EXPERT OPINION ON THE CRIMES TO WHICH UNIVERSAL JURISDICTION APPLIES

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DEFINITIONS

Forum State	The prosecuting State (e.g. Sweden).
State of nationality	State of nationality of the accused.
Territorial state	The State in which the crime occurred.

ABREVIATIONS

Apartheid Convention= International Convention on the Suppression and Punishment of the Crime of Apartheid

Additional Protocol I/ AP I= Additional Protocol I to the to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts

CED= UN Convention on Enforced Disappearance

ICC= International Criminal Court

ICJ= International Court of Justice

ILC= International Law Commission

Rome Statute = Rome Statute of the International Criminal Court

UNCAT= Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1987, entered into force 26 June 1987)

UNGA= United Nations General Assembly

INSTRUCTIONS

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[redacted] ('the Expert') was instructed to write an Expert Opinion on the following question:

> *Does the principle of universal jurisdiction apply to the crime of murder, outside of the act constituting an international crime?*

This document answers this question.

INTRODUCTION: JURISDICTION UNDER INTERNATIONAL LAW

Universal jurisdiction is a type of extraterritorial jurisdiction in international law. It permits *any* state to prosecute persons accused of committing certain grave human rights abuses regardless of where the offence occurred and irrespective of the nationality of the accused person(s) or victims.[1] Renowned International Legal Scholar and Judge, Antonio Casesse defined the principle as where 'any State is empowered to bring to trial persons accused of international crimes regardless of the place of commission of the crime, or the nationality of the author or the victim'.[2] Jurisdiction in international law is defined as '…the limits of the legal competence of a state or other regulatory authority… to make, apply, and enforce rules of conduct upon persons'.[3] The capacity of a state to enact laws and then enforce them when a breach occurs is part of that states' jurisdictional competence. This ability is integral to state sovereignty,[4] as it denotes the reach of state power.

There are three ways in which states exercise their jurisdictional competence: (1) The ability of a state to enact laws that apply to persons or property is known as 'prescriptive jurisdiction' or 'legislative jurisdiction'. (2) 'Adjudicative jurisdiction' refers to the capacity of a state to host litigation in respect of persons or property in its legal system.[5] (3) Enforcement jurisdiction is the capacity of a state to enforce non-compliance with its enacted laws, including breaches that occur abroad.[6] In order to exercise its enforcement jurisdiction in another state, the consent of the territorial State (the State in which the crime has occurred) is required, in order to respect that state's sovereignty and to not breach the principle of non-intervention in the internal matters of another state.[7] As stated in the famous *Lotus Case* before the Permanent Court of International Justice (the precursor to the International Court of Justice):

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[1] Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford University Press, 2015); Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, 2002).
[2] Antonio Cassese, *International Law* (2nd edn, Oxford University Press, 2005), p 451.
[3] Christopher Staker, 'Jurisdiction' in Malcolm D Evans (ed.), *International Law* (5th edn, Oxford University Press, 2018), p 289.
[4] Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015), pp 5-6.
[5] Roger O'Keefe, *International Criminal Law* (Oxford University Press, 2015), p 4.
[6] Christopher Staker, 'Jurisdiction' in Malcolm D Evans (ed.), *International Law* (5th edn, Oxford University Press, 2018), p 292.
[7] Charter of the United Nations, Article 2(7).

> Now the first and foremost restriction imposed by international law upon a State is that-failing the existence of a permissive rule to the contrary-it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.[8]

When States legislate for universal jurisdiction in their domestic law, this allows their national prosecutor to prosecute a foreign national in their national court in respect of a crime that has occurred abroad. As such, in the words of Professor Roger O'Keefe, universal jurisdiction is 'a species of jurisdiction to prescribe'.[9] When a State's national criminal courts adjudicate a breach of that State's universal jurisdiction laws, the State is exercising its adjudicatory jurisdiction functions. In this context, O'Keefe comments, '[a]s a result, a state's criminal courts have no greater authority under international law to adjudge conduct by reference to that state's criminal law than has the legislature of the state to prohibit the conduct in the first place'.[10]

The vast majority of criminal prosecutions that occur in national courts are on the basis of that State exercising its jurisdiction over a crime that occurred in its territory (territorial jurisdiction).[11] Under international law, states may also exercise prescriptive, adjudicatory and enforcement jurisdiction in respect of crimes that have occurred outside of their territory, under what is known as extraterritorial jurisdiction. International law permits states to exercise jurisdiction within their own state in relation to events that occur outside of their territory, so long as the forum state (i.e. the prosecuting state) acts within the limits of international legal principles. For example that the forum state does not infringe another state's sovereignty by attempting to prosecute an incumbent head of State.[12] As stated by the Permanent Court of International Justice in the *Lotus Case*:

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[8] *Lotus Case* (France v Turkey) PCIJ Rep Series A No 10 (7 September 1927), p 18.

[9] Roger O'Keefe, 'Universal jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735-760, p 737.

[10] Roger O'Keefe, 'Universal jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735-760, p 737.

[11] In effect, the flag principle is an extension of the territorial principle and is important in the context of vessels navigating the seas (both territorial and other) and aircrafts flying in air space or operating in other states' territories.

[12] *Arrest Warrant Case (DRC v Belgium)* (Judgment) [2002] ICJ Rep 3.

> 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.[13]
>
> …
>
> [A]ll that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty'.[14]

Universal jurisdiction (also referred to as the 'universality principle) is a type of extraterritorial jurisdiction that applies to serious violations of international law. Although there is disagreement as to the specific list of crimes to which the principle applies, which will be discussed below, the crimes to which the jurisdiction is connected are: genocide, war crimes (in international and non-international armed conflict), crimes against humanity and torture. Under international treaty law and customary international law, there are a number of specific acts to which universal jurisdiction applies (for example international piracy and torture), as will be illustrated in sections X and Y below.

The universality principle exists alongside other types of enforcement extra-jurisdictional competence in international law. The most common of these are: the active (or nationality) principle, the passive personality principle, the protective principle and the representation principle.[15] The active or nationality principle allows a state whose national is accused of committing the offence to conduct the prosecution. The passive personality principle authorises the state whose nationals are victimised by the crime to try the offender(s) in its national court. The protective principle allows a state to try the offender(s) when its national interest is affected by the act that occurs in another state. Finally, the representation principle enables a state to engage its jurisdictional competence and prosecute a crime on behalf of a state with a closer nexus to the offence. The distinction between universality and

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[13] *Lotus Case* (France v Turkey) PCIJ Rep Series A No 10 (7 September 1927), p 19

[14] *Lotus Case* (France v Turkey) PCIJ Rep Series A No 10 (7 September 1927), p 19.

[15] Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, 2002), pp. 21-24.

representation principles is often blurred,[16] as universal jurisdiction is often used on a subsidiary basis, where the territorial State is not in a position to carry out the prosecution. As such, another state conducts the prosecution. Traditionally, territorial jurisdiction is prescribed by common law jurisdictions, whereas the nationality and passive personality principles are more commonly enacted and utilised by states from the civil law tradition. In more recent times, the majority of States rely on a number of types of enforcement jurisdiction provided under international law.[17]

THE PRINCIPLE OF UNIVERSAL JURISDICTION UNDER INTERNATIONAL LAW

Unlike the active and passive personality principles, universal jurisdiction does not require a link between the forum state and the crime committed abroad. However, in practice there is often a link between the forum state and the accused, either through the presence of the accused in the forum State or through a connection between the forum State and the territorial State. For example, many European States have exercised universal jurisdiction in respect of international crimes committed in former colonies.[18] In addition, one of the factors contributing the recent increase in universal jurisdiction cases in Europe is the initiation of cases by the refugee communities residing in the forum State.[19] Notwithstanding the wide scope of the principle of universal jurisdiction in theory, in practice there is a lack of consensus as to the scope of universal jurisdiction under international and the crimes to which it applies. As noted by the American Law Institute, '[a]lthough well accepted in theory, prosecutions based on universal criminal jurisdiction are rare in practice and often attract controversy'.[20] The scope of universal jurisdiction is a contentious area for States, with not all

[16] Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, 2002), p.24.

[17] Dinah Shelton (ed.), *International Law and Domestic and Domestic Legal Systems: incorporation, transformation and persuasion* (Oxford University Press, 2011).

[18] In Spain see for example, *Unión Progresista de Fiscales de España et al v Pinochet* Order of the Criminal Chamber of the Spanish *Audiencia Nacional* English translation in Reed Brody and Michael Ratner (eds.), *The Pinochet Papers: The case of Augusto Pinochet in Spain and Britain*, (Kluwer Law International, 2000). In Belgium see *Public Prosecutor v Higaniro et al*, Assize Court of Brussels, 8 June 2001, which resulted from the genocide in Rwanda.

