

Universal Jurisdiction *in*

Absentia:

Ryan Rabinovitch*

*B.C.L. (McGill), LL.B. (McGill), B.C.L. (Oxon.). Law clerk to the Hon. Justice Louise Arbour, Supreme Court of Canada. I would like to thank Prof. René Provost of McGill University for his comments and insight. Any errors are my own.

Universal Jurisdiction in Absentia:

I. Introduction:

In recent years, the issue of universal jurisdiction has received a great deal of attention from international jurists. While the existence of some form of universal jurisdiction for certain serious international crimes, such as war crimes, genocide, and crimes against humanity has generally been recognized, the exact parameters of the doctrine have not yet been defined. This paper will address the question of whether international law requires the presence of the offender in a forum state for universal jurisdiction to exist. This issue was recently addressed by the International Court of Justice¹ in *Case Concerning the Arrest Warrant of 11 April 2000*.² It will be argued that pursuant to the ruling of the P.C.I.J. in the *Lotus* case, international law currently permits the exercise of universal jurisdiction *in absentia*. In the alternative, it will be argued that a customary rule of international law to that effect is in the process of emerging. An examination of this development in light of the historical and philosophical justifications for the existence of universal jurisdiction and the policy considerations it entails will follow. On this basis, it will be argued that the recognition of universal jurisdiction in absentia constitutes an undesirable development in international law.

II. The I.C.J. Ruling:

On April 11, 2000, an investigating judge of the Brussels *tribunal de première instance* issued an

¹ [Hereinafter I.C.J.].

² *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, (2002) 41 I.L.M. 536 [hereinafter *Arrest Warrant Case*].

international arrest warrant *in absentia*,³ against Abdulaye Yerodia Ndombasi, at that time Minister of Foreign Affairs for the Democratic Republic of the Congo.⁴ Ndombasi was charged with grave breaches of the *Geneva Conventions of 12 August 1949*,⁵ and crimes against humanity pursuant to the *Law of 16 June 1993 Concerning the Punishment of Grave Breaches of the International Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto*, as amended by the *Law of 19 February 1999 Concerning the Punishment of Serious Violations of International Humanitarian Law*,⁶ in relation to allegations that in August 1998, he made speeches inciting racial hatred against Tutsi refugees in the D.R.C., referring to them as “vermin” and calling for their extermination.⁷

On October 17, 2000, the D.R.C. instituted proceedings contesting the validity of the international warrant before the I.C.J. Initially, the D.R.C. impugned the validity of the warrant on two grounds. Firstly, it argued that the warrant violated the rule of customary international law that a sitting Minister of Foreign Affairs enjoys absolute immunity from prosecution before foreign municipal tribunals. Secondly, it argued that Belgium lacked jurisdiction to issue the warrant, since universal jurisdiction was only exercisable if the accused was present in the forum state at the time the warrant was issued. This second argument was subsequently dropped from the Congo’s final submissions.

The majority of the Court held that the *non ultra petitia* rule prevented it from ruling on the jurisdictional issue, since it was not raised by the parties in their final submissions. It went on to consider the issue of immunity, and concluded that as a matter of customary international law,

³ Ndombasi was at that time residing and currently continues to reside in the Democratic Republic of the Congo.

⁴ [Hereinafter the D.R.C].

⁵ *Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287.

⁶ *Arrest Warrant Case*, *supra* note 2 at para. 15.

Ministers of Foreign Affairs enjoy absolute immunity from prosecution in foreign municipal courts while they hold office, and that no exception to this premise existed for war crimes or crimes against humanity.

Justices Van Den Wyngaert, Higgins, Kooijmans, Buergenthal and Guillaume, disagreed with the majority on the application of the *non ultra petitia* rule, holding that the issue of jurisdiction should have been addressed, since it was not possible to conceive of absolute “immunity from the jurisdiction of municipal courts”, without determining whether such jurisdiction existed in the first place. In addition, although Justices Bula-Bula, Rezek and Ranjeva agreed that the *non ultra petitia* rule prevented the Court from ruling on the question of jurisdiction, they nevertheless made passing comments on the subject of universal jurisdiction. Justice Van Den Wyngaert held that universal jurisdiction in absentia was permissible in international law under the decision of the P.C.I.J. in the *Lotus* case. Justices Higgins, Kooijmans and Buergenthal agreed, provided that (1) all applicable immunities are respected, (2) the national State of the accused person is first given the opportunity to act upon the charges alleged, (3) the charges are laid by a prosecutor or juge d’instruction who acts in full independence, without links to or control by the government of the State, and (4) it is reserved for only the most heinous international crimes.⁸ Justices Guillaume, Ranjeva, Rezek, and Bula-Bula, on the other hand, held that as a matter of customary international law, the presence of the accused is required for universal jurisdiction to be exercised.

⁷ [Http://www.cnn.com/2000/WORLD/africa/12/08/congo.belgium.reut/](http://www.cnn.com/2000/WORLD/africa/12/08/congo.belgium.reut/).

⁸ *Arrest Warrant Case*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, *supra* note 2 at para. 59-60 [hereinafter *Higgins, Kooijmans and Buergenthal*].

It is unfortunate that the majority of the I.C.J. declined to consider the existence of universal jurisdiction in absentia, as the issue is of increasing importance in international law. While it is true that the Court's ruling with respect to immunity renders the question of jurisdiction moot with respect to sitting heads of state and Ministers of Foreign Affairs, the issue is bound to resurface when these officials step down and face criminal liability for certain acts committed outside their official capacity. In addition, the question of jurisdiction is of primary importance in cases involving the prosecution of ordinary citizens who may not benefit from immunity in international law.

