30 MICH. J. INT'L L., 927, 933 (2009).

⁴ Kaleck, *supra* note 3, at 933.

Peng for participating in genocide in Tibet. In 2009, various Iraqi victims took former U.S. Presidents, George H. W. Bush, William J. Clinton, George W. Bush and his senior officials, Vice-President Colin Powell and Secretary of State Dick Cheney, U.S. President Barak H. Obama, along with four U.K. Prime Ministers to a Spanish court for war crimes, crimes against humanity and genocide committed during the bombing of Baghdad in 1991 and 2003.⁵ In that same year, a British court issued an arrest warrant at the behest of pro-Palestinian activists against Israeli opposition leader Tzipi Livni for alleged war crimes committed during Operation Cast Lead,⁶ during which she acted as Israeli's Foreign Minister.⁷ The warrant was later cancelled after British officials learned that Livni was not in Britain.⁸ The Israeli foreign Ministry called the move "an absurdity."⁹

This list which is far from being exhaustive clearly signals new changes in international norms and highlights some of the dangers associated with the exercise of universal jurisdiction. Britain, Belgium, and Spain have since reformed their laws to narrow the scope of universal jurisdiction. Nevertheless, the damage caused remains considerable.

⁵ See Global Research, BRussells Tribunal, *Law Suit Against 4 US Presidents and 4 UK Prime Ministers for War Crimes, Crimes Against Humanity, & Genocide in Iraq, Statement on Closure of Legal Case for Iraq in Spain*, February 10, 2010, available at <http://www.globalresearch.ca/index.php?context=va&aid=17535>.

⁶ On December 27, 2008, Israeli forces began a devastating bombing campaign on the Gaza Strip codenamed Operation "Cast Lead" with the purpose of ending rocket attacks into Israel by armed groups affiliated with Hamas and other Palestinian factions; see Center for Research on Globalization, Michel Chossudovsky, *The Invasion of Gaza: "Operation Cast Lead," Part of a Broader Israeli Military-Intelligence Agenda*, available at <http://www.globalresearch.ca/index.php?context=va&aid=11606> (last visited January, 2010).

⁷ Diane Morrison & Justus R. Weiner, *Curbing Enthusiasm for Universal Jurisdiction*, 4 BERKELEY J. INT'L L. PUBLICIST 1, 1 (2010).

⁸ Haaretz Service, Barak David, *Foreign Ministry Outraged over U.K. Arrest Warrant Against Livni*, available at <http://www.haaretz.com/news/foreign-ministry-outraged-over-u-k-arrest-warrant-against-livni-1.2191> (December 12, 2009). Ms. Livni cancelled her visit to London where she initially intended to speak at a Jewish National Fund Conference after she learned of the arrest warrant issued against her.

⁹ *Id.*

Under territorial jurisdiction¹⁰, States may enact criminal laws which give authority to their national courts to prosecute perpetrators of crimes committed on their territory, regardless of the nationality of the perpetrator or the victim. In addition, States may enact laws to prosecute perpetrators of *certain* crimes even where there is no nexus to the State. This is known as the principle of universal jurisdiction.

The principle of universal jurisdiction has attracted global attention since the 1998 arrest of Augusto Pinochet in London.¹¹ However, this principle is not a creature of today's international laws. For more than three centuries, States have exercised universal jurisdiction over piratical acts on the high seas, even when neither pirates nor their victims were nationals of the prosecuting State.¹² Traditionally, pirates were considered *hostes humani generis* (enemies of the human race). Today, this expression refers to perpetrators of heinous crimes, namely genocide, war crimes, crimes against humanity, torture, extrajudicial executions and crimes of "disappearance." In the aftermath of the atrocities of the Second World War, the international community extended the principle of universal jurisdiction to war crimes and crimes against humanity.¹³ Because these crimes often encompass serious crimes that are "so grave" and "of universal concern,"¹⁴ they are deemed to

¹⁰ HENRY .C. BLACK, *BLACK DICTIONARY LAW* (8th ed. Thomson West Group 2004) (defining Territorial jurisdiction as 1. jurisdiction over cases arising in or involving persons residing within a defined territory; 2. territory over which a government, one of its courts, or one of its subdivision has jurisdiction).

¹¹ Human Right Watch, *Universal Jurisdiction in Europe The State of the Art*, Volume 18, No. 5(D) June 2006, available at <http://www.hrw.org/en/reports/2006/06/27/universal-jurisdiction-europe>. [“hereinafter “Human Right Watch.”].

¹² Michael P. Scharf, *The United States and the International Criminal Court: The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 *LAW & CONTEMP. PROBS.* 67, 81 (2001).

¹³ The International Military Tribunal in Nuremberg held that due to the grave nature of war crimes, it ought to include universal jurisdiction; *see also* the four Geneva Conventions of 1949 which place a duty on the States to protect victims of warfare and bring violators of the laws of war to justice.

¹⁴ *Restatement (Third) of the Foreign Relations Law of the United States* § 404 (1986) [hereinafter “Restatement Third.”]

affect the moral and even peace and security interests of the international community as a whole and deserve condemnation.¹⁵

Thus the principle of universal jurisdiction holds that international law enables each State to assert jurisdiction over certain crimes on behalf of the international community “in a manner equivalent to the Roman concept of *actio popularis*, which gave every member of the public the right to take legal action in defense of public interest, whether or not one was affected.”¹⁶ International law, both customary and conventional, regulates a State’s assertion of universal jurisdiction.¹⁷ Today, the principle of universal jurisdiction is waiting to become an integral part of the international justice system.¹⁸ Yet, serious obstacles stand on the way of its realization.¹⁹

The international community lacks a coherent international criminal system. The exercise of universal jurisdiction in cases involving crimes under international law remains highly debated and underlines a certain number of legal and political problems in its implementation. In order to have the principle of universal jurisdiction fulfill its potential as an effective criminal system to combat impunity, its laws ought to be applied uniformly among the international community.

This article discusses the scope of universal jurisdiction and the dangers that are associated with its application. The article further highlights the various obstacles that may explain why

¹⁵ Bruce Broomhall, *Universal Jurisdiction: Myths, Realities, and Prospects: Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law*, 35 NEW ENGL. L. REV. 399, 402 (2001).

¹⁶ Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INTL L. 81, 88 (2001); *see also*, OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 209 (Dordrecht: Martinus Nijhoff Publishers, 1991).