[19] Frédéric Mégret, 'The "Elephant in the Room" in Debates about Universal Jurisdiction: Diasporas, Duties of Hospitality and the Constitution of the Political' (2015) 6 *Transnational Legal Theory* 89-116; Maximo Langer and Mackenzie Eason, 'The Quiet Expansion of Universal Jurisdiction' (2019) 30 *European Journal of International Law* 779-817.

[20] American Law Institute, *Restatement of the Law, 4th, Foreign Relations Law of the United States* (published by the American Law Institute, 2018) p. 211.

States agreeing as to what crimes are subject to the principle. The lack of an agreed set definition for the principle has not prevented States from incorporating it into their domestic law and conducting prosecutions. Sweden is an example of a State that has legislated for and exercises universal jurisdiction in practice.[21] Indeed, not all States have legislated for universal jurisdiction,[22] and many countries have never exercised universal jurisdiction.[23]

Several international treaties provide for the application of universal jurisdiction to certain offences. These crimes are: international piracy (or piracy committed on the high seas),[24] grave breaches of the Geneva Conventions,[25] apartheid,[26] torture,[27] enforced disappearance,[28] and the destruction of cultural property during armed conflict.[29] Of course, it is up to each State as to whether or not they agree to be bound by an international treaty. As will be explained below in section X, not all of these treaties are widely adopted by States, which means that the application of universal jurisdiction to all of these crimes has not reached the

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[21] Chapter 2, Section 3 and Chapter 22, section 6 (as amended) of the Swedish Criminal Code provides for its universal jurisdiction laws.

[22] For example , Colombia has not legislated for the jurisdiction, as noted in the *Report of the Secretary-General: The scope and application of the principle of universal jurisdiction*, UN Doc. A/66/93, 20 June 2011, para 10. Zimbabwe has not legislated for universal jurisdiction, see *Report of the Secretary-General: The scope and application of the principle of universal jurisdiction*, UN Doc. A/75/151, 9 July 2020, para 25.

[23] For example, Brazil has never exercised universal jurisdiction, as stated in *Report of the Secretary-General: The scope and application of the principle of universal jurisdiction*, UN Doc. A/76/203, 21 July 2021, para 23.

[24] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, Art 105; United Nations Convention on the High Seas (adopted 27 April 1958, entered into force 30 September 1962) 450 UNTS 11, Art 19.

[25] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31, Art 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85, Art 50; Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, Art 129; Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, Art 146; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I; AP I), Art 85.

[26] International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243 (Apartheid Convention), Art 5.

[27] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1987, entered into force 26 June 1987) 1465 UNTS 85 (UNCAT), Arts 5(2), 7.

[28] International Convention for the protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3, Arts 9(2), 11 (Convention on Enforced Disappearance or CED).

[29] Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 212 (Second Protocol to the 1954 Hague Convention), Art 16 (1).

status of customary international law, when using the traditional two element test of *opinio juris* and state practice. Relying on the two traditional components of customary international law, out of the list of international treaties cited above, the crimes over which a rule of customary international law providing for universal jurisdiction has crystallised are international piracy,[30] grave breaches of the Geneva Conventions,[31] and torture.[32] This development is in large part due to the high number of ratifications and State support for these respective treaties.

It is clear that disagreement remains among States as the list of crimes that come under the remit of the principle. This situation is particularly evident in the ongoing discussions before the Sixth Committee of the United Nations General Assembly (UNGA) on 'The Scope and Application of Universal Jurisdiction'. Since 2009, this item has been on the agenda of the Sixth Committee, which has provided an opportunity for states to share their positions and views on the principle. This development followed a request by a number of African States to examine the scope and application of the principle, in the context of concerns that their nationals were disproportionately being subjected to the jurisdiction. The ongoing discussions illustrate the lack of consensus between states regarding the scope of the jurisdiction and the crimes to which it applies. As noted by the Sixth Committee of the UNGA in 2021:

> As regards the scope of universal jurisdiction, a number of delegations considered that universal jurisdiction applied to the most serious crimes under international law and provided various examples of such crimes, including war crimes, genocide, crimes against humanity, slavery, torture, piracy, terrorism and aggression, even though there remained divergences as to which crimes in particular.[33]

Using the hierarchy of sources of international law, as set out in Article 38(1) of the Statute of the International Court of Justice, this Expert Opinion focuses on identifying the crimes to

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[30] *Re Piracy jus gentium* [1934] All ER Rep 506; Separate Opinion of President Guillaume and Joint Separatee Opinion of Judges Higgins, Kooijmans and Buergenthal in *Case Concerning the Arrest Warrant of 11 April 2000*, ICJ, 14 February 2002;

[31] Jean Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol 1 (Cambridge University Press, 2005), pp 604-10.

[32] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422.

[33] Sixth Committee (Legal) 76th session, available at www.un.org/en/ga/sixth/76/universal_jurisdiction.shtml, accessed 22 March 2022.

which universal jurisdiction applies via international treaties and under customary international law.[34] In particular, it illuminates the methodology to be employed in order to assess what crimes come under the remit of the jurisdiction under the customary international law criteria. This Expert Opinion does not propose to identify the full list of crimes to which universal jurisdiction applies under customary international law, as to do so is beyond the scope of this submission.

THE CODIFICATION OF UNIVERSAL JURISDICTION IN INTERNATIONAL TREATIES

As stated above, the application of universal jurisdiction is codified in international treaties in respect of the following crimes: piracy committed on the high seas, grave breaches of the Geneva Conventions, torture, apartheid, the protection of cultural property and enforced disappearance. Universal jurisdiction is also provided for in a number of international treaties related to acts that come under the wider heading of 'transnational crimes'. For example, treaties related to terrorist activity, such as the Convention for the Suppression of Unlawful Seizure of Aircraft,[35] the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,[36] and the International Convention against the Recruitment, Use, Financing, and Training of Mercenaries.[37]

It is important to note that when the principle of universal jurisdiction is codified in an international treaty, it normally takes the form of one of two constructions. The first is known as 'absolute universal jurisdiction', whereby the construction of the treaty provision allows for a state to exercise universal jurisdiction, irrespective of whether the accused is present in

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[34] Article 38 of the Statute of the International Court of Justice sets out the hierarchy of sources of international law, and affirms:
1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law
[35] (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105, Arts 4(2) and 7. See also International Convention for the Suppression of Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002), Art 7(4).
[36] (adopted 14 December 1979, entered into force 10 February 1977) 1035 UNTS 21931, Art 3(2).
[37] (adopted 4 December 1989, entered into force 20 October 2001), Art 9(2).

the forum state. An example of such a treaty provision is Article 5 of the Apartheid Convention, which reads:

> Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction.

This provision does not explicitly require that the accused be present in the forum State, thus it leaves the door open for the exercise of universal jurisdiction *in absentia*, where the accused is not present in the forum state for the trial. The negotiating history of universal jurisdiction in international treaties demonstrates that States are very reluctant to employ the first provision construction in international treaties, due to the broad scope of the jurisdiction (in theory), which many states believe will lead to abuse.[38]

The second construction used in international treaties to codify the principle of universal jurisdiction therein, is under the *aut dedere aut judicare* framework, which is also referred to as 'the obligation to try or extradite' or 'the obligation to prosecute or extradite'.[39] Here, the (non-national) accused must be present in the territory of the forum state for the trial. In practice, the accused is also present in the forum state for the pre-trial investigation stage. If the forum State does not extradite the accused to a state with a closer nexus to the crimes, for example the State of nationality of the accused or the territorial State, it must conduct the prosecution in its own courts. Prime examples of this construction can be found in the following international treaties:

Article 7(1) of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (UNCAT):

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[38] See Amina Adanan, 'Allies and enemies, past and present: An analysis of the rationale for the development of universal jurisdiction over serious crimes under international law' (Ph.D thesis, Irish Centre for Human Rights, National University of Ireland, Galway, 2017), pp.98-146, available at https://aran.library.nuigalway.ie/bitstream/handle/10379/7063/Amina%20Adanan%20thesis%20FINAL.pdf?sequence=1&isAllowed=y, accessed 22 March 2022.

[39] Bassiouni MC and Wise E, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff 1995).

> The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

Article 10(1) of the United Nations Convention for the Protection of All Persons from Enforced Disappearance 2007 (CED):

> Upon being satisfied, after an examination of the information available to it, that the circumstances so warrant, any State Party in whose territory a person suspected of having committed an offence of enforced disappearance is present shall take him or her into custody or take such other legal measures as are necessary to ensure his or her presence. The custody and other legal measures shall be as provided for in the law of that State Party but may be maintained only for such time as is necessary to ensure the person's presence at criminal, surrender or extradition proceedings.

