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Universal Jurisdiction¹

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I. The meaning of “jurisdiction”

Like every concept, “jurisdiction” may have different meanings. The word comes from latin roots: “*jus*” or “*juris*” means “law” and “*dicere*” means “to say” or “to read”. Therefore, “jurisdiction” can be understood to mean; “to say the law” and, as a derivative; “the power to say the law”. Presently, “jurisdiction” is understood as the legislative, adjudicative and executive power that provides respectively competence to *prescribe*, *adjudicate* or *execute* the law, in particular the territorial competence of courts. Jurisdiction in criminal matters may be considered either as substantial or procedural law.

The prescriptive jurisdiction depends of course basically on States, be it by enacting laws or by being parties to international conventions. In the case of genocide, most States have become parties to the 1948 Genocide Convention and the majority of States have incorporated the Convention into their internal legal order. No international convention yet exists on crimes against humanity, except for where they may be found within the conventions which create international criminal tribunals. The executive

¹ This conference relies to a large extent on the chapter “Universal Jurisdiction” written by the author of the present paper and published in : Dinah Shelton (ed, et al.), *Encyclopedia of Genocide and Crimes Against Humanity*, Farmington Hills 2005, 1110-1123.

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power, in criminal law, is basically one of the forces (Police, a.s.o.) which may intervene to enforce a search or arrest warrant. In principle, no State is allowed to exercise executive power on the territory of other States. The adjudicative jurisdiction is the one of the courts of States to decide on a case.

II. Adjudicative jurisdiction

Adjudicative jurisdiction can be discussed on a *material, personal* or *territorial* level. With genocide, the material jurisdiction is given by the crime itself, "genocide", which has, fortunately, been largely uniformly understood and defined worldwide since the 1948 Convention.. On the personal level, there is an onus in criminal law that every natural person over a certain age can be prosecuted for a crime which is committed within the boundaries of a State's borders. For personal jurisdiction therefore, it is more a question of defining the exceptions than of defining the rule. For instance there are exceptions for; some persons under a certain age; persons benefiting from immunities; or persons of a certain status, such as military persons in foreign States with which the State they serve has signed specific Conventions.

The most controversial question debated in recent years is the extent the courts of a State can adjudicate crimes which have been committed outside their territory. In criminal law there are numerous different means of claiming jurisdiction over an accused; each means are not recognised equally by all States. The most easily recognisable and applicable is the *territorial principle* whereby persons may be tried and punished for crimes committed on a certain territory. Further persons may be prosecuted by their State of nationality for a crime no matter on which territory they commit it (*active personality principle*). In the first means of claiming jurisdiction, the primary interest of a State is to maintain law and order in a certain territory, which is the most basic duty and prerogative of States. In the second case, States may be interested to maintain a certain level of morality among their citizens, even when they act abroad. More controversial is the right for States to adjudicate crimes which have been committed abroad by foreigners but against their own citizens (*passive personality principle*). Normally, it should be in fact the duty of the State where the crime has been committed, or even the State of the nationality of the author of the crime, to prosecute the person who has committed the

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crime. Yet, most States still maintain the prerogative to exercise the passive personality principle, simply to avoid a denial of justice if the territorial or the national States do not proceed against the author.

III. Universal jurisdiction

Customary Law v. Systemic Approach

One controversial issue is whether States are allowed to judge foreign persons who have committed crimes abroad against foreigners. Indeed, in this case, States have no connecting link with the persons or the crimes, except for the fact that the suspects are present on their territory. This principle is usually known as the *universality principle*, or *universal jurisdiction*.

Usually, this principle is recognized when States expressly or tacitly allow other States to proceed against their own citizens or for crimes which have been committed on their own territory. This “jurisdiction” may be transferred to another State through bilateral treaties, *ad hoc* agreements or through multilateral treaties. Customary law may also allow the application of this principle, as is historically the case with piracy. Universal jurisdiction therefore is not new and was largely applied by small States in Europe in the Middle-Ages when they were fighting gangs of international thieves.