¹⁷ *See* The Report of the Council Secretariat, The AU-EU Expert Report on the Principles of Universal Jurisdiction, PP 8-9, delivered to the Council of the European Union and the Delegation, U.N. Doc. 8672/1/09 (Apr. 16, 2009) [hereinafter “AU-EU Report.”]

¹⁸ Broomhall, *supra* note 15, at 400.

¹⁹ *Id.*

universal jurisdiction has yet proven to be an effective tool to combat impunity. Finally, this article proposes the optimal solution that may remedy the current inadequacies associated to the implementation of the principle of universal jurisdiction and will ensure peace and justice against heinous crimes within the international community.

I. SCOPE & APPLICATION OF UNIVERSAL JURISDICTION

There is no generally accepted definition of universal jurisdiction in conventional or customary international law.²⁰ However, it generally amounts to the assertion of jurisdiction by any State over crimes that are so heinous²¹ regardless of “any nexus the [S]tate may have with the offen[c]e, the offender, or the victim²² even if its nationals have not been injured by the acts. Universal jurisdiction offenses are injuries to “the international community as a whole.”²³ Paragraph 1(1) of the Princeton Principle defines universal jurisdiction as:

“[C]riminal 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.”²⁴

²⁰ Roger O’Keefe, *Journal of International Criminal Justice*, 2 JICJ 735, 744 (2004); see also, Dissenting opinion of Judge ad hoc, Van den Wyngaert in *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, *Judgment*, I.C.J. Reports, 2002, p. 3, 166, available at <http://www.icj-cij.org/docket/files/121/8126.pdf>.

²¹ Princeton Principles, Principle 2, *Serious Crimes Under International Law*, Paragraph 1. Under these Principles, serious crimes under international law include: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture [hereinafter “Princeton Principles.”]

²² O’Keefe, *supra* note 20, at 746; see also, AU-EU Report, *supra* note 15.

²³ See Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 LAW & CONTEMP. PROBS., 153, 165 (1996) (arguing that the “only basis” for exercising Universal jurisdiction is the “assumption that the prosecuting state is acting on behalf of all states.”)

²⁴ Princeton Principles, *supra* note 21.

Similarly, Paragraph 404 of the *Restatement (Third) of the Foreign Relations Law of the United States* provides that,

“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”²⁵

Uncertainties as to the limits of scope and applicability of universal jurisdiction remain strongly contested.²⁶ Indeed, no treaty mandates States to exercise universal jurisdiction over genocide, crimes against humanity, extrajudicial executions, war crimes, torture, and crimes of “disappearance.” Thus, the exercise of universal jurisdiction can be either permissive or mandatory.²⁷ However, many scholars, commentators and human rights advocates argue that international law “mandates” the exercise of universal jurisdiction and the punishment of perpetrators of international crimes.²⁸ Their view is mainly grounded in the norm of *jus cogens* and obligations *erga omnes*. On that same note, in the *Case Concerning the Barcelona Traction, Light and Power Company Limited* (Belgium v. Spain)²⁹, the International Court of Justice stated that:

²⁵ Restatement Third, *supra* note 14, at § 404.

²⁶ Broomhall, *supra* note 15, at 404.

²⁷ *Id.* at 401.

²⁸ See, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 303 (5th ed.) (“[T]here is in international law a duty on states to punish crimes against humanity ... even if this means rejecting or annulling amnesty laws and taking some risks of counter-revolution.”); see also Broomhall, *supra* note 15, at 405.

²⁹ *Case Concerning the Barcelona Traction, Light and Power Company Limited* (Belgium v. Spain), (“New Application” 1962), (2nd Phase), ICJ Reports 3, at Paragraph 33 (1970).

...An essential distinction should be drawn between the obligations of a State towards the international community as a whole and those arising vis-à-vis another State.... By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

In 2010, in its Sixth Committee, the United Nations General Assembly recalled with its Member States the principles that govern the exercise of universal jurisdiction over “grave breaches.”³⁰ While many international conventions provide for a duty to prosecute certain crimes but do not always entail universal jurisdiction,³¹ the four 1949 Geneva Conventions recognized the principle of universal jurisdiction in the form of the obligation to extradite and prosecute “grave breaches.”³² In addition, States that have ratified the Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment³³ are legally bound to exercise universal jurisdiction over perpetrators in breach of the Convention.

Today, most States have recognized that they have a moral duty to exercise universal jurisdiction over these crimes. Yet, many have not fulfilled their obligations to enact national laws

³⁰ See, United Nations, General Assembly, 65th Session, Sixth Committee, item 86, *Statement by the ICRC*, New York, 15 October 2010; see also, *Principle of Universal Jurisdiction as Safeguard Against Impunity for Major Crimes; Some Caution Risk of Abuse*, Sixty-four General Assembly, GA/L/3371, 20 October 2009, available at <http://www.un.org/News/Press/docs/2009/gal3371.doc.htm> (last visited January 2010).

³¹ Broomhall, *supra* note 15, at 403.

³² See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, arts. 49, 50, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, arts. 50, 51, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of War, Aug. 12, 1949, arts. 129, 130, 75 U.N.T.S. 135; and Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 146, 147, 75 U.N.T.S. 287.

³³ Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, General Assembly Resolution 3453 9 December 1975, available at <http://untreaty.un.org/cod/avl/ha/catcidtp/catcidtp.html>.

providing for universal jurisdiction. This may in part be due to political interferences or inadequacy of national legal systems to implement the laws.³⁴ According to a preliminary study conducted by Amnesty International in 2001, over 125 countries had universal jurisdiction laws but none had laws that were entirely adequate.³⁵

Thus, the true debate surrounding the principle of universal jurisdiction is not whether the concept validly exists as a basis for jurisdiction in international law but rather the scope of its applicability.³⁶ Indeed, the implementation of universal jurisdiction is often inhibited by various obstacles that may explain why universal jurisdiction has yet proven to be an effective tool to combat impunity, namely inexistent or inadequate legislation in national legal systems, political pressure exercised by national governments, and governments' recognition of amnesty or immunity. Each of these obstacles is discussed in turn.

1. Inadequacy of National Legislation & Procedure

There is a lack of appropriate implementing legislation in States as to the exercise of universal jurisdiction. Because universal jurisdiction relies on national legal systems to enforce international norms, more often than not, its application is hindered by the inexistence or

³⁴ Christopher Keil Hall, Senior legal Adviser, International Justice Project, at the Second International Expert Meeting on War Crimes, Genocide and Crimes against Humanity, 19 June 2005, Interpol Lyon, *available at* <http://www.amnestyusa.org/document.php?lang=e&id=ENGIOR530072007>.