III. Universal Jurisdiction In Absentia and the Current State of International Law:

Four types of jurisdiction have traditionally been recognized in international law. Territorial jurisdiction exists for the prosecution of crimes committed on State territory ('subjective territorial jurisdiction'), or the effects of which are felt on State territory ('objective territorial jurisdiction'). Personal jurisdiction exists for crimes committed by ('active personal jurisdiction') or against ('passive personal jurisdiction') national of the forum State. According to the protection principle, States also have jurisdiction where an act or offence threatens their 'security'.⁹ In each of these instances, there is some connection between the prosecuting State and the accused or the act at issue. Universal jurisdiction, by contrast, is exercisable for a small number of crimes in international law, such as piracy, slavery, war crimes, drug trafficking and genocide.¹⁰ Although these crimes do not affect the forum State in particular, they are of such a serious nature that perpetrators may be characterized as enemies of mankind in general, or, *hostis humani generis*, and as such, any State has jurisdiction to try them.

The principles of international law regarding normative jurisdiction were set out by the P.C.I.J. in the *Lotus* Case:

It does not, however follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law... Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.¹¹

The general principle in international law is therefore that States are free to extend the application of their laws as far as they desire, unless a rule of international law can be found which *prohibits* the exercise of such jurisdiction. It is unlikely that a prohibition on the exercise of universal jurisdiction in absentia exists. This was the view taken in the I.C.J. by Justices Van Den Wyngaert, Higgins, Kooijmans and Buergenthal. There is no treaty which expressly prohibits States from exercising jurisdiction in absentia, and no evidence of a custom that such a practice violates international law. The most that can be said is that, as will be demonstrated below, is that States have rarely exercised such jurisdiction. However, in the *Lotus* case, the P.C.I.J. stated,

Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstances alleged by the Agent for the French Government, it would merely show that States had often, in practice abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstentions were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom [emphasis added].¹²

As Judge Van Den Wyngaert points out, the failure of States to exercise universal jurisdiction in absentia is attributable to considerations such as political convenience, public opinion, their desire to avoid overburdening their judicial systems, and the practical challenges associated with

⁹ J.M. Arbour, *Droit International Public*, 3rd ed. (Cowansville: Yvon Blais, 1997) at 265.

¹⁰ *Ibid.* at 276.

gathering evidence and witnesses in distant States, rather than any conscious belief that there is a custom that prohibits the exercise of universal jurisdiction in absentia.¹³

That being said, in recent years, the presumption of normative jurisdiction set out in the *Lotus* decision has been challenged by members of the I.C.J. Accordingly, in the *Case Concerning the Legality of the Threat or Use of Nuclear Weapons*, Justices Shahabuddeen and Bedjaoui expressed doubts as to the doctrine's continued applicability in the contemporary context globalization, international cooperation, and an increasingly limited conception of State sovereignty.¹⁴ In addition, as Justice Guillaume points out in his individual opinion, the P.C.I.J. in the *Lotus* case expressed some doubt as to whether the presumption of normative jurisdiction applied in the criminal context, and concluded that it was unnecessary to decide this point.¹⁵ Accordingly, it is possible that before asserting universal jurisdiction in absentia, States may be required to point to the existence of a positive rule of law which permits this.

There is no treaty which presently recognizes the right of States to exercise universal jurisdiction in absentia. Most of the treaties which currently provide for universal jurisdiction expressly state that the accused should be found on the territory of the prosecuting State. Thus, for example, art. 36(2) of the *Single Convention on Narcotics and Drugs, 1961* provides that

¹¹ *The Case of the S.S. "Lotus" (France v. Belgium)*, (1927), P.C.I.J. (Ser. A) No. 10 at 19 [hereinafter *Lotus*].

¹² *Ibid.* at 28.

¹³ *Arrest Warrant Case*, Dissenting Opinion of Judge Van Den Wyngaert, *supra* note 2 at para. 56 [hereinafter *Van Den Wyngaert*]. For example, the a French Minister explained his opposition to a proposed amendment to the French Penal Code allowing for universal jurisdiction in absentia in the following terms, "[e]n effet, si l'on retenait sa proposition, nombre des victimes vivant en France déposeraient plainte, pour la plupart devant le tribunal de grande instance de Paris. Cela provoquerait un embouteillage considérable qui aboutirait à l'effet inverse de celui recherchée, car certaines exactions qui pourraient être sanctionnées ne le seraient jamais à cause de cet encombrement artificiel. Nous sommes donc dace là face à un problème pratique." *Journal officiel de l'Assemblée nationale*, 20 décembre 1994, 2e séance, p. 9446.

¹⁴ *Case Concerning the Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, [1996] I.C.J. Rep. 341.

¹⁵ *Arrest Warrant Case*, Separate Opinion of President Guillaume, *supra* note 2 at para. 14 [hereinafter *Guillaume*].

Serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made... [Emphasis added].¹⁶

The only exception is art. 146 of the *Geneva Convention*, which does not explicitly require the accused to be present in the prosecuting State. It states, “[e]ach High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed... grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.”¹⁷ Thus the treaty does not expressly require the presence of the accused in the forum State in order for jurisdiction to be asserted. However, the use of the words “search for” implies that parties to the Convention have an obligation to prosecute the perpetrators “found” as a result of investigations *in their territory*.¹⁸

Customary international law also does not support the existence of a rule permitting States to exercise universal jurisdiction in absentia. This is demonstrated by the municipal legislation and case law. A majority of the States that have implemented the various conventions establishing universal jurisdiction in their national legislation, expressly require the presence of the offender on their territory before asserting jurisdiction. For example, Art. 689-1 of the French Penal Code provides, “[p]ursuant to the international conventions referred to below, any person who renders himself guilty outside the territory of the Republic of any of the offences enumerated in those article may, if in France, be prosecuted and tried by French courts [emphasis added]...”