One other view, more naturalist, is that universal jurisdiction applies to “crimes that affect the international community and are against international law”, and are therefore “crimes against mankind”. Enemies of the whole human family” (“*hostes humani generis*”) should be prosecuted wherever they are. In this view, States are “delegated” by the international community as a whole the task to judge certain crimes and some criminals of common concern.

The different systems of the Conventions

Among the many multilateral treaties which allow such delegation of adjudicative jurisdiction, are those supposed to fight transnational

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criminality such as terrorism, narcotics or in certain fields of international humanitarian law (Geneva Conventions) and human rights (torture for example). Indeed, States consider that serious transnational crimes and criminals can only be dealt with by promoting transnational accountability and mutual assistance in criminal matters, including allowing all the States party to certain treaties to prosecute the criminals where they can catch them.

Of course, this kind of jurisdiction implies that States agree on the definition of the crime which can be prosecuted and that they trust each other's respective legal systems. Or to say least, that the evil of the prosecution by dubious foreign judicial systems are matched by the necessity to fight hard certain crimes and criminals (crime control *versus* procedural guarantees).

Most of the UN treaties provide for "*aut dedere aut judicare*" obligations, such as

- the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963) and
- the Hague Convention for Unlawful Seizure of Aircraft (1970),
- the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973,
- the Convention against the Taking of Hostages, 1979
- the International Convention for the Suppression of Terrorist Bombing, 1997

followed by many others.

"*Aut dedere aut judicare*" means that States where the suspect is have the choice between extraditing or judging him. The application of this treaty was, for example, at the center of the dispute between the United States and Libya in the Lockerbee case, where the United States demanded the extradition of the suspect on the basis of the Tokyo convention, where Libya said that it did not extradite its own nationals but would rather judge them.

The Council of Europe Treaties provide for formula which are closer to "*primo dedere secundo prosequi*", which means that states should first extradite the suspect and, only if they cannot, should judge him. This

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different system is due to the fact that the States members of the Council of Europe are rather close to each others and would have less reluctance to extradite the suspects.

Council of Europe Conventions are fore example:

- the European Convention on the suppression of terrorism, 1977
- the European Convention on the Protection of the Environment, 1998

IV. The *Lotus* case, 1927

The ambit of the jurisdiction of States in criminal law has been dealt with by numerous specific international treaties, yet no general treaty provides for a comprehensive solution of jurisdiction of States in criminal cases. The most comprehensive opinion has been issued by the Permanent International Court of Justice in the *Lotus* case, 1927.

In this case, the Court had to deal with a case of collision between two ships, one French (*Lotus*) and one Turkish (*Boz-Kourt*), in the Mediterranean high sea, causing loss of life amongst the Turkish sailors. On the arrival of the *Lotus* in Constantinople, the French Lieutenant and officer on the bridge at the time of the collision was arrested and prosecuted by the Turkish authorities on a charge of homicide by negligence. The Turks invoked Article 6 of the Turkish Penal Code which gave the Turkish courts jurisdiction, on the request of the injured parties, to prosecute foreigners accused of having committed crimes against Turkish nationals. The French government protested against the arrest and the two States agreed to seize the Permanent Court of International Justice to know whether Turkey had acted in conflict with the principles of international law by asserting criminal jurisdiction over the French officer. France alleged that Turkey should have to find support in international law before asserting its extraterritorial jurisdiction whereas Turkey alleged that it had jurisdiction unless it was forbidden by international law.

In its judgment, the Court decided with the thinnest majority that Turkey had not infringed international law by ruling that France had not proven that international law provided for a restriction of adjudicative jurisdiction. As President Huber clearly stated: "restrictions upon the independence of

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States cannot be presumed”. Where international law does not provide otherwise, States are free to adjudicate cases as long as their executive power is not exercised outside its territory:

“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”

According to this case, States would be free to adjudicate cases of genocide committed abroad, even by foreigners against foreigners, as long as third States cannot prove that this extraterritorial jurisdiction is prohibited. The burden of proof that a State acts in contradiction to international law as far as its jurisdiction is concerned, lies on the plaintiff State. Treaties as well as the development of customary law, i.e. State practice as well as *opinio juris*, are of course of highest importance to know whether States use a recognized principle of jurisdiction or if they trespass the limits and interfere with other States’ internal and domestic affairs.

