

Universal Jurisdiction *in Absentia* Before Domestic Courts Prosecuting International Crimes: A Suitable Weapon to Fight Impunity?

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Abstract

This article addresses the legality and desirability of States asserting universal jurisdiction without the suspect being present on their territory when prosecuting international crimes before domestic courts. First the legality under international law of States asserting universal jurisdiction *in absentia* (or absolute universal jurisdiction) will be discussed. No comprehensive regulation in this regard appears to exist in codified international law. Based on State practice, it would seem that no customary law either fully permits or entirely prohibits States asserting absolute universal jurisdiction. Applying the *Lotus* paradigm, it could arguably be concluded that the lack of a prohibition under international law results in States being allowed to assert universal jurisdiction *in absentia* when prosecuting certain international crimes.

Having established its legality, this article will consequently approach absolute universal jurisdiction from a normative point of view, i.e. whether States *should* assert it. Although a tool in ending impunity of perpetrators of international crimes, it will be concluded that it is undesirable for States to assert absolute universal jurisdiction. Its use is likely to compromise fundamental rights of the accused and has a destabilizing effect on international relations while only suboptimally serving the goals of criminal prosecution.

A. Introduction

As the world is time and again confronted with horrible acts, the desire to prosecute perpetrators of the most heinous crimes continues to be a priority of the international community. In 1998 this led to the adoption of the *Rome Statute* and the subsequent establishment of the International Criminal Court (ICC) in 2002.¹ *The Rome Statute* has played a major role in the development of international criminal law. Not only was it the basis for establishing the ICC, it also obliged the parties to domesticate the criminalization of a number of international crimes by incorporating them into their national laws.² For some, however, the ICC has yet to live up to its expectations or should already be

¹ *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90.

² This obligation is based on the complementarity principle derived from the preamble, Article 1 and Article 17 of the *Rome Statute*, *supra* note 1; see, e.g., The Netherlands: *Kamerstukken II 2001/02*, 28337, 3 (Memorie van Toelichting Regels met betrekking tot ernstige schendingen van het internationaal humanitair recht (Wet internationale misdrijven)), 2. [Explanatory Memorandum to the Dutch International Crimes Act]; G. Werle & F. Jessberger, 'International Criminal Justice is Coming Home: The New

deemed to have failed.³ In 2016 this led to South Africa, Gambia and Burundi announcing their intention to withdraw from the *Rome Statute*,⁴ while Russia decided to withdraw its signature.⁵ It is hence necessary to consider alternatives to the ICC for the purpose of prosecuting alleged perpetrators of international crimes.

The alternative discussed here is absolute universal jurisdiction. It is also referred to as universal jurisdiction *in absentia* and is asserted by States prosecuting international crimes before their domestic courts. Invoking this type of jurisdiction, a State would be allowed to prosecute *any* alleged perpetrator of particular international crimes. After having shortly touched upon its definition and material scope, the first question to be considered is whether absolute universal jurisdiction is permitted under international law. Using case law from national and international courts (including the recent *Zimbabwe Torture Docket* case)⁶ and publications by both scholars and practitioners, it will be established whether international law allows for prosecution based on absolute universal jurisdiction. The second question has a policy character rather than being of a legal nature - addressing whether absolute universal jurisdiction *should* be

German Code of Crimes Against International Law', 13 *Criminal Law Forum* (2002) 2, 191, 214.

- ³ D. Robinson, 'Inescapable Dyads: Why the International Criminal Court Cannot Win', 28 *Leiden Journal of Int. Law* (2015) 2, 323, 331; E. Kontorovich, 'Three International Courts and their Constitutional Problems', 99 *Cornell Law Review* (2014) 6, 1353, 1354; M. Ssenyonjo, 'The International Criminal Court and the Warrant of Arrest for Sudan's President Al-Bashir: A Crucial Step Towards Challenging Impunity or a Political Decision?' 78 *Nordic Journal of International Law* (2009) 3, 397, 430; K. Thynne, 'The International Criminal Court: A Failure of International Justice for Victims?', 46 *Alberta Law Review* (2009) 4, 957, 958; J. Goldsmith, 'The Self-Defeating International Criminal Court', 70 *University of Chicago Law Review* (2003) 1, 89, 90.
- ⁴ L. Williams, 'Africa Turning its Back on International Criminal Court' (2016), available at <http://www.irishtimes.com/opinion/africa-turning-its-back-on-international-criminal-court-1.2915667> (last visited 20 December 2017); O. Bowcott, 'Rising Nationalism Leaves International Criminal Court at Risk' (2016), available at <https://www.theguardian.com/news/2016/dec/29/rising-nationalism-leaves-international-criminal-court-at-risk> (last visited 20 December 2017).
- ⁵ S. Walker & W. Bowcott, 'Russia Withdraws Signature from International Criminal Court Statute' (2016), available at <https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute> (last visited 20 December 2017).
- ⁶ *National Commissioner of The South African Police Service v. Southern African Human Rights Litigation Centre and Another*, (2014) Constitutional Court of South Africa, Case CCT 02/14 [Hereinafter: *Zimbabwe Torture Docket* case].