Article 49 of the First Geneva Convention concerning the Amelioration of the Condition of the Wounded and Sick in the Armed Forces 1949:

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

In order to give effect to these provisions, the State must have proscribed for universal jurisdiction in respect of the act or crime, which the Treaty ordinarily requires.[40] The

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[40] For example, Art 5(2) of UNCAT reads: 'The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution'. Art 9(2) of the CED reads: 'Each State Party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has

negotiating history of treaties in which universal jurisdiction adopts this formula demonstrates that States prefer this construction in international treaties, as opposed to the former.[41]

It is important to note that the inclusion of a provision providing for universal jurisdiction in a treaty does not equate to the principle being part of customary international law. It cannot be assumed that the inclusion of universal jurisdiction in a treaty means that the principle is part of customary international law. Provisions of international treaties that provide for universal jurisdiction over a crime, are specific to States parties, unless they meet the two components of customary international law. Whether a provision of an international treaty has reached the status of customary international law will depend on whether the two elements of *opinio juris* and state practice have been met, which is discussed below in section X. As stated above, the application of the principle to some, but not all, of these crimes has reached the status of customary international law, as declared at international fora. This is true in respect of piracy,[42] grave breaches of the Geneva Conventions,[43] and torture.[44] The crystallisation of these norms is in part due to the high level of State support for these treaties. At the time of writing, there were 168 State parties to the UN Convention on the Law of the Sea, 196 States parties to the first 3 Geneva Conventions (which is a kin to universal ratification), 174 States parties to AP I and 173 States parties to UNCAT.[45] It should also be noted that there are minimal reservations to the provisions providing for universal jurisdiction in these treaties. In contrast, at the time of writing, there are 67 States parties to the UN Convention on Enforced

recognized'. The first paragraph of Art 49 of the First Geneva Convention reads 'the High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article'.

[41] See Amina Adanan, 'Allies and enemies, past and present: An analysis of the rationale for the development of universal jurisdiction over serious crimes under international law' (Ph.D thesis, Irish Centre for Human Rights, National University of Ireland, Galway, 2017), pp.98-146, available at https://aran.library.nuigalway.ie/bitstream/handle/10379/7063/Amina%20Adanan%20thesis%20FINAL.pdf?sequence=1&isAllowed=y accessed 22 March 2022.

[42] Separate Opinion of President Guillaume and Joint Separatee Opinion of Judges Higgins, Kooijmans and Buergenthal, *Case Concerning the Arrest Warrant of 11 April 2000*, ICJ, 14 February 2002, para 5; *Re Piracy jus gentium* [1934] All ER Rep 506.

[43] Jean Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol 1 (Cambridge University Press, 2005) 604-10.

[44] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422.

[45] This information is from the United Nations Treaty Collection, which is the secretariate for treaties under international law. Information accessed 25 March 2022. There are 193 member States of the UN.

Disappearance, 110 States parties to the Apartheid Convention, there are 82 States parties to the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict.[46]

The number of ratifications of a treaty has implications for the number of States that codify universal jurisdiction over a crime in their domestic law. This is because, most States proscribe universal jurisdiction on the basis of an obligation in an international treaty.[47] This state of affairs is particularly pertinent for common law States, due to their tradition of only incorporating international obligations into national law when required to do so by an international agreement. The codification of universal jurisdiction in domestic law, in turn, has an effect on the number of trials initiated in a state, if a state has not legislated for the jurisdiction, it is unlikely to prosecute the extraterritorial crime.

The decisions of the ICJ in the *Arrest Warrant Case* and in *Questions Relating to the Obligation to Prosecute or Extradite* also support the position that where a domestic law providing for universal jurisdiction based on the scope of an international treaty provision, it is concrete under international law. In the *Arrest Warrant Case*, a Belgian law that allowed for the exercise of universal jurisdiction *in absentia*, in respect of grave breaches of the Geneva Conventions committed in international and non-international armed conflict and crimes against humanity, was found in breach of international law. It is important to note that this law went beyond the scope of universal jurisdiction provided for in the grave breaches regime of the Geneva Convention, because it allowed for universal jurisdiction where the accused was not present in Belgium and applied universal jurisdiction to the crime when committed in a non-international armed conflict. Thus, the Belgian law expanded the scope of universal jurisdiction in the grave breaches regime to apply to non-international armed conflict, which is not supported by the content of the grave breaches regime in the Geneva Conventions, which applies to international armed conflicts only. In contrast, in *Questions Relating to the Obligation to Prosecute or Extradite*, the ICJ found in favour of Belgium

[46] This information is from the United Nations Treaty Collection, which is the secretariate for treaties under international law. Information accessed 25 March 2022. Information accessed 25 March 2022.

[47] Devika Hovell, 'The authority of Universal Jurisdiction' (2018) 29(2) *European Journal of International Law* 427-456, 435 citing Kevin Jon Heller, 'What Is an International Crime? (A Revisionist History)', (2017) 58(2) *Harvard International Law Journal* 353-420. This corresponds to the information submitted by States to the UNGA regarding their universal jurisdiction laws, see information on the crimes over which States have legislated for universal jurisdiction in the appendices of the reports of the UN Secretary General 2010-2021.

when it sought to have the former President of Chad, Hissène Habré, extradited to Belgium to be prosecuted for torture under its universal jurisdiction laws. Notably, in the latter case, Belgium sought to exercise universal jurisdiction within the scope of the obligation to prosecute of extradite, as set out in UNCAT.

Judging from ICJ case law, where a domestic law providing for universal jurisdiction originates from the provisions of an international treaty and stays within the scope of that treaty, the domestic law is viewed as sound international law. This position mirrors the hierarchy of sources of international law that stems from Article 38 of the ICJ Statute.

UNIVERSAL JURISDICTION UNDER CUSTOMARY INTERNATIONAL LAW

Customary international rule formation plays an important part in the creation of humanitarian-based norms in international law. The required components of customary rule formation have been addressed a number of times by the ICJ and other influential legal bodies.[48] For a rule to have evolved into a binding legal norm, there must be the requisite general practice or State practice (or *usus* or *diuturnitas*) and *opinio juris* (or *opinio necessitatis*).[49] The former consists of the conduct of States, which the International Law Commission (ILC) defines as 'conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions'.[50] This component is referred to as the 'objective element' of customary rule formation.[51] The latter component refers to State action carried out in the belief that a rule should be followed, the ILC defines *opinio juris* as, '[t]he requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with

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[48] See *North Sea Continental Shelf Case (Federal Republic of Germany/ Denmark; Federal Republic of Germany/ Netherlands)* (Judgment) [1969] ICJ Rep 3; *Nicaragua Case* (*Nicaragua v United States of America*) (merits) [1986] ICJ Rep 14. From 2012-18, the International Law Commission (ILC) included the topic, 'the Identification of Customary International Law' in its programme of work, see < https://legal.un.org/ilc/guide/1_13.shtml> accessed 26 March 2022.

[49] *North Sea Continental Shelf Case (Federal Republic of Germany/ Denmark; Federal Republic of Germany/ Netherlands)* (Judgment) [1969] ICJ Rep 3; *Nicaragua Case* (*Nicaragua v United States of America*) (merits) [1986] ICJ Rep 14; Antonio Cassese, *International Law* (2nd edn, Oxford University Press, 2005), p. 157; ILC, 'Draft conclusions on identification of customary international law 2018' UN Doc. A/73/10, conclusion 5.

[50] ILC, 'Draft conclusions on identification of customary international law 2018' UN Doc. A/73/10, conclusion 5.

[51] ILC, Draft conclusions on identification of customary international law, with commentaries 2018', UN Doc. A/73/10, p 129.

a sense of legal right or obligation'.[52] This is the 'subjective element' of customary rule formation.[53] As declared by the ICJ in the *North Sea Continental Shelf Case,* it is integral that States carry out the conduct in the conscious belief that a rule should be followed.[54] As Anthea Roberts and Sandesh Sivakumaran note, 'State practice refers to general and consistent practice by States, while *opinio juris* means that the practice is accepted as law. Consistent international practice alone does not create a rule of customary international law'.[55]

The extent of State practice that is required for a customary rule to become binding has been referred to by the ICJ on a number of occasions. Originally, the Court declared that State practice should be '…both extensive and virtually uniform in the sense of the provision invoked…'.[56] This stringent test was relaxed somewhat in the famous ICJ *Nicaragua* litigation, where it was held that, '[t]he Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule'.[57] This statement is cited as evidence that State practice need not be absolutely uniform.[58]

The question arises as to what level of general practice is required in order for that rule to crystallise as a norm of customary international law. At this juncture, the Expert would like to draw the Court's attention to the International Law Commission's Draft Conclusions on the Identification of Customary International Law and commentary, which provide direction on the methodology for identifying the rules of customary international law and their scope.[59] Conclusion 8 states:

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[52] ILC, 'Draft conclusions on identification of customary international law 2018' UN Doc. A/73/10, conclusion 9.
[53] ILC, Draft conclusions on identification of customary international law, with commentaries, (UN Doc. A/73/10, 2018), p. 138.
[54] *North Sea Continental Shelf Case (Federal Republic of Germany/ Denmark; Federal Republic of Germany/ Netherlands)* (Judgment) [1969] ICJ Rep 3, para 77.
[55] Anthea Roberts and Sandesh Sivakumaran, 'The Theory and Reality of Sources of International Law' in in Malcolm D Evans (ed.), *International Law* (5th edn, Oxford University Press, 2018), p. 92.
[56] *North Sea Continental Shelf Case (Federal Republic of Germany/ Denmark; Federal Republic of Germany/ Netherlands)* (Judgment) [1969] ICJ Rep 3, para 74.
[57] *Nicaragua Case* (*Nicaragua v United States of America*) (merits) [1986] ICJ Rep 14, para 186.
[58] Antonio Cassese, *International Law* (2nd edn, Oxford University Press, 2005), p157.
[59] ILC, Draft conclusions on identification of customary international law, with commentaries 2018', UN Doc. A/73/10.