V. The Nuremberg Statute and the post WW II prosecutions

For the first time, the Nuremberg Statute, 1945, provides expressly for the prohibition of the crime against humanity. The term “genocide” has also been used in several indictments by national courts which have judged Nazis after the end of the war.

Yet, the Nuremberg Statute was only applicable to the crimes committed by the Nazis and their allies, even though not only on the German territory. Besides, it has been argued that the jurisdiction of the Allies to judge the Nazis for the core crimes of aggression, war crimes and crimes against humanity stemmed either from the surrendering of Germany to the Allies, and therefore from the jurisdiction of Germany itself to judge its own nationals, or because of occupation.

VI. The 1948 Genocide Convention

The clearest ambit of the adjudicative jurisdiction of States for crimes of genocide is provided for by Article 6 of the 1948 Genocide Convention, which states that:

“Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted jurisdiction”.

The question to be raised is whether States Parties to this Convention do allow themselves to prosecute persons who have committed or participated to a genocide in a third country, be them nationals of the State which wants to prosecute them or not. The text itself in Article 6 does not say whether the term “shall be tried”, provides for compulsory territorial jurisdiction or whether a state may, on the basis of customary international law, bring someone accused of genocide before its own courts on the basis of extraterritorial jurisdiction, or further, based on universal jurisdiction.

As a matter of fact, the preparatory work of the treaty shows that the authors clearly contemplated universal jurisdiction. Yet, an historical interpretation of the Convention drives to the conclusion that most States, at the start of the cold war, clearly wanted to avoid a broad jurisdiction. Thus, the Soviet representative at the conference stated that “no exception should be made in the case of genocide to the principle of the territorial jurisdiction of states, which alone was compatible with the principle of national sovereignty”. Indeed, according to the Egyptian representative, “it would be very dangerous if statesmen could be tried by the courts of countries with a political ideology different from that of their own country”. This opinion was also shared by the American representative, who thought that prosecution for crimes committed outside the territory of a State could only be allowed with the consent of the territorial State. Some States, like Burma, Algeria and Morocco, even made formal declarations according to which no crime of genocide committed on their territory could be judged by other State courts other than their own. The jurisdiction of the international penal tribunal was

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precisely agreed upon as a compromise between the States which wanted to limit jurisdiction to the territorial principle and those which wanted to broaden its meaning.

Yet, the preparatory work of a treaty is only a “supplementary means of interpretation”, to be used only when ordinary interpretation leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. Besides, the 1948 Convention is more than fifty years old and the jurisdiction of States to prosecute crimes of genocide must be reviewed according to the evolution of customary law in the meantime. Indeed, the very restrictive approach of Article VI has been criticized by some authorities, who base their opinion on the specific nature of the crime considered. Thus; the International Law Commission (2000); the American Law Institute in its *Restatement of the Foreign Relations Law of the United States* (1987); as well as the International Court of Justice (ICJ), in the *Genocide* case of the ICJ (1993) or in individual Judges in the *Arrest Warrant* case (2002); also the International Criminal Tribunal of ex-Yugoslavia (ICTY), for example in the *Tadic* case (1995), not to say a considerable part of the academics and authors, who propose that the crime of genocide or even crimes against humanity should “naturally” be prosecuted on the basis of universal jurisdiction. In particular, for these authorities and authors, Article VI of the 1948 Convention, by obliging States to prosecute crimes of genocide committed on their territory, does not prevent States from prosecuting them, even if they are committed in third countries. They also generally insist on the fact that genocide is a crime of concern not only for individual States but for the international community as a whole.

Yet, international law is created by States and not by “authorities” or by doctrine. It is therefore necessary to verify if the evolution of the practice of the States and their *opinio juris* expressed since 1948 can match the evolution of the doctrine. As a matter of fact, it is hard to find many cases of prosecutions for acts of genocide outside the territorial State where the acts have been committed.