asserted from a normative point of view. By discussing both its legal basis and the policy aspects, this article hopes to provide some clarification on a perhaps slightly theoretical topic in international law. Seeing as States do however seem to assert universal jurisdiction *in absentia*, it is an endeavor worth undertaking.

B. Is Universal Jurisdiction *in Absentia* Legal Under International Law?

I. Definition and Material Scope

Genocide, crimes against humanity and war crimes are considered the most heinous crimes imaginable.⁷ The nature of these crimes is so cruel that they should not only be deemed a crime against specific victims, but as crimes against humankind itself.⁸ These crimes, referred to in the preamble to the *Rome Statute* as “the most serious crimes of concern to the international community as a whole”,⁹ should not go unpunished.¹⁰ This argument was often put forward after the Second World War, when the allied forces prosecuted high-ranking Nazis in Nuremberg.¹¹ The fight against impunity has played a role in the development of international criminal law ever since, and eventually led to the establishment of the ICC – a very tangible effect of the wish to end impunity. Yet a less concrete but perhaps more profound result has been the development of the principle

⁷ As to why heinous crimes are here limited to genocide, crimes against humanity and war crimes. See R. Cryer, ‘International Criminal Law’, in Malcolm D. Evans (ed.) *International Law* (2010), 752, 764; D. Turns, ‘Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium): The International Court of Justice’s Failure to Take a Stand on Universal Jurisdiction’, 3 *Melbourne Journal of International Law* (2002) 3, 383, 397; N. Arajarvi, ‘Looking Back from Nowhere: Is There a Future for Universal Jurisdiction over International Crimes?’, 16 *Tilburg Law Review* (2011) 1, 5, 7-8; C. C. Joyner, ‘Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability’, 59 *Law and Contemporary Problems* (1996) 4, 153, 169; K. C. Randall, ‘Universal Jurisdiction under International Law’, 66 *Texas Law Review* (1988) 4, 785, 829.

⁸ See section 3.2. below.

⁹ *Rome Statute of the International Criminal Court*, *supra* note 1, preamble.

¹⁰ United Nations Secretary-General, ‘The Scope and Application of the Principle of Universal Jurisdiction: Report of the Secretary-General Prepared on the Basis of Comments and Observations of Governments’, UN Doc. A/65/181, 2010, 4, 6.

¹¹ M. M. El Zeidy, ‘Universal Jurisdiction In Absentia: Is it a Legal Valid for Repressing Heinous Crimes?’ 37 *The International Lawyer* (2003) 3, 835, 840-41; G. A. Finch, ‘The Nuremberg Trial and International Law’, 41 *American Journal of International Law* (1947) 1, 20, 22.

of universal jurisdiction. This concept allows States to prosecute any alleged perpetrator of international crimes.

As noted in the ICJ's *Arrest Warrant* case,¹² due to the "loose use of language",¹³ universal jurisdiction is not truly universal. The concept of universal jurisdiction does not require any link between the prosecuting State and the crime with regard to the location of the crime, the nationality of the alleged perpetrator or the nationality of the victims. It does however usually require the prosecuting State to have the alleged perpetrator present on its territory.¹⁴ Universal jurisdiction that does *not* require the prosecuting State to have the alleged perpetrator in custody is referred to as *absolute* (or *pure* or *true* or *unconditional*) universal jurisdiction or as universal jurisdiction *in absentia*.¹⁵ This truly universal jurisdiction was defined by then President of the International Court of Justice (ICJ) Gilbert Guillaume as "jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question".¹⁶

Before elaborating on the concept of universal jurisdiction *in absentia*, it should be clear what its material scope is. As mentioned above, the offences for which this type of jurisdiction can be asserted are the so called 'international crimes.' As this article will not dive into the discussion of what constitutes an international crime, I will join the consensus in this debate and assume that at least crimes against humanity, genocide and war crimes are accepted as such.¹⁷

¹² *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, 3 [*Arrest Warrant* case].