³⁵ Amnesty International, *Universal Jurisdiction: The Duty of States to enact and implement legislation*, AI Index: IOR 53/2002-018/2001, *available at* <http://www.amnesty.org/en/library/asset/IOR53/020/2001/en/009a145b-d8b9-11dd-ad8c-f3d4445c118e/ior530202001en.pdf> [hereinafter "Amnesty International."]

³⁶ The Executive Council, Thirteenth Ordinary Session, 24-28 June 2008, *Report of the Commission on the Use of the Principle of Universal Jurisdiction by Some Non-African States as Recommended by the Conference of Ministers of Justice/ Attorney General*, *available at* http://www.unhcrro.org/Regional_Partners/Docs/ExeCoun_2008b.pdf, para. 9 [hereinafter the "Executive Council."]

inadequacies of these systems.³⁷ Many States fail to define the term “crimes” under international law in their criminal code. China’s legislation, for instance, does not include the crimes of genocide, crimes against humanity, war crimes and crimes of aggression into its national laws.³⁸ Thus, a Chinese court will try the perpetrator of a rape committed in war time as a domestic crime of rape subjecting him or her to a lighter sentence than the one the International Criminal Court (“ICC”)³⁹ would use under Article 7(1) of the Rome Statute⁴⁰ for crimes against humanity.⁴¹

What is more troubling is that some States that have ratified the Rome Statute fail to include definitions of crimes under international law in their national laws.⁴² The case of Chad former President Hissène Habré illustrates this point. In 2000, a Senegalese court relied on the principle of universal jurisdiction to indict Hissène Habré on charges of torture, war crimes, and crimes against humanity committed while he was in office between 1982 and 1990.⁴³ Although Senegal implemented criminal laws that criminalized torture, these laws did not expressly provide for universal jurisdiction over the crime. Thus, in the case of Hissène Habré, the Chad’s Supreme Court ruled that Senegalese courts did not have jurisdiction over the crimes committed by a foreign national outside its territory. Yet, the Court’s ruling directly conflicted with Article 79 of the Senegal’s Constitution which provides that,

³⁷ Broomhall, *supra* note 15, at 399.

³⁸ Lijun Yang, *On the Principle of Complementarity in the Rome Statute of the International Criminal Court*, 4 CHINESE J. INT’L L. 121, 128 (2005).

³⁹ See discussion *infra* Part II.A-B.

⁴⁰ *Id.*

⁴¹ Yang, *supra* note 38, at 128.

⁴² Human Right Watch, *supra* note 11, at 24.

⁴³ Amnesty International, *supra* note 35.

“[T]he treaties or agreements regularly ratified or approved have, on their publication, an authority superior to that of laws, subject, for each treaty and agreement to its application by the other party.”⁴⁴

Because Senegal has ratified the Convention against Torture, it was obligated to exercise universal jurisdiction.⁴⁵ Senegal ultimately reformed its laws to prosecute Hissène Habré following an indictment by a Belgium court in 2005. Prosecutors in States like Denmark and Norway that have joined the ICC can only interpret international crimes in terms of national crimes which generally amount to murder or assault.⁴⁶ In 2004, for instance, a Danish court charged a national of Uganda with armed robbery and abduction under the Danish Penal Code for war crimes he committed.⁴⁷ Thus, in the absence of a definition of the term “crimes” that can be prosecuted under universal jurisdiction, these States fail to capture the full nature of the crime equating torture with assault. In other States, the definitions of the crimes may be inconsistent with the definitions of crimes that follow the Rome Statute or other international law conventions or treaties.⁴⁸ These differences generate gaps and problems with the principle of legality and *nulla poena sine lege*.⁴⁹

Some scholars and commentators argue that one way of trying to resolve this issue is to require States to ensure domestic incorporation of international crimes as they are defined in treaties

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See International Federation for Human Rights, *Strategies for the Effective Investigation and Prosecution of Serious International Crimes: The Practice of Specialised War Crimes Units*, P.19 December 2010, available at http://www.fidh.org/IMG/pdf/The_Practice_of_Specialised_War_Crimes_Units_Dec_2010.pdf. In Denmark, it is the Special International Crime Office (SICO) which investigates and prosecutes all complaints on the basis of ordinary crimes defined under the Danish Penal Code.

⁴⁸ See *supra* Part I.1.

⁴⁹ Kaleck, *supra* note 3, at 959.

to which the States are parties.⁵⁰ While this may somewhat lessen the gap in the application of universal jurisdiction between States, major obstacles still remain.

The applicability of national law to prosecute international criminal crimes often means that the offense is subject to statutes of limitations. Under Danish national law, international crimes are subject to a ten-year statute of limitations.⁵¹ However, such crimes are not subject to statutes of limitation⁵² under international law. Indeed, there is a fundamental principle which provides that where crimes against humanity are involved, responsibility for the crime cannot lapse with time and thus renders the statute of limitation inapplicable. On November 26, 1968, the United Nations General Assembly adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.⁵³ While Hungary and Argentina⁵⁴ have approved the 1968 Convention, some others States like France have affirmed that war crimes can be subject to

⁵⁰ See Redress 7 FIDH, Legal Remedies for Victims of “International Crimes”: Fostering an EU Approach to Extraterritorial Jurisdiction 3-5 (2004) available at <http://www.fidh.org/Legal-Remedies-for-Victims-of-International> (last visited April 23, 2011).

⁵¹ Danish Penal Code, Sections 93-97.

⁵² United Nations General Assembly, Convention Against the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, GA Resolution 2391 (XXIII), November 1968, entered into force on November 11, 1970, available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-6&chapter=4&lang=en (last visited March 10, 2011) [hereinafter “Convention Against the Non-Applicability of Statutory Limitations”]; see also, Rome Statute, *infra* note 89, at art. 29.

⁵³ Convention Against the Non-Applicability of Statutory Limitations, *supra* note 50. Article 1 of the Convention declares that “[n]o statutory limitation shall apply [to these crimes]...irrespective of the date of their commission.” The Convention also includes genocide with the definition of crimes against humanity.