VII. The cases Eichmann and Demjanjuk in Israel

Eichmann was abducted in 1961 in Argentina by Israeli agents and prosecuted and condemned in Israel for his participation in the genocide committed by the Nazis. Argentina strongly disagreed with the abduction, even though its opposition to the judgment itself was less vocal. In any case the German authorities clearly agreed that Eichmann, a German citizen having committed crimes in Germany, should be prosecuted by Israel. Yet, the German authorities probably did not act with the feeling that they applied customary law, but due to political reasons and because they did not want to hamper the repression of Nazis.

On the other hand, the Israeli courts did not so much rely on a delegation of competence to judge Eichmann but acted on two grounds; the passive personality principle, therefore asserting that the State of Israel was legitimised to judge acts which had been committed against Jews even before the State of Israel existed; and also a reference to a mix of international morale and law was made:

“(T)hese crimes constitute acts which damage vital interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilised nations. The underlying principle in international law regarding such crimes is that the individual who has committed any of them and who, when doing so, may be presumed to have fully comprehended the heinous nature of his act, must account for his conduct”.

The reasoning of the Israeli court is that a crime can be defined by the international community and that States are empowered to serve as “executive agents” of the said international community as long as the instruments under international law are not created and effective.

What is interesting with the “*Eichmann case*” is the declarations of the Israeli courts, but the fact that other States did not react negatively against the application of universal jurisdiction by Israel for its prosecution of a case of genocide. And even if Argentina did protest harshly against the abduction of Eichmann on its territory, it did not lodge a formal complaint against its judgment.

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In another case concerning the genocide committed by the Nazis, an American court extradited in 1986 *Demjanjuk*, an alleged Ukrainian warden in Treblinka, to allow Israel to judge him for his participation in the genocide, therefore recognizing the jurisdiction of Israeli courts to judge him. *Demjanjuk* was then judged in Israel and acquitted on the merits of the case.

Yet, the *Eichmann* and *Demjanjuk* cases judged by Israel can hardly be considered as an ordinary precedent for other States.

VIII. Other national court cases applying universal jurisdiction

The jurisdiction of States to judge acts of genocide which have been committed in other States has been considered in various cases concerning the genocide in Rwanda, committed in 1994. Yet, the practice of States has been rather heterogeneous and ambiguous.

AUSTRIA

In 1994, **Austria** put to trial *Cvjetkovic*, former commander of a Serbian military unit, for acts of genocide committed in the former Yugoslavia. The Appeals Court justified the jurisdiction of the Austrian courts as follows:

“Article VI of the Genocide Convention, which provides that persons charged with genocide or any of the acts enumerated in Article III shall be tried by a competent tribunal of the State where the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction, is based on the fundamental assumption that there is a functioning criminal justice system in the locus delicti (which would make the extradition of a suspect legally possible). Otherwise – since at the time of the adoption of the Genocide Convention there was non international criminal court – the outcome would be diametrically opposed to the intention of its drafters and a person suspected of genocide or any of the acts enumerated in Article III could not be prosecuted because the criminal justice in the locus delicti is not functioning and the international criminal court is not in place (or its jurisdiction has not been accepted by the State concerned)” (reprinted from Reydam, 2003).

A jury acquitted him of all charges.

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BELGIUM

In **Belgium** four Rwandese were prosecuted in 2001 for having participated in the genocide in various capacities in the Butare province. Yet, Belgium applied universal jurisdiction to judge them for war crimes only. They were not charged with crimes against humanity or genocide, apparently because universal jurisdiction for these crimes had been added to the Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, 1993, in 1999 only.

In all these cases, the Republic of Rwanda never challenged the jurisdiction of the aforementioned States to adjudicate.

FRANCE

In **France**, the Appeal Court of Nîmes expressly stated in 1996, in the case *Munyeshyaka*, that France had no jurisdiction based on Article VI of the Genocide Convention because this Convention did not allow the application of universal jurisdiction for cases of genocide. This judgement was overrun by the French Supreme Court but only on the fact that France had adopted a specific law on the genocide in Rwanda based on Security Resolution 955 and because France could alternatively prosecute Munyeshyaka on the basis of the Torture Convention, 1984.