> 1.The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.
> 2.Provided that the practice is general, no particular duration is required.

In respect of this conclusion, the ILC commentary affirms:

> …[N]o absolute standard can be given for either requirement; the threshold that needs to be attained for each has to be assessed taking account of context. In each case, however, the practice should be of such a character as to make it possible to discern a virtually uniform usage. Contradictory or inconsistent practice is to be taken into account in evaluating whether such a conclusion may be reached.[60]

Thus, for the application of universal jurisdiction over a crime to have crystallised as a norm of customary international law, this threshold of general practice must be established.

Acceptance of general practice as law or *opinio juris* dictates that the practice must be 'undertaken with a sense of legal right or obligation',[61] and this component 'is to be distinguished from mere usage or habit.[62] The ILC also affirm that what constitutes forms of evidence of acceptance as law or *opinio juris* encompasses 'a wide range of forms' that includes 'both physical and verbal acts', and may also 'under certain circumstances, include inaction'.[63] The key here is that the state action or inaction is carried out in the belief that it is law. There is no hierarchy of sources of evidence of State practice, and such sources include:

> [D]iplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct

[60] ILC, Draft conclusions on identification of customary international law, with commentaries 2018', UN Doc. A/73/10, p 136.
[61] ILC, 'Draft conclusions on identification of customary international law 2018' UN Doc. A/73/10, Conclusion 9(1).
[62] ILC, 'Draft conclusions on identification of customary international law 2018' UN Doc. A/73/10, Conclusion 9(2).
[63] ILC, 'Draft conclusions on identification of customary international law 2018' UN Doc. A/73/10, Conclusion 6.

> "on the ground"; legislative and administrative acts; and decisions of national courts.[64]

Evidence of *opinio juris* includes, and is not limited to:

> Public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.[65]

In particular, treaties and resolutions of international organizations and intergovernmental conferences provide examples of evidence of rules of customary international law, so long as these sources meet the two-element test.[66] Decisions of courts and tribunals and the teachings of the most highly qualified publicists are subsidiary sources of evidence of rules of customary international law.[67]

Regarding the application of universal jurisdiction to crimes under customary international law, using the traditional two element test of *opinio juris* and State practice, it is questionable

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[64] ILC, 'Draft conclusions on identification of customary international law 2018' UN Doc. A/73/10, Conclusion 6(2).
[65] ILC, 'Draft conclusions on identification of customary international law 2018' UN Doc. A/73/10, Conclusion 10(2).
[66] Conclusions 11 reads: 1.A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:
(*a*) codified a rule of customary international law existing at the time when the treaty was concluded;
(*b*) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or
(*c*) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.
2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.
Conclusion 12 reads:
Resolutions of international organizations and intergovernmental conferences
1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.
2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development.
3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).
[67] ILC, 'Draft conclusions on identification of customary international law 2018' UN Doc. A/73/10, Conclusions 11-14.

whether the application of the principle to other crimes, including genocide and crimes against humanity, has reached the same status. It is one thing for an act to be designated as a crime under international law and another thing for universal jurisdiction to apply to that crime. If an act has reached the status of a crime under international law, it does not automatically mean that universal jurisdiction applies to that crime. Moreover, it is even more difficult to demonstrate that universal jurisdiction applies to an 'ordinary criminal offence', such as murder or assault, under customary international law. As Devika Hovell notes, '[t]he customary international law yardstick – requiring proof of state practice and *opinio juris*, where the relevant state practice must be "widespread and representative, as well as consistent" – proves a difficult measure in the case of universal jurisdiction'.[68] Perhaps, this fact is one reason why former President of the ICJ, Gilbert Guillaume, asserted '[I]nternational law knows only one true case of universal jurisdiction: piracy' in the *Arrest Warrant Case*.[69] One of the reasons why it is difficult for universal jurisdiction to meet the customary international law criteria is due to the fact of its subsidiary nature, which makes it rare.[70] It I never supposed to be the first choice for prosecution of an international crime, as the territorial State has priority to try the offender. In relying on state officials to create custom, universal jurisdiction meets another barrier to the formation of customary law, because the jurisdiction is used to prosecute state officials.[71]

Looking to the crime of genocide, as an example, it is clear that genocide has been recognised as a crime under customary international law for quite some time,[72] it is less clear as to whether the application of the universality principle to the crime of genocide forms part of customary international law, if one relies on the traditional two-component test of *opinio juris* and state practice. This situation has arisen because there are difficulties in pronouncing the crystallisation of this rule in customary international law, under the two traditional

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[68] Devika Hovell, 'The Authority of Universal Jurisdiction' 29 *European Journal of International Law* (2018) 427-456, p 433.

[69] Separate Opinion of President Guillaume, *Case Concerning the Arrest Warrant of 11 April 2000*, ICJ, 14 February 2002, at para 12. See also the Joint Separate Opinion of Judges Higgins, Koojimans and Buergenthal in this case.

[70] Devika Hovell, 'The authority of Universal Jurisdiction' (2018) 29(2) *European Journal of International Law* 427-456, p 435.

[71] Devika Hovell, 'The authority of Universal Jurisdiction' (2018) 29(2) *European Journal of International Law* 427-456, p 435.

[72] UNGA Resolution 96(I) 1946. In the Canadian case of Munyaneza, the Court of Appeal asserted that genocide was a crime under customary international law 'long before 1994', *Prosecutor v Munyaneza*, Court of Appeal, 2014 QCCA 906, at para 26.

components of customary rule formation.[73] There is little evidence of sufficient general practice to warrant the realisation of the principle as a rule under customary international law,[74] given the few examples of domestic prosecutions of genocide under the principle of universal jurisdiction.

Yet, this lack of evidence of the crystallization of a concrete rule has not prevented states from relying on the principle, and citing customary international law as the source permitting them to do so.[75] Here, such national courts are placing more emphasis on *opinio juris* rather than state practice to come to this finding. Such statements from national courts are made without conducting an analysis of whether state practice and *opinio juris* have been met. Perhaps it is for this reason that the ILC Draft conclusions on the identification of customary international law declare, '[r]egard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules'.[76] Moreover, if the national courts take the occasion to embark on such a study, it is highly likely that they would find that sufficient general practice and *opinio juris* is lacking in respect of genocide, crimes against humanity, not to mention ordinary criminal offences.

When States utilise universal jurisdiction outside of an international treaty provision, they often cite the source as universal jurisdiction based under customary international law. Support for the proposition that *opinio juris* is more persuasive than State practice in the formation of customary international human rights can be found in scholarly writing.[77]

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[73] On this point see Devika Hovell, 'The Authority of Universal Jurisdiction' 29 *European Journal of International Law* (2018) 427-456, p. 433.

[74] Furthermore, it is questionable whether the practice of states exercising universality would meet the standard set by the ILC in its examination of the 'Identification of Customary International Law', see ILC, 'Identification of Customary International Law: Text of the draft conclusions as adopted by the Drafting Committee on second reading', UN Doc. A/CN.4/L.908*, 17 May 2018.

[75] See for example, *Attorney General of the Government of Israel v. Eichmann*, Israel Supreme Court 1962 published in 36 *International Law Reports* (1968) 277-344; *Attorney General of the Government of Israel v Eichmann*, District Court of Jerusalem 1961 published in 36 *International Law Reports* (1968) 59 (*Attorney General v Eichmann*; *Eichmann*).; *Guatemala Genocide Case*, judgment no. STC 237/2005, Constitutional Tribunal (Second Chamber), 26 September 2005, unofficial translation available at https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/6CDD72AEA4C2FC4AC1257102003B836B, accessed 25 March 2022.

[76] ILC, 'Draft conclusions on identification of customary international law 2018' UN Doc. A/73/10, Conclusion 13(1).