¹³ *Ibid.*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, 63, 76, para. 41 [Hereinafter 'Joint Opinion'].

¹⁴ UN Doc. A/65/181, 2010, 4, 6., *supra* note 10.

¹⁵ See, e.g., R. O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept', 2 *Journal of International Criminal Justice* (2004) 3, 735, 748-749; A. Poels, 'Universal Jurisdiction in Absentia', 23 *Netherlands Human Rights Quarterly* (2005) 1, 65 [Poels, Universal Jurisdiction]; R. Rabinovitch, 'Universal Jurisdiction In Absentia', 28 *Fordham International Law Journal* (2005) 2, 500.

¹⁶ *Arrest Warrant* case, *supra* note 12, Separate Opinion of President Guillaume, 30, para. 9.

¹⁷ Some include crimes against peace (aggression) and torture, but this might be controversial. There is however little or no debate about the status of crimes against humanity, genocide and war crimes as international crimes. See *supra* note 7.

For the sake of clarity, the definition of universal jurisdiction *in absentia* requires a distinction to be made.¹⁸ Some jurists, including O’Keefe¹⁹ and Crawford,²⁰ do not consider universal jurisdiction *in absentia* to be a distinct head of jurisdiction, but rather as “enforcement *in absentia* of universal prescriptive jurisdiction”.²¹ Others, such as Cassese,²² Guillaume²³ and Van den Wyngaert,²⁴ on the other hand, have assessed the legality of absolute universal jurisdiction as a separate concept - deeming it necessary to assess its lawfulness in its own right.²⁵ In practice too, the legality of universal jurisdiction *in absentia* has been determined separately from other jurisdictional grounds (although naturally connected to the universal principle), as evidenced by – *inter alia* - the Constitutional Court of South Africa in its 2014 judgment in the *Zimbabwe Torture Docket* case.²⁶ Seeing the prevalence of separate considerations of universal jurisdiction *in absentia*, this article will adhere to the latter approach and determine the legality of the concept in its own right.

A final definitional distinction relates to the inclusion or exclusion of trials *in absentia* as an element of absolute universal jurisdiction. The literature seems ambivalent in this regard.²⁷ In principle, the objective of (legislation allowing for) an assertion of absolute universal jurisdiction is to try the accused.²⁸ In practice, however, trials *in absentia* based on absolute universal jurisdiction are rare; the exercise of absolute universal jurisdiction is usually limited to elements of prosecution, such as investigations, bringing criminal charges and issuing arrest warrants.²⁹ Trials based on absolute universal jurisdiction do usually not take place, since the domestic legislation of many States does not allow for

¹⁸ This distinction is – *inter alia* – made by the *Institut de Droit International* and analysed in: C. Kreß, ‘Universal Jurisdiction over International Crimes and the Institut de Droit international’, 4 *Journal of International Criminal Justice* (2006) 3, 561, 576-579.

¹⁹ O’Keefe, *supra* note 15, 750.

²⁰ J. Crawford, *Brownlie’s Principles of Public International Law* (2012), 469.

²¹ O’Keefe, *supra* note 15, 750.

²² A. Cassese, *International Law* (2001), 261.

²³ *Arrest Warrant* case, *supra* note 12, Separate Opinion of President Guillaume, 30.

²⁴ *Arrest Warrant* case, *supra* note 12, Dissenting Opinion of Judge *ad hoc* Van den Wyngaert, 137.

²⁵ O’Keefe, *supra* note 15, 749.

²⁶ *Zimbabwe Torture Docket* case, *supra* note 6.

²⁷ El Zeidy, *supra* note 11, 837.

²⁸ O’Keefe, *supra* note 15, 741.