Another case has to be mentioned : Ely Ould Dah. In 1990 under the pretext of a hypothetical conspiracy, several thousands of African Mauritians were arrested and tortured. Captain *Ely Ould Dah* was, at the time, intelligence officer at the Jreida prison base. He was charged with responsibility for having ordered acts of torture to be carried out against two black Mauritanian soldiers, Mamadou Diagana and Ousmane Dia and to have participated in these acts. In May 1993, an amnesty law prohibited any legal proceedings to be taken against those responsible for these acts. Proceedings were triggered in France on 4 June 1999 when a complaint was lodged by two victims who by then had become political refugees in France. At that time, Ely Ould Dah was in France on an internship at a military school in Montpellier. Indicted for torture, Ely Ould Dah was placed in pre-trial detention on 2 July 1999. The French judicial

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authorities authorised his release on 28 September 1999, under judicial control. Ely Ould Dah escaped to Mauritania on 5 April 2000. On 25 May 2001, the examining magistrate ordered that Ely Ould Dah be sent before the “Cour d’assises” to be tried. The trial in absentia, as a result of Ely Ould Dah’s escape, opened on June 30, 2005, before the “Cour d’assises” of Nîmes. On July 1st, 2005, the Cour d’assises of Nîmes took a historic decision by sentencing the Mauritania Captain Ely Ould Dah to ten years in prison, the maximum term. The Court accepted all the charges for acts of torture Ely Ould Dah committed directly, ordered or organised at the “Jreïda death camp”. On 30 March 2009, the European Court of Human Rights rejected Ely Ould Dah's appeal filed in 2003 against its judgement rendered by the French courts in application of the French rather than the Mauritanian law. She declares the appeal ill-founded, repeats the importance of the ban of torture in international law, recalls the principle of universal and criticizes the Mauritanian amnesty law.

GERMANY

In **Germany**, a court sentenced *Jorgic* in 1998 to life imprisonment for acts of genocide, on the basis of the German Criminal Code which provided for universal jurisdiction in cases of genocide. Interestingly, the Higher Court expressly mentioned “the generally accepted non-exclusive interpretation of Article VI of the 1948 Genocide Convention” to assert that there is no prohibition of universal jurisdiction under international law to prosecute acts of genocide. The Federal Supreme Court confirmed that a hypothetical norm forbidding the application of universal jurisdiction would be contrary to the rule prohibiting genocide, which is a peremptory or a “*jus cogens*” norm. In a later case *Sokolovic* (1999), the Federal Supreme Court even dropped the exigency of a special link between the accused person and Germany to prosecute him for genocide on the basis of universal jurisdiction.

At the end of 2005, reports indicated that the former Minister of Internal Affairs of Uzbekistan was in Germany to receive medical treatment. Victims of crimes allegedly committed by troops under his control filed a complaint against him with the competent German authorities. Meanwhile the suspect left Germany. On grounds of his absence the Federal

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Prosecutor refused to open official proceedings based on universal jurisdiction in absentia and dropped the case. While this decision might be considered prudent in that it foregoes 'purely symbolic prosecution', it is problematic in so far it leaves the pursuit of justice at the mercy of considerations of policy and expediency that run counter to the spirit of the German Code of Crimes Against International Law².

SPAIN

On 26 September 2005, the Spanish Constitutional Tribunal reversed the decisions of the *Audiencia Nacional* and the High Court (*Tribunal Supremo*) in the case of the *Guatemalan Generals*. According to the two judicial bodies, the exercise of universal jurisdiction over international crimes required a link between the crime or the victims or the offender and Spain, such as the presence of the offender on Spanish territory or the Spanish nationality of the victims. The Constitutional Tribunal held, instead, that these requirements are contrary to the principle *pro actione*, i.e. they result in an unjustified restriction of the constitutional right to effective judicial protection. The Tribunal also clarified that universal jurisdiction, whose aim is fighting impunity, does not require any link other than the universal character of the values protected by the provisions criminalizing the most serious violations of international law. The presence of the accused in Spain is merely a condition for trial, not a distinct ground of jurisdiction; in other words, the accused must be in Spain for the trial to begin, but jurisdiction may be exercised even in his absence, for example for the issuance of a request for extradition. The only condition to which the exercise of universal jurisdiction is subject is that the state of the *locus commissi delicti* is not already investigating and prosecuting the case effectively³.

On 6 February 2008, the Spanish Investigative Judge Andreu Merelles issued an indictment charging 40 current or former high-ranking Rwandan

² Salvatore Zappalà, The German Federal Prosecutor's Decision not to Prosecute a Former Uzbek Minister Missed Opportunity or Prosecutorial Wisdom? *Journal of International Criminal Justice* 2006 4(3):602-622.

³ Hervé Ascensio, The Spanish Constitutional Tribunal's Decision in *Guatemalan Generals*. Unconditional Universality is Back, *Journal of International Criminal Justice* 2006 4(3):586-594.

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military officials with serious crimes including genocide, crimes against humanity, war crimes and terrorism, perpetrated over a period of 12 years, from 1990 to 2002, against the civilian population, and primarily against members of the Hutu ethnic group. While the investigations were initially based on complaints from families of nine Spaniards who were killed, harmed or disappeared during the period at issue, the indictment was subsequently expanded to include crimes committed against Rwandan and Congolese victims, based on the universal jurisdiction doctrine. The indictment rules out the prosecution of Paul Kagame, arguing that he may not be prosecuted as long as he holds the position of President of Rwanda. To conclude, in many cases where universal jurisdiction has been used to judge suspects of the genocide in Rwanda, the States have either indicted and sentenced them on the basis of national provisions of humanitarian law or have enacted a special law on the implementation of the status of the International Criminal Tribunal for Rwanda. Indeed, the States which applied universal jurisdiction for acts of genocide committed in this context were encouraged to do so by the international community and especially the Security Council in the particular case of Rwanda. Therefore, it is difficult to draw definitive conclusions on the general acceptance by States of the universal jurisdiction for the crime of genocide.

Rather interesting is also the legislative practice of States. Thus, some States have implemented legislations which allow the prosecution of crimes of genocide and crimes against humanity according to universal jurisdiction. For example, **Australia, Belgium, Canada, Germany, The Netherlands** and, to some extent, **Argentine, Ethiopia and Venezuela**, allow for judging these crimes even if they have been committed abroad.

SWITZERLAND

In **Switzerland**, *Niyonteze*, former “bourgmestre” of Mushubati, was tried in 1997 by the military courts for his participation in the genocide in Rwanda. Although the Prosecutor had indicted Niyonteze for murder, grave breaches of international humanitarian law, genocide and crime against humanity, the Court of Division refused to judge him for genocide and for crime against humanity as Switzerland was not, at the time of the trial, a State party to the 1948 Convention and had incorporated no provision for genocide or crime against humanity in its legal order.

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Therefore, the Court convicted him of murder, incitement to murder and grave breaches of the Geneva Conventions, applicable in the internal conflict of Rwanda. The Military Court of Appeal dismissed the judgement of the Court of Division on indictment of murder and incitement to murder to retain only the grave breaches of the Geneva Conventions. As the Geneva Conventions expressly provide for the possibility to judge a person on the basis of universal jurisdiction, Switzerland had not to decide whether the crime of genocide could be judged on this basis.

IX. Prosecutions on the basis of active or passive personality principle

Quite a few cases are close to universal jurisdiction but are not because, as a matter of fact, national authorities prosecute on other basis than universal jurisdiction, such as active or passive personality principle.

Thus, in 2006, a French investigating judge issued international arrest warrants against nine Rwandan officials closely allied to current Rwandan President Kagame. They were accused of premeditated murder and terrorism, for having planned and ordered the April 1994 attack on the airplane in which former Rwandan President Habyarimana and others were killed. The recent arrest by German authorities of one of the nine suspects targeted in Judge Bruguière's order brought some new attention on the matter.

X. National legislation of implementation allowing the prosecution of universal jurisdiction

Unfortunately, no State has made a formal declaration to the Convention at the time when it became Party on the question of the extent of jurisdiction as provided for by article VI. The reaction of the international community to such an interpretation would indeed be good evidence of the state of customary law on this matter.

In all the cases where States adopted universal jurisdiction into their own legislation, customary law was consolidated. The States also put themselves in a situation where they cannot deny other States to allow themselves to prosecute one of their nationals for crimes of genocide.

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On the other hand, the huge majority of States seem neither to have implemented the Genocide Convention into their own legal system or to have extended their own jurisdiction for genocide to universality. Besides, most recently, some States have shown a strong opposition against extraterritorial jurisdiction and against States which allow themselves, by law, to exercise such jurisdiction. Others became aware of the excesses universal jurisdiction could trigger and so played it down. The Belgian legislation on universal jurisdiction and its application by investigating judges and courts was notably the focal point of heated debate in doctrinal and political circles.

Switzerland, which became a Party to the Genocide Convention only in 2000, expressly enacted universal jurisdiction for the crime of genocide by explaining in the Message of the Council of Ministers that

“with the view of the “*jus cogens aspect*” of the prohibition of genocide as well as of its effects “*erga omnes*”, there is no doubt that the prosecution of the crime of genocide must be based, in international law, on universal jurisdiction. Therefore, States may – and even must – prosecute or extradite foreign nationals or their own nationals who are suspect of having committed an act of genocide, even if the act has not been committed on their territory. This does not constitute a violation of the principle of non intervention in other States’ internal affairs”.

On 1 July 2002 new provisions for the prosecution of genocide, crimes against humanity and war crimes came into operation within the **Australian** Commonwealth Criminal Code. The offences were introduced as a part of Australia's ratification of the Rome Statute of the International Criminal Court. Through the enactment of these crimes within the broader context of the Criminal Code, Australia has, perhaps unwittingly, created a basis to prosecute corporations for these crimes even under the universal jurisdiction principle. A current investigation by the Australian Federal Police into the possible role of mining company Anvil Mining Limited in facilitating a military offensive in the town of Kilwa in the Democratic Republic of the Congo indicates that Australia, like many nations today, is grappling locally with the possibility of corporate involvement in international crime. As a potential source of action against companies implicated in international crime, the possible reach of the Australian Criminal Code provisions warrants consideration. This article outlines the

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application of the new Australian international crimes provisions to corporations and argues that, if used appropriately, these will represent a positive development toward corporate accountability⁴.

XI. Universal jurisdiction and the International Criminal Court

These developments, which may give the appearance that customary law could have evolved towards a more permissive jurisdiction, as far as a crime of genocide is concerned, still have to be considered with new eyes since the Rome Statute of the International Criminal Court (thereafter “ICC”) was adopted in 1999.

Indeed, the Rome Statute provides for the jurisdiction of the ICC for crimes of genocide and for crimes against humanity, with the definition of genocide being the same as under the Genocide Convention, 1948. Therefore, it is argued that States party to both the Genocide Convention and the Rome Statute wished to favour either the territorial or the active personality principle on the one hand, or the jurisdiction of the ICC on the other. Indeed, and according to the first justification of the exercise of universal jurisdiction by a State, i.e. the Israeli explanation that the competence of its own courts derived from the fact that there was no international court allowed at that time to prosecute international crimes, in particular genocide, could fall short now with the emergence of the ICC. This interpretation also is clearly in-line with the Genocide Convention, 1948.

Yet, a case can only be considered by the ICC if the State which has jurisdiction is unwilling or unable genuinely to carry out the investigation or prosecution. One understands the term “jurisdiction” under the ICC Statute to be territorial or active personality jurisdiction. In support of this interpretation comes also the fact that the German proposal to allow the ICC to have universal jurisdiction on the “core crimes” provided for by the Statute, because States could already rely on such jurisdiction, was not accepted by the participants to the Rome conference.

⁴ Joanna Kyriakakis, Australian Prosecution of Corporations for International Crimes. The Potential of the Commonwealth Criminal Code, *J Int Criminal Justice* 2005. vol. 5: 809-826.

XII. The case of the *Arrest warrant of 11 April 2000 (Democratic Republic of Congo v / Belgium)* before the International Court of Justice

The question of the admissible extension of States' criminal jurisdiction could have been laid to rest, more than seventy years after the *Lotus* case, by the ICJ in the case, *Arrest warrant of 11 April 2000*, issued by the Democratic Republic of Congo (DRC) against Belgium before the ICJ.