Similarly, s. 8 of the *Canadian Crimes Against Humanity and War Crimes Act* states, “[a] person who is alleged to have committed an offence under section 6 or 7 may be prosecuted for that

¹⁶ *Higgins, Kooijmans and Buergenthal, supra* note 8 at para. 33. For other examples, see *Guillaume, supra* note 15 at para. 8.

¹⁷ *Van Den Wyngaert*, p. 27, *Higgins*, p. 8.

¹⁸ *Higgins*, *supra* note 8 at para. 31.

offence if... after the time the offence is alleged to have been committed, the person is present in Canada [emphasis added].¹⁹ The *Australian War Crimes Act of 1945* (as amended in 1988) is even more restrictive, and requires that the accused be an Australian resident or citizen at the time the offence was committed.²⁰

Municipal case law also suggests that no custom has as of yet emerged recognizing a positive right to assert universal jurisdiction in absentia. In Germany, courts have held that in order for the federation to exercise universal normative jurisdiction there must be some “link” between the accused and the State, such as the accused’s presence in the country.²¹ In *Jorgic*, a German Court convicted a Bosnian Serb man living in Germany of war crimes, holding that Germany could exercise universal jurisdiction, as the accused had been voluntary residing in Germany at the time of his arrest.²² French courts have adopted a similar position. In *re Javor*, certain Bosnian nationals attempted to file a complaint against certain Serbs not present in France, whom they accused of acts of torture. The Cour de Cassation rejected lower court’s conclusion that the French courts had jurisdiction to consider the complaint, holding that investigations and prosecutions could not be initiated by authorities unless the accused was present in French territory.²³ The Supreme Court of the Netherlands has also insisted on the presence of the accused before universal jurisdiction can be exercised under Dutch law. In *re Bouterse*, the Dutch Supreme Court held that Holland could not prosecute the former leader of Suriname for war crimes, since he was not present in Holland at any stage in the proceedings.²⁴ Finally, in *R.*

¹⁹ *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24.

²⁰ *Higgins, Kooijmans and Buergenthal*, *supra* note 8 at para. 20. The United Kingdom War Crimes Act of 1991 places similar conditions on the exercise of jurisdiction.

²¹ *Bundesgerichtshof*, 13 February 1994.

²² *Bundesgerichtshof*, 30 April 1999.

²³ *In re Javor*, Cass. Crim., 26 March 1996, Bull. Crim. 1996. II. 379, No. 132., 93 A.J.I.L. 525.

²⁴ *Hoge Raad*, 18 September 2001.

v. *Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No. 3)*, Lord Millett of the British House of Lords wrote that in order for Britain to exercise extraterritorial criminal jurisdiction without committing “an unwarranted interference in the internal affairs of another state...., the accused must be present in the forum state.”²⁵

While it is true that the foregoing analysis suggests that no custom has emerged permitting States to exercise universal jurisdiction in absentia, there are signs that such a custom is in the process of emerging. Thus, for example, s. 8(1)(c)(iii) of the New Zealand *International Crimes and International Criminal Court Act 2000*, states that “[p]roceedings may be brought for an offence... whether or not the person accused was in New Zealand at the time that the act constituting the offence occurred or at the time a decision was made to charge the person with an offence.”²⁶ While the Belgian Law which was invoked in the *Arrest Warrant Case* is not as clear, it does not contain any express requirement that the accused be present in order for an investigation or prosecution to be initiated. Art. 7 of the law merely states that “[t]he Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed.”²⁷ Luxemburg, Bolivia, and Spain have enacted similar statutes.²⁸ Finally, the German government submitted a legislative proposal to the German Parliament on January 16, 2002 which would introduce into the German Criminal Code a provision stating, “[t]his Code governs all the punishable acts listed herein violating public

²⁵ [1999] 2 All E.R. 97 at para. 248.

²⁶ “Counter-Memorial of the Kingdom of Belgium”, 28 September 2001 at para. 3.3.56 [hereinafter *Belgian Counter-Memorial*].

²⁷ *Act of 16 June 1993 concerning the punishment of grave breaches of the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 18 June 1977*, 5 August 1993, as amended by the *Act concerning the punishment of grave breaches of international humanitarian law*, 10 February 1999, printed in 38 I.L.M. 918. The original French text reads, “[I]es juridictions belges sont competentes pour connaitre des infractions prevues a la presente loi, independamment du lieu ou celles-ci auront ete commises.”