²⁹ A. J. Colangelo, ‘The New Universal Jurisdiction: In Absentia Signaling over Clearly Defined Crimes’, 36 *Georgetown Journal of International Law* (2005) 2, 537, 543.

trials *in absentia*.³⁰ Approaching these trials as a matter of national law might therefore be the appropriate method, seeing as the legality of such trials “has little to do with bases of jurisdiction recognized under international law”.³¹ That is why, when discussing legality, I will interpret absolute universal jurisdiction as encompassing all steps leading up to trial, but excluding trial itself. The section on the desirability of States asserting absolute universal jurisdiction will however unequivocally include trials *in absentia* since they may well take place if the domestic law of the prosecuting State does allow for trials without the accused present. Moreover, a normative discussion requires all (potential) aspects be taken into account, warranting a discussion of trials *in absentia* as a natural consequence of States asserting absolute universal jurisdiction.

II. The Applicability of the *Lotus* Case

The practice of absolute universal jurisdiction is rather limited; Courts are not often in the position to consider the concept. So when Belgium’s assertion of universal jurisdiction *in absentia* was disputed before the ICJ, many hoped the Court to provide much needed clarification on the status of international law with regard to absolute universal jurisdiction. The concept was however (in)famously not addressed by the ICJ in the 2000 *Arrest Warrant* case.³² After the *Lotus* case of 1927,³³ the *Arrest Warrant* case would have been the perfect opportunity for the Court to rule on the concept of absolute universal jurisdiction, but it decided not to. Although the concept was not (fully) addressed by the Court, individual judges did elaborate on absolute universal jurisdiction.³⁴ This article will focus on three opinions which reflect different stances on the matter. President Guillaume issued a separate opinion arguing against the legality of absolute universal jurisdiction under international law, while Judge *ad hoc* Van den Wyngaert was a strong supporter in her dissenting opinion. In a joint separate opinion, Judges Higgins, Kooijmans and Buergenthal also argued in favor – be it with more

³⁰ See, e.g., UN Doc. A/65/181, *supra* note 10, 18; C. Ryngaert, ‘Universele Jurisdictie’, in J. Wouters & B. Pattyn (eds.), *Misdaden tegen de mensheid: de internationale strijd tegen straffeloosheid* (2006), 141, 143.

³¹ *Arrest Warrant* case, *supra* note 12, Joint Opinion, 80, para. 56.

³² See, e.g., Rabinovitch, *supra* note 15, 503; Turns, *supra* note 7, 386; J. Wouters and H. Panken, ‘Waar naartoe met de Genocidewet?’, *Working Paper Katholieke Universiteit Leuven, Instituut voor Internationaal Recht*, 2002/30, 18.

³³ *S.S. Lotus case (France v. Turkey)*, PCIJ Series A, No. 10 (1927) [*S.S. Lotus* case].

³⁴ I. F. Dekker & N. J. Schrijver, ‘Congo v. België’, 84 *Ars Aequi KwartaalSignaal* (2002) 4545, 4546.

reservations than Van den Wyngaert. These opinions feature prominently in the debate on the legality (and desirability) of States asserting universal jurisdiction *in absentia*. Considering President Guillaume's stance on the applicability of the *Lotus* case, his opinion will be addressed in more detail below. The other opinions will feature throughout the sections to come.

The lack of a general treaty on universal jurisdiction and little jurisprudence complicates the research on this matter.³⁵ The accepted sources of international law³⁶ are limited in number and cannot be interpreted unequivocally with regard to universal jurisdiction *in absentia* - which confirms the need for further research. Chronologically, the 1927 *Lotus* case is the natural starting point in assessing the law on absolute universal jurisdiction. This dispute between Turkey and France, brought before the Permanent Court of International Justice provides a framework or paradigm for assessing other sources. This framework is mainly derived from the following paragraph, which I will cite in full seeing as the applicability of this case to (absolute) universal jurisdiction or international criminal law in general remains a topic of debate:³⁷

“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. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.”³⁸

³⁵ Rabinovitch, *supra* note 15, 506.

³⁶ *Statute of the International Court of Justice*, 26 June 1945, 33 UNTS 993, Article 38.

³⁷ See, e.g., Kreß, *supra* note 18, 571-572.

³⁸ *S.S. Lotus case*, *supra* note 33, 19.