[77] Theodor Meron, *Human Rights and Humanitarian Norms* (Clarendon Press, 1989); Louis Henkin, *The Age of Rights* (Columbia University Press, 1990); Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff Publishers, 1991).

However, there is a legal fault with this finding, as the components of customary international law have not been met. This right is said to originate in customary international law.[78] As noted by the ILC Chairperson for the work on customary international law, Sir Michael Wood, allowing *opinio juris* to be the sole requirement for the formation of a fundamental human rights norm would fragment the rules of formation of customary international law.[79]

Let it be remembered that in the *Arrest Warrant Case*, Belgium sought to rely on the argument that universal jurisdiction *in absentia* was a principle of customary international law. This argument was rejected by the ICJ because, as noted by President Guillaume, 'the national legislation and jurisprudence cited in the case file do not support the Belgian argument'.[80] In other words, there was insufficient *opinio juris* and state practice to support this argument. On this point, the Expert reminds the court that in order for a norm of international law to have reached the status of customary international law, it must have the required *opinio juris* and state practice.

Without an official study on what crimes other than piracy, grave breaches of the Geneva Conventions and torture come under the remit of universal jurisdiction under customary international law, one can look to the content of international treaties that provide for universal jurisdiction, as well as their negotiating history to give an insight into States opinion on universal jurisdiction and the crimes it applies to under international law. As part of their doctoral research, the Expert examined the negotiation of provisions providing for universal jurisdiction in respect of the following international treaties concerning international crimes: the Genocide Convention,[81] the Four Geneva Conventions of 1949 and

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[78] For example, see *Eichmann*, *supra* note 66; *Guatemala Genocide Case*, judgment no. STC 237/2005, Constitutional Tribunal (Second Chamber), 26 September 2005, unofficial translation available at https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/6CDD72AEA4C2FC4AC1257102003B836B (visited 23 July 2021); Institute de Droit International resolution on 'Universal Criminal Jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes' (2005), at p. 2; A. Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' 1 *Journal of International Criminal Justice* (2003) 589-595; Claus Kreß, 'Universal Jurisdiction over International Crimes and the Institut de Droit international' 4 *Journal of International Criminal Justice* (2006) 561-585.

[79] Michael Woods in 'Customary International Law and Human Rights' EUI working Papers, (AEL 2016/03 Academy of European Law, Distinguished Lectures of the Academy), p 7.

[80] Separate Opinion of President Guillaume, *Case Concerning the Arrest Warrant of 11 April 2000*, ICJ, 14 February 2002, at para 12.

[81] See also Amina Adanan, 'Reflecting on the Genocide Convention in its Eighth Decade: How Universal Jurisdiction Developed Over Genocide' (2021) 19(5) *Journal of International Criminal Justice* 1039-1065.

AP I, the Apartheid Convention, UNCAT, the CED, the Rome Statute and the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1999.[82]

The negotiating history of universal jurisdiction clauses in international treaties demonstrates that State views as to the support or non-support for universal jurisdiction varies according to the proposed crime. For example, in 1948, proposals to include a provision allowing for universal jurisdiction over genocide was explicitly excluded from the Genocide Convention.[83] In contrast, in 1949, there was no opposition from States to include universal jurisdiction within the grave breaches regime of the Geneva Conventions.[84] Similarly, during the negotiating history of UNCAT, in the early 1980s, the vast majority of States supported the inclusion of universal jurisdiction over torture within the *aut dedere aut judicare* framework.[85] However, in 1998, proposals to allow the International Criminal Court to operate on the basis of universal jurisdiction were rejected by powerful negotiating States.[86] Thus, in trying to identify which crimes universal jurisdiction applies to under customary international law, one must do so on a crime by crime basis, as opposed to identifying a general principle of universal jurisdiction under international law. The justifications for the inclusion of the principle in a treaty and the concerns raised by States that oppose the

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[82] Amina Adanan, 'Allies and enemies, past and present: An analysis of the rationale for the development of universal jurisdiction over serious crimes under international law' (Ph.D thesis, Irish Centre for Human Rights, National University of Ireland, Galway, 2017), pp.98-146, available at https://aran.library.nuigalway.ie/bitstream/handle/10379/7063/Amina%20Adanan%20thesis%20FINAL.pdf?sequence=1&isAllowed=y accessed 22 March 22.

[83] W. A. Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn., Cambridge: Cambridge University Press, 2009); Amina Adanan, 'Reflecting on the Genocide Convention in its Eighth Decade: How Universal Jurisdiction Developed Over Genocide' (2021) 19(5) *Journal of International Criminal Justice* 1039-1065.

[84] Jean Pictet, *Commentary on the Geneva Conventions of 1949* (ICRC, Geneva, 1952); Amina Adanan, 'Allies and enemies, past and present: An analysis of the rationale for the development of universal jurisdiction over serious crimes under international law' (Ph.D thesis, Irish Centre for Human Rights, National University of Ireland, Galway, 2017), pp.98-146, available at https://aran.library.nuigalway.ie/bitstream/handle/10379/7063/Amina%20Adanan%20thesis%20FINAL.pdf?sequence=1&isAllowed=y accessed 22 March 22.

[85] Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford University Press, 2008); Hans Danelius and Herman Burgers, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff Publishers, 1988).

[86] Amina Adanan, 'Allies and enemies, past and present: An analysis of the rationale for the development of universal jurisdiction over serious crimes under international law' (Ph.D thesis, Irish Centre for Human Rights, National University of Ireland, Galway, 2017), pp.189-202, available at https://aran.library.nuigalway.ie/bitstream/handle/10379/7063/Amina%20Adanan%20thesis%20FINAL.pdf?sequence=1&isAllowed=y accessed 22 March 22.

principle are raised time and time again. Those states in favour, cite the need to fight impunity for international crimes and the 'no safe haven' approach, whereby suspects should have no place to hide from prosecution. In contrast, those states against the inclusion of universal jurisdiction in an international treaty argue that it infringes the UN Charter, principally, the principles of State sovereignty and the equality of States. Ultimately, whether a State supports the application of universal jurisdiction to a crime will depend on that state's national interest.

The ongoing discussion before the Sixth Committee of the UNGA also shed light on *opinio juris* and general practice of States in relation to universal jurisdiction and the crimes to which it applies. As part of the process, a broad spectrum of States from all parts of the world have voiced their opinion on the principle of universal jurisdiction. The discussions show quite clearly that it cannot be said that there is consensus on the crimes to which universal jurisdiction applies under customary international law. In general, there is vast support for the principle *per se* and States largely support the justifications for the principle, but there are differences as to how it should operate in practice and the range of crimes to which it applies, so much so, that it is doubtful as to whether agreement will be met regarding the outcome of these discussions.

For example, in one of its submissions to the UNGA, the United Kingdom noted:

> '…[u]nder international law, universal jurisdiction in its true sense is only clearly established for a small number of specific crimes: piracy and war crimes, including grave breaches of the Geneva Conventions. The United Kingdom acknowledges that there is a further limited group of crimes which some States consider to attract universal jurisdiction, including genocide and crimes against humanity, but there is a lack of international consensus on the issue. These crimes are not underpinned by treaties providing for universal jurisdiction.[87]

Similarly, in 2021, Iran noted, on behalf of the Non-Aligned Movement:

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[87] United Kingdom submission (2011), available online at www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/UK&Northern Ireland.pdf, accessed 22 March 2022, at pp 3-4.

> Although universal jurisdiction provides a tool for the prosecution of the perpetrators of certain serious crimes under international treaties, there are questions and controversies concerning universal jurisdiction, including understanding the range of crimes that fall under this jurisdiction as well as the conditions for its application.[88]

The discussions at the UNGA show that there is general consensus among States that the primacy for the prosecution rests with the territorial state or the state of nationality,[89] with many states confirming that universal jurisdiction is an exceptional tool of last resort. There are practical reasons for this position, as the territorial state and state of nationality have best access to witnesses and evidence, as well as political reasons.

However, many concerns regarding the scope of universal jurisdiction have been raised by States, which has led to the lack of consensus with the debate before the UNGA Sixth Committee. There is considerable overlap with the concerns raised before the Sixth Committee and those raised by States during the negotiations of international treaties. As commented by the Sixth Committee of the UNGA in 2021:

> With respect to the application of universal jurisdiction, a number of delegations reaffirmed their concerns over the uncertain scope of the principle and its potential for abuse or misuse. Several delegations stressed that the principle must be applied in accordance with the Charter of the United Nations and international law. The importance of applying the principle respecting the sovereign equality of States, the

[88] Statement by Mr Mohammad Ghorbanpour of the Permanent Mission of the Islamic Republic of Iran to the UN on behalf of the Non-Aligned Movement on the Scope and Application of the Principle of Universal Jurisdiction, 21 October 2021, p 2.

[89] For example, see views of Mali in *Report of the Secretary-General: The scope and application of the principle of universal jurisdiction*, UN Doc. A/74/144, 11 July 2019, para 57; views of Australia in *Report of the Secretary-General: The scope and application of the principle of universal jurisdiction*, UN Doc. A/73/123, 3 July 2018, para 41; views of Spain in *Report of the Secretary-General: The scope and application of the principle of universal jurisdiction*, UN Doc. A/71/111, 28 June 2016, para 22; views of the EU in *Report of the Secretary-General: The scope and application of the principle of universal jurisdiction*, UN Doc. A/70/125, 1 July 2015, para 50; views of Chile in *Report of the Secretary-General: The scope and application of the principle of universal jurisdiction*, UN Doc. A/65/181, 29 July 2010, para 114; Observations of the African Union on the Scope and Application of the Principle of Universal Jurisdiction UAU Statement 2021, p 2; Statement of Ms Petra Langerholc of the Permanent Mission of Slovenia to the United Nations, 3-4 November 2020, p 3; Joint statement of Canada, Australia and New Zealand, 3 November 2020, p 2; Comments of Switzerland, *Report of the Secretary-General: The scope and application of the principle of universal jurisdiction*, UN Doc. A/75/151, 9 July 2020, p 4..

> territorial integrity of States and non-interference in the internal affairs of States, as well as the immunity of States officials was emphasised. A number of delegations further highlighted the need for its application to be in accordance with right to a fair trial and the rule of law.[90]

Similarly, Iran's submission in 2021 on behalf of the Non-Aligned Movement stated:

> The Non-Aligned Movement firmly believes that the principles enshrined in the Charter of the United Nations, particularly the sovereign equality of States as well as their political independence and non-interference in internal affairs of other States, should be strictly observed in any judicial proceedings.[91]

Most of the apprehension from States in relation to the impact of the principle on State sovereignty of the territorial State or State of nationality comes from nations in the Global South, whose nationals are more often prosecuted under the principle.

States have also expressed concern as to the list of crimes to which the principle of universal jurisdiction applies. Sweden and the Nordic Countries have expressed that they '...continue to urge caution against developing an exhaustive list of crimes for which universal jurisdiction would apply', stating that they 'agree that any form of misuse of prosecutorial powers would be of grave concern and should be prevented from occurring'.[92] This view is also shared by Iran and the Non-Aligned Movement.[93]

Additionally, UK affirmed that a collaborative approach by States is required to determine the crimes to which the jurisdiction applies. However, it noted that it:

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[90] UN General Assembly, Sixth Committee (Legal)- 76th session, 2021 <www.un.org/en/ga/sixth/76/universal_jurisdiction.shtml> , accessed 22 March 2022.

[91] Statement by Mr Mohammad Ghorbanpour of the Permanent Mission of the Islamic Republic of Iran to the UN on behalf of the Non-Aligned Movement on the Scope and Application of the Principle of Universal Jurisdiction, 3 November 2020, p 1.

[92] Statement by Sweden on behalf of Nordic countries, 27/28 October 2020, p 2.

[93] 'The Non-Aligned Movement cautions against the unwarranted expansion of the crimes under universal jurisdiction', see Statement by Mr Mohammad Ghorbanpour of the Permanent Mission of the Islamic Republic of Iran to the UN on behalf of the Non-Aligned Movement on the Scope and Application of the Principle of Universal Jurisdiction, 3 November 2020, p 2. Slovenia also cautions about defining a specific list of crimes to which the jurisdiction applies, see Statement of Ms Petra Langerholc of the Permanent Mission of Slovenia to the United Nations, 3-4 November 2020, p 2.

> …[C]ontinues to consider that the lack of consensus between States on the nature, scope and application of universal jurisdiction indicates that it would be premature to take a definitive view on the crimes to which universal jurisdiction should apply or on a methodology to determine such crimes.[94]

Thus, it is clear that States are reluctant to produce a definitive list of crimes to which the principle of universal jurisdiction applies.

It is generally believed that when universal jurisdiction is utilised by states to prosecute international crimes, where it is not expressly provided for in an international treaty, that it is a right of states and not a duty.[95] This position is in part because the exercise of the principle is not based on an international treaty obligation. One of the justifications put forward national courts exercising universal jurisdiction outside of an international treaty framework is that they are relying on what is known as the 'Lotus principle' in international law. The Lotus Principle emanates from the *Case of the SS Lotus (France v Turkey)*, before the Permanent Court of International Justice in 1927.[96] Here, a French steamer, the *SS Lotus*, collided with a Turkish vessel, the *Boz-Kourt*, on the high seas, which resulted in the deaths of eight Turkish nationals. After the collision, the Turkish authorities arrested, detained and tried the French captain of the *Lotus* for manslaughter under a pre-existing law that enabled this action. The French Government challenged the authority of Turkey to try a French citizen under the passive personality principle (as provided under Article 6 of the Turkish penal code at the time), and initiated proceedings before the PCIJ. In the proceedings, the French Government relied on the 'permissive rule' approach to extraterritorial jurisdiction and argued that there was no rule of international law that authorised Turkey to exercise enforcement jurisdiction in this way.[97] On the other hand, Turkey argued that it could exercise its criminal law to the extent that it did not interfere with a principle of international law.

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[94] Statement of the United Kingdom of Great Britain and Northern Ireland, 3 November 2020, p 3.
[95] *Polyukhovitch* v *The Commonwealth* (1991) 172 CLR 501, § 35; *Public Prosecutor v Jorgić*, Oberstes Landesgericht Düsseldorf, 26 September 1997 (Appeal judgment); Bundesgerichtshof (Federal Supreme Court), 30 April 1999. See also W. B. Cowles, 'Universality of Jurisdiction Over War Crimes (1945) 33 (2) *California Law Review* 177-218, p. 217.
[96] *Lotus Case (France v Turkey)* PCIJ Rep Series A No 10 (7 September 1927).
[97] *Lotus Case (France v Turkey)* PCIJ Rep Series A No 10 (7 September 1927), pp 19-22.

The PCIJ found that states can exercise extraterritoriality to the extent that it does not conflict with a rule of international law. It affirmed, '…all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty'.[98] Thus, the Court affirmed that the exercise of jurisdiction by a State is firmly linked to its sovereignty under international law. The PCIJ stated that this principle, known as the '*Lotus* principle', applied to both civil and criminal matters.[99] The Court then moved on to consider whether such a rule preventing the enforcement jurisdiction of Turkey existed under international law, finding that no such rule existed.[100]

In this case, the question for the court was whether Turkey had jurisdiction under international law to prosecute and whether international law prohibited Turkey from exercising criminal jurisdiction over the French subject. The Expert would like to draw the Court's attention to the fact that in this case Turkey was exercising the passive personality principle and not universal jurisdiction. The effects of the collision were felt by Turkey, which distinguishes this case from the case at hand. Thus, there was a definitive link between the forum State and the extraterritorial crime. As the PCIJ commented:

> Consequently, once it is admitted that the effects of the offence were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting Lieutenant Demons because of the fact that the author of the offence was on board the French ship'.[101]

Moreover, Turkey was conducting the prosecution on the basis of a law that existed before the collision on the High Seas, so the issue of *nullem crimen sine lege* did not arise.

When States exercise universal jurisdiction over a crime and rely on the *Lotus* principle to do so, they are vulnerable to a challenge from the territorial State or State of nationality of the accused as to the legality of their action. Although, this question has yet to be decided on by the International Court of Justice, the decision in the *Arrest Warrant Case*, and the *obiter dictum* statements of the Judiciary suggest that the Court would take a conservative narrow

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[98] *Lotus Case (France v Turkey)* PCIJ Rep Series A No 10 (7 September 1927), p 19.
[99] *Lotus Case (France v Turkey)* PCIJ Rep Series A No 10 (7 September 1927), p 20.
[100] *Lotus Case (France v Turkey)* PCIJ Rep Series A No 10 (7 September 1927), p 26.
[101] *Lotus Case (France v Turkey)* PCIJ Rep Series A No 10 (7 September 1927), p 23

approach to the exercise of universal jurisdiction outside of a treaty norm or a principle of customary international law. Moreover, *Arrest Warrant Case*, and indeed the wider ICJ case law on customary international law, also tells us that the ICJ will not declare a principle to have reached the status of customary international law where sufficient evidence of State practice and *opinio juris* is absent. It is one thing for scholars to assert the application of universal jurisdiction to a set of crimes as provided for under customary international law and quite another for this principle to meet the threshold of *opinio juris* and state practice. Commenting on the Joint separate opinion by Judges Higgins, Kooijmans and Buergenthal in her recent article on universal jurisdiction, Dr Devika Hovell notes:

> In their review of the writings of eminent jurists, many of whom had previously declared universal jurisdiction to be a principle of customary international law, Judges Higgins, Kooijmans and Buergenthal (in a polite, though clear, rebuke) remarked that these writings, "important and stimulating as they may be", "cannot serve to substantiate an international practice where virtually none exists".[102]

Using the two-component test of customary international law, it is impossible to say that universal jurisdiction applies to crimes other than piracy, grave breaches of the Geneva Conventions and torture under customary international law. Here, a paradox arises, as many States do not legislate for universal jurisdiction unless it is an obligation in an international treaty.[103] This in turn means that it difficult to establish the component of general practice, as required for a rule to crystallise under customary international law. Notwithstanding the recent increase in cases under universal jurisdiction,[104] such cases and investigations are relatively rare as the principle is relied on on a subsidiary basis, with most proceedings occurring in Europe. This lack of distribution of investigations and prosecutions, means that it is difficult to find international general practice that is required for a rule to be part of customary international law. Moreover, the few cases and investigations is one of the reasons why it is difficult for universal jurisdiction to meet the customary international law criteria.[105]

[102] Devika Hovell, 'The authority of Universal Jurisdiction' (2018) 29(2) *European Journal of International Law* 427-456, p 433.
[103] For example, as noted by the American Law Institute,
[104] See annual reports on universal jurisdiction cases published by TRIAL and others since 2016.
[105] Devika Hovell, 'The authority of Universal Jurisdiction' (2018) 29(2) *European Journal of International Law* 427-456, p 435.