⁵⁴ See Bruce Broomhall, *Statutory Limitations*, available at <http://www.enotes.com/genocide-encyclopedia/statutory-limitations> (last visited March 15, 2011). In 1993, the Hungarian Constitutional Court upheld a law revoking statutes of limitations with respect to crimes against humanity that were perpetrated in the suppression of the 1956 uprising. In 2003, Argentina approved and incorporated the 1968 Convention even though it annulled two laws that provided amnesties in relation to the military dictatorship that ruled from 1976 to 1983.

statutory limitations.⁵⁵ It is worth noting that in 2010, France extended its statute of limitation for war crimes from 10 years to thirty years.⁵⁶

The acquisition of evidence from other States poses another substantial problem that may set back prosecution under the principle of universal jurisdiction.⁵⁷ In many States, the legal system lacks the means to investigate or prosecute on the basis of universal jurisdiction. Consequently, the process becomes extremely lengthy and challenging. When criminal proceedings require evidence involving a State's official, the State's government may obstruct the access to the victims, witnesses, and to other relevant documents that may be necessary to make out the case.⁵⁸ Thus, the exercise of universal jurisdiction raises evidentiary challenges as another jurisdiction where the alleged crime occurred or where the perpetrator may be a standing official retains control over most part of the evidence.⁵⁹ Even if the documents can be obtained, a court outside the jurisdiction of the crime may still face issues of authenticity.⁶⁰ Finally, there is no assurance that the prosecuting State will comply with due process in adjudicating criminal cases. Thus, where States may agree to assist other jurisdictions to allow the prosecution of international crimes under universal jurisdiction, their effort

⁵⁵ *Id.* The French Court of Cassation affirmed through its 1984 and 1985 decisions against Klaus Barbie that pursuant to a 1964 French law, crimes against humanity cannot be subject to statutory limitations even though and contrary to the 1968 Convention, war crimes can. Consequently, charges for war crimes against Klaus Barbie committed against Jean Moulin were dismissed. Klaus Barbie was only sentenced for the crimes against humanity he committed against the children of Izieu.

⁵⁶ Loi n° 2010-930 du 9 août 2010 portant adaptation du droit pénal à l'instruction de la Cour pénale internationale, *available at* <http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=?cidTexte=JORFTEXT000022681235&dateTexte=&oldAction=rechJO&categorieLien=id> (last visited April 3, 2011).

⁵⁷ Kaleck, *supra* note 3, at 962.

⁵⁸ *Id.*

⁵⁹ Broomhall, *supra* note 15, at 412.

⁶⁰ *Id.*

to reach uniformity will be tedious.⁶¹ Therefore, it is likely that the prosecution of foreign nationals under the principle will undermine peaceful international relations.

2. *Potential and Actual Political Abuses*

Where universal legislation is in place, its application under international law presents political issues in cases involving international crimes.⁶² Indeed, because universal jurisdiction relies on national authorities to enforce international prohibitions, critical decisions are expected to reflect national positions regarding the interests of justice and State's interest.⁶³ Consequently, there is a real risk that prosecutions may be politically motivated.⁶⁴ Distinguished Research Professor of Law at DePaul University College of Law and war crimes expert at the United Nations, Cherif Bassiouni stated that,

Unbridled 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 intentions, universal jurisdiction can be used imprudently, creating unnecessary frictions between States, potential abuses of legal processes, and undue harassment of individuals prosecuted or pursued for prosecution under this theory. Universal jurisdiction must therefore be utilized in a

⁶¹ *Id.*

⁶² Broomhall, *supra* note 15, at 399.

⁶³ *Id.* at 400.

⁶⁴ Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENGLAND L. REV., 337, 38 (2000).

cautious manner that minimizes negative consequences, while at the same time enabling it to achieve its purposeful purposes.⁶⁵

Former Secretary of State Henry Kissinger, who was himself subject to questioning under the principle of universal jurisdiction, argued that the universal system “must not allow legal principles to be used as weapons to settle political scores.”⁶⁶ He further argued that, “if law replaced politics, peace and justice would prevail.”⁶⁷ In 2003, U.S. Secretary of State Colin Powell denounced the risks associated to the exercise of universal jurisdiction that may render the task of public officials carrying out their duties more difficult. Most recently, the Bush administration feared that anti-American activists around the world might invoke universal jurisdiction to bring frivolous and politically motivated prosecutions against U.S. officials for alleged international crimes.⁶⁸ When Belgium was in the forefront of assertion of universal jurisdiction, U.S. Defense Secretary Donald H. Rumsfeld threatened the Belgium Parliament that it risked its status as host to NATO’s headquarters if it did not rescind its universal jurisdiction laws. As a result of the political pressures exercised by the United States,⁶⁹ Belgium Parliament repealed its law.⁷⁰ The new *loi du 5 août 2003*⁷¹ as it stands

⁶⁵ AU-EU Report, *supra* note 17, at 13 (referring to Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 82 (2001-2002).

⁶⁶ Henry Kissinger, *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*, Foreign Affairs, July/August 2001, and reply by Kenneth Roth, *The Case for Universal Jurisdiction*, Foreign Affairs, September/October 2001.

⁶⁷ *Id.*

⁶⁸ Congressional Research Service/ The Library of Congress, *The International Criminal Court Treaty: Description, Policy Issues, and Congressional Concerns*, January 6, 1999, at 9.

⁶⁹ Sean D. Murphy, *US Reaction to Belgian Universal Jurisdiction Law*, 97 AM. J. INT’L L. 984, 986 (2003).

⁷⁰ Article 7 de la loi du 16 juin 1993 relative à la répression des violations graves de droit international humanitaire. The law provided that, « les juridictions belges sont compétentes pour connaître des infractions prévues a la présente loi, indépendamment du lieu ou celles-ci auront été commises.... » Belgium courts have jurisdiction over offenses regardless of the place and territory where these offenses were committed.

⁷¹ Loi du 5 août 2003 modifiant la loi du 16 juin 1993 relative a la répression des violations graves de droit international.

today allows the exercise of universal jurisdiction over international crimes only in cases where the offender is either a national of Belgium or has primary residence in Belgium for at least three years at the time the crimes were committed, or if Belgium is required by treaty to exercise jurisdiction over the case.⁷²

The African Union expressed similar concerns. In its 2008 Report of the Executive Council (“Report”), the African Union stated that the exercise of universal jurisdiction over States’ officials can result in harassment while adversely impacting on the effective performance of their official functions.⁷³ The Report further stated that the exercise could have international repercussion by “embarrassing” or limiting a State in its conduct of foreign affairs.⁷⁴ This could in turn generate tensions between States and open avenues to forum-shopping.⁷⁵

Finally, international crimes are often committed in non-party States that did not consent to the jurisdiction of the ICC over their nationals for crimes their government supported. In Iraq, no court was willing to prosecute Saddam Hussein or his highly ranked officers who acted under his orders.⁷⁶ Even where a State is a party to the Rome Statute, it may be unwilling to investigate or

⁷² Loi du 23 avril 2003 modifiant la loi du 16 juin 1993 relative a la répression des violations graves de droit international humanitaire et l'article 144ter du Code judiciaire, *available at* http://www.ulb.ac.be/droit/cdi/Site/Legislation_files/Loi%20de%201993%20telle%20que%20modifiee%20par%20la%20loi%20du%2023%20avril%202003%20texte%20de%20loi.pdf; *see also*, Anthony Dworkin, *Belgium Court Rules that Sharon Cannot Be Tried in Absentia*, CRIMES OF WAR PROJECT, July 11, 2002, *available at* <http://www.crimesofwar.org/print/onnews/sharon-print.html> (last visited March 16, 2011).