From this paragraph it follows that States asserting universal jurisdiction *in absentia* would thus be allowed to do so unless there is a rule prohibiting the practice. As mentioned above, not everyone seems to agree with this interpretation of the Court's words in this judgment, notably among them former ICJ President Guillaume. In his separate opinion, Guillaume agrees that the Court leaves open the possibility of absolute universal jurisdiction, but only "given the sparse treaty law at that time".³⁹ In this day and age, however, the development in international (criminal) law has made it clear that absolute universal jurisdiction has not at any point been desired, he argues.⁴⁰ To substantiate this claim he lists a great number of treaties that have incorporated the principle of *aut dedere aut judicare*, to demonstrate the significance of a suspect being present on a State's territory as a condition for prosecution. Furthermore, Guillaume adds, the practical consequences in terms of relations between States would be "total judicial chaos".⁴¹

Guillaume makes a valid point with regard to the practical concerns inherent to absolute universal jurisdiction – more on this in the third part of this paper. The legal argument put forward - his idea of universal jurisdiction *in absentia* being incompatible with (the development of) international law, is however hardly compelling.

If anything, absolute universal jurisdiction fits well within the development of international (criminal) law.⁴² The fight against impunity, as articulated in – *inter alia* – the *Rome Statute*,⁴³ has been a priority of the international community for many years now.⁴⁴ In a 2010 report by the United Nations Secretary-General on the concept of universal jurisdiction, governments reaffirmed that "one of the major achievements in international law in recent decades had been the shared understanding that there should be no impunity for serious crimes".⁴⁵ States asserting universal jurisdiction (*in absentia*) would

³⁹ *Arrest Warrant* case, *supra* note 12, Separate Opinion of President Guillaume, 44, para. 15.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Poels, *Universal Jurisdiction*, *supra* note 15, 78.

⁴³ *Rome Statute of the International Criminal Court*, *supra* note 1, Preamble.

⁴⁴ Kreß, *supra* note 18, 574.

⁴⁵ UN Doc. A/65/181, 2010, 4, *supra* note 10, This report provides an indication of the standpoint of a significant number of governments on the issue of universal jurisdiction. The report states that it 'has been prepared pursuant to General Assembly resolution 64/117, by which the Assembly requested the Secretary-General to prepare a report on the scope and application of the principle of universal jurisdiction, on the basis of information and observations from Member States.' The following governments submitted a response: Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, the Plurinational State

only contribute to ending impunity. And although Guillaume is right to point out that international (criminal) treaties overwhelmingly embrace the principle of *aut dedere aut judicare* rather than forms of universal jurisdiction, the latter has not been ruled out either. Guillaume's objections to the applicability of the Court's interpretation of the law in the *Lotus* case hence fail to convince.

Although Guillaume's arguments fail to convince, it should once more be noted that the relevance of the *Lotus* case to (absolute) universal jurisdiction is indeed disputed. Kreß, for example, when discussing the 2005 Resolution of the *Institut de Droit International* (IDI) on universal jurisdiction, observes a consensus among the members of the IDI's 17th Commission with regard to the irrelevance of the "classic *Lotus* presumption" for universal jurisdiction.⁴⁶ At the same time, however, Kreß does notice Judges Higgins, Kooijmans, Buergenthal and Van den Wyngaert invoking the *Lotus* case when arguing for the possibility of States asserting universal jurisdiction *in absentia*.⁴⁷ Moreover, these judges are not alone in their interpretation of the *Lotus* case: as recently as 2014, the South-African Constitutional Court referred to the reasoning in the *Lotus* case while addressing (absolute) universal jurisdiction.⁴⁸

Considering the abovementioned, this article will deem the *Lotus* paradigm relevant in assessing the legality of universal jurisdiction *in absentia* – while at the same time recognizing the discussion with regard to this assumption. So in line with the *Lotus* paradigm, States asserting universal jurisdiction *in absentia* would be allowed to do so under international law where a prohibitive rule does not seem to exist.⁴⁹ Since the existence of a permissive rule would however be preferable, both a prohibitive as well as a permissive rule of international law will be considered.

of Bolivia, Bulgaria, Cameroon, Chile, China, Costa Rica, Cuba, Cyprus, the Czech Republic, Denmark, El Salvador, Estonia, Ethiopia, Finland, France, Germany, Iraq, Israel, Italy, Kenya, Kuwait, Lebanon, Malaysia, Malta, Mauritius, the Netherlands, New Zealand, Norway, Peru, Portugal, the Republic of Korea, Rwanda, Slovenia, South Africa, Sweden, Switzerland, Tunisia and the United States of America.