In this case, an investigating judge of Belgium issued an arrest warrant for grave breaches of international humanitarian law, against the former Cabinet Chief of President Kabila whilst he was still Minister of Foreign Affairs for the DRC, Belgium had no connecting point with the case, except that the claimants were resident in Belgium. The DRC had two main points of contention about the arrest warrant. The first was that Belgium had applied extraterritorial jurisdiction to events which had taken place in the DRC, and therefore violated its territorial authority and the principle of sovereign equality among all members of the United Nations. The other was that Belgium had violated the customary law on diplomatic immunity of Ministers of foreign affairs in office.

Unfortunately for the sake of international law, Congo later abandoned its claim that the *in absentia* proceedings against its former Minister was an exorbitant exercise of its jurisdiction as recognized by international law. Moreover, the Court could save its reasoning on universal jurisdiction as it found, by thirteen votes to three, that Congo was right to complain on the basis of the sovereign immunity argument.

XIII. The case *Certain Criminal Proceedings in France (Republic of the Congo v. France)* before the International Court of Justice

On December 2002, the Republic of the Congo filed an Application to the ICJ instituting proceedings against France seeking the annulment of the investigations and prosecution measures taken by an investigating judge in France following a complaint concerning crimes against humanity and torture allegedly committed in the Congo against individuals of Congolese

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nationality. Among the individuals targeted by the French measures were the President of the Republic of the Congo, the Congolese Minister of the Interior and some other Generals, including the Inspector-General of the Congolese Armed Forces and the Commander of the Presidential Guard. France is a party to the 1984 Torture Convention and it has implemented a provision in its Criminal Procedure Code expressly allowing for universal jurisdiction in its courts in cases of torture. Yet, Congo is not a Party to the Torture Convention and as such it considers that the issuing of the arrest warrant against Congolese authorities is a violation of its sovereignty.

The Congo complains that “by attributing itself universal jurisdiction in criminal matters and by arrogating to itself the power to prosecute and try the Minister of the Interior of a foreign State for crimes allegedly committed by him in connection with the exercise of his powers for the maintenance of public order in his country”, France violated “the principle that a State may not, in breach of the principle of sovereign equality among all Members of the United Nations (...) exercise its authority on the territory of another State”.

In this case, the question of immunity can again allow the Court to successfully avoid a judgment on the merits of universal jurisdiction as for the President, or even the Minister of Interior, are concerned. Yet, it would be difficult to see how the Court could avoid to take a decision on universal jurisdiction in the case of the Generals, who most probably do not benefit of any immunity. Therefore, the question which has to be decided by the Court is whether States are allowed to prosecute a person on the basis of universal jurisdiction when the territorial State or the State of the nationality of the author is not a Party to a Convention which provides for universal jurisdiction.

XIV. Some practical considerations and other pitfalls

Even if the ICJ allows States in the *Congo v. France* case to prosecute actors of crimes against humanity on the basis of universal jurisdiction, one hardly foresees that national courts will rush to judge such cases committed abroad by foreigners against foreigners. Indeed, many obstacles will remain.

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One of the most obvious is the difficulty for States to allocate important human and financial resources to investigate cases, to prosecute, judge and in the end, possibly imprison persons which maybe did trouble the morale and security of the community of nations, but which did not, in particular, trouble the public order of the State where the arrest was carried out. For this reason, States will probably be tempted to deny the entrance onto their territory of persons suspected of having committed acts of genocide, or, if they are found on their territory, will extradite them rather than judge them.

One has also to bear in mind the huge difficulty for States to judge cases of genocide and other international crimes committed outside their borders. Think of the political problems which the judging States may face, of the lack of evidence available in these States, and therefore the necessary reliance on mutual assistance from the territorial States, not to say the cultural differences between the State of judgment and the persons to be judged and the linguistic difficulties. With all these elements in mind, it would appear to be highly preferable that States are encouraged to judge the acts of genocide which have been committed on their territory, maybe with the assistance of the international community, or that the International Criminal Court is allowed, by ratification of its treaty or by an *ad hoc* recognition of competence, to judge such cases.