²⁸ *Belgian Counter-Memorial*, *supra* note 26 at para. 3.3.57.

international law, [and] in the case of felonies listed herein [this code governs] even if the act was committed abroad and does not show any link to Germany [emphasis added].”²⁹

With respect to municipal case law, the Dutch Court of Appeal explicitly held in the *Bouterse*³⁰ case that the exercise of universal jurisdiction did not require Bouterse’s presence in the Netherlands. In *Demjanjuk v. Petrovsky*,³¹ the United States 6th Circuit Court of Appeal held that an alleged Nazi war criminal could be extradited to Israel, since that nation, in addition to “any other nation” was entitled to exercise universal jurisdiction despite Demjanjuk’s presence in the United States. Finally, on November 4, 1998, the Criminal Division of the Spanish National Court held unanimously that Spain has jurisdiction to try the crimes committed by former Chilean president Augusto Pinochet. Although some of the alleged victims were Spanish nationals, the court relied on the principle of universal jurisdiction, rather than passive personal jurisdiction in its conclusions, despite the fact that Pinochet was not present in Spain.³²

In sum, while the current state of international law does not support the existence of a customary rule of international law entitling states to exercise universal jurisdiction in absentia, there is evidence that states have become increasingly willing to assert the existence of such jurisdiction in recent years. Therefore, even if the exercise of universal jurisdiction in absentia is not permitted under the *Lotus* principle, it may be on the verge of becoming authorized by international custom. The next section of this paper will attempt to determine whether this development is consistent with the historical and philosophical underpinnings of the concept of universal jurisdiction, and desirable from a policy point of view.

²⁹ *Higgins, Kooijmans and Buergenthal*, *supra* note 8 at para. 20.

³⁰ *In re Bouterse*, *Belissing van Het Gerechtshof* (Decision of the Court of Appeal), 3 March 2000, at para. 3.1.

³¹ 79 I.L.R. 534 at 545.

IV. Historical and Philosophical Rationales of the Concept of Universal Jurisdiction:

Grotius argued that wrote that violations of the rules of natural law constituted offenses against all the *societas generis humani*, or universal society of humanity. Thus, he argued that all states had an interest, and even a duty to punish international crimes.³³ This view has been articulated in the fourth paragraph of the preamble to the *Rome Statute of the International Criminal Court*, which affirms “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation [emphasis added].”³⁴ Under this conception of ‘international community’, it is argued that since all States are interested parties in cases involving the commission of certain serious crimes, there is no reason to insist on any special link between the victim, the offender, and that State in order for universal jurisdiction to be exercised.³⁵

However, history suggests that a more direct State interest forms the basis for the exercise of universal jurisdiction. Donnedieu de Vabres writes,

³² *In Re Pinochet*: Spanish National Court, Criminal Division (Plenary Session). Case 19/97, November 4, 1998; Case 1/98, 93 A.J.I.L. 690.

³³ Grotius wrote, “[k]ings, and those who are invested with a Power equal to that of Kings, have a Right to exact Punishments, not only for Injuries committed against themselves or their Subjects, but likewise, for those which do not peculiarly concern them, but which are, in any Persons whatsoever, grievous Violations of the Law of Nature or Nations. For the Liberty of consulting the Benefit of human Society, by Punishments, does now, since Civil Societies, and Courts of Justice, have been instituted, reside in those who are possessed of the supreme Power, and that properly, not as they have Authority over others, but as they are in Subjection to none. For . . . it is so much more honorable, to revenge other Peoples Injuries rather than their own . . . Kings, beside the Charge of their particular Dominions, have upon them the care of human Society in general.” H. Grotius, *De Jure Belli Ac Pacis Libri Tres, Polegomena*, Carnegie ed. (Oxford: Clarendon Press, 1925)., Book II, Chap. XX.

³⁴ *Statute of the International Criminal Court*, 17 July 1998, UN Doc. No. A/CONF.183/9, 37 I.L.M. 999 [hereinafter *Rome Statute*].

³⁵ That being said, until the twenty-first century, universal jurisdiction was accepted on this basis only for the crime of piracy, and has therefore always been a very restricted doctrine in international law, *Guillaume, supra* note 15 at para. 5.

Néanmoins, il fut admis pendant tout le moyen age, dans la doctrine italienne, et dans le droit qui gouvernait les rapports des villes lombardes, qu'à l'égard de certaines catégories de malfaiteurs dangereux – banniti, vagabundi, assassini, - la simple présence, sur le territoire, du criminel impuni, étant une cause de trouble, donnait vocation à la cité pour connaître de son crime.³⁶

Thus, in the Middle Ages, it was assumed that certain dangerous criminals posed a threat to the societies in which they were found, presumably since they were likely to commit repeat offenses. It was for this reason that these jurisdictions were entitled to investigate and prosecute crimes committed by these actors in other jurisdictions. Thus, it was the accused presence in the jurisdiction and the dangers posed by him in that jurisdiction that justified the exercise of universal jurisdiction. In his individual opinion, Justice Guillaume made a similar argument. He wrote,

The question has, however, always remained open whether States other than the territorial State have concurrent jurisdiction to prosecute offenders. A wide debate on the subject began as early as the foundation in Europe of the major modern States. Some writers, like Covarruvias and Grotius, pointed out that the presence on the territory of a State of a foreign criminal peacefully enjoying the fruits of his crimes was intolerable. They therefore maintained that it should be possible to prosecute perpetrators of certain particularly serious crimes not only in the State on whose territory the crime was committed but also in the country where they sought refuge [emphasis added].³⁷

Thus, the basis for asserting universal jurisdiction lay in the impact of the accused *presence in the prosecuting State*, i.e. the public outrage in that country at the prospect of permitting the perpetrators of heinous crimes to remain in their State and find themselves rewarded for fleeing States which could otherwise exercise jurisdiction.

V. Policy Implications:

The recognition of universal jurisdiction in absentia would have three principle consequences.

³⁶ Henri Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (Paris: Sirey, 1928) at 135. According to De Vabres, the principle of universal jurisdiction traces its origins to the Justinian Civil Code, which recognized the jurisdiction of the district where a crime was committed, or where the accused was apprehended.

³⁷ *Guillaume*, *supra* note 15 at para. 4.