⁴⁶ Kreß, *supra* note 18, 571-572.

⁴⁷ *Ibid.*

⁴⁸ *Zimbabwe Torture Docket* case, *supra* note 6, para. 26.

⁴⁹ Rabinovitch, *supra* note 15, 505, The Israeli Court in the *Eichmann* case came to the same conclusion by applying the *Lotus* paradigm, see Arajjarvi, *supra* note 7, 12.

III. Conventional Law

A positive rule of international law is required to be derived from one of the sources of international law as enumerated in Article 38 of the ICJ Statute.⁵⁰ Considering the position of conventional law in the article, a treaty or convention on universal jurisdiction (*in absentia*) would be desired. Such a treaty, as mentioned before, does not exist.⁵¹ Nonetheless, multiple international treaties address the topic of jurisdiction of domestic courts with regard to international crimes. A great number of these treaties require the prosecuting State to be linked to the crime.⁵² There are however treaties that do not require a nexus. The *Geneva Conventions* are the prime example of treaties that – be it implicitly – allow for States to assert universal jurisdiction *in absentia*.⁵³ Article 146 of the *IV Geneva Convention*, for instance, allows States to prosecute for crimes committed abroad, while not requiring the presence of the offender on its territory.⁵⁴ The customary law status of the Geneva Conventions reinforces this possibility for States to assert absolute universal jurisdiction – regarding war crimes that is. No treaty, however, seems to *explicitly* provide for absolute universal jurisdiction.

Whilst not expressly allowing for universal jurisdiction *in absentia*, international criminal law treaties often respect a principle of complementarity. The *1984 Convention against Torture*, for example, allows (or requires) its State parties in Article 5 to assert jurisdiction if there is a nexus based on location of the crime or offender on its territory, nationality of the offender or nationality of the victims.⁵⁵ These nexus requirements do however “not exclude any criminal jurisdiction exercised in accordance with internal law”, according to the last paragraph of the same article.⁵⁶ Sienho Yee, when discussing universal jurisdiction, is correct when he considers it a bridge too far to conclude that the convention therefore supports the assertion of universal jurisdiction: “Such a meaning would have required affirmative support in the text of the treaty

⁵⁰ *Statute of the International Court of Justice*, *supra* note 36.

⁵¹ Kreß, *supra* note 18, 562.

⁵² *Arrest Warrant* case, *supra* note 12, Joint Opinion, 76, para. 41; Rabinovitch, *supra* note 15, 506.

⁵³ *Arrest Warrant* case, *supra* note 12, Joint Opinion, 77, para. 46.

⁵⁴ *Arrest Warrant* case, *supra* note 12, Dissenting Opinion of Judge *ad hoc* Van den Wyngaert, 174-175, para. 59; *Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287.

⁵⁵ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, Article 5, paras. 1, 5.

⁵⁶ *Ibid.*, para 3.

itself.”⁵⁷ Likewise, however, lack of a prohibition would mean that universal jurisdiction is to be ruled out. If the internal law of a State party allows for universal jurisdiction *in absentia* to be asserted, the Torture Convention in no way impedes this.⁵⁸ The ‘method’ of not creating a basis for States to prosecute offenders *in absentia* for the crimes relevant to the treaty, while leaving the option to do so open is a concept that Judge Van den Wyngaert argues is present in a host of conventions relating to international crimes.⁵⁹

Conventional international law does thus neither permit nor prohibit absolute universal jurisdiction to be asserted. Its lawfulness is therefore to be sought in international customary law – as agreed upon by the *IDI* in its 2005 Resolution on universal jurisdiction.⁶⁰

IV. Customary Law

The dearth of conventional law on universal jurisdiction *in absentia* is all but surprising. It is only logical for a possible legal basis to be found in customary international law since it, inherent to the universality of the concept, would apply to all States, and very few treaties – if any – have been signed and ratified by all States.⁶¹ Even so, the importance of customary law is not evident from custom itself since State practice with regard to absolute universal jurisdiction is rather limited. The advantage of limited State practice does however make it possible to provide a relatively thorough assessment here.