THE APPLICATION OF UNIVERSAL JURISDICTION TO ORDINARY CRIMES

The principle of universal jurisdiction is an exceptional form of jurisdiction which does not apply to all criminal offences. As the American Law Institute's *Fourth Restatement of the Law, on Foreign Relations Law of the United States* affirms, 'universal jurisdiction is limited to the most serious offenses about which a consensus has arisen for the existence of universal jurisdiction'.[106] The unique nature of the principle, which does not require a link between the forum State and the extraterritorial crime, is associated with what are known as international crimes. The reason for this nexus is primarily historical. The first crime to which universal jurisdiction ever applied was piracy *jus gentium* or piracy on the high seas, as such international piracy was the first 'international crimes'.[107] The principle was justified on the grounds that the crime, when committed was so heinous that it affected the whole of mankind.[108] The perpetrator lost their nationality and became *hostis humanis generis* or an enemy of mankind, which in turn meant that any State could prosecute them.[109] Overtime, this narrative was transferred to other offences deemed to be 'international crimes', for example genocide, crimes against humanity and war crimes, as illustrated in national case law.[110]

Today, universal jurisdiction remains associated with serious violations of international law, notwithstanding the lack of a formal crystallisation of such a rule under customary international law. This association can be seen in the negotiation of international treaties concerning international crimes as well as in the ongoing discussions before the Sixth Committee of the UNGA. Outside of international treaties, there is a lack of consensus as to what crimes are subject to universal jurisdiction, however, there is broad consensus that the principle is connected to international crimes. As stated in the American Law Institute *Fourth Restatement of Foreign Relations Law of the United States*:

> International law recognizes a state's jurisdiction to prescribe law with respect to certain offenses of universal concern, such as genocide, crimes against humanity, war

[106] American Law Institute, *Restatement of the Law, 4th, Foreign Relations Law of the United States* (published by the American Law Institute, 2018), p. 212.
[107] Rubin AP, *The Law of Piracy* (2nd ed, Transnational Publishers, 1998).
[108] *King v Marsh* (1615) 3 Bulstr 27.
[109] *King v Marsh* (1615) 3 Bulstr 27.
[110] Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, 2002).

> crimes, certain acts of terrorism, piracy, the slave trade, and torture, even if no specific connection exists between the state and the persons or conduct being regulated.[111]

The statements and declarations made by States, international organisations and non-governmental organisations to the UNGA also confirm this nexus. In its statement, the International Committee of the Red Cross affirmed that, '[s]tates have increasingly recognized the principle of universal jurisdiction as an important means to end impunity for the commission of serious violations of IHL and other international crimes'.[112] As commented by Chile in its statement to the UNGA in 2021, universal jurisdiction is:

> An exception to the principle of territoriality, which is the general rule, universal jurisdiction is applicable only in criminal matters, in relation to serious crimes under international law, in particular crimes against humanity, war crimes and genocide, in order to prevent impunity for such crimes.[113]

In its statement in 2021, Germany affirmed universal jurisdiction as a 'tool to pursue accountability for the worst international crimes'.[114] Canada, New Zealand and Australia commented, 'Nos pays estiment que la comptence universelle constitue un principe de droit international bien établi, applicable aux crimes internationaux les plus graves et qui portent atteinte aux intérêts de tous les États, ce qui justifie une dénonciation universelle ou mondiale'.[115] Similarly, the Czech Republic commented that universal jurisdiction applies to 'crimes under international law',[116] while the Slovenia stated that '…universal jurisdiction does not apply to all crimes, but only to the most serious crimes under international law

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[111] American Law Institute, *Restatement of the Law, 4th, Foreign Relations Law of the United States* (published by the American Law Institute, 2018), s. 413, p 210.
[112] Statement of the International Committee of the Red Cross, General Debate on the Scope and Application of the Principle of Universal Jurisdiction, 22 October 2021, p 2.
[113] Statement of Chile to the Sixth Committee 2021, p. 1.
[114] Statement of Germany to the Sixth Committee on 'The Scope and application of the principle of universal jurisdiction' October 2021, p 1.
[115] Statement 2020, p 2.
[116] Statement of the Permanent Mission of the Czech Republic to the United Nations on the Scope and application of the principle of universal jurisdiction, 3 November 2020, p 1.

whose abhorrent nature merits its application, such as war crimes, genocide, crimes against humanity, slavery, torture and piracy'.[117]

The connection between universal jurisdiction and international crimes can be seen in the national laws of States. Many States incorporated universal jurisdiction into their national laws after ratifying the Rome State, notwithstanding that the Rome Statute does not obligate States parties to exercise universal jurisdiction. In Germany, the 2002 Code for Crimes against International Law (Volkerstrafgesetzbuch) allows for Germany to prosecute genocide, crimes against humanity and war crimes under the principle of universal jurisdiction. This legislation was introduced to give effect to Germany's obligations under the Rome Statute. Germany is one of the countries in Europe exercising universal jurisdiction on a regular basis, and at present, there are over 100 investigations into international crimes ongoing in Germany.[118] Canada enacted the Crimes Against Humanity and War Crimes Act in 2000 to give effect to its obligations under the Rome Statute. This legislation also provides for the exercise of universal jurisdiction over genocide, crimes against humanity and war crimes. Canada has reported two cases concerning war crimes, genocide and crimes against humanity.[119]

In the UK, the International Criminal Court Act 2001, as amended, provides for extraterritorial over genocide, crimes against humanity and war crimes, so long as there is a connection between the accused and the UK. The UK has legislated for universal jurisdiction over grave breaches of the Geneva Conventions and international piracy. In Switzerland, universal jurisdiction applies to crimes against humanity and war crimes and is currently prosecuting these crimes committed in Liberia.[120] Some states have incorporated universal jurisdiction in relation to transnational crimes. For example, Costa Rica has legislated for the

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[117] Statement of Ms Petra Langerholc of the Permanent Mission of Slovenia to the United Nations, 3-4 November 2020, p 2.

[118] Statement of Germany to the Sixth Committee on 'The Scope and application of the principle of universal jurisdiction' October 2021, p 2.

[119] *Report of the Secretary-General: The scope and application of the principle of universal jurisdiction*, UN Doc. A/75/151, 9 July 2020, p 6.