⁷³ The Executive Council, *supra* note 36.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Douglass Cassel, *Universal Criminal Jurisdiction*, 31 HUM. RTS. 22 (2004).

prosecute one of its nationals who perpetrated international crimes. In Afghanistan, for instance, the Taliban regime sheltered Osama bin Laden despite his indictment in the United States.⁷⁷

3. Immunity & States' Officials

Some prosecutions of international crimes are prevented from going forward because of the exercise of immunity granted to political officials. Chinese law, for instance, grants absolute immunity to government officials or persons with official capacity.⁷⁸ China's stand followed by many other States is contrary to international practice which strongly suggests that grave international crimes cannot be amnestied.⁷⁹

Article 27(2) of the Rome Statute does not recognize the immunity of States' officials under national or international law. The Article directly conflicts with the 2002 International Court of Justice's decision in *The Case Concerning the Arrest Warrant of April 11, 2000* ("*Arrest Warrant*")⁸⁰ where the Court held that acting heads of State and Ministers for Foreign Affairs are protected by immunity *rationae personae*.⁸¹ In *Arrest Warrant*, a Belgium magistrate issued an arrest warrant *in absentia* against Congo Minister for the Foreign Affairs Mr. Yerodia alleging grave breaches of the 1949 Geneva Conventions for perpetrating war crimes and crimes against humanity. The Court ruled that the issue of the arrest warrant constituted a violation of an obligation of Belgium towards

⁷⁷ *Id.*

⁷⁸ Yang, *supra* note 38, at 130.

⁷⁹ See Human Rights Watch citing to United Nations Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, 23 August 2004, S/2004/616, paras. 10, 64(c), at 25

⁸⁰ *Arrest Warrant*, *supra* note 20.

⁸¹ Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407 (2004).

Congo because it failed to respect the immunity of a Minister.⁸² Some States have extended the International Court of Justice ruling to grant immunity to former heads of States.⁸³

4. *Absence or Inefficiency of Extradition Laws*

Lastly, although the right to extradite for crimes exists under international law, many States fail to have extradition laws. The *Pinochet* case,⁸⁴ for instance, made clear the extent to which national laws regarding extradition can create obstacles and delay the exercise of universal jurisdiction.⁸⁵ In another instance, following the amendment of its 1993 law, Belgium retained pending cases including that of former President of Chad, Hissène Habré.⁸⁶ Belgium sought his extradition from Senegal where he was arrested. However, the Senegalese court did not grant Belgium's request for extradition. Instead, the court referred the matter to the African Union which decided that the matter fell within its competence and ultimately mandated Senegal to prosecute Hissène Habré.⁸⁷ These two instances illustrate how proceedings to extradite are made more difficult and are often left to the discretion of political rather than judicial authorities.

The author has modestly attempted to show that the inclusion of definitions of international crimes and provisions of jurisdictions in States' national laws is not sufficient to mitigate the

⁸² *Arrest Warrant*, *supra* note 20.

⁸³ See Complaint Against Mr. Rumsfeld, Tribunal de Grande Instance, Paris, Oct. 25, 2007, available at http://ccrjustice.org/files/rumsfeld_0.pdf (filed by author, among others) (last visited April 23, 2011).

⁸⁴ See *Regina v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte*, 2 WLR 827, 830 (HL 1999); see also Curtis A. Bradley and Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2133-34 (1999) (discussing the role of universal jurisdiction in the Pinochet case).

⁸⁵ Broomhall, *supra* note 15, at 415.

⁸⁶ See, Jurist Legal News and Research, 29 September 2005, *Belgium Issues International Arrest Warrant for Former Chad Leader*, available at <http://jurist.law.pitt.edu/paperchase/2005/09/belgium-issues-international-arrest.php> (last visited March 10, 2011).

⁸⁷ The Executive Council, *supra* note 36.

concerns and disagreements regarding the application of the principle of universal jurisdiction.⁸⁸ Even once the issues of jurisdiction and definition have been addressed, the full implementation of the principle of universal jurisdiction into national law requires the adoption of laws regarding immunity, mutual legal assistance to facilitate the discovery process, and extradition.⁸⁹ Thus, although the implementation of corresponding procedural provisions in each State's legislature seems to be the answer, disparate applicability of universal jurisdiction will persist.

II. THE PROPOSAL

Considering the obstacles and risks associated with the scope and application of the principle of universal jurisdiction, States have a duty to protect the international community from heinous crimes left unpunished. The author argues that the exercise of universal jurisdiction ought to be removed from the States and be conferred on the ICC in its *entirety*. This delegation of jurisdiction will in turn bring uniformity in the prosecution of crimes of universal concern and allow the ICC to fulfill its primary purpose, namely, to end impunity for perpetrators of these crimes. While this proposal may be far from perfect and remains open for improvement, its defects do not outweigh those that currently hinder the exercise of universal jurisdiction. This proposal further requires the support of great powers, including the United States, China, and Russia, which continue to undermine the legitimacy of the ICC by failing to join.

⁸⁸ Broomhall, *supra* note 15, at 411.

⁸⁹ *Id.*

A. The ICC As It Stands Today: Brief Overview of Its Limitations

The ICC⁹⁰ was established in 2002 as the first permanent court to combat impunity for the perpetrators of crimes that are the “most serious crimes of concern to the international community as a whole.”⁹¹ The Court was created upon the entry of force of the Rome Statute of the International Criminal Court on July 1, 2002.⁹² While the United States, Russia, China, India, and Israel among other States are not Parties to the Rome Statute⁹³, one hundred and fourteen States have ratified the Rome Statute.⁹⁴

The ICC is a treaty-based court with limited jurisdiction. It is binding only on States that ratified it unless a special agreement exists between the Court and a non-party State.⁹⁵ The ICC has jurisdiction *ratione temporis* only over crimes that were committed after the Rome Statute entered into force in 2002⁹⁶ while national courts can prosecute perpetrators of crimes committed before 2002.