Firstly, the exercise of universal jurisdiction in general would become more frequent as *all* States would become empowered to try serious international crimes. While this might have the advantage of reducing the impunity currently enjoyed by the perpetrators of heinous crimes, it would also raise concerns regarding the stability of international relations, multiple prosecutions, disproportionate use against non-Western nationals, and the future role of the International Criminal Court. Secondly, the recognition of universal jurisdiction in absentia would be likely to increase the speed with which international crimes are investigated and prosecuted, since states seeking to exercise universal jurisdiction would not be required to wait for the accused to travel to their country before initiating legal proceedings. It has been argued that this would have important implications regarding the extent to which criminals are able to avoid justice for extended periods of time, and also facilitate the gathering of evidence necessary for obtaining convictions. Thirdly, it is arguable that the recognition of universal jurisdiction in absentia would increase the scope for prosecuting international criminals in absentia (or *par contumace*). While *investigations* in absentia are relatively common and uncontroversial in international law, the same cannot be said of trials in absentia, which raise serious legal and policy concerns.

A. More Frequent Exercise of Universal Jurisdiction:

If States such as Belgium are entitled to initiate proceedings in the absence of the accused, it makes sense that they will do so with increasing frequency. Advocates of a broad conception of universal jurisdiction argue that this will have the advantage of decreasing the extent to which international criminals enjoy impunity with respect to their actions. It is clear that in most cases, the exercise of universal jurisdiction in absentia would not lead to the incarceration or extradition of defendants, particularly where they remain in their home state, which will be likely to refuse

extradition.³⁸ However, it has been argued that the stigma associated with investigations and prosecutions, even in absentia, will in some measure punish criminals, and have the effect of deterring violations of crimes for which universal jurisdiction exists.

It has also been argued that investigations and prosecutions in absentia, will provide relief for victims and their families even if the proceedings would not necessarily result in the incarceration of the accused. Forum states would serve as ‘truth commissions’, providing a permanent record of crimes such as torture, war crimes, and genocide. As Justice Goldstone of the ICTY has stated, in relation to Rule 61 proceedings which reconfirm indictments despite the accused’s failure to appear, “[t]here can be no justification for ignoring the rights of the victims and of their families. They too, have a right to be heard and thereby begin their own healing process and that of many tens of thousands of victims who will identify with them.”³⁹

Furthermore, it has been suggested that the increasing the ability of foreign countries to assert jurisdiction will have a catalyzing effect on States where crimes have been committed (and consequently, where the accused often continues to reside), increasing the likelihood that the accused will actually be brought to trial and punished.⁴⁰ Following the indictment of Augusto Pinochet and retired Argentinean Navy Captain Adolpho Scilingo, in the Spanish National Court, 170 complaints were brought by individuals against Pinochet in Chile. In addition, the Chilean Supreme Court approved stripping Pinochet of his parliamentary immunity. The Spanish case

³⁸ In the absence of a treaty obligation, extradition is subject to the discretion of the requested State. *See* B. Broomhall, “Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International law”, 35 *New Eng. L. Rev.* 399 at 415 [hereinafter *Broomhall*].

³⁹ M. Thieroff, E.A. Amley, Jr., “Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61”, 23 *Yale J. Int'l L.* 231 at 247 [hereinafter *Thieroff and Amley*].

turned the issue into a topic of national conversation, which in turn led to the institution of a dialogue roundtable on the subject between military leaders, human rights lawyers, and representatives of civil society.⁴¹ The Spanish action also led to a strengthening of the anti-impunity movement in Argentina, which has led to, *inter alia*, the repeal of legislation barring the prosecution of Argentinean military officers, and the introduction of legislation expanding the reparations offered to survivors of Argentinean concentration camps.

While there are therefore some clear benefits to the recognition of universal jurisdiction in absentia, increasing the frequency with which this type of jurisdiction is exercised will pose the risk of undermining the stability of international relations. The home State of the accused, or the State where crimes have been committed are likely to view the assertion of universal jurisdiction by foreign nations as an unwarranted intervention in their internal affairs. This risk is even more acute in States which allow for the initiation of criminal proceedings by private individuals (*actio popularis*) or where prosecutors are not subject to tight government control. In these countries, proceedings instituted by prosecutors or private citizens could alienate States that the government would not normally intend to risk offending through the exercise of universal jurisdiction.⁴² This effect would be exacerbated if future decisions by international tribunals adopt Justices Higgins, Kooijmans, and Buergenthal's requirement that prosecutors must act "in full independence, without links or control by the government of that State" in order for universal jurisdiction in absentia to be exercised,⁴³ as governments would be unable to stay

⁴⁰ N. Roht-Arriaza, "Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: The Pinochet Precedent and Universal Jurisdiction", 35 New Eng.L. Rev. 311 at 316.

⁴¹ *Ibid.*

⁴² However, it should be noted that many states the prosecutor, who is generally subject to government control, possesses an executive veto on proceedings instituted by individuals.

⁴³ *Higgins, Kooijmans and Buergenthal, supra* note 8 at para. 59.

prosecutions which would threaten the stability of their international relationships with other States.

In addition, States might abuse universal jurisdiction to prosecute the nationals of enemy states as a means of gaining a political advantage or impugning their reputation in the international community.⁴⁴ In some cases, States might initiate investigations and prosecutions even where the allegations against an accused are clearly baseless. As a result, the exercise of universal jurisdiction in absentia is likely to exacerbate tensions between states currently involved in a conflict.⁴⁵

Another concern raised by the recognition of universal jurisdiction in absentia is that multiple prosecutions of the same individual would ensue, as the number of States entitled to exercise jurisdiction would be substantially increased. While it is true that the possibility of multiple prosecutions already exists as a necessary incident to the existence of extra-territorial forms of jurisdiction such as personal or objective territorial jurisdiction, the number of prosecutions in the cases of universal jurisdiction would be virtually unlimited. In practice many States would not initiate proceedings, due to the high costs associated with investigating crimes committed in another country, however some States, such as Belgium, have demonstrated a commitment to exercising universal jurisdiction. Increasing the number of prosecutions and investigations would inevitably lead to conflicts over access to evidence and the accused person, and would increase the likelihood of conflicting decisions in certain instances, which would undermine the legitimacy of the judicial systems in all States which have exercised jurisdiction.

⁴⁴ M.H. Morris, "Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Universal Jurisdiction in a Divided World: Conference Remarks", 35 *New Eng. L. Rev.* 337 at 355.

It has also been argued that a broadened conception of universal jurisdiction would be exercised disproportionately by Western nations to prosecute non-Western nationals and leaders. Universal jurisdiction has always been perceived by some as a means of imposing Western values on weaker developing nations. Verhoeven writes,

La compétence universelle ... n'est que l'expression d'un pouvoir, et non de la justice, si certains seulement en revendiquent l'exercice, tout compréhensiblement que soit le besoin d'un "procès" qu'éprouvent les victimes d'infractions particulièrement odieuses. Plutôt que les intérêts de la justice et d'une communauté internationale digne de ce nom, elle pourrait bien ne servir que ceux d'Etats occidentaux enclins à maintenir dans une dépendance, néo-colonialiste qu'on dit il y a plusieurs années, des sociétés auxquelles ils imposent leur conception de la démocratie. Ce qui n'est sans doute pas très démocratique...⁴⁶

A broad universal jurisdiction would also be used disproportionately to indict the nationals of developing countries. As Justice Bula-Bula points out in his individual opinion in the *Arrest Warrant Case*, complaints have been instituted before Belgian courts on the basis of Universal Jurisdiction against Laurent Gbagbo of the Ivory Coast, Iraq's Saddam Hussein, Denis Sassou Nguesso of the Congo, Israel's Ariel Sharon, and Paul Biya of Cameroon. Developing nations, on the other hand, being politically weaker in the international arena, and highly dependent on Western powers for humanitarian aid, are not in a position to initiate investigations and prosecutions of European and North American nationals, particularly where there is no personal or territorial connection with their country. While it true that Chilean judge Juan Guzman has initiated an investigation of former American Secretary of State Henry Kissinger in relation to war crimes allegedly committed in the context of 'Operation Condor' in South America during

⁴⁵ For example, on October 23, 2000, the Arab league released a statement indicating its intention to "pursue, in accordance with international law, those responsible for these brutal practices (referring to alleged Israeli crimes, under the Geneva Conventions, against Palestinians." *Ibid.*

⁴⁶ J. Verhoeven, "Vers un ordre répressif universel?" (1999) *Ann. fran. dr. int.* 1999.55 at 63.

the 1970's, it should be noted that this does not constitute an exercise of universal jurisdiction, since the crimes alleged were committed against Chilean nationals.⁴⁷

A final concern that has been raised in relation to increasing the frequency with which universal jurisdiction is exercised, is that it could substantially undermine the role of the International Criminal Court. Art. 17 of the *Rome Statute* states,

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
 - (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
 - (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;⁴⁸

Therefore, assuming the existence of universal jurisdiction in absentia, a *bona fide* investigation by *any* state of any of the offences listed in Art. 5 of the Statute (there is arguably universal jurisdiction for all of these crimes) would preclude a hearing by the I.C.C. This would effectively render the court unnecessary, assuming that countries such as Belgium insist on exercising universal jurisdiction to the fullest extent permitted under international law. The D.R.C. has suggested that the exercise of universal jurisdiction may even run contrary to the object and purpose of the *Rome Statute*, in contravention of art. 18 of the *Vienna Convention on the Law of*

⁴⁷ D. Campbell and J. Franklin, Friday March 29, 2002, reported at www.guardian.co.uk/bush/story/0,7369,675745,00.html. In addition, a request by Spanish and French judges from U.K. officials to hold Kissinger, who was visiting the United Kingdom, for questioning in relation to an investigation of the murder of Spanish and French nationals in Chile during the Pinochet regime was denied in April 2002, "Spanish judge seeks Kissinger, April 18, 2002, <http://europe.cnn.com/2002/WORLD/europe/04/18/spain.kissinger/index.html>. See also, G. Tremlett, Tuesday April 23, 2002, "Kissinger testimony pleas refused", http://www.guardian.co.uk/uk_news/story/0,3604,689162,00.html.

⁴⁸ *Rome Statute*, *supra* note 34, art. 17.

Treaties.⁴⁹ On the other hand, it is arguable that if the I.C.C. is successful in bringing criminals to justice, municipal courts and prosecutors will stop exercising universal jurisdiction altogether, in which case there would be little point in recognizing the existence of universal jurisdiction in absentia.