[120] Statement of Switzerland on the scope and application of the principle of universal jurisdiction, 30 April 2021.

crime of transnational bribery,[121] while Qatar has legislated for universal jurisdiction over human trafficking and money laundering.[122]

A minority of States have legislated for universal jurisdiction over ordinary crimes. In 2012, a study by Amnesty International found that 75.1.% of the 193 UN member States had laws in place to exercise universal jurisdiction over at least one of the following crimes: genocide, war crimes, crimes against humanity and torture.[123] In contrast, the study also found that approximately 47.1% of the States had legislated to exercise universal jurisdiction over 'ordinary crimes, even when the conduct does not involve conduct amounting to a crime under international law'.[124] Examples of such States are Austria, Denmark, Germany, Norway,[125] and Finland,[126] and Sweden.[127]

Prosecuting an international crime under ordinary legislation raises a fundamental issue, namely that the nature of the international crime, in the sense of its gravity is not reflected in the punishment.[128] Indeed, the ordinary crime is unlikely to reflect the severity or true nature of the international crime. For example, in *Prosecutor v. Bagaragaza*, the International Criminal Tribunal for Rwanda refused to transfer a case to Norway on the grounds that the crime of genocide, which requires a specific *mens rea*, could not be adequately prosecuted under the ordinary crime of murder.[129] Moreover, the modes of criminal responsibility that

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[121] *Report of the Secretary-General: The scope and application of the principle of universal jurisdiction*, UN Doc. A/76/203, 21 July 2021, para 11.
[122] *Report of the Secretary-General: The scope and application of the principle of universal jurisdiction*, UN Doc. A/76/203, 21 July 2021, para 18.
[123] Amnesty International, 'Universal Jurisdiction: A Preliminary Survey of Legislation around the World' (2011), p 12, available at https://www.amnesty.org/en/documents/ior53/004/2011/en/, accessed 22 March 2022.
[124] Amnesty International, 'Universal Jurisdiction: A Preliminary Survey of Legislation around the World' (2011), p 12, available at https://www.amnesty.org/en/documents/ior53/004/2011/en/, accessed 22 March 2022.
[125] Amnesty International, 'Universal Jurisdiction: A Preliminary Survey of Legislation around the World' (2011), p 14, available at https://www.amnesty.org/en/documents/ior53/004/2011/en/, accessed 22 March 2022.
[126] Open Society Justice Initiative and TRIAL International, 'Universal Jurisdiction Law and Practice in Norway' (January, 2019), p 5, available at www.justiceinitiative.org/publications/universal-jurisdiction-law-and-practice-in-norway, accessed 22 March 2022.
[127] Swedish Criminal Code, Chapter 3, Section 1, as amended.
[128] Amnesty International, 'Universal Jurisdiction: A Preliminary Survey of Legislation around the World' (2011), p 14, available at https://www.amnesty.org/en/documents/ior53/004/2011/en/, accessed 22 March 2022.
[129] *Prosecutor v. Bagaragaza*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway, Case No. ICTR-2005-86-11 bis, Trial Chamber, 19 May 2006,

apply under international criminal law, such as command responsibility, do not apply to ordinary crimes.[130]

The vast majority of prosecutions under universal jurisdiction are for serious violations of international law, where it stems from an obligation in an international treaty, as opposed to ordinary offences, such as murder. Moreover, in her survey of the 52 completed trials under universal jurisdiction since the *Eichmann* Trial, Dr. Devika Hovell noted that:

> It is also significant that over 30 of the 52 completed trials involve prosecutions for war crimes and torture, with the judgments in these trials reflecting that jurisdiction was exercised pursuant to domestic legislation implementing a treaty 'obligation to prosecute' rather than a belief that the right to exercise universal jurisdiction exists independently under customary international law.[131]

Using the two-component test for customary international law, as outlined above, it cannot be said that the application of universal jurisdiction to the ordinary crime of murder has reached the status of customary international law. This position is due to the fact that the requisite State practice and *opinio juris* have been met. Moreover, no international treaty provides for the application of universal jurisdiction to murder outside of the act constituting a serious violation of international law, such as a grave breach of the Geneva Conventions or apartheid. The expert would like to draw the Court's attention to the fact that this legal situation means that if a state exercises universal jurisdiction over the ordinary crime of murder, its actions do not stem from a rule of international law. Moreover, the exercise of universal jurisdiction over murder, as in this case, does not originate from an international obligation.

States, such as Sweden, that exercise universal jurisdiction over murder, may argue that they are acting on the basis of the *Lotus Principle* under international law. At this juncture, it is important to note that because a State is exercising its enforcement jurisdiction over an extraterritorial crime does not automatically mean that its actions are in line with the rules of

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para. 16

[130] Amnesty International, 'Universal Jurisdiction: A Preliminary Survey of Legislation around the World' (2011), p 14, available at https://www.amnesty.org/en/documents/ior53/004/2011/en/, accessed 22 March 2022.

[131] Devika Hovell, 'The authority of Universal Jurisdiction' (2018) 29(2) *European Journal of International Law* 427-456, p 434.

international law. The *Arrest Warrant* Case illustrates that where there is no link between the forum State and the extraterritorial crime, there are limits to the actions of the forum State, particularly where that State cannot rely on a rule of international law, because none exists. Moreover, it is also important to note that in the *Lotus Case*, there was a nexus between the forum State (Turkey) and the extraterritorial offence, because Turkish nationals were the victims of the crime. In addition, a Turkish registered vessel was involved in the collision on the high seas. Commenting on the nexus between Turkey and the offence in the *Lotus Case*, ICJ Guillaume commented in his Separate Opinion in the *Arrest Warrant Case*:

> Given that the case involved the collision of a French vessel with a Turkish vessel, the Court confined itself to noting that the effects of the offence: in question had made themselves felt on Turkish territory, and that consequently a criminal prosecution might "be justified from the point of view of this so-called territorial principle"[132]

Moreover, in the *Lotus Case*, Turkey was acting on the basis of a pre-existing law, which gave it enforcement jurisdiction in respect of murder and other ordinary offences committed against its nationals.

The Expert would also like to highlight to the Court that the retrospective application of a national law, to an act that occurred prior to the enactment of that law, where the national law is not based on a rule of international law that existed at the time of the act, raises serious concerns in respect of the prohibition of the non-retrospective application of law. As Professor Roger O'Keefe has noted, 'the nexus relied on to ground prescriptive jurisdiction over given conduct must exist at the time at which the conduct is performed. This is obvious in relation to territoriality.'[133] Here, it is worth noting that the ongoing prosecutions against Syrian nationals in Germany are being investigated and prosecuted on the basis of the 2002 Code for Crimes against International Law, which was enacted prior to the commission of the acts being prosecuted. As O'Keefe affirms:

[132] Separate Opinion of President Guillaume, *Case Concerning the Arrest Warrant of 11 April 2000*, ICJ, 14 February 2002 para 14 citing the *Lotus Case* at p 23.

[133] Roger O'Keefe, 'Universal jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735-760, p 742.

> The exercise of prescriptive jurisdiction on the basis of a jurisdictional nexus established subsequent to the commission of the offence is a form of *ex post facto* criminalization and, therefore, repugnant, in that a substantive national criminal prohibition and its attendant punishment - and not merely a national procedural competence - become applicable to the accused only after the performance of the impugned conduct.
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> …
>
> [T]he exercise by a state of prescriptive jurisdiction in reliance on a jurisdictional nexus not satisfied until after the commission of the "offence" means that, at the moment of commission, the "offender" is not prohibited by the law of that state from performing the relevant act; as such, his or her subsequent conviction and punishment for that act under the law of the state in question are violations of the principle of legality.[134]

At the time of the commission of the offence, the crime of murder was no doubt a 'general principles of law recognised by civilised nations'. However, it was not a crime to which universal jurisdiction applied outside of the act constituting an international crime, for the reasons explained above. As Devika Hovell has commented, '[a]ny rule navigating the difficult path from "becoming" to "being" faces the paradox that customary legal rules will only be recognized where a critical mass of states are willing to engage in practice, but, until the point it achieves such widespread acceptance, such practice is unsupported by law'.[135] Over time, if it is the case that more and more States legislate for and exercise universal jurisdiction over murder, a norm may develop to this effect under customary international law, however, at the present time such a norm has not crystallised. Moreover, no such norm existed at the time of commission of the offence in 1988.

It is also important to note that given the lack of consensus before the UNGA concerning agreement on the list of crimes to which universal jurisdiction applies, it is unlikely that

[134] Roger O'Keefe, 'Universal jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735-760, p 743.

[135] Devika Hovell, 'The authority of Universal Jurisdiction' (2018) 29(2) *European Journal of International Law* 427-456, 435.

States would agree to the application of universal jurisdiction to less serious crimes, such as ordinary criminal offences. In its statement on behalf of the Non-Aligned Movement, Iran affirmed:

> …[T]he Movement reiterates that universal jurisdiction shall not replace other jurisdictional bases namely territoriality and nationality and only asserted for the most serious crimes. Expansion of the principle to include any less than most heinous crimes could call into question its legitimacy. Moreover, it cannot be exercised in isolation or to the exclusion of other relevant rules and principles of international law...[136]

CONCLUSION

This Expert Opinion concludes that universal jurisdiction does not apply to murder, outside of the act constituting an international crime. Universal jurisdiction does not apply to murder as an ordinary criminal offence via an international treaty, nor does the principle apply to murder under customary international law. Specifically, in order for universal jurisdiction to apply to a crime under customary international law, there must be the required level of 'general practice that is accepted as law'.[137] In order for the principle of universal jurisdiction to have legitimacy, it must be exercised on the basis of an international treaty or a norm of customary international law. Or at least it must not go beyond limitations imposed by international law.

[136] Statement by Mr Mohammad Ghorbanpour of the Permanent Mission of the Islamic Republic of Iran to the UN on behalf of the Non-Aligned Movement on the Scope and Application of the Principle of Universal Jurisdiction, 3 November 2020, p 2

[137] ILC, 'Draft conclusions on identification of customary international law 2018' UN Doc. A/73/10, Conclusion 2.