Furthermore, Article 12 of the Rome Statute provides that the ICC may only investigate and prosecute crimes that were (1) committed on the territory of, or by a national of, a contracting State to the Rome Statute; (2) committed on the territory of, or by a national of, a State that has

⁹⁰ For the purpose of this article, the International Criminal Court is referred as the “ICC” or the “Court.”

⁹¹ Rome Statute of the International Criminal Court, *opened for signature* July 17 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF. 183/9, art. 5, *available at* <http://untreaty.un.org/cod/icc/statute/romefra.htm>. [hereinafter the “Rome Statute”].

⁹² *Id.*

⁹³ The United States, Russia, and Israel have signed the Rome Statute but have not ratified it.

⁹⁴ As of 12 October 2010, 114 countries are States Parties to the Rome Statute. *See*, U.N. Treaty Collection, *Multilateral Treaties Deposited With the Secretary-General*, Ch. XVIII (Penal Matters), entry 10, *available at* http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en; *see also*, International Criminal Court, *The States Parties to the Rome Statute*, *available at* <http://www.icc-cpi.int/Menus/ASP/states+parties/>.

⁹⁵ SEAN D. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 145 (Thomson West 2006); *see also*, Rome Statute, *supra* note 91.

⁹⁶ Rome Statute, *supra* note 91, at art. 11

consented *ad hoc* to the jurisdiction of the ICC⁹⁷; or (3) referred to the ICC by the Security Council of the United Nations under Article 13.⁹⁸ Thus, if the Security Council refers the case to the ICC, jurisdiction extends to the territory of any State. In the absence of a Security Council referral, the ICC will not be able to investigate crimes committed either by nationals of a State that has not ratified the Rome Statute, or on the territory of a State that has not ratified the Rome Statute.

Even where the ICC has temporal, national, and territorial jurisdiction, Article 5 of the Rome Statute limits the type of crimes the Court may try to the “most serious crimes of concern to the international community as a whole,” which include (1) the crime of genocide; (2) crimes against humanity; (3) war crimes; and (4) the crime of aggression.⁹⁹ Article 5(2) provides that the Court can exercise jurisdiction over a crime only after the States’ parties have defined it. In 2010, during the Review Conference which took place seven years after the Rome Statute entered into force,¹⁰⁰ the Rome Statute was amended to define the crime of aggression.¹⁰¹

Finally, the ICC is not currently intended to replace national courts as States are required to ratify the Rome Statute in order for the Court to accept primary responsibility to investigate and prosecute perpetrators of crimes within its jurisdiction. Rather, it is designed to operate as a court of last resort and complement national courts that are unwilling or unable to investigate or prosecute persons.¹⁰² In deciding whether to investigate or prosecute, the ICC must first determine whether a

⁹⁷ *Id.* at art. 12.

⁹⁸ *Id.* at art. 13.

⁹⁹ *Id.* at art. 5.

¹⁰⁰ *Id.* at art. 123.

¹⁰¹ Review Conference of the Rome Statute of the International Criminal Court 31 May -11 June 2010, Kampala, *Official Records*, available at <http://www.icc-cpi.int/Menus/ASP/ReviewConference/> (last visited March 10, 2011).

¹⁰² Rome Statute, *supra* note 91, Preamble, para. 10; art. 1; *see also* the AU-EU Report, *supra* note 17.

national system can exercise jurisdiction regarding a particular crime within the jurisdiction of the ICC.¹⁰³ The purpose behind the idea of complementarity is to preserve State sovereignty, under which States have a duty to exercise their criminal jurisdiction over the perpetrators of international crimes.¹⁰⁴

Yet, despite all efforts made to recognize State sovereignty to exercise criminal jurisdiction, many national systems are unable or unwilling to fulfill their obligations to investigate and prosecute international crimes. Since States can exercise universal jurisdiction under international law, they could use their sovereign power to confer such exercise on the ICC.¹⁰⁵ States parties to the Rome Statute have already consented to such delegation. Similarly, non-party States that fail to implement national laws to prosecute international crimes are deemed “unwilling” or “unable” and thus indirectly consent to the delegation of the exercise of criminal jurisdiction to the ICC over their nationals who have committed international crimes. If the States consent to delegate their exercise of universal jurisdiction to the ICC, such delegation will remove the Court from the current restrictions on its jurisdiction *ratione territorii* and *ratione personae*.¹⁰⁶ Consequently, the ICC could prosecute any international crime regardless of the territory where the crime was committed, the nationality of the perpetrator, or the referral by the U.N. Security Council.¹⁰⁷ Most importantly, no State would fall outside of the ICC’s purview.

¹⁰³ Rome Statute, *supra* note 91, at art. 17.

¹⁰⁴ *Id.* at Preamble, para. 6.

¹⁰⁵ Cedric Ryngaert, *The International Criminal Court and Universal Jurisdiction: A Fraught Relationship*, 12 NEW CRIM. L. REV. 498, 498 (2009).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

B. A Time to Confer Universal Jurisdiction on the ICC

The ICC does not currently have universal jurisdiction.¹⁰⁸ Yet, States have to a greater or lesser extent consented to the delegation of the exercise of universal jurisdiction to the ICC.

First, it is commonly established that international crimes cannot be considered merely as domestic matters but rather fall under the scope of universal jurisdiction. The core crimes within the ICC's jurisdiction- genocide, crimes against humanity, war crimes, and the crime of aggression- are crimes of universal jurisdiction that are recognized under customary international law. In addition, Paragraph 5 of the Preamble of the Rome Statute specifically provides that impunity must end for perpetrators of international crimes. Because the ICC has a legitimate interest on the basis of the universal nature of the crimes to prosecute nationals of non-party States, the Court's jurisdiction is deemed to be concurrently universal and territorial.¹⁰⁹ On that same note, at the time the Rome Statute was adopted in 1998, South Korea along with Germany and the NGO Coalition proposed to confer universal jurisdiction on the Court. Thus, to impose limits on the jurisdiction of the ICC is contrary to the primary purpose of the Rome Statute.¹¹⁰

Second, the Court has jurisdiction over States that have accepted the jurisdiction of the Court, have become parties to the Rome Statute by ratifying it, or have accepted its jurisdiction by lodging a declaration with the Registrar.¹¹¹ Thus, these States have freely delegated some of their

¹⁰⁸ Ryngaert, *supra* note 105, at 498.

¹⁰⁹ Scharf, *supra* note 12, at 76.

¹¹⁰ Ryngaert, *supra* note 105, at 498.

¹¹¹ Rome Statute, *supra* note 91, at art. 12.

sovereign powers to the ICC when they ratified the Rome Statute, namely, the right for the Court to exercise universal and territorial jurisdiction.¹¹²

Conversely, States that are not parties to the Rome Statute view the exercise of the ICC jurisdiction as a threat to their State sovereignty. Their concern rests essentially on Article 1, Article 12, Article 13, and Article 17 of the Rome Statute.

Article 1 of the Rome Statute provides that the ICC is designed to complement national courts. Thus, non-party States argue that Article 1 is specifically designed to limit the authority of the ICC over States. However, as rightfully stated by Robert Cryer,

“[T]he idea behind complementarity can also be seen as a use of state sovereignty for international ends.”¹¹³

Thus, rather than limiting the power of the ICC, Article 1 merely promotes the collective exercise of State sovereignty to combat crimes of universal concern. Similarly, Cherif Bassiouni opines that the Court does not violate State sovereignty:

[It] is not a supranational body, but an international body similar to existing ones... The ICC does not more than what each and every State can do under existing international law.... The ICC is therefore an extension of national criminal jurisdiction Consequently the ICC... [does not] ... infringe on national sovereignty.¹¹⁴

¹¹² Robert Cryer, *International Criminal Law vs State Sovereignty: Another Round?*, 16 EUR. J. INT'L L. 979, 985 (2005).

¹¹³ *Id.*

¹¹⁴ See Cryer, *supra* note 112, at 983, 84 (citing to Cherif Bassiouni on his chapter on the ICC in *Justice* at p. 181).

Alternatively, under Article 12, the ICC may exercise jurisdiction over nationals of non-party States that have committed a crime in the territory of a party State. Not surprisingly, non-party States see this exercise of jurisdiction as another violation of their sovereignty. The United States, for instance, argues that the exercise of the jurisdiction by the ICC over U.S. nationals without its consent violates international law on the ground that a treaty cannot impose obligations on non-party States without their consent.¹¹⁵ This contention which leaves room for debate will be briefly discussed below.

In addition, Article 13 of the Rome Statute grants the ICC authority to prosecute international crimes committed by nationals of non-party States that are referred by a State party or the Security Council to the Prosecutor. Indeed, the international community may request the Security Council to adopt a resolution under Chapter VII of the United Nation Charter to mandate non-party States to cooperate with the ICC in cases of threats or breaches to the peace.¹¹⁶ Thus, if a U.S. national commits an international crime in a State party to the Rome Statute, the ICC has authority to prosecute the U.S national without the consent of the United States. Similarly, if a U.S. national commits a crime in a non-party State that poses a threat or breach of peace, the Security Council can refer the case to the Court where the Court would not otherwise has authority to hear it. While the United States sees these instances as a violation of international law, its recent approval of the U.N. Security Council Resolution 1973 (“Resolution 1973”) to respond to the massive shootings of Libyan civilians perpetrated by security forces under the control of Muammar

¹¹⁵ See Dapo Akande, *The Jurisdiction of the International Criminal Court over National of Non-Parties: Legal Basis and Limits*, INTL. CRIM. JUST. 618, 620 (2003). See also, Scharf, *supra* note 12, at 70 (citing to former U.S. Ambassador for War Crimes, David Scheffer, *International Criminal Court: The Challenge of Jurisdiction*, address at the Annual Meeting of the American Society of International Law 2 (Mar. 26, 1999)).

¹¹⁶ Ryngaert, *supra* note 105, at 498.

Qadhafi¹¹⁷ provides otherwise. Indeed, when the United States approved Resolution 1973, it consented to some extent to the authority of the ICC to investigate and prosecute international crimes committed by a non-party State's national, including a U.S. national. In other words, the United States' continuous assertion that the ICC jurisdiction over nationals of non-party States that did not consent to it violates international law no longer stands.

Finally, Article 17(2) of the Rome Statute grants authority to the ICC to investigate and prosecute perpetrators of international crimes if a State is unable or unwilling to investigate or prosecute the crime.¹¹⁸ In its determination, the ICC considers whether (1) the State only held judicial proceedings for the purpose of shielding the accused from criminal responsibility, (2) the national court unjustifiably waited too long to have the judicial proceedings establishing an intent contrary to bring the perpetrator to justice, or (3) the proceedings are not being conducted independently or impartially. While some scholars and commentators denounce the dangers associated with the Court's discretion to assess the terms "unable" and "unwilling," their concern is not entirely founded. Indeed, because of the nature of the crimes committed, the international community cannot take the chance to wait for the States to investigate and prosecute international especially when there is sufficient evidence to show that they have no intention to act but rather to use deceptive means to delay the process to protect their nationals.

Moreover, where States voluntarily fail to implement national laws to include international crimes in their criminal code, the ICC can determine that they are "unwilling" or "unable" to prosecute or investigate perpetrators of international crimes. Because the ICC may have

¹¹⁷ Resolution 1973, S/RES/1973, adopted by the Security Council on 17 March 2011, *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/268/39/PDF/N1126839.pdf?OpenElement>.

¹¹⁸ Rome Statute, *supra* note 91, at art. 17.

jurisdiction over nationals of non-party States with or without the consent of the perpetrator's State of nationality, the ICC jurisdiction over nationals of non-party States is grounded as a form of delegated jurisdiction. A non-party State's failure to act against international crimes that their nationals have committed can be interpreted as the State's implied consent to the ICC jurisdiction. Thus, the exercise of the ICC jurisdiction over these crimes on the basis of universal jurisdiction does not constitute a violation of the principle of State sovereignty nor of international law.

Conversely, non-party States are likely to assert that if they impliedly consented to the delegation of the exercise of universal jurisdiction to the ICC due to their failure to investigate or prosecute, it would defeat the purpose of having States join the Rome Statute at the first place.¹¹⁹ While this may be correct, States that collectively joined and ratified the Rome Statute did so to reaffirm their position to combat impunity for perpetrators of crimes of universal concern. In doing so, they authorize the Court to claim primacy in a criminal case and override their jurisdiction.¹²⁰ Thus, the ICC's authority to act "supremely" over failing national legal system only reiterates the purpose of the Rome Statute to establish a sense of universal justice brought against perpetrators of the most heinous international crimes.

Third, unlike some scholars and commentators who assert that the delegation of criminal jurisdiction over nationals of a State to an international court, either territorial or universal, where that State is not a party to the "relevant" treaty is "impermissible,"¹²¹ the author argues that the delegation to an international court is well established under customary law of universal or territorial

¹¹⁹ Ryngaert, *supra* note 105, at 498.

¹²⁰ Rome Statute, *supra* note 91, at art. 17.

¹²¹ See Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROBS. 13, 47 (2001).

jurisdiction. Because certain crimes are so heinous, the international community has agreed to the establishment of international courts intended to act as the delegated and joint authority of States seeking to achieve the same collective purpose, namely, to end impunity for perpetrators of crimes of universal concern. Several international courts or tribunals, *ad hoc* Tribunals for the Former Yugoslavia (“ICTY”) and for the Rwanda (“ICTR”) among others specifically exercise criminal jurisdiction over nationals of States that are not parties to a relevant treaty and have not consented to such exercise. Unlike the ICC which is a creature of a treaty, both tribunals are the creature of a U.N. Security Council Resolution¹²² which exercises its powers that U.N. States Members have delegated to it collectively. Similarly, the Nuremberg International Military Tribunal can be seen as an international tribunal of delegated universal jurisdiction.¹²³ In its Report to the Security Council, the U.N. Commission of Experts in the Former Yugoslavia stated,

States may choose to combine their jurisdictions under the universality principle and vest this combined jurisdiction in an international tribunal. The Nuremberg International Military Tribunal may be said to have derived its jurisdiction from such combination of national jurisdiction of the States parties to the London Agreement setting up that Tribunal.¹²⁴

Arguably, because the Security Council’s authority derives from Article 25 of the Charter of the United Nation,¹²⁵ a treaty,¹²⁶ the ICTY and the ICTR can be viewed as international tribunals of

¹²² See S.C. Res. 827 (1993) which establishes the ICTY and S.C. Res. 955 (1994) which establishes the ICTR.

¹²³ Scharf, *supra* note 12, at 105.

¹²⁴ *Interim Report of the Independent Commission of Experts Established Pursuant to Security Council Resolution 780* (1992), 73 U.N. Doc. S/25274 (1993).

¹²⁵ United Nations, *Charter of the United Nations*, 24 October 1945, 1 U.N.T.S. XVI, art. 25, available at <http://www.un.org/en/documents/charter/chapter5.shtml>

delegated criminal jurisdiction to prosecute cases where the crime occurred on the territory of a U.N. State Member regardless of the perpetrator's nationality.

Fourth, the delegation of the exercise of universal jurisdiction to the ICC will grant the Prosecutor the power to pursue an international crime without having to consult another authority.¹²⁷ Many States, including the United States, have already questioned the impartiality of the ICC Prosecutor. U.S. ambassador to the United Nations, Bill Richardson, stated that,

“[T]here is also a need for checks and balances with respect to the decisions of a single Prosecutor, who in theory also could be influenced by personal and political considerations....”¹²⁸

The United States' fear was and still is today without merit. Indeed, Article 46 and Article 47 of the Rome Statute specifically provide for the removal of and disciplinary measures against the Prosecutor on the ground of misconduct or serious breach of the Prosecutor's duties.¹²⁹ Through an amendment to the Rome Statute, the ICC Prosecutor could have non-party States appoint some of their nationals to assist him in the investigation and prosecution of a case. This would not only minimize these States' concern but would also provide additional assistance to the Prosecutor's office which currently lacks the means and resources to prosecute the crimes.

¹²⁶ Scharf, *supra* note 12, at 108.

¹²⁷ Eric K. Leonard, *Establishing an International Criminal Court: The Emergence of a New Global Authority? Case # 258*, Pew Case Studies in International Affairs, Ed. August 2002, available at <http://www.usc.edu/calis>.

¹²⁸ Michael Lohr & William Lietzau, *One Road Away from Rome: Concerns Regarding the International Criminal Court*, 9 U.S.A.F. ACAD. J. LEGAL STUD. 33 (1998-1999).

¹²⁹ Rome Statute, *supra* note 91, at arts. 46, 47.

Fifth, and lastly, the ICC tries crimes that are recognized under international law or the law of the State where the crime was committed.¹³⁰ These crimes can be recognized either by custom or treaty, or both.¹³¹ Although Article 5 of the Rome Statute limits the jurisdiction of the Court certain crimes, these crimes are considered *jus cogens* norms¹³² by most States and commentators.

Article 11 of the Rome Statute further limits the Court's jurisdiction to crimes committed after the Rome Statute entered into force. However, the true debate is not whether States will ever agree on the exact definition of a particular crime. The crime of aggression, for instance, although provided for in the Rome Statute, was not defined until the first Review Conference took place in 2010¹³³ because States parties could not agree on the definition of the crime. However, as Professor Leila Sadat stated,

“It is [certainly] possible to view the drafters in Rome merely as scribes writing down existing customary international law, rather than as legislators prescribing laws for the international community.”¹³⁴

Thus, although States may disagree on the exact definition of a particular crime, they have nevertheless proven that they can define the scope of that crime based upon existing customary international laws.

¹³⁰ Scharf, *supra* note 12, at 79.

¹³¹ *Id.* at 83.

¹³² *Id.* at 80.

¹³³ *See* Review Conference, *supra* note 101.

¹³⁴ Scharf, *supra* note 12, at 80.

CONCLUSION

The exercise of universal jurisdiction is unlikely to become significantly uniform and recognized within the international community.¹³⁵ Without a comprehensive system of laws at the national level and without such laws adopted by a certain number of States, the principle of universal jurisdiction cannot be expected to function in practice as an effective and reliable pillar of the international justice system to end impunity for perpetrators of international crimes. Proper exercise of universal jurisdiction is currently lacking. Yet, its defects can be remedied if the States delegate their exercise of universal jurisdiction to the ICC. Non-party States which strongly believe that such delegation will inevitably lead to the death of State sovereignty or to the violation of international law are unlikely to embrace the principle unless they can impose their own rules to the rest of the international community. Their failure to join clearly undermines the legitimacy of the ICC to bring a global and uniform form of justice to combat heinous crimes.

The universality principle ought to be included in the Rome Statute through various amendments according to uniform laws and in line with the Rome Statute's primary purpose to end impunity for perpetrators of these crimes. Only then will a sense of proper justice be rendered to the international community as a whole.

¹³⁵ Broomhall, *supra* note 15, at 400.