B. Fewer Delays in initiating investigations and prosecutions:

In the event that universal jurisdiction in absentia is recognized, countries desiring to exercise such jurisdiction will not be required to wait for the accused to travel to their territory (a thing he or she is not likely to do if he or she is aware that the State actively exercises its universal jurisdiction). Thus investigations and prosecutions could be initiated more rapidly. This would have two main advantages. Firstly, it would bring perpetrators to justice more quickly. Secondly, it would increase the likelihood of conviction, since it would facilitate the gathering of evidence and testimony. As Thieroff and Amley point out,

There are a variety of ... pragmatic reasons for the speedy introduction of information that tends to incriminate the accused. For example, evidence tends to degrade over time. Witnesses may forget important facts and details about the actions of the accused or the context in which the alleged violations took place. They may also die from natural causes.⁵⁰

However, these arguments are subject to challenge. As has already mentioned, the initiation of an investigation or prosecution will not necessarily result in the extradition and incarceration of the accused *at any stage*, particularly where his or her home State refuses to cooperate. In addition, with respect to evidence, since the exercise of universal jurisdiction necessarily means that the crime will have been committed in another State, there are substantial costs associated

⁴⁹ “Memorial of the Democratic Republic of the Congo”, 15 May 2001, at para. 91, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331.

with evidence gathering, such as those associated with having witnesses flown in, or having the tribunal visit the State in which the alleged crimes have taken place in order to hear testimony.⁵¹ In addition, State officials in the jurisdiction where the evidence lies may be uncooperative, and make it impossible to visit crime scenes, or refuse to allow investigators to access witnesses.⁵² Even where such evidence can be obtained, it will be difficult for foreign officials to verify its authenticity, or interpret it properly (particularly where testimony in a foreign language is concerned.) The result is that foreign tribunals and officials will generally have access evidence of questionable authenticity, and in smaller quantities, and which they may be unable to properly understand. This would be particularly problematic in cases of universal jurisdiction in absentia, since not even the accused would be available to act as a source of information for prosecution and defense counsel. The result is that the likelihood of obtaining a conviction when universal jurisdiction in absentia is exercised is less likely than advocates argue.

C. Trials in Absentia:

While not generally permitted in common law states such as Canada, the United States, and the United Kingdom, criminal trials in absentia are accepted practice in civil law countries.⁵³ States have not as of yet attempted to try international criminals in absentia in their municipal courts on the basis of universal jurisdiction. However, in absentia proceedings have been used in the context of the I.C.T.Y. to try international criminals who fail to appear before the tribunal.

Although *trials* are not held before the tribunal unless the accused is present, under Rule 61 of

⁵⁰ *Thieroff and Amley, supra* note 39 at 251.

⁵¹ This is the current practice of States such as Switzerland when exercising universal jurisdiction. L. Reydam, “International Decision: *Niyonteze v. Public Prosecutor*”, 96 A.J.I.L. 231 at 233.

⁵² *Broomhall, supra* note 38 at 412.

⁵³ A.L. Quintal, “Rule 61: “The Voice of the Victims” Screams Out For Justice”, 36 Colum. J. Transnat'l L. 723 at 741 [hereinafter *Quintal*], N.P. Cohen, “Trial in Absentia Re-Examined”, 40 Tenn. L. Rev. 155 [hereinafter *Cohen*].

the I.C.T.Y. Rules of Procedure, if the accused fails to appear, a public hearing is held in which witnesses are called and evidence is presented, in order to determine whether the indictment against the defendant should “confirmed”, and an international arrest warrant issued.⁵⁴ Rule 61 was adopted in order to provide a forum for condemning defendants’ actions, and voicing the allegations of their victims. This procedure has been invoked in the cases of Radko Mladic and Radovan Karadic, two Bosnian Serbs who failed to appear before the I.C.T.Y.⁵⁵ If universal jurisdiction in absentia is recognized, States would be able to conduct Rule 61-type proceedings, or even conduct *trials* in absentia of individuals accused of serious international crimes in municipal courts, particularly civilian jurisdictions that allow for such proceedings in their national legislation. It is arguable though that this may be an undesirable development in international law.

Trials and other judicial proceedings in absentia may violate art. 14(3)(d) of the *International Covenant on Civil and Political Rights*, which provides for the right of the accused to be present during his or her trial.⁵⁶ Although the United Nations Human Rights Committee has expressed the opinion that an accused who fails to appear waives his or her rights under art. 14(3)(d),⁵⁷ this position is disputed by certain jurists.⁵⁸ In addition, it has been argued that the absence of the accused in such proceedings will lead juries and officials to draw the inappropriate inference that

⁵⁴ It was suggested by France that defendants who failed to appear before the tribunal should be tried in absentia. Due to U.S. opposition to this suggestion, Rule 61 was proposed as a ‘compromise’ solution. See “Letter Dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General”, Annex 2, U.N. Doc. S/25266 (1993), “Letter Dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General”, Annex, U.N. Doc. S/25575 (1993), V. Morris, M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, (New York: Transnational Publishers, 1995).

⁵⁵ *Quintal*, *supra* note 54 at 756.

⁵⁶ 19 December 1966, Can. T.S. 1976 No. 47, 999 U.N.T.S. 171.

⁵⁷ General Comment No. 13 of the Human Rights Committee on the International Covenant on Civil and Political Rights, U.N. Doc. A/40/40, *Mbenge v. Zaire*, Decision of the Human Rights Committee under the Optional Protocol at 138, U.N. Doc. A/38/40, Annex 10 (1983).

because the accused may be absent he or she is a fugitive and therefore probably guilty, even if there is not sufficient evidence to support this conclusion.⁵⁹ In addition, it has been suggested that it is an essential aspect of the proper administration of justice, particularly in common law jurisdictions which have adopted an adversarial system that the accused be present to oversee the work of defense counsel, seeking out improper conduct by the judge or the jury, or pointing out errors of fact alleged by the prosecution.⁶⁰ It has also been argued that the shame experienced by an accused who is present at trial is an essential part of the punishment that the guilty ought to suffer.⁶¹ Finally, the legitimacy of proceedings against international criminals will be undermined by trials in absentia, as the absence of the accused would convey a message which would bring the judicial system of the forum State into disrepute, i.e. that the State exercising jurisdiction and its judicial system are powerless to bring criminals before their tribunals, or that the defendant does not believe that that he will obtain a fair trial in the State asserting universal jurisdiction.⁶²

VI. Conclusion:

It is unfortunate that the majority of the I.C.J. declined to comment on the issue of universal jurisdiction in absentia in the *Arrest Warrant Case*. However, the conclusions reached by four of the eight justices who commented on the issue of jurisdiction raise serious concerns for international jurists. Their analysis suggests that this expansive form of jurisdiction is currently permitted in international law, under the *Lotus* principle, or likely to become permitted in the near future under an emerging rule of customary international law. This development may be

⁵⁸ *Thieroff and Amley, supra* note 39 at 260.

⁵⁹ *Cohen, supra* note 54 at 181.

⁶⁰ *Ibid.*

⁶¹ *Ibid.* at 179.

inconsistent with certain historical justifications for the exercise of universal jurisdiction. In addition, the exercise of universal jurisdiction in absentia is likely to pose important problems from a policy point of view. While the increase in frequency with which such jurisdiction would be exercised would have the effect of decreasing the impunity currently enjoyed by many perpetrators of serious international crimes, it is also likely to pose a threat to the stability of international relations, lead to multiple claims against individual defendants, and undermine the role played by the I.C.C. In addition, while the existence of universal jurisdiction in absentia would result in fewer delays in bringing defendants to justice, officials would be required to make decisions on the basis of little evidence which might be of questionable authenticity. Finally, universal jurisdiction in absentia would make it possible for countries to try international criminals with no connection to their State. This would call the fairness and hence the legitimacy of such proceedings into question, and bring judicial systems which exercise universal jurisdiction into disrepute. These considerations should be borne in mind by governments as they shape State practice in the coming years, and by international and municipal tribunals called upon to rule on the scope of the doctrine of universal jurisdiction in the future.

⁶² *Ibid.* at 177.

Bibliography:

LEGISLATION AND TREATIES

- Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287.
- Rome Statute of the International Criminal Court*, 17 July 1998, UN Doc. No. A/CONF.183/9, 37 I.L.M. 999.
- Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24.
- International Covenant on Civil and Political Rights*, 19 December 1966, Can. T.S. 1976 No. 47, 999 U.N.T.S. 171.

CASES

- Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, (2002) 41 I.L.M. 536.
- The Case of the S.S. "Lotus" (France v. Turkey)*, (1927), P.C.I.J. (Ser. A) No. 10 at 19.
- Case Concerning the Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, [1996] I.C.J. Rep. 341.
- In re Jorgic, Bundesgerichtshof*, 30 April 1999.
- In re Javor*, Cass. Crim., 26 March 1996, Bull. Crim. 1996. II. 379, No. 132., 93 A.J.I.L. 525.
- R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No. 3)*, [1999] 2 All E.R. 97.
- In re Bouterse*, Belissing van Het Gerechtshof (Decision of the Court of Appeal), 3 March 2000.
- Demjanjuk v. Petrovsky*, 79 I.L.R. 534 at 545.
- Mbenge v. Zaire*, Decision of the Human Rights Committee under the Optional Protocol at 138, U.N. Doc. A/38/40, Annex 10 (1983).

SECONDARY MATERIAL: MONOGRAPHS

- J.M. Arbour, *Droit International Public*, 3rd ed. (Cowansville: Yvon Blais, 1997).
- V. Morris, M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, (New York: Transnational Publishers, 1995).
- H. Grotius, *De Jure Belli Ac Pacis Libri Tres, Polegomena*, Carnegie ed. (Oxford: Clarendon Press, 1925).

SECONDARY MATERIAL: ARTICLES

- M.C. Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", 42 Va. J. Int'l L. 81.
- B. Broomhall, "Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International law", 35 New Eng. L. Rev. 399.
- M. Thieroff, E.A. Amley, Jr., "Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61", 23 Yale J. Int'l L. 231.
- N. Roht-Arriaza, "Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: The Pinochet Precedent and Universal Jurisdiction", 35 New Eng. L. Rev. 311.
- M.H. Morris, "Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Universal Jurisdiction in a Divided World: Conference Remarks", 35 New Eng. L. Rev. 337.

L.N. Sadat, "Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Redefining Universal Jurisdiction", 35 New Eng. L. Rev. 241.

A.P. Rubin, "Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Actio Popularis, Jus Cogens and Offenses Erga Omnes?", 35 New Eng. L. Rev. 265.

J. Verhoeven, "Vers un ordre répressif universel?" (1999) Ann. fran. dr. int. 1999.55.

L. Reydams, "International Decision: *Niyonteze v. Public Prosecutor*", 96 A.J.I.L.

A.L. Quintal, "Rule 61: The Voice of the Victims" Screams Out For Justice", 36 Colum. J. Transnat'l L. 723.

N.P. Cohen, "Trial in Absentia Re-Examined, 40 Tenn. L. Rev. 155 [hereinafter *Cohen*].

General Comment No. 13 of the Human Rights Committee on the International Covenant on Civil and Political Rights, U.N. Doc. A/40/40.

"Letter Dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General", Annex 2, U.N. Doc. S/25266 (1993).

"Letter Dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General", Annex, U.N. Doc. S/25575 (1993).