When assessing custom it is essential to keep in mind that it requires both an “established, widespread, and consistent practice [...] of States”,⁶² as well as *opinio juris*.⁶³ The latter requirement, as confirmed in the *Lotus* case,⁶⁴ often plays a decisive role – as it will here. I will now first address the absence of a permissive rule, after which the lack of a prohibitive rule will be discussed.

⁵⁷ S. Yee, ‘Universal Jurisdiction: Concept, Logic, and Reality’, 10 *Chinese Journal of International Law* (2011) 3, 503, 518.

⁵⁸ *Arrest Warrant* case, *supra* note 12, Joint Opinion, 74, para. 38.

⁵⁹ *Arrest Warrant* case, *supra* note 12, Dissenting Opinion of Judge *ad hoc* Van den Wyngaert 175-176, para. 61.

⁶⁰ Kreß, *supra* note 18, 566.

⁶¹ Colangelo, *supra* note 29, 564.

⁶² H. Thirlway, ‘The Sources of International Law’, in M. D. Evans (ed.) *International Law* (2010), 95, 102.

⁶³ *Ibid.*

⁶⁴ *S.S. Lotus* case, *supra* note 33, 28.

1. Absence of a Permissive Rule

A permissive rule being preferable, it should be assessed whether there is consistent State practice and *opinio juris* with regard to States asserting universal jurisdiction *in absentia*. Since there is no codified rule of international law, national law is essential here as it usually forms the legal basis for national prosecuting authorities to act upon.

A State that has had controversial legislation in this regard is Belgium.⁶⁵ As a result, it became a prominent actor in the State practice of absolute universal jurisdiction; illustrated by its role in the ICJ's *Arrest Warrant* case.⁶⁶ The – now retracted – legislation on which the arrest warrant was based, was one of the most (if not *the* most) far-reaching criminal jurisdiction laws in the world.⁶⁷ With its present day legislation on universal jurisdiction, Belgium joins many States that only allow for a more restricted, conditional universal jurisdiction (i.e. with a nexus requirement in place). In their joint separate opinion to the *Arrest Warrant* case, Judges Higgins, Kooijmans and Buergenthal list Australia, France, Germany and the United Kingdom as States that have (had) forms of universal jurisdiction in their laws.⁶⁸ When States codify crimes as result of a treaty to which they are party, they often have to decide on the type of jurisdiction. The Netherlands, for example, when criminalizing the crimes of the *Rome Statute* in its national law,⁶⁹ choose for a conditional universal jurisdiction which requires either the victim(s) or defendant to be Dutch or for the crime to have been committed on Dutch territory.⁷⁰ As mentioned, a majority of States⁷¹ assumes this type of jurisdiction in international crimes laws rather than an

⁶⁵ Belgium: *La loi relative à la répression des infractions graves aux conventions internationales de Genève du 12 août 1949 et aux protocoles 1 et II du 8 juin 1977, additionnels à ces conventions* (16 June 1993), amended by *La loi relative à la répression des violations graves de droit international humanitaire* (10 February 1999); R. B. Baker, 'Universal Jurisdiction and the Case of Belgium: A Critical Assessment', 16 *ILSA Journal of International & Comparative Law* (2009) 1, 141, 142.

⁶⁶ It was Belgian investigating Judge Vandermeersch of the *Brussels Tribunal de première instance* who issued the arrest warrant which led to the dispute between Belgium and the Democratic Republic of the Congo before the ICJ. See D. Vandermeersch, 'Prosecuting International Crimes in Belgium' 3 *Journal of International Criminal Justice* (2005) 2, 400.

⁶⁷ *Arrest Warrant* case, *supra* note 12, Joint Opinion, 69, para. 20.

⁶⁸ *Ibid.*, 69-70, paras. 20-24.

⁶⁹ As it saw itself obliged to do. See *Kamerstukken II 2001/02*, 28337, *supra* note 2, 2.

⁷⁰ *Ibid.*, 17.

⁷¹ Rabinovitch, *supra* note 15, 507.

unconditional universal jurisdiction.⁷² Nonetheless, Belgium is not the only State that has allowed or still allows for the latter type of jurisdiction to be asserted.⁷³

New Zealand is one of the States that did opt for an absolute universal jurisