

Universal Jurisdiction *In Absentia*: Is it a Legal Valid Option for Repressing Heinous Crimes?

MOHAMED M. EL ZEIDY*

I. Background

On April 11, 2000, an investigating judge of the Brussels tribunal of first instance issued an international arrest warrant *in absentia* against Mr. Abdulaye Yoridia Ndombasi.¹ The warrant was issued for offences constituting grave breaches of the 1949 Geneva Conventions, and the Additional Protocols thereto, and crimes against humanity.² At the time of the arrest warrant issuance, Ndombasi was the Minister for Foreign Affairs of the Democratic Republic of Congo.³ The Ndombasi warrant was circulated to both the international criminal police organization (Interpol) and the Congolese authorities.⁴

Accordingly, on October 17, 2000, the Republic of Congo filed, in the registry of the ICJ, an application instituting proceedings against the Kingdom of Belgium in respect to a dispute concerning the issuance of the international arrest warrant against the Minister of Foreign Affairs of the Democratic Republic of Congo.⁵ In its application, the Republic of Congo contended that Belgium had not acted in accordance with the principles of

*Senior prosecutor, Office of the Attorney General of the Arab Republic of Egypt, Egyptian Ministry of Justice (2000–present); Prosecutor Egyptian Ministry of Justice (1997–2000); First Lieutenant, Special Guarding Unit, Ministry of Interior (1995–1997); First Lieutenant, Special Forces-Anti-terrorism Unit, Ministry of Interior (1993–1995); Ph.D. cand.; LL.M. (International Human Rights—Irish Centre for Human Rights—National University of Ireland Galway, 2001); LL.M. (Public Law-Cairo University, 1999); LL.B. (Police Academy-Cairo, 1993); BS (Bachelor of Police Sciences-Police Academy, 1993). Special thanks to Professor William Schabas for commenting on an earlier draft of this article, and to Noelle Higgins.

1. Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), 2002 I.C.J. (Feb. 14, 2002), ¶ 1 [hereinafter Congo v. Belgium Case]. See also Annex: Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), 8 ANN. SURV. INT'L & COMP. L. 151 (2002) (summarizing the judgment of Democratic Republic of Congo v. Belgium).

2. Congo v. Belgium Case, *supra* note 1, ¶¶ 13, 15, 67. The acts were committed in 1998, before Mr. Yerodia became Minister of Foreign Affairs. Those acts included speeches “allegedly inciting attacks on the Tutsi population in Kinshasa.” See Steffen Wirth, *Immunity for Core Crimes? The ICJ’s Judgment in the Congo v. Belgium Case*, 13 EUR. J. INT’L L. 877, 878 (2002).

3. *Id.*

4. Congo v. Belgium Case, *supra* note 1, ¶ 14.

5. *Id.* ¶ 1.

international law. It based this challenge mainly on three grounds: (1) that Belgium had violated “the principle that a State may not exercise its authority on the territory of another State”; (2) that it had infringed the “principle of sovereign equality among all members of the United Nations as laid down in Article 2, paragraph 1 of the Charter of the United Nations”; and (3) that it had violated the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State.”⁶

Thus, the Republic of Congo’s application relied on two main arguments. First, it claimed that “[t]he *universal jurisdiction* that the Belgian State attributes to itself under article 7 of [its law] constituted a violation”⁷ of the first two aforementioned points and, secondly, it claimed that “[t]he non recognition, on the basis of Article 5 . . . of the Belgian Law, of the immunity of a Minister of Foreign Affairs in Office constituted a violation of [his] diplomatic immunity.”⁸

The Republic of Congo’s memorial and final submissions presented at the end of the oral proceedings, however, excluded the first legal ground, namely, the pleas regarding *universal jurisdiction*.⁹ Thus, the Republic of Congo focused on the issue concerning the violation of a norm of customary international law that grants a Foreign Minister “absolute inviolability and immunity” from criminal jurisdiction. Thus, the arrest warrant of April 11, 2000 would be unlawful on this assumption.¹⁰ Belgium countered and invoked the *non ultra petita* rule, which operates to restrict the jurisdiction of the ICJ to those issues that are the subject of the Republic of Congo’s final submissions. Therefore, Belgium requested that the ICJ refrain from ruling on the question of whether the rules and principles of international law permit the exercise of *universal jurisdiction in absentia* where the accused person is not present on the Belgian territory.¹¹

Interestingly, the ICJ replied that “it is [its] duty not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions, [and] thus [it is] not entitled to decide upon questions not asked of it, it did not preclude, however, the possibility of addressing certain legal points relevant to the main issue.”¹² The ICJ held that the *non ultra petita* rule would not preclude it from answering part of the question in the operative part of the judgment, namely, whether the issuance of the arrest warrant on the ground of *universal jurisdiction in absentia* complied with the rules of international law.¹³ Furthermore, the ICJ considered it necessary to rule on this issue before ruling on the question of immunity.¹⁴ Despite this promising and progressive step taken by the court, it avoided ruling on this question on the merits of the case and thus left the judgment open for criticism. Alternatively, several judges made some comments in their dissenting and separate opinions as seen below.

6. *Id.*

7. *Id.* ¶ 17. Article 7 contains a jurisdictional clause, which reads, in part, as follows: “Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed.” Belgian Law, *Loi relative à la répression des violations graves du droit international humanitaire* (Act Concerning the Punishment of Grave Breaches of International Humanitarian Law) (Feb. 1999).

8. Congo v. Belgium Case, *supra* note 1, ¶ 17.

9. *Id.* ¶ 21.

10. *Id.* ¶ 41.

11. *Id.*

12. *Id.* ¶ 43.

13. *Id.*

14. *Id.* ¶ 46.

This study is devoted to examining the question of *universal jurisdiction in absentia* and seeks to (1) shed light on the concept of universality, (2) answer the question of absolute universal jurisdiction in the abstract, and (3) answer the question in light of the judgment of the ICJ in *Congo*.

II. The Idea behind Universality of Jurisdiction

Under international law there are different forms of jurisdiction, each requiring a certain link.¹⁵ These forms are territoriality,¹⁶ active personality,¹⁷ passive personality,¹⁸ and protective principles.¹⁹

Unlike these forms of jurisdiction, the universality principle does not require any link between the state demanding to assert jurisdiction and the offence.²⁰ Arguably, the only requirement is the voluntary physical presence of the person on the territory of the state that demands to exercise jurisdiction (*judex loci deprehensionis*).²¹ But, the latter requirement is not absolute and might be questionable.

The term universal jurisdiction *in absentia* connotes at least three different meanings. It could refer to the possibility of initiating proceedings in the absence of the offender. Hence, international arrest warrants may be issued to secure the offender's presence to stand trial. It may, however, go further by using enforcement means, such as abductions. Finally, it could refer to trials *in absentia*. I argue more in favor of the first meaning, because the second and third meanings might involve or trigger human rights issues. But, as will be demonstrated by the current study, the language used in some cases is broad and may be construed to support even the third meaning of the term.²² If the language goes as far as

15. For a thorough discussion regarding the various forms of jurisdiction, see Christopher L. Blakesley, *Extraterritorial Jurisdiction*, in *INTERNATIONAL CRIMINAL LAW: PROCEDURAL AND ENFORCEMENT MECHANISMS* 43-69 (M. Cherif Bassiouni ed., Transnational Publishers 2d ed. 1999); D. W. Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, in *INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS* 210-217 (Charlotte Ku et al. eds., Lynne Rienner Publ. 1998); ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 56-77 (Clarendon Press 1994); Covey T. Oliver, *The Jurisdiction (Competence) of States*, in *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* 307-321 (Mohammed Bedjaoui ed., Unesco 1991); GEORG SCHWARZENBERGER & E. D. BROWN, *A MANUAL OF INTERNATIONAL LAW* 72-79 (6th ed. 1976); D. J. LATHAM BROWN, *PUBLIC INTERNATIONAL LAW* 121-126 (Sweet & Maxwell 1970).

16. The place where the crime is committed.

17. Where the accused is a national of the state asserting jurisdiction.

18. Where the act perpetrated abroad affected the nationals of the state claiming jurisdiction.

19. According to this principle a state may exercise jurisdiction over aliens who have committed an act abroad which prejudiced the security of that state.

20. M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW* 227 (2d ed. 1999); HOWARD S. LEVIE, *TERRORISM IN WAR-THE LAW OF WAR CRIMES* 230-231 (1992).

21. Luc Reydam, *Prosecuting Crimes Under International Law on the Basis of Universal Jurisdiction: The Experience of Belgium*, in *INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS* 812 (Horst Fischer et al. eds., 2001); LEVIE, *supra* note 20, at 231; *see, e.g.*, Convention for the Suppression of Unlawful Seizure of Aircraft, December 16, 1970, art. 4(2); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971, art. 5(2). However, these conventions only cover crimes described as international terrorism. *But see* Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 *HASTINGS INT'L. & COMP. L. REV.* 303, n.37 (2002) (noting that, "[s]ome states assert the capacity to exercise universal jurisdiction *in absentia*.").

22. *See, e.g.*, Der Bundesgerichtshof, *Judgment of February 21, 2001*, 3 STR 372/00, 20, available at <http://www.bundesgerichtshof.de/> [hereinafter Sokolovic Case]; Prosecutor v. Tadic, Case No. IT-94-1-AR72, ¶ 57 (Oct. 2, 1995) [hereinafter Tadic Case].

supporting trials *in absentia*, by implication, initiating investigations and issuing international arrests warrants would be possible.

The genesis of the universal jurisdiction principle could be traced back to two different periods in history and two different categories. As Professor Bassiouni has noted, the history of universal jurisdiction “stems [from] the customary international practices regarding pirates and brigands in the 1600s; even before international law in the modern sense of the term was in existence.”²³ Commentators of the sixteenth century, such as Francisco de Vitoria, and those of the seventeenth century, such as Hugo Grotius, “recognized it as a general principle of law applicable to crimes under international law and ordinary crimes.”²⁴ On the other hand, Professor Sunga pointed out that the principle of universal jurisdiction, with regards to violations of international humanitarian law, dates back to the fourteenth century when the *jus militare* became part of the *jus gentium*, and “the military profession became widely recognized as an honorable profession governed by the *jus gentium*.”²⁵ Honor was of the utmost importance to the military and breach of the rules and customs of the *jus militare* was seen as a breach of honor, which led to the instigation of universal jurisdiction. While the gravity of the piracy crime and the need to protect the interest of the international community was an element for triggering universal jurisdiction, the fact that it was committed outside the territorial jurisdiction of any state was the rationale for its application.²⁶ This is different than the idea of universality in regard to war crimes, crimes against humanity, and genocide, where only the seriousness of those crimes is the rationale for its application.²⁷

23. BASSIOUNI, *supra* note 20, at 229; see also A. Hays Butler, *The Doctrine of Universal Jurisdiction: A Review of the Literature*, 11 CRIM. L. F. 353, 357 (2000). According to Oppenheim, “[with regard to pirates] [e]very state has, by international law, the right, on the high seas or in any other place outside the jurisdiction of any state, to seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, arrest the persons and arrest the property on board.” ROBERT JENNINGS, OPPENHEIM’S INTERNATIONAL LAW 753 (Arthur Watts ed., 1992). See Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT’L L. 269 (1988) (discussing further the issue of universal jurisdiction for piracy). Marc Henzelin, *Le Principe De L’ Universalité En Droit Pénal International: Droit et obligation pour les États de poursuivre et juger selon le principe de l’universalité* (Bale/Geneve/Munich: Bruxelles, 2000) (providing a thorough historical survey of universal jurisdiction); see also ALFRED P. RUBIN, *THE LAW OF PIRACY* at 102 ff (2d ed. 1998).

24. Amnesty International, *UNIVERSAL JURISDICTION: THE DUTY TO ENACT AND ENFORCE LEGISLATION* Ch. II. (2001), available at <http://www.amnestyusa.org/icc/ujqanda.pdf>; see also Henzelin, *supra* note 23, at 90–97. Henzelin quoted Vitoria when he made reference to universal jurisdiction in the following: “en vertu du droit naturel, le pouvoir de punir et de châtier ses propres citoyens quand ils lui portent prejudice, (alors) le monde le possède (rait) sans aucun doute vis-à-vis de tous ceux qui lui portent prejudice et ne vivent pas humainement (même s’il) ne l’exerce (rait) que par l’intermédiaire des princes.” *Id.* at 90. While Grotius stated: “. . . les rois, et ceux qui ont un pouvoir égal à celui des rois, ont le droit d’infliger des peines non seulement pour des injures commises contre eux ou leurs sujets, mais encore pour celles qui ne les touchent pas, et qui violent à l’excès le droit de nature ou des gens à l’égard de qui que ce soit.” *Id.* at 97.

25. LYAL S. SUNGA, *INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS* 102–03 (Martinus Nijhoff Publishers 1992).

26. *Id.* at 103. He expressed himself in the following words: “[T]he basis for universal jurisdiction as it arose in connection with efforts to suppress slave-trading and piracy relates primarily to the peculiar character of the *locus delicti*, rather than to the serious nature of the crime.”

27. *Id.* at 104. Sunga refers to the differences of their rationale in the following words: “Unfortunately, confusion between the two rationale for universal jurisdiction appears in some of the efforts at codification, in adjudication, and in certain doctrinal works.”

Under the principle of universal jurisdiction, each and every state has jurisdiction to try particular offences. As Randall stated:

[T]his principle provides every state with jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of the situs of the offense and the nationalities of the offender and the offended. While the other jurisdictional bases demand direct connections between the prosecuting state and the offense, the universality principle assumes that every state has an interest in exercising jurisdiction to combat egregious offenses that states universally have condemned.²⁸

The rationale for such an extension of jurisdiction is that crimes such as genocide, war crimes, and crimes against humanity are an affront to humanity and, therefore, are of concern to all states.²⁹ The demand for universal jurisdiction is compelling. Justice and law should intervene when innocent human beings are slaughtered, tortured, and subjected to other inhumane treatment. Thus, perpetrators of those crimes should not be granted safe haven. In spite of the latter goal, the question that poses itself in this context is whether the demand for this form of jurisdiction is conditional and thus dependent on the presence of the accused in the territory of the state that asserts jurisdiction. The early reference to this principle in post-war trials and its codification in some treaties might be of useful guidance to examine this question.

III. The Nuremberg International Military Tribunal and Subsequent Trials

While it is debatable that the IMT jurisdiction was based on the idea of universality, the statement made by the IMT in its judgment at Nuremberg at least makes reference to the recognition and existence of such a principle over crimes against the peace, war crimes, and crimes against humanity. The IMT stated:

28. Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 *TEX. L. REV.* 785, 788 (1988). See also *Attorney General v. Eichmann*, 36 *I.L.R.* 26 (1968) (where the court mentioned the core reason for applying the universality principle: “[T]he abhorrent crimes defined in this Law are not crimes under Israel law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (*delicta juris gentium*). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is *universal*.” Although Eichemann’s apprehension was illegal, it could reflect one of the types of universality *in absentia*; namely taking action to secure his presence. The court, however, exercised jurisdiction notwithstanding his abduction. I do not believe that exercising universality of jurisdiction in this way is valid and in conformity with the norms of international law. Similarly, in the *Finta* case the court observed that “some acts are crimes under international law. They may be punished by any state which has custody of the accused. Example of this . . . basis of jurisdiction include breaches of the laws of war.” *R. v. Finta* (Can.) 1 *S.C.R.* 701, ¶ 171 (1994).

29. *United States v. Yunis*, 681 *F. Supp.* 896 (1988); see also Bruce T. Smith, *Assertion of Adjudicatory Jurisdiction by United States Courts over International Terrorism Cases*, 1991 *ARMY LAW.* 13 (1991) (noting that “[t]he basis for universal jurisdiction that the offense violates the law of nations and humanity and that, in effect, the prosecuting state is acting on behalf of all nations by bringing the criminal to justice.”); see also Bruno Simma & Andreas L. Paulus, *Symposium on Method in International Law: The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 *AM. J. INT’L L.* 302, 314 (1999) (emphasizing that “the establishment of universal jurisdiction for genocide and crimes against humanity, even if committed by aliens against aliens abroad, seems almost universally to be considered permissible, although the Genocide Convention is silent on the matter . . . Universal jurisdiction for grave breaches of the Geneva Conventions seems to be increasingly accepted.”).

[T]he Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right to set up special courts to administer law. With regard to the Constitution of the Court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law.³⁰

The U.N. Secretary General construed this statement, in the 1949 Report on the Nuremberg Tribunal, as stating, “[the] Court considered the crimes under the Charter to be, as international crimes, subject to the jurisdiction of every state,”³¹ and accordingly, subject to universal jurisdiction.³² Although the statement made by the tribunal may be construed as supporting the universality principle, it did not explain how far this principle could be applied and whether there were any restrictions on its application. But, reading the entire paragraph in light of the statement, “in doing so, they have done together what any one of them might have done singly,” arguably supports a theoretical proposition that if any of them had to exercise universal jurisdiction, nothing would have prevented any of them from applying it in an absolute manner without any restrictions regarding the presence of the accused on the territory of that state. This conclusion is drawn from the fact that the Allied Powers demanded, by all means necessary, to place those criminals on trial. It follows from the final sentence of the statement, “all that the defendants are entitled to ask is to receive a fair trial,” that any legal procedure could have been adopted to bring those persons to justice. Once present, their trial should be fair. It is the strong and wide language used by the tribunal that suggests this reading.

On the other hand, the concept of universality jurisdiction gained support during the post-World War II trials in the U.S. and British military courts. The language used by those tribunals, however, inclined more toward conditional universal jurisdiction, namely restricting its application to the presence of the accused in the prosecuting state’s custody at the time the proceedings were initiating.

In the *Hadamar Trial*,³³ a military commission appointed by the Commanding General of the Seventh U.S. Army, tried Alfons Klein and six others for violating the laws of war. In examining the possibility of exercising jurisdiction, the commission stated:

30. The International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, *reprinted in* 41 AM. J. INT’L L. 172, 216–17 (1947); *see also* Nicolaos Strapatsas, *Universal Jurisdiction and the International Criminal Court*, 29 MANITOBA L.J. 1, 19 (2001).

31. *See* Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337, 344 (2001); *see also* Matthew Lippman, *International Law and Human Rights Edition: Crimes Against Humanity*, 17 B.C. THIRD WORLD L.J. 171, 238 (1997).

32. BASSIOUNI, *supra* note 20, at 235–36 (“[T]he foundation for the application of the universality principle to war crimes, as well as crimes against humanity, stems from the proceedings before the IMT and subsequent trials. . . . It may be inferred from [the above] statement that “any nation” would have jurisdiction to prosecute the war criminals, whether or not the nation had a nexus with the offenses at issue. . . . This conclusion is supported by [the] memorandum prepared by the United Nations Secretary General.”). However, Professor Bassiouni’s recently expressed a different view point regarding the IMT’s jurisdictional basis when he stated, “In both the IMT and IMFTE, the states in question exercise their powers to enforce international criminal law on a territorial jurisdictional basis because they exercised *de facto* sovereign prerogatives over the occupied territories where these tribunals were established. . . . it could be said [that the IMT and IMFTE] have also relied on “passive personality.” M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 91, 118 (2001) (hereinafter *Universal Jurisdiction*). Nonetheless, both arguments have merit. Also, Professor’s Morris’s argued that “neither the Nuremberg nor the Tokyo tribunal based its competence on the collective exercise of universal jurisdiction.” Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROB. 13, 37 (2001).

33. 1 U.N. WAR CRIMES COMM’N LAW REPORTS OF TRIALS OF WAR CRIMINALS 46 (1945).

[t]he Commission had to decide the question whether it could assume jurisdiction despite the fact that the crime, committed by foreigners outside United States territory, had not affected United States nationals . . . The Commission decided the question in the affirmative [and thus] the . . . reasons sustaining the Commission's jurisdiction can be adduced from (a) the general doctrine recently expounded and called "universality of jurisdiction over war crimes," which has the support of the United Nations War Crimes Commission and according to which every independent State has, under International Law, jurisdiction to punish not only pirates but also war criminals in its custody, regardless of the nationality of the victim or of the place where the offence was committed, particularly where, for some reason, the criminal would otherwise go unpunished.³⁴

Moreover, in the *Almelo*³⁵ and *Zyklon B*³⁶ cases, the same principle was adopted by the British Military Courts. The cases stated that "under the general doctrine called universality of jurisdiction over war crimes, every independent state has an international law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victim or the place where the offence was committed."³⁷

A close reading of the texts previously referred to suggests that any state could punish war criminals by virtue of universal jurisdiction, but only when they are found in that state's custody. But, the question remains, how could that person be found in the state's custody? Is it the voluntary presence of the accused, his surrender to the detaining power, incidentally being present at the time of his arrest or capture, being captured in the territory of the detaining power, or being absent and subsequently issuing an arrest warrant accompanied with an extradition request to ensure his custody? If the language points to the last scenario, then it is possible to argue that the military courts were authorized by the practice of absolute universality.

Nevertheless, in *Eisentrager* and others,³⁸ the U.S. Military Commission in China, which tried the German Lothar Eisentraeger and others for violations of laws and customs of war committed in China against the United States, made no reference to such a requirement when stating:

[A] war crime, however, is not a crime against the law of or criminal code of any individual nation, but a crime against the *jus gentium*. The laws and usages of war are of universal application, and do not depend for their existence upon national laws or frontiers. Arguments to the effect that only a sovereign state of the *locus criminis* has jurisdiction and that only the *lex loci* can be applied, are therefore without any foundation.³⁹

Unlike the abovementioned cases that explicitly required the presence of the accused in the state's custody at the time of the initiating proceedings, the wording of the U.S. Commission in this case seems does not make reference to any restriction when applying universal jurisdiction over a war crime. Thus, it left room for different interpretations. An examination of the facts of this case, however, suggests that the U.S. Commission exercised

34. *Id.* at 52–53.

35. 1 U.N. WAR CRIMES COMM'N LAW REPORTS OF TRIALS OF WAR CRIMINALS 35 (1945) (hereinafter *Almelo*).

36. 1 U.N. WAR CRIMES COMM'N LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 103 (1946) (hereinafter *Zyklon B*).

37. *Almelo*, *supra* note 35, at 42.

38. 14 U.N. WAR CRIMES COMM'N LAW REPORTS OF TRIALS OF WAR CRIMINALS 8 (1947) (hereinafter *Eisentrager*).

39. *Id.* at 15.

extraterritorial jurisdiction over foreigners who committed crimes against foreigners—a sort of absolute universal jurisdiction (*in absentia*). In this case, the United States extended its jurisdiction over Shanghai even though the accused persons were German nationals, who had committed their crimes in China and were residents of China at the time of initiating proceedings. Thus, no links existed between the United States and the accused.⁴⁰

IV. Absolute Universal Jurisdiction in light of Recent Jurisprudence and Contemporary National Legislations

It is interesting to note that while some of the national legislations do not support universal jurisdiction without any connection between the offender and the forum state, others do allow such exercises of jurisdiction in an absolute manner.

The United Kingdom War Crimes Act of 1991, for example, allows proceedings to be brought against a person in the UK irrespective of his nationality at the time of the alleged offence. This act applies in cases of murder, manslaughter, or culpable homicide committed between September 1, 1935 until June 5, 1945, in circumstances where the accused was at the time or has become a British citizen or resident of the UK, and the offence constituted a violation of laws and customs of war.⁴¹

40. For example, the plea to the jurisdiction of the Court (Commission) filed on behalf of all accused by the defense alleging “in substance that the accused were German citizens and residents of China, and thus subject only to Chinese law and the jurisdiction of Chinese courts.” *Id.* Although it appears that the U.S. Commission exercised absolute universal jurisdiction, because the defendants were residents and found on Chinese territory, the Prosecutor attempted to justify the exercise of such extended jurisdiction based not only on the gravity of the crime that violates the laws of nation, but also for another reason. He asserted that the Chinese Government invited the U.S. to send troops to Chinese territory to wage war. “In view of this, the United States army entered China as an allied expeditionary force with rights and privileges as well as the duties which are well recognized in international law as attaching to such a force.” *Id.* Thus, the United States has the right to punish those “who violate the laws of war.” *Id.* at 16. Moreover, the defendants had been initially captured in China. See Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT’L L. 1, 23–24 (2001).

41. Reprinted in MALCOLM EVANS, *BLACKSTONE’S: INTERNATIONAL LAW DOCUMENTS*, 525 (5th ed. 2001); see also Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L L. 554, 573, n.103 (1995) (Article 7 of the Criminal Code of Canada 1985 allows exercise of universal jurisdiction, when “at the time of the act or omission Canada could, in conformity with international law, exercise jurisdiction over the person on the basis of the person’s presence in Canada.”). Moreover, section 8(b) of the *Crimes Against Humanity and War Crimes Act* stipulates “[A] person who is alleged to have committed an offence under section 6 or 7 may be prosecuted for that offence if . . . (b) after the time of the offence is alleged to have been committed, the person is present in Canada,” *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c.24, available at <http://laws.justice.gc.ca/en/C-45.9/40062.html> (last updated Dec. 31, 2002). For a discussion regarding the Canadian Act, see William A. Schabas, *Canadian Implementing Legislation for the Rome Statute*, 3 Y.B. INT’L HUMANITARIAN L. 337, 343–344 (2000); see also Bassiouni, *supra* note 32, at 142. See Reydams, *infra* note 93, at 263, n.13 (a new article has been inserted in the Swiss Criminal Code, which entered into force December 15, 2000. Article 264 of the Swiss Criminal Code incorporates genocide as a crime under domestic law that is subject to the exercise of universal jurisdiction by “civilian courts,” however, such power is subject to the presence of the suspect on the Swiss territory). See Brigitte Stern, *International Decision: In re Javor*, 93 AM. J. INT’L L. 525 (1999). Likewise, article 689(2) of the French Criminal Procedure Code provides the basis for universal jurisdiction only if the accused is “found in France.” *Id.* at 528. But in the *re Javor* case, Bosnian victims “of the policy of ethnic cleansing” who were refugees in France filed a complaint “against their Serb torturers” with an investigating magistrate. *Id.* at 525. They relied on universal jurisdiction. At the Tribunal *de grande instance*, Judge Getti accepted both the 1949 Geneva Conventions and the Torture Convention as “authorizing the French courts to decide this case involving foreign plaintiffs for acts committed abroad by foreign defendants.” *Id.* at 527. It is interesting to note that in interpreting article 689(2), Judge Getti adopted a broad construction. He afforded it “some power [to apply] even when the accused is not on French territory.”

For example, articles 64, 64.6, and 65.1.2 of the Austrian Penal Code permit Austrian courts to exercise extra-territorial jurisdiction over war crimes and torture. But, article 65.1.2 limits such application by requiring the presence of the accused in Austria.⁴²

Thus, in the *Cvijetkovic* case, the accused was a Bosnian Serb who was arrested in Salzburg on July 14, 1994, on the ground of committing genocide in Bosnia. He challenged the legality of the arrest warrant on the grounds that Austrian courts lacked jurisdiction over the case. The question was subsequently referred to the Austrian Supreme Court, which held that Austrian courts were entitled to exercise jurisdiction over Cvjetkovic. On July 27, 1994, the District Court of Salzburg acquitted him for insufficient evidence. Although the Austrian courts based its jurisdiction on the universality principle, the latter based its jurisdiction on article 65.1.2, which required the presence of the accused on the Austrian territory. Indeed, the accused was arrested in Salzburg.⁴³

Furthermore, the Australian War Crimes Act 1945, as amended in 1988, requires a similar rule to that of the aforementioned. In the *Polyukhovich* case, the Australian High Court mentioned that the "universality principle . . . permits jurisdiction to be exercised over a limited category of offences on the basis that the offender is in the custody of the prosecuting state."⁴⁴ Likewise, in the *S.H.T.* case, the District Court of Haarlem (Netherlands)

Id. at 527. He considered that "all the *actes d'instruction*, that is, all the acts of preliminary inquiry, could be undertaken even without the presence of the accused on French territory." *Id.* However, both the court of appeals and the court of cassation rejected this interpretation by holding that, as long as the offender is not on the French territory, universal jurisdiction cannot be exercised. Even the jurisdiction to try to ascertain the offender whereabouts is not permissible. Moreover, the Court of cassation, while accepting the narrow type of universality to Torture under article 689(2), disregarded it for the 1949 Geneva Conventions. She concluded that although the conventions were ratified by France, no specific legislation to incorporate universal jurisdiction has been enacted. Thus, they could not have a direct effect in the national legal system. Nevertheless, Professor Stern argues that, unlike article 689-2, which explicitly requires the presence of the offender on the French territory (for Torture) article 689 does not make any reference to such restriction. Thus, the court of cassation could have relied on it with regard to the 1949 Geneva Conventions. *Id.* at 528-29. In light of this finding, it appears that even the French legislation seems to recognize universality *in absentia*. However, as Professor Stern has observed, this case "illustrate[s] the reluctance of the French courts to assert universal jurisdiction. This attitude is not a French exception, but is quite widespread." *Id.* at 529. But note Professor Cassese's different opinion that mentioned that article 2 of the Law of January 2, 1995, implementing the Statute of the ICTY regarding the provisions of the 1949 Geneva Conventions (grave breaches) required the presence of the offender on the French territory. See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 286 (2003) [hereinafter CASSESE ICL].

42. Redress, *Universal Jurisdiction in Europe, Annex: Law and Cases in Ten European Countries, Austria: Domestic Legislation*, available at <http://www.redress.org/publications/annex.html> (last visited Aug. 23, 2003) ("Article 64 of the Austrian Penal Code deals with offences which can be prosecuted in the Austrian courts even though committed abroad . . . [Its application] is extended to specific listed offences (such as treason, kidnapping, offences against the armed forces) and Article 64.4 adds [to those offences] other punishable criminal acts which Austria is under an obligation to punish even when they have been committed abroad." These might include the UN Convention Against Torture, and the [1949] Geneva Conventions. Article 65.1.2 provides that Austrian criminal law may apply in respect of offences committed abroad, so long as the acts are also punishable in the place where they are committed (double criminality), and provided, if a foreigner, is present in Austria and cannot be extradited to the other state due to reasons other than the nature and characteristics of the offence.").

43. *Id.*

44. *Polyukhovich v. Commonwealth of Australia*, 91 INT'L L. REP. 1, 118 (1993) ("The accused, who had become an Australian citizen after the Second World War, was charged with having committed war crimes while serving in the German army in the Ukraine between 1942, 1943. These charges were brought under the War Crimes Act 1945, and amended in 1988, which provided for the trial and punishment of persons who had committed serious war crimes in Europe during the Second World War and who had entered Australia and had become Australian citizens or residents after 1945. The Act therefore dealt with acts which had taken place

applied article 7(4)(b) of the Dutch Penal Code, which limits the exercise of extraterritorial jurisdiction to the presence of the “offender” in the Netherlands.⁴⁵

On the other hand, there exist other national laws that make it permissible to apply absolute universal jurisdiction (*in absentia*) without the accused being physically present in the state that is asserting jurisdiction. This different version of the universality principle is upheld in Spain, Germany, Belgium, Italy, New Zealand, and Israel.⁴⁶ As their provisions differ, I will limit my examination to the first three countries.

Professor Antonio Cassese argues that this version of the universality principle is “legally” permissible for two reasons. First, given the gravity of war crimes, crimes against humanity, and genocide, universal prosecution and repression is warranted. Second, because the exercise of this jurisdiction does not amount to a breach of the principle of sovereign equality of states, as set out in article 2(1) of the U.N. Charter, its application is permissible.⁴⁷ Indeed, both the Trial and Appeals Chambers, in the *Tadic* case, adopted a similar view, namely, when dealing with the most odious crimes of international concern, the sovereign rights of states should not be invoked. The *Tadic* case stated:

It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity . . .⁴⁸

[T]he crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognized in international law as serious breaches of international humanitarian law, and transcending the interest of any one State. The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world . . .⁴⁹

outside Australia and which had been committed by persons who were not at the time citizens or residents of Australia. The Act required that the person to be charged must have become an Australian citizen or resident by the time that he was charged.”)

45. *Public Prosecutor v. S.H.T.*, 74 INT’L L. REP. 162, 162–63 (1987). Although in the current case the court dealt with terrorist acts as opposed to war crimes and crimes against humanity, it provides a good example for the procedural requirements to exercise the universality principle at least with regard to hijacking crimes. The accused, a resident of Jerusalem, was committed for trial in the Netherlands. He was charged together with an accomplice for hijacking a British aircraft on a flight from Beirut to London and forcing the crew to land at Schipol airport in the Netherlands. The main charge against the accused was based on article 385(a) of the Dutch Penal Code, which implemented the Convention for the Suppression of Unlawful Seizure of Aircraft of 1970, and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971.

46. See Section 8, (1)(c)(iii) of the New Zealand International Crimes and International Criminal Court Act 2000, which permits that type of universality; with regard to Israel; see *also* *Congo v. Belgium*, 2002 I.C.J. 121, 41 I.L.M. 536 (President’s Separate opinion, para. 12); *Yunis*, *supra* note 29, at 348. Meanwhile, Professor Cassese argues that article 7 of the Italian Code could be widely construed to that effect. However, Professor Bassiouni’s expressed a different opinion regarding article 7 of the Italian Criminal Code asserting that “Italy’s criminal code, Article 7, also provides for extraterritorial criminal jurisdiction, but requires a nationality or territorial connection.” Bassiouni, *supra* note 32, at 144.

47. CASSESE, INTERNATIONAL LAW 261–62 (2001). Cassese rightly limited such type of universality to the failure of either the national state or the territorial state to take proceedings, CASSESE (ICL), *supra* note 41, at 287; see *also* Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323 (2001) (noting that universal jurisdiction does not require a nexus between “the regulating nation and the conduct, offender, or victim.”).

48. *Prosecutor v. Tadic*, 35 I.L.M. 32, ¶ 58 (1995).

49. *Id.* ¶ 59; *Prosecutor v. Tadic*, Case No. IT-94-1-T, 10 August 1995, ¶ 42.

Based on this finding, it is arguable that when a state exercises universal jurisdiction by default, it is hardly persuasive for any other state to claim a violation of article 2(1) of the UN Charter. The state exercising that type of jurisdiction is not acting to merely protect its own interest rather it's acting on behalf of the international community for the sake of saving a common interest.

As mentioned previously, some countries applied the wider idea of universality, and thus, extended their laws to cover extraterritorial acts committed by foreigners without any connection between the offender, the offense, the victims, and the state asserting jurisdiction. Those countries allow the application of universality by default or *in absentia*.

For example, article 23(4) of the Law on Judicial Powers of 1985 provides that "Spanish courts have jurisdiction over crimes committed outside Spain when such crimes constitute genocide, terrorism, or other crimes which Spain is obliged to prosecute under international treaties."⁵⁰ Accordingly, it has been argued that the grave breaches may be prosecuted in Spain regardless of where they were committed or the nationality of the offender.⁵¹ The requirement of a certain link between the offender and the state asserting jurisdiction is not significant.⁵² The presence of the accused on the Spanish territory, however, is required only for the actual passing of the sentence.⁵³ Although article 75(4)(e) of Additional Protocol I⁵⁴ necessitates the presence of the accused for his trial and thus outlaws *in absentia* trials, it does not seem to bar proceedings to be taken in the absence of the accused to guarantee his presence to stand trial before the courts of the state asserting jurisdiction.⁵⁵

50. See also CASSESE, *supra* note 47, at 206, 445; Jose-Luis Rodriguez et al., *The Protection of War Victims under the 1995 Spanish Penal Code: Offences Against Persons and Objects Protected in the Event of Armed Conflict, in NATIONAL MEASURES TO REPRESS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW (CIVIL LAW SYSTEMS): REPORT ON THE MEETING OF EXPERTS (GENEVA, 23-25 SEPTEMBER 1997)* 287 (Christina Pelladini ed., 2000).

51. Rodriguez, *supra* note 50, at 287.

52. See Antonio Casseese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 EUR. J. INT'L L. 853, 860 (2002). In this respect, Professor Casseese argues that article 23(4) of the Spanish law of 1985 as amended in 1999 permits the exercise of universal jurisdiction *in absentia*. However, see the recent decision rendered by the Spanish Supreme Court concerning the Guatemala Genocide Case, where the Court restricted its interpretation of article 23(4) regarding the application of universal jurisdiction under Spanish courts, to the existence of a connection with Spain. Spanish Supreme Court: Guatemala Genocide Case [February 25, 2003] 42 I.L.M. 686, 699 (2003). But see the interesting dissenting opinion written by Judges García, Pallín, Tourón, Chavarri, García, Arrieta, and Ibanez, who considered that the Court erred in its interpretation of article 23(4). They argued that, "The requirement that the offenders be located in Spanish territory [for the exercise of universal jurisdiction is misleading, since the Court relied on a] series of International Conventions, none of which relate to genocide. . . [moreover] such treaties normally establish certain international obligations in the exercise of jurisdiction. . . , which constitute an obligatory minimum and not a maximum for this it cannot be concluded that there is a generic prohibition on the exercise of universal jurisdiction over those responsible who are not located in national territory. . ." *Id.* at 707-08.

53. Rodriguez, *supra* note 50, at 287.

54. Additional to the Geneva Conventions of August 12, 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted June 8, 1977, entered into force December 7, 1978, 1125 U.N.T.S. 17512, art. 75(4)(e).

55. The Spanish law is compatible in this regard, since it does not allow trials *in absentia*. However, "initial stages" could be taken "before a trial could commence." See Daniel Rothenberg, "Let Justice Judge": *An Interview with Judge Baltasar Garz'on and Analysis of His Ideas*, 24 HUM. RTS. Q. 924, 930 (2002). Thus, presumably among those permitted initial stages, the initiation of arrest warrants to ensure the physical presence of the person to stand trial. But, if the territorial state or the nationality state is acting or started acting, Spanish courts

In May 1996, based on a complaint against General Pinochet and others, the Spanish Judge Manuel Garcia agreed to investigate. Later, Judge Baltazar Garzon issued an arrest warrant and a request for extradition of General Pinochet from London, where he was obtaining medical treatment.⁵⁶ He was arrested in a London clinic in October 1998.⁵⁷ Moreover, in 1998 Judge Garzon issued an international arrest warrant for retired General Galtieri and nine other Argentine officers to obtain their custody in Spain.⁵⁸ Thus, according to these warrants Spain exercised *de facto* universal jurisdiction *in absentia* within the meaning of the *Congo v. Belgium* case.⁵⁹

It is interesting to note that on November 1, 1998, another complaint was filed against Pinochet in Belgium.⁶⁰ The Belgian Magistrate observed that by virtue of the 1993 War Crimes Act, Belgian courts were competent to exercise universal jurisdiction over the alleged crimes.⁶¹ Even in the absence of any link between the forum state and the perpetrator, namely the voluntary presence of the accused on Belgian territory, Belgium could still assert jurisdiction.⁶² This was a departure from the general rule set out in article 12 of the preliminary title of the Code of Penal Procedure.⁶³ Despite the fact that the Belgian Magistrate issued an arrest warrant for Pinochet, the Belgian Government failed to obtain his custody because the British authorities released him on medical grounds.⁶⁴

should yield to them. In its ruling of December 13, 2000, in the case of *Guatemalan Generals*, the *Audiencia nacional* affirmed this view when she "rejected a claim to the exercise of universal jurisdiction by Spanish courts" on the ground that the Guatemalan authorities could investigate and try them. *CASSESE (ICL)*, *supra* note 41, at 287.

56. *Regina v. Bartle*, 37 I.L.M. 1302, 1305 (1998) [hereinafter *Ex Parte Pinochet I*]; Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 *NEW ENG. L. REV.* 311, 312 (2001).

57. Roht-Arriaza, *supra* note 56, at 311. Pinochet was arrested on October 23, 1998 based on the second arrest warrant, which was issued on October 22, 1998. See *Ex Parte Pinochet I*, *supra* note 56, at 1303.

58. Roht-Arriaza, *supra* note 56, at 311.

59. This does not deny the fact that there existed a link, namely that some victims were Spanish nationals. However, Spain requested Pinochet's extradition based on the passive personality principle only with regard to the first request. Nonetheless, in October, Judge Garzon issued a second international arrest warrant for Pinochet based mainly on the broader ground of universality principle. See Antonio F. Perez, *The Perils of Pinochet: Problems for Transitional Governance Solution*, 28 *DEN. J. INT'L L. & POL.* 175, 191 (2000). The first warrant was issued on October 16, 1998, while the second warrant was issued on October 22, 1998. See *Regina v. Bartle*, 37 I.L.M. 1302; see also Rothenberg, *supra* note 55, at 936.

60. Luc Reydam, *International Decision: Belgian Tribunal of First Instance of Brussels (investigating magistrate)*, 93 *AM. J. INT'L L.* 700 (1999) [hereinafter *International Decision*]. On November 1, 1998, a criminal complaint was filed by "six Chilean exiles" against Pinochet. They alleged that during his presidency, he committed, "crimes under international law" in Chile that are punishable under the Belgian statute implementing the 1949 Geneva Conventions and Additional Protocols thereto. *Id.*; see also LUC REYDAMS, *UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES* (forthcoming 2003).

61. See Belgian Law, *Loi relative à la répression des infractions graves aux Conventions de Genève du 12 août 1949 aux Protocoles I et II du 8 juin 1977 et (June 16, 1993)*, art. 7. This Complaint was filed before the amendment of the Act in 1999.

62. Damien Vandermeersch, *Belgian Legal System for the Repression of Crimes under International Law*, in Rodriguez, *supra* note 50, at 166-67; see also *International Decision*, *supra* note 60, at 701 (noting, "the magistrate observed that the Belgian statute implementing the Geneva Conventions and Additional Protocols endows the Belgian judicial authorities with universal jurisdiction and that it was the legislator's unambiguous intent that the law should apply even when the alleged perpetrator is not present on Belgian territory."). *Id.*

63. Article 12 provides that jurisdiction of Belgian courts is restricted to the presence of the suspect in Belgium. See Vandermeersch, *supra* note 62, at 167.

64. Reydam, *supra* note 60. Even the Spanish extradition request was denied because Britain considered that PINOCHET was "mentally unfit to stand trial." Major Christopher M. Supernor, *International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice*, 50 *A.F. L. REV.* 215, 223 (2001).

Section 6(9) of the German Penal Code refers to “Acts committed abroad which are made punishable by the terms of an international treaty binding in the Federal Republic of Germany.”⁶⁵ Consequently, German courts are entitled to try international crimes covered by those acts under the principle of universality.⁶⁶ Although the German law and the traditional jurisprudence required the existence of a factual link for a German court to exercise jurisdiction over crimes committed abroad by foreigners,⁶⁷ this view has recently been reversed. In the *Sokolovic* case, the Federal Supreme Court (*Bundesgerichtshof*) opposed the early finding of the Court of Appeal with regard to the requirement of a ‘factual link’ and upheld the principle that universal jurisdiction does not require any link between Germany, the crime, the offender, or the victim.⁶⁸ The court stated, “[t]he Court however inclines, in any case under Article 6, paragraph 9 of the German Criminal Code, not to hold as necessary these additional factual links that would warrant the exercise of jurisdiction.”⁶⁹

65. Cassese, *supra* note 52, at 861, n.22.

66. Horst Fischer, *National Systems to Repress Violations of International Humanitarian Law*, in Rodriguez, *supra* note 50, at 78.

67. *Id.*; CASSESE, *supra* note 47, 445, n.63; see also Sascha Rolf Luder, *The Repression of Violations of international Humanitarian Law under German Domestic Law*, in Pellandini, *supra* note 50, at 247–48.

68. Cassese, *supra* note 52, at 861. “[T]he Court noted that in its decision of 29 November 1999 that the Court of Appeal, following the traditional German case law, had held that a factual link was required by law for a German court to exercise jurisdiction over crimes committed abroad by foreigners (in the case at issue the offender was a Bosnian Serb accused of complicity in genocide perpetrated in Bosnia). The court of appeal had found this factual link in the fact that the accused had lived and worked in Germany from 1969 to 1989 and had thereafter regularly returned to Germany to collect his pension and also to seek work.” However, after recalling these findings, the Supreme Court found that the factual link is not significant and thus, its absence does not bar German courts from exercising absolute universal jurisdiction. However, see Wirth’s different opinion that mentions that under German Law trials *in absentia* are not permitted. Thus, presumably his interpretation of the new CCIL (*infra* notes 71–75) leads to the conclusion that only initiating proceedings including issuing international arrest warrants is the only permissible type of universality *in absentia*; Steffen Wirth, *Germany’s New International Crimes Code: Bringing a Case to Court*, 1 J. INT’L CRIMINAL JUSTICE (JICJ) 152, 160, 164 (2003).

See *Demjanjuk v. Petrovsky*, 79 INT’L L. REP. 535 (1985). The facts of this case, as well, may reflect an exercise of universal jurisdiction *in absentia*. The accused John Demjanjuk a “native of the USSR” and a resident of the United States, was charged of having murdered “tens of thousands of Jews and non-Jews” during his service in the SS at the Treblinka concentration camp in Poland during World War II. Israel issued an arrest warrant which later was the ground for requesting his extradition from the United States, pursuant to the 1950 Nazis and Nazi Collaborators (Punishment) Law. No link existed between Israel and the offences or the offender, and the United States Court of Appeal realized this fact when stating “[A] state’s courts may exercise jurisdiction to enforce the state’s criminal laws which punish universal crimes or other non-territorial offenses within the state’s jurisdiction to prescribe. Israel is seeking to enforce its criminal law for the punishment of Nazis and Nazi collaborators for crimes universally recognized and condemned by the community of nations.” *Id.* at 545. “The courts of Israel had jurisdiction to try Demjanjuk, even though he had never been a citizen of Israel.” *Id.* at 536. “[T]he fact that [he] is charged with committing these acts in Poland does not deprive Israel of authority to bring him to trial. . . . When proceeding on [universal jurisdiction] premise, neither the nationality of the accused or the victim(s), nor the location of the crime is significant. The underlying assumption is that the crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations. This is being so, Israel or any other nation, regardless of its status in 1942 or 1943, may undertake to vindicate the interest of all nations by seeking to punish the perpetrators of such crimes.” *Id.* at 545–46. However, Professor Bassioni’s different opinion considers that although “the United States Courts of Appeals for the Sixth Circuit referred to universal jurisdiction over crimes of genocide and crimes against humanity, [it] relied [however] on the same Israeli law that was based on the theory of passive personality.” See Bassiouni, *supra* note 32, at 138.

69. *Sokolovic Case*, *supra* note 22, at 20. The original German text reads: “Der Senat neigt jedoch dazu,

The court found that universal jurisdiction *in absentia* was permitted in some instances when it ruled on a sensitive legal issue stating, “when Germany prosecutes and punishes under German law an offence committed by a foreigner abroad, it is difficult to speak of an infringement of the principle of non-intervention,” provided that Germany is under a duty to prosecute by virtue of an international treaty.⁷⁰ This conclusion finds its way in the new German Code of Crimes Against International Law (*Voelkerstrafgesetzbuch*, CCIL).⁷¹ On June 30, 2002, the CCIL entered into force.⁷² Section 1 permits the exercise of universal jurisdiction to genocide, crimes against humanity, and war crimes, despite the fact that the offences have no specific link to Germany.⁷³ Accordingly, Professor Gerhard Werle, argues that the “deviating jurisprudence” which set out the requirement of “the additional link to Germany” has no standing for the application of the CCIL.⁷⁴

Nevertheless, although the scope of extraterritorial jurisdiction is broad, it is not without limitations or suitable guidelines to avoid or reduce its danger. Some modifications to the German Code of Criminal Procedure have been made. Section 153(f) has been inserted and provides the prosecutor with full discretion to decide whether or not to prosecute “where the crime has been committed abroad by a non-German national against a non-German national and where the offender is neither present on German territory nor expected to enter German territory.”⁷⁵ In sum, Germany has taken positive steps that inevitably contribute to the development of the idea of absolute universality.

jedenfalls bei § 6 Nr. 9 StGB, solche zusätzlichen legitimierenden Anknüpfungstatsachen für nicht erforderlich zu halten,” available at <http://www.bundesgerichtshof.de/> (last visited Feb. 7, 2003); see also Cassese, *supra* note 47, at 445, n.63; Cassese, *supra* note 52, at 861, n.22.

70. Sokolovic Case, *supra* note 22, at 20. The original text reads as follows: “Wenn nämlich die Bundesrepublik Deutschland in Erfüllung einer völkerrechtlich bindenden, aufgrund eines zwischenstaatlichen Abkommens übernommenen Verfolgungspflicht die Auslandstat eines Ausländers an Ausländern verfolgt und nach deutschem Strafrecht ahndet, kann schwerlich von einem Verstoß gegen das Nichteinmischungsprinzip die Rede sein.” *Id.*; see also Cassese, *supra* note 47, at 445, n.63; Cassese, *supra* note 52, 861, n.22.

71. Gerhard Werle & Florian Jessberger, *International Criminal Justice is Coming Home: The New German Code of Crimes Against International Law*, 13 CRIM. L.F. 191 (2002).

72. *Id.*

73. *Id.* at 201.

74. *Id.* at n.49.

75. *Id.* at 213. Section 153(f) stipulates: “(1) In the cases referred to under Section 153c subsection (1), numbers 1 and (2), the public prosecution may dispense with prosecuting an offence punishable pursuant to sections 6 to 14 of the Code of Crimes against International Law, if the accused is not present in Germany and such presence is not to be anticipated. If in the cases referred to under Section 153c subsection (1), number 1, the accused is a German, this shall however apply only where the offence is being prosecuted before an international court or by a State on whose territory the offence was committed or whose national was harmed by the offence. (2) In the cases referred to under Section 153c subsection (1), numbers 1 and (2), the public prosecution office may dispense with prosecuting an offence punishable pursuant to sections 6 to 14 of the Code of Crimes against International Law, in particular if

1. there is no suspicion of a German having committed such 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. The same shall apply if a foreigner accused of an offence committed abroad is residing in Germany but the requirements pursuant to the first sentence, numbers 2 and 4, have been fulfilled and transfer to an international court or extradition to the prosecuting state is permissible and is intended. (3) If in the cases referred to under subsection

Based on the foregoing, one may conclude that while universal jurisdiction *in absentia* is excluded under some legal systems, it is permissible under others. Thus, the question whether such practice is prohibited remains unresolved.

In her dissenting opinion in the *Congo v. Belgium* case, Professor Van Den Wyngaert argued that because of the diversity of state practice and national systems regarding that type of jurisdiction, the existence of a barring rule of “customary international law” was lacking. She made her point in the following words:

There is *no customary international law* to this effect either. The Congo submits there is a State practice, evidencing an *opinio juris* asserting that universal jurisdiction, *per se*, requires the presence of the offender on the territory of the prosecuting State. Many national systems giving effect to the obligation *aut dedere aut judicare* and/or the Rome Statute for an International Criminal Court indeed require the presence of the offender. This appears from legislation and from a number of national decisions . . . However, there are also examples of national systems that do not require the presence of the offender on the territory of the prosecuting State. Governments and national courts in the same State may hold different opinions on the same question, which makes it even more difficult to identify the *opinio juris* in that State.⁷⁶

Furthermore, even the practice of states to abstain from initiating proceedings *in absentia* or to choose to initiate proceedings in the presence of the accused, did not lead to the conclusion that such practice was contrary to international law.⁷⁷ This might be due to other “practical” or “political” considerations.⁷⁸

Moreover, the *Lotus* case, examined by the Permanent Court of International Justice (PCIJ), is instructive and as mentioned by Professor Van Den Wyngaert “not only an authority on jurisdiction, but also on the formation of customary international law.”⁷⁹ In that case, the court tested the extraterritorial scope of a country’s criminal law and concluded that:

According to international law, the jurisdiction of States was territorial in the sense that, failing the existence of a permissive rule to the contrary, a State must not exercise its power in any form in the territory of another State. But from that it does not follow that international law prohibits a State from exercising jurisdiction in its territory in regard to acts committed abroad. 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 . . . But this is certainly not the case under international law as it stands at present.⁸⁰

(1) or (2) public charges have already been preferred, the public prosecution office may withdraw the charges at any stage of the proceedings and terminate the proceedings.”

Id. at Appendix 222–23. It should be noted that sections 6 to 14 referred to in the above text covers the three crimes, in addition to the command responsibility. It is interesting to note that section 153(f)(2) seems to offer a solution for the problem that might arise in cases of conflict of jurisdiction between states. This is one of the major problems of universality *in absentia*. However, this amendment seems to offer a valid solution to reduce such danger by leaving room for the dismissal of cases in the situation where any of the International, territorial, or the national state courts of the accused and the victim are acting.

76. *Congo v. Belgium*, *supra* note 1, ¶ 55 (Judge Van Den Wyngaert Dissenting Opinion).

77. *Id.* ¶ 13.

78. *Id.*

79. *Id.* ¶ 56.

80. Annual Digest, 1927–1928, Case No. 98, at 155–56. Thus, the water mark here is as long as a state has not exercised jurisdiction into the territory of another state (enforcement jurisdiction) or exercised such jurisdiction without the consent of that state, there is no other restrictive rule under international law that bar a state from exercising jurisdiction in its territory over acts committed abroad.

Thus, a state must not exercise absolute or universal jurisdiction *in absentia* where there is a “general” prohibitive rule under international law to that effect. To determine the existence of such a prohibitive or restrictive rule, “it is necessary [as Cowles mentioned] to show that States generally, as a matter of practice expressing a rule of law, have consented not to exercise [such type of] jurisdiction . . . As independent States are involved, any such restriction must be conclusively proved, and to do this municipal law and practice must not be divided”⁸¹ and if “municipal jurisprudence [is] divided, it is hardly possible to see in it an indication of the existence of the restrictive rule of international law.”⁸² Based on this conclusion, one may argue that because the municipal jurisprudence and laws of various countries are divided, in regard to this issue, international law lacks the restrictive rule that bans the exercise of absolute universality.

Nevertheless, some commentators disregard the validity of *Lotus* as too liberal with no precedential value. This may be because the rules regulating the formation of custom have slightly changed. The previously prevailing idea, that the “tacit” agreement or “consent of all states” is required for a rule of customary law to emerge is no longer tenable.⁸³ It is sufficient for a majority of states to engage in a consistent practice corresponding with the rule⁸⁴ and accepting it as legally binding.⁸⁵ The ICJ confirmed this viewpoint in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, when it stated:

The Court does not consider that, for a rule to be established as customary the corresponding practice must be in absolutely rigorous conformity with the rule. . . the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indication of the recognition of a new rule.⁸⁶

81. Willard B. Cowles, *Universality of Jurisdiction over War Crimes*, 33 CAL. L. REV. 177, 181 (1945).

82. PCIJ, 1927, Series A, No. 10, at 29. See also Cowles, *supra* note 81, at 180. However, see Shaw's different opinion, citing to the *Anglo-Norwegian Fisheries* and the *Nottebohm* cases, where he considers that the liberal rule set out in the *Lotus* case does not stand anymore. MALCOLM N. SHAW, INTERNATIONAL LAW 460–61 (4th ed. 2001).

83. Cassese, *supra* note 47, at 123; see also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6 (5th ed. 2001).

84. Cassese, *supra* note 47, at 123.

85. KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 44 (2d ed. 1993).

86. I.C.J. Reports, 1986, at 98; but see *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, July 8, 1996, ¶¶ 71, 73, available at <http://www.icj-cij.org/icjwww/icases/iunan/iunanframe.htm>. The Court noted that the diversity of opinions impeded the determination of the rule of customary law prohibiting the use or threat of nuclear weapons as follows:

Examined in their totality, the General Assembly resolutions put before the Court declare that the use of nuclear weapons would be ‘a direct violation of the Charter of the United Nations’; and in certain formulations that such use ‘should be prohibited’. The focus of these resolutions has some times shifted to diverse related matters; however, several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons. . . The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.

Id.; see also RODNEY DIXON ET AL., ARCHBOLD: INTERNATIONAL CRIMINAL COURTS PRACTICE, PROCEDURE AND EVIDENCE 8 (2003) (noting that it is “necessary to consider whether there are divergent views and conduct in

Thus, one may wonder whether current national legislation, case law, and *opinio juris* that discounts absolute jurisdiction are sufficient grounds for the formation of a custom or a restrictive rule.⁸⁷

V. The Codification of the Doctrine of Universal Jurisdiction under the 1949 Geneva Conventions

The late 1940s saw the creation of a new series of treaties that codified the use of universal jurisdiction over war crimes “treating the [doctrine] as an accepted feature of customary international law.”⁸⁸ These are the 1949 Geneva Conventions.

Articles 49,⁸⁹ 50,⁹⁰ 129,⁹¹ 146,⁹² common to the four Geneva Conventions, impose a duty upon the States to prosecute or extradite (*aut dedere aut judicare*) perpetrators of grave breaches of international humanitarian law through a mechanism of “mandatory universal jurisdiction.”⁹³ These provisions oblige state parties to the Geneva Conventions to undertake enactment of any legislation necessary to provide effective penal sanctions for persons

State practice—the inquiry must not be limited to those States that support the rule of customary law.”) *Id.*

Based on the aforementioned wording, one may therefore argue that the diversity of opinion regarding universality in *absentia* supports the conclusion that a customary rule prohibiting its application is lacking.

87. As Villiger has rightly observed, the “fluid and dynamic nature of customary law makes it difficult to assess in *abstracto* at what point State practice and the *opinio* give rise to a rule.” MARK E. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* 194 (1985).

88. MORRIS, *supra* note 31, at 346; see also Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L L. 554, 572 (1995).

89. 1949 Geneva Conventions: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31.

90. 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85.

91. 1949 Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135.

92. 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, adopted Aug. 12, 1948, entered into Oct. 21, 1950, 75 U.N.T.S. 287.

93. Prosecutor v. Tadic, Case No. IT-94-I-AR72, Oct. 2, 1995, ¶ 80; Prosecutor v. Zejnir Delalic’ et al., Case No. IT-96-21-T, Nov. 16, 1998, ¶ 200 (noting that “[t]he system of mandatory universal jurisdiction over those offenses described as ‘grave breaches’ of the Conventions requires all States to prosecute or extradite alleged violators of the Conventions.”); see also Horst Fischer, *The Grave Breaches of the 1949 Geneva Conventions*, in *SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS: COMMENTARY* 73 (Gabrielle Kirk McDonald et al. eds., 2000); Bartram S. BROWN, *Nationality and Internationality in International Humanitarian Law*, 34 STAN. J. INT’L L. 347, 392-93 (1998); L.C. Green, ‘Grave Breaches’ or Crimes Against Humanity, 8 U.S. AIR FORCE ACADEMY J. LEGAL STUDIES 19, 27-29 (1997); Sonja Boelaert Suominen, *Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for All Armed Conflicts?* 5 J. CONFLICT & SECURITY L. 63, 71 (2000); Mary O’Connell, *Symposium Method in international Law: New International Legal Process*, 93 AM. J. INT’L L. 334, 341 (1999); Luc Reydam, *Niyonteze v. Public Prosecutor, Tribunal Militaire de Cassation (Switzerland), April 27, 2001*, 96 AM. J. INT’L L. 231 (2002). Despite the fact that this case reflects the application of universal jurisdiction where the accused was present in Switzerland, it is worth mentioning as set out below. In the *Niyonteze* case, the Swiss Tribunal *militaire de cassation* is considered the first municipal court to render a conviction based on universal jurisdiction under the 1949 Geneva Conventions and Additional Protocol II in an internal armed conflict. After crimes were committed and the government forces defeated during the armed conflict between the government forces and the rebel army of Rwanda Patriotic Front (RPF), which took place from April to July 1994, Mr. Fulgence Niyonteze and his family fled to Switzerland, where he was arrested. The ICTR did not request deferral, while Rwanda requested his extradition, but to no avail. *Id.*

committing, or ordering to be committed, any of the “grave breaches” defined in the conventions. More importantly, each party “shall be under an obligation to search for [those] persons alleged to have committed or to have ordered to be committed, such grave breaches, and shall bring them before its own courts.” This is true regardless of their nationality. Should a state party decide not to try any of those persons, it is under an obligation to extradite them to another state party for trial, provided that the latter “has made out a *prima facie* case.”

Paragraph 2, common to the aforementioned four Geneva Conventions, is the key to the mechanism of repression through the concept of universality of jurisdiction. A literal reading of the text of paragraph 2 suggests that every state is under a duty to search, arrest, and try those who commit any of the “grave breaches” set out in the conventions, regardless of any link between the perpetrator and the state asserting jurisdiction. Furthermore, it could be argued that the wide language used by the drafters, “shall be under an obligation to search for persons alleged to have committed . . . such grave breaches,” supports the proposition that every state party is obligated not only to search for those perpetrators, but also to arrest them wherever they might be found. Obviously, this could be achieved through the issuance of an international arrest warrant accompanied by an extradition request, which would be enforced by the authorities of the state where the accused is present. In addition, while the wording of the text supports the application of universal jurisdiction generally, it does not include any language that precludes its application by default. In its advisory opinion on the reservations to the genocide convention, the ICJ stated:

[I]n this state of international practice, it could certainly not be inferred from the absence of an article providing for reservations in a multilateral convention that the Contracting States are prohibited from making certain reservations . . . The character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations.⁹⁴

In a parallel line of argument, it cannot be inferred from the absence of a specific article or explicit language providing for absolute universal jurisdiction that the parties are prohibited from applying it. Indeed, the language used in the Geneva Conventions requires the exercise of universal jurisdiction. The only problem, however, is that the text is silent regarding the method of application. An examination of the humanitarian character, beyond the Geneva Conventions and their purposes, reflects that a highly effective system of repression was required and intended by the drafters.⁹⁵ Accordingly, one cannot hold a view that the Geneva Conventions do not allow states to exercise absolute universal jurisdiction.

94. Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of Genocide, 1951 I.C.J. Rep. 15, 22 (May 28, 1951).

95. See, e.g., *Re Javor*, *supra* note 41 (expressing the opinions of Professor Claude Lombois and Brigitte Stern regarding the interpretation of the 1949 Geneva Conventions); Meron, *supra* note 88, at 570. Judge Meron stresses the main purposes and objects of the Conventions and the legal consequences that might result from not acting in conformity with them, by saying: “[G]iven the purposes and objects of the Geneva Conventions and the normative content of their provisions, any state that does not have the necessary laws in place, or is otherwise unwilling to prosecute and punish violators of clauses other than the grave breaches provisions that are significant and have a clear penal character, calls into serious question its good faith compliance with its treaty obligations.” *Id.*; see also Oren Gross, *The Grave Breaches System and the Armed Conflict in the former Yugoslavia*, 16 MICH. J. INT’L L. 783, 792–93 (1995) (noting that there are several arguments that support the mechanism of universal jurisdiction for grave breaches). These arguments demonstrate that “there was an apparent need to foster respect for the Conventions and to ensure their efficient implementation. Grave

Although Pictet argues that states are under a duty to arrest perpetrators of grave breaches only when found on their territory⁹⁶ and, therefore, universality by default would be impermissible under the Geneva Conventions, this strict interpretation⁹⁷ can no longer accommodate the development of international law and the pressing need to suppress the increased number of gross violations that have taken place during the last few decades. This view has been upheld in an early advisory opinion of the ICJ regarding Namibia, when the court stated, “[i]nterpretation cannot remain unaffected by the subsequent development of law, . . . Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”⁹⁸

On the other hand, the European Court of Human Rights (ECHR) adopts a similar approach of interpretation by applying the “principle of effectiveness.” The latter principle, as Professor Merrills argues, is a means “to interpret [a treaty] in a way which gives its provisions a maximum of effectiveness, having regard to its language and its object and purpose.”⁹⁹

Thus, in the early *Airey* case and in the recent, *Mamatkulov, Ocalan*, and *Loizidou* cases, the ECHR made a reference to the principle of effectiveness when stating, “the Convention must be interpreted in the light of present day conditions . . .”¹⁰⁰ This evolutionary interpretation is consistent with the underlying character and goals of the aforementioned Geneva Conventions that face critical situations subject to continuous development.¹⁰¹

Thus, applying the above principles to the text of the Geneva Conventions leads to the conclusion that the practice of absolute universal jurisdiction is consistent with the spirit of those conventions. Although the four common provisions set out in the Geneva Conventions, and similar provisions in other treaties, are based on the principle of *aut dedere*

breaches were given a special place in the Conventions in order to prevent such acts from going unpunished.” *Id.* If this is the underlying premise of those Conventions, then one might wonder why an exercise of universality by default should not be allowed in specific cases to avoid “such acts from going unpunished.”

96. Commentary on Geneva Convention IV, art. 146, at 578; but see Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, Ch. 1, 2001, at 14 (noting that the Geneva Conventions do not require any link between the state exercising jurisdiction and the accused.). On the basis of that jurisdiction a prosecutor or an investigating judge may commence an investigation, gather evidence, issue international arrest warrants, and file extradition requests where a state is unwilling or unable to act. *Id.*

97. Rudolf Bernhardt, *Evolutionary Treaty Interpretation, Especially of the European Convention on Human Rights*, 42 GERMAN Y.B. INT’L L. 11, 14 (1999). It seems that the demand to preserve states national sovereignty played a major role in Pictet’s strict interpretation to the abovementioned provisions. However, as Judge Bernhardt has rightly mentioned: “the principle that treaties should be interpreted restrictively and in favor of State sovereignty, *in dubio mitius* . . . is no longer relevant . . . Treaty obligations are in case of doubt and in principle not to be interpreted in favor of State sovereignty. It is obvious that this conclusion can have considerable consequences for human rights conventions: Every effective protection of individual freedoms restricts State sovereignty.” *Id.* In a same line of argument the fight against impunity in the sake of effective protection of individual human rights may permit a limitation or restriction on state sovereignty.

98. 1971 I.C.J. at 31.

99. J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 97 (1990).

100. Series A. No. 32, ¶ 26; *Mamatkulov and Abdurasulovic v. Turkey*, (Merits) App. No., 00046827/99, Judgment Feb. 6, 2003, ¶ 94; *Ocalan v. Turkey*, (Merits), App. No. 00046221/99, Judgment Mar. 12, 2003, ¶ 193; *Loizidou v. Turkey* (Preliminary Objections), App. No., 0001531/89, Mar. 23, 1995, ¶¶ 71–72 *Tyrer Case*, Series A. No. 26, ¶ 31. *Minelli Case*, Series A. No. 62; *Artico Case*, Series A. No. 37; *Klass Case*, Series A. N. 28.

101. Deborah Mangion, *Article 3 of the ECHR: Relative Interpretations of a Universal Right?* 6 MEDITERRANEAN J. HUM. RTS. 247, 251 (2002).

aut judicare, which normally envisages the presence of the accused on the territory of the state asserting jurisdiction, this conclusion “cannot be interpreted *a contrario so as to exclude* a voluntary exercise of universal jurisdiction.”¹⁰² Thus, as mentioned in the joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal, in the *Congo* case, “if the underlying purpose of designating certain acts as an international crimes is to authorize a wide jurisdiction to be asserted over persons committing them, there is no rule of international law (and certainly not the *aut dedere* principle) which makes illegal co-operative overt acts designed to secure their presence within a State wishing to exercise jurisdiction.”¹⁰³ Hence, according to their conclusion, universal jurisdiction *in absentia* is not forbidden.

VI. The ICJ’s Approach toward Absolute Universality

As mentioned previously in section 1, the ICJ did not address the question of universality *in absentia* and, therefore, as Professor Cassese pointed out, the court missed “a golden opportunity to cast light on a difficult and topical legal issue.”¹⁰⁴ Some of the judges, however, tackled this significant issue in their separate opinions and reached different conclusions.

President Guillaume vigorously opposed the idea of universal jurisdiction to all heinous crimes with the exception of piracy.¹⁰⁵ He asserted moreover that international law did not recognize what is known as universality *in absentia*.¹⁰⁶ His argument was based on the grounds that neither treaties that entail the duty to prosecute or extradite, nor customary international law, recognize jurisdiction in the absence of the offender in the prosecuting state at the time of initiating procedures against him.¹⁰⁷ Instead, he cited various treaties that embody the rule of *aut dedere aut judicare* that requires only the state where the person is found, to either prosecute or hand over the accused to another state for prosecution.¹⁰⁸ “None of [the mentioned treaties] has contemplated establishing jurisdiction over offences committed abroad by foreigners when the perpetrator is not present in the territory of the State in question.”¹⁰⁹

But, the fact that the listed conventions require the voluntary presence of the perpetrator on the territory of the state asserting jurisdiction does not mean that the general practice of universality *in absentia* is outlawed.¹¹⁰ It should not be forgotten that the grave breach

102. *Congo v. Belgium Case*, *supra* note 1, ¶ 57 (Opinions of Judges Higgins, Kooijmans, and Buergenthal).
103. *Id.* ¶ 58.

104. Cassese, *supra* note 52, at 856.

105. See *Congo v. Belgium Case*, *supra* note 1, ¶ 16 (stating President Guillaume’s Separate Opinion).

106. *Id.* ¶¶ 12–13; see also Alexander Orakhelashvili, *International Decision: Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), 96 AM. J. INT’L L. 677, 681 (2002) (supporting Judge Guillaume’s opinion).

107. *Congo v. Belgium Case*, *supra* note 1, ¶ 13 (President Guillaume’s Separate Opinion).

108. *Id.* ¶¶ 7–9.

109. *Id.* ¶ 9.

110. See, e.g., Clark’s early article where he does not preclude the possibility of universality *in absentia*. He said: “one of the dangers of conceding universal jurisdiction that is sometimes mentioned is that states will try officials of another state *in absentia*, for political reasons. [The provision of article V of the Apartheid Convention], at least does not legitimate trials held in the absence of the accused. The sparse material on this point concerning this and other treaties certainly does not support a general proposition that trial *in absentia* is inappropriate in respect of other crimes of international concern. The point is simply not developed.” Roger S. Clark, *Offenses of International Concern: Multilateral State Treaty Practice in the Forty Years Since Nuremberg*, 57 NORDIC J. INT’L L. 49, 93, n.60 (1988); see also *The Princeton Principles*, which states in Principle I(1): “For

provisions to the 1949 Geneva Conventions do not beg such requirement and, therefore, could be interpreted in an effective manner or a broad sense, as previously demonstrated in Section 1.5, and would not require such restriction.¹¹¹ This conclusion is in line with Professor's Brigitte Stern's finding that stated:

The Universality principle is generally understood as giving jurisdiction to a state for acts committed by foreigners anywhere in the world, merely on the basis of the perpetrator being in that state's territory. This is an unduly limited interpretation of what universal jurisdiction should be, however. If such a territorial link is required, real universal jurisdiction is not being exercised.¹¹²

Furthermore, President Guillaume's assertion that the principle of universal jurisdiction is limited to piracy clearly contradicts the finding of the Appeals Chamber in the *Tadic* case, in which it affirmed the early finding of the Italian Supreme Military Tribunal in the case of *General Wagener* stating:

[T]he solidarity among nations, aimed at alleviating in the best possible way the horrors of war, gave rise to the need to dictate rules which do not recognize borders, punishing criminals wherever they may be . . . Crimes against the laws and customs of war . . . are . . . crimes of *lèse-humanité* (*reati di lesa umanità*) and, . . . the norms prohibiting them have a universal character, not simply a territorial one. Such crimes . . . concern all civilised States, and are to be opposed and punished, in the same way as the crimes of piracy . . .¹¹³

The finding of this chamber that the punishment for some crimes "need to dictate rules which do not recognize borders," . . . [and] ("Such crimes, . . . are to be opposed and punished, in the same way as the crimes of piracy") makes it clear that universal jurisdiction is neither limited to the crime of piracy nor should be narrowed or restricted in its application. Thus, universality *in absentia* is justified.

President Guillaume found no ground for this type of jurisdiction under state practice or customary law. In so doing, he cited to the French, Dutch, and German legislations as valid examples to support his viewpoint.¹¹⁴ Despite these arguments, this conclusion is hardly persuasive. It is true that the French¹¹⁵ and Dutch systems do not recognize absolute

the 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 jurisdiction. Principle 2(1). . . 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." See Neil Boister, *The ICJ in the Belgian Arrest Warrant Case: arresting the Development of International Criminal Law*, 7 J. OF CONFLICT & SECURITY LAW 293, 311 (2002).

111. But, President Guillaume's opinion argues that even the common provisions of the 1949 Geneva Conventions require the presence of the accused on the territory of the arresting state. See *Congo v. Belgium Case*, *supra* note 1, ¶ 17.

112. Brigitte Stern, *Better Interpretation and Enforcement of Universality of Jurisdiction*, 14 NOUVELLES ETUDES PENALES 175, 185 (1998); see also Judge Higgins' opinion regarding the meaning of universal jurisdiction. Her apparent opinion seems to suggest that true universal jurisdiction does not require any nexus whatsoever. HIGGINS, PROBLEMS AND PROCESS, *supra* note 15, at 64–65.

113. *Tadic Case*, *supra* note 22, ¶ 57 (quoting an early judgment of the Italian Supreme Military Tribunal *Mar* in *Rivista Penale* 753, 757 (Sup. Mil. Trib., Mar. 13, 1950)).

114. *Congo v. Belgium Case*, *supra* note 1, ¶ 12 (President Guillaume's opinion).

115. *But see* Stern, *supra* note 41, at 528–29 (stating that article 689 of the Code of Criminal Procedure leaves room for the applicability of universality *in absentia*).

universality (*in absentia*). But, along the same line of argument, it does not follow from this conclusion that the practice is generally prohibited under international law. Still, there exists other laws such as the Spanish, Belgium (however is currently under amendments as seen in the conclusion), Italian, New Zealand, and Israeli legislations that recognize the type of universality *in absentia* as mentioned previously in section 1.4. Moreover, it is undeniable that in the past German courts have restricted the exercise of universal jurisdiction under section 6, paragraphs 1 and 9 to the presence of a “factual link” between Germany and the offender. This view, however, does not stand anymore, as the Federal Supreme Court reversed it recently in the *Sokolovic* case.¹¹⁶ In addition, section 1 of the new CCIL evidences that a new trend has emerged that favors universality *in absentia*.¹¹⁷

Aside from the aforementioned arguments, it is worth noting that heinous crimes, such as war crimes, crimes against humanity, and genocide are part of *jus cogens*. As a result, all states have an obligation *erga omnes* to repress these crimes and combat impunity by all legal means including universal jurisdiction.¹¹⁸ To outlaw a highly legal mechanism that contributes in the repression of those odious crimes might rise to a violation of a *jus cogens* norm. One cannot believe, for example, that a state that initiates proceedings by issuing an international arrest warrant accompanied by an extradition request to subsequently secure the presence of the offender would be in violation of international law. It should be seen as an effective type of cooperation between all states in order to fight those crimes that shock the conscious of not only one state, but humanity as a whole.¹¹⁹ Professor Brigitte Stern expressed a similar view when she stated:

116. See *supra* notes 67–70.

117. See *supra* notes 71–75; see also *Congo v. Belgium Case*, *supra* note 1, ¶ 20 (stating the joint separate opinion of judges Higgins, Kooijmans, and Burgenthal regarding the initial proposal for this Code).

118. M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: CRIMES*, Vol. I, 46 (Ardsley, New York: Transnational Publishers, 1999); M. Cherif Bassiouni, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: International Crimes: Jus Cogens and Obligation Erga Omnes*, 14 NOUVELLES ETUDES PENALES 133 (1998); see also, e.g., *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5, 1970). The ICJ defined the concept of “*erga omnes*” and its legal effect towards the entire community in the following terms:

[A]n 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 in the field of diplomatic protection. 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*.

See also *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Yugoslavia)*, 1996 I.C.J. 4, 27–33, ¶ 33 (July 11, 1996). The ICJ expressed itself regarding obligations *erga omnes* in the following words: “The Court is of the view that it follows from the object and purpose of the Convention that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*.” *Id.* This wording emphasizes that the Convention imposes an obligation *erga omnes* to punish and prevent the crime of genocide. *Id.* at 25.

119. See, e.g., G.A. Res., U.N. GADR 2840 (XXVI), adopted 1971, which stipulates that: “[A state’s refusal] to co-operate in the arrest, extradition, trial and punishment of persons accused of war crimes and crimes against humanity is contrary to the United Nations Charter and to generally recognized norms of international law.” Despite the fact that GA Resolutions are considered soft law and thus, do not create other than moral obligations, “it does at least suggest [as Prof. Stern has validly pointed] the right to act in accordance with such a resolution.” Stern, *supra* note 112, at 181–82. It follows that any denial of cooperation on the part of a State for the sake of arresting a war criminal might place that state in violation of international law norms. However, see Reydams different opinion who considers that “[t]he proposition that the presence of the accused can be self-generated through extradition is . . . untenable both from the perspective of the rights of the States and from the perspective of human rights.” Reydams, *supra* note 21, at 815.

In state's efforts to bring a perpetrator into its custody, all legal devices should be used. Especially in this period where civil society is often at the root of positive changes, all possibilities available to set in motion the prosecution of international crimes should be encouraged . . . Universal jurisdiction must always imply some *rights of research* on the perpetrator in order to bring him into that state's territory . . . search for, and apprehended persons charged with international crimes under universal jurisdiction cannot be contested.¹²⁰

In contrast to President Guillaume's opinion, Judges Higgins, Kooijmans, and Buergethal hold the view that absolute universal jurisdiction is permissible under international law, despite the variations in national legislation, case law, and *opinio juris*.¹²¹ But such permissibility is subject to the following five conditions:¹²² (1) a State that demands to initiate criminal proceedings must first offer to the national State of the prospective accused person the opportunity to act upon the charges concerned; (2) charges may only be brought by a prosecutor or investigating judge in order to ensure independence of the government; (3) commencement of legal proceedings are subject to a complaint to the prosecutor or the investigating judge filed by the person concerned; (4) the alleged crimes must be regarded as the most heinous by the international community; and (5) jurisdiction cannot be exercised as long as the prospective accused is a foreign minister in office. After he leaves office, jurisdiction may be exercised over private acts.

These prerequisites are well constructed. The first requirement, however, poses some interesting questions. The three judges mentioned that the state initiation of criminal proceedings should first give the national state of the accused the opportunity to act. But the reason for choosing the state of nationality of the accused and not the territorial state or the state of which the victim is a national is not clear. Nonetheless, a close reading of paragraph 59 of the joint separate opinion suggests two distinct conclusions. First, the judges examined this issue in a strict sense, namely with regard to state officials as opposed to civilians or other state agents who are not immune. This conclusion is supported on several grounds. Under international law only the sending state, which in this case is the national state of the accused (diplomatic agent), has the competence to waive the immunity over its diplomatic agents.¹²³ Moreover, international law does not grant diplomatic agents immunity from criminal jurisdiction in their own countries, which signifies that they could be tried before the domestic courts of those countries.¹²⁴ Finally, to save international relations between states, it deems necessary to offer the national state of the accused the opportunity to act. The sum of these reasons makes it more plausible to offer the national state of the accused the opportunity to prosecute. Consequently, it is not possible to make reference to either the territorial state or the nationality of the victim. This conclusion is conceivable, but only when dealing with situations that involve diplomatic agents. It is hardly persuasive to reach the same conclusion when dealing with civilians, because it would

120. Stern, *supra* note 112, at 180–82.

121. Congo v. Belgium Case, *supra* note 1, ¶¶ 45, 54 (stating the joint separate opinion of judges Higgins, Kooijmans, and Buergethal). See also Judge Koroma's Opinion that mentioned the judgment "cannot be seen either as a rejection of the principle of universal jurisdiction." It is available to certain crimes, such as war crimes and crimes against humanity, genocide, and slave trade. The Court, however, did not rule on it because it was not indispensable to do so to reach its conclusion, nor was such submission before it. *Id.* ¶ 9.

122. *Id.* ¶¶ 59–60, 79–85.

123. See Vienna Convention on Diplomatic Relations, 1961, art. 32; Congo v. Belgium Case, *supra* note 1, ¶ 59.

124. *Id.* art. 31(4); Congo v. Belgium Case, *supra* note 1, ¶ 61.

not appear necessary to restrict such offer to the state of nationality of the accused as the case with diplomatic agents. The same question seems to be unresolved with regard to non-diplomatic agents, and thus the reason why the offer should be directed to the state of nationality of the accused and not the territorial or the state of nationality of the victim? The three judges provided no guidance to this question. If such an offer is deemed necessary in the case of diplomatic agents for the three aforementioned reasons, would this be the case when dealing with non-diplomatic agents, especially when the first two abovementioned reasons are lacking? Second, according to another reading of paragraph 59, if the three judges initially intended to apply such an offer to cover only situations involving non-diplomatic agents, it would be unreasonable to conclude that they have chosen to restrict such an offer to the state of nationality of the accused on the basis of the first two abovementioned reasons. The only logical justification would be the third abovementioned reason, namely, to save international relations and avoid inter-states diplomatic friction. The latter justification, however, cannot be taken in the abstract because offering the national state of the accused the opportunity to act, while it preserves international relations between the states directly involved, may not save those relations with the territorial or the national state of the victim. Thus, if the exercise of absolute universality should be limited to an offer from the third state, that offer should be directed to all states that are directly connected with the accused or the crime, including the territorial and the national state of the victim. The conflict between those states as to which state should exercise jurisdiction could be solved through diplomatic channels or classical state practice.

VII. Conclusion

The question of universality of jurisdiction *in absentia* is highly debatable. The trials held post-World War II by the U.S. and British Military courts showed recognition to the principle of universal jurisdiction. But the prevailing language used by these courts inclines toward the classical or conditional form of universality.

The adoption of the 1949 Geneva Conventions demonstrated another significant development of the concept of universality of jurisdiction. Arguably, the provisions regulating universal jurisdiction under the Geneva Conventions require the voluntary presence of the accused on the territory of the state asserting jurisdiction. Nevertheless, the language used in those provisions does not entail any such restrictive rule and may accommodate a broader effective interpretation. Consequently, they could be construed in a manner that permits the exercise of absolute universality to ensure the highest mechanism of fight against impunity.

Although it has been argued that a number of treaties do not permit the application of universality *in absentia*,¹²⁵ this does not mean that such practice is prohibited under international law. Only the idea had not been developed at the time.¹²⁶ While contemporary legislations and jurisprudence in some countries exclude this practice, it is allowed in others. For example, the practice is still allowed in the Spanish, Italian, New Zealand, and Israeli legislation. Conversely, given the gravity of genocide, crimes against humanity, and war crimes, Germany has adopted a new trend favoring such a type of jurisdiction.¹²⁷ Although

125. See *id.* ¶ 8 (President Guillaume's Opinion reviewing those treaties).

126. See, e.g., Clark, *supra* note 110.

127. See *The New German Code*, *supra* note 71. However, Professor William Schabas argues that states who are willing to apply universality *in absentia* "only exercise it when they have a real interest in the offender, rather

state practice seems to be divided regarding this type of jurisdiction, such controversy may support the view that a restrictive rule of international law that bars its application is lacking, as previously demonstrated.¹²⁸ It does not follow from this conclusion, however, that this type of jurisdiction is not perilous. It could lend itself to abuse¹²⁹ and interstate friction,¹³⁰ especially if procedures target a high state official or a diplomatic agent. This was clearly mentioned by the three judges in the joint separated opinion of the ICJ judgment. Thus, the five conditions set out by the three judges aim to reduce the degree of danger, if a state has chosen to exercise that type of universality. Notwithstanding this reasonable compromise, the outcome of the judgment that favored the Congo's application caused diversity in views¹³¹ and forced the Belgium Government and courts to re-assess this type of universality. On April 16, 2002, a pre-trial appeals court in Brussels ruled that the proceedings

than the alleged interest in the good of humanity that publicists all invoke but that states rarely seem to be concerned about." Nevertheless he believes that states might be hesitant to exercise that type of universality, because "when the offender is on the territory, they have an interest in dealing with him or her that they rarely have in other cases." *Private Conversation with William Schabas*, May 26, 2003.

128. See Section 1.3, *supra*; Congo v. Belgium Case, *supra* note 1, ¶ 51 (Judge Van Den Wyngaert Dissenting Opinion). Judge Van Den holds the proposition that based on the *Lotus* case, each state is authorized "to provide extraterritorial jurisdiction on its territory unless there is a prohibition under international law." She concludes, however, that such a rule does not exist under an international law that bars investigating or prosecuting war crimes and crimes against humanity committed abroad.

129. For a thorough discussion regarding the pitfalls of universal jurisdiction in general, see Morris, *supra* note 31, at 351–59; see also Professor Bassiouni's opinion when he stated: "With respect to the [practice of universal jurisdiction *in absentia*], this case is, for all practical and legal purposes, a case of first impression as there has never before been a state with such extraterritorial jurisdictional reach. One way of considering this issue is to balance the positive effects of such legislation on the enforcement of international criminal law with respect to *jus cogens* crimes against the negative effects of potentially disrupting the stability, and predictability of the international of the international legal order and its potential for infringing upon human rights because of the possibilities of politically motivated, vexatious prosecutions, and its potential for multiple prosecutions (in light of the non-applicability of *non bis in idem* to [prosecutions] sic by separate sovereigns)." Bassiouni, *supra* note 32, at 147. One has to admit that the issue of *non bis in idem*, the restriction of its application to the same state sovereign and the lack of respect to foreign judgments might be one of the pitfalls for the exercise of universal jurisdiction *in absentia*. Some states do not recognize or give weight to foreign judgments and thus a person could be prosecuted or tried simultaneously for the same offense. According to this writer, however, a sort of practice of universality *in absentia*, which does not exceed the limit of initiating proceedings, or securing the presence of the offender as opposed to the actual trial, renders the argument of violating the *non bis in idem* principle sometimes inapplicable. For a discussion regarding the problem of foreign judgments and the application of the *non bis in idem* principle, see Mohamed El Zeidy, *The Doctrine of Double Jeopardy in International Criminal and Human Rights Law*, 6 MEDITERRANEAN J. HUM. RTS. 183, 204–09 (2002); see also Christine Van Den Wyngaert et al., *The International Non Bis In Idem Principle: Resolving Some of the Unanswered Questions*, 48 INT'L & COMP. L.Q. 779, 784 (1999).

130. Morris, *supra* note 31, at 354; see also CASSESE (ICL), *supra* note 41, at 289–90 (providing a detailed list of pitfalls especially for exercising universality *in absentia*).

131. See Bassiouni, *supra* note 32, at 147. "A solution that would preserve the positive effects and mitigate the negative ones 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 that 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. The result would be that Belgium's law would be declared not to be in violation of international law, but that its attempt to secure the arrest of the accused outside its territory would be invalid unless it can be shown for enforcement purposes that a nexus to the enforcing state exists." *Id.* Although Professor Bassiouni's statement refers to a "solution," a close reading of his statement emphasizes that he opposes the entire idea of universality by default, but in a relaxed indirect manner. Apparently he believes that universality *in absentia* lies within the category of enforcement jurisdiction which is normally prohibited by the classical rules of international law.

against Mr. Ndombasi were “inadmissible (*irrecevables*) from the beginning” because the accused, at the time of issuing the arrest warrant, was not voluntarily present in Belgium, as required by virtue of article 12 of preliminary title of the Code of Penal Procedure.¹³² Moreover, on June 26, 2002, the same court reached the same conclusion with regard to the proceedings against the President of Ivory Coast Laurent Gbagbo and others. It further concluded that the exercise of universal jurisdiction *in absentia* was inconsistent with international law.¹³³ Interestingly, on February 12, 2003, the Court of Cassation reversed this decision.¹³⁴ It held that although article 12 of preliminary title of the Code of Penal Procedure requires the presence of the accused on the Belgian territory, this article is limited to a certain category of crimes that does not include genocide, crimes against humanity, or the grave breaches under the 1949 Geneva Conventions.¹³⁵ By contrast, heinous crimes similar to those covered by article 7 of the 1993 War Crimes Act as amended in 1999, does not call for such a requirement.¹³⁶

Furthermore, some lawmakers announced legislation to save this type of universality before the Court of Cassation hears these cases.¹³⁷ They proposed a broader model of article 7 of the War Crimes Act, which would clearly permit the exercise of universality *in absentia*.¹³⁸ Despite such fear, the Court of Cassation was supportive. Nevertheless, due to tensions between Belgium and other countries, such as Israel and the United States, resulting from this law, the government passed two amendments.¹³⁹ The first amendment took place in April 2003,¹⁴⁰ and may be seen as regulating rather than abolishing universality *in absentia*.¹⁴¹

132. Reydams, *supra* note 60. See also Abbas Hijazi et al. v. Sharon et al., Decision of June 26, 2002 (holding, by the same court, but differently composed, that the proceedings against Sharon and others were inadmissible for the same reason listed above). *Id.*

133. *Id.* The court observed that such practice violates the principle of sovereign equality of States.

134. Cour De Cassation, 2E Chambre, Arrêt no. JC032C1_1, available at http://www.cass.be/cgi_juris/jurif.pl http://www.cass.be/cgi_juris/jucf.21.htm (last visited Mar. 25, 2003). The Court expressed itself in the following words: “Casse L’arrêt attaqué en tant qu’il dit irrecevable l’action publique exercée à charge d’A.Y et D’inconnus . . . Renvoi la cause, ainsi limitée, à la cour d’appel de Bruxelles, chambre des mises en accusation, autrement comosée.” *Id.* at 9.

135. *Id.* at 4–5.

136. *Id.* The original text appears as follows: “Qu’étrangers au contenu du chapitre II du titre préliminaire du Code de procédure pénale, les crimes de droit international visés par la loi du 16 juin 1993, modifiée par celle du 10 février 1999, ne constituent pas des infractions pour la poursuite desquelles la loi requiert, lorsqu’elles ont été commises en dehors du territoire, que l’inculpé ait été trouvé en Belgique.” *Id.* at 6.

137. Reydams, *supra* note 60.

138. *Id.*

139. BBC NEWS, WORLD EDITION, *Belgium Restricts ‘Genocide Law,’* Apr. 6, 2003, available at <http://news.bbc.co.uk/2/hi/europe/2921519.stm> [hereinafter Genocide Law]; Paul Ames, *Former Prime Minister Proposes Repealing Belgian War Crimes Law*, Associated Press World Stream, June 21, 2003, available at LEXIS, News Library. The U.S. State Department spokesman, Philip T. Reeker, reacted towards the first Belgian amendment by saying, “. . . , even with the recent amendments, the law does not work and we believe should be repealed.” *Id.*

140. Luc Reydams, *Commentary on the 2003 Amendment of the Belgian Act Concerning Grave Breaches of International Humanitarian Law*, 1 J. INT’L CRIMINAL JUSTICE (forthcoming 2003).

141. Human Rights Watch, *Belgium: Questions and Answers on the “Anti-Atrocity” Law*, 3–4 (Feb. 2003), available at <http://www.humanrightswatch.org/campaigns/icc/belgium-qna.pdf> [hereinafter Human Rights Watch]. According to the new amendment, before the victim could file a case directly, there should be a link with Belgium, whether because the suspect is on the Belgian territory, the crimes were committed in Belgium, or because the suspect or the victims reside in Belgium. However, if such a link is lacking, the victim must take the case to the state prosecutor who will decide whether the case is well-founded. The decision is subject to appeal. *Id.* Such an amendment seems to be a positive step to avoid abusing such dangerous type of universality.

Under the so-called “anti-atrocity” law,¹⁴² the prosecutor can proceed with a case in the absence of any link with Belgium, only if the countries concerned with the crimes lack “democracy or fair trials.”¹⁴³ Moreover, the amendment affirms a significant legal issue, namely, that the 1993 War Crimes Act intended to apply even if the suspect was not present in the territory of Belgium at the time of initiating proceedings.¹⁴⁴ Thus, an investigation could be opened in his absence.¹⁴⁵ However, it seems that the first amendment was not sufficient to satisfy the United States’ demands.¹⁴⁶ Under continuous political and economic pressure from the United States, the Belgian Prime Minister, Guy Verhofstadt, declared that the 1993 law (as amended in 1999) would be fully scrapped.¹⁴⁷ A new bill is going to be approved by the Parliament within the coming weeks, where only cases involving Belgian citizens or residents would be considered.¹⁴⁸ At this stage it seems that universal jurisdiction *in absentia* would be quashed. Even if it is so, this does not lead to the conclusion that the principle does not stand any more. It is clear that such change is based on political and economic pressure rather than any legal justification.¹⁴⁹ The United States threatened to move the NATO headquarters out of Belgium if the law was not scrapped.¹⁵⁰ The latter action taken by the Belgian legislator, which contradicted the Belgian higher Court’s finding demonstrates that when politics interferes law could be suspended.

Almost the same regulations appear in a revised study by Human Rights Watch, Belgium: Questions and Answers on the “Anti – Atrocity” Law, p. 3 (June 2003), at <http://www.humanrightswatch.org/campaigns/icc/belgium-qna.pdf> (last visited July 15, 2003). According to this study, if a link is lacking between Belgium and the crime such as: the suspect is not on the Belgium territory, the crime is not committed in Belgium, or if the victim is not a Belgian national “or has not lived in Belgium for at least three years,” “cases may only be brought by the state prosecutor.” *Id.* at 3. However, see Reydams’ different opinion who mentioned that cases that bears no link to Belgium “becomes the prerogative of the federal prosecutor (*procureur fédéral*).” For a detailed commentary on the first Act, see Reydams, *supra* note 140.

142. *Id.* at 1.

143. Genocide Law, *supra* note 139.

144. Human Rights Watch, *supra* note 141, at 4.

145. *Id.*

146. Craig S. Smith, *Belgians Angry with U.S. : War—Crimes Law Already Amended to Suit Americans, Foreign Minister Says*, THE GAZETTE (Montreal, Quebec) June 14, 2003, available at LEXIS, News Library.

147. BBC Monitoring International Reports, *Belgian Government Cancels Genocide Law*, July 14, 2003, available at LEXIS, News Library.

148. *Belgian Change Law Condemned*, July 14, 2003, available at <http://news.bbc.co.uk/1/hi/world/europe/3063427.stm>.

149. This change is intended to prevent prosecution of President Bush, Sharon, Rumsfeld, and other U.S. State officials. Paul Geitner, *Critics Say Changes to Belgian War Crimes Law Won’t Solve all Cases that Angered Washington*, ASSOCIATED PRESS, July 30, 2003, available at LEXIS, News Library.

150. Paul Ames, *Human Rights Campaigners Criticize with Changes to Belgian War Crimes Law*, Associated Press World Stream, July 13, 2003, available at LEXIS, News Library; *War Crimes Complaints Filed Against Bush, Blair*, CHI. TRIB., June 20, 2003, at 12, available at LEXIS, News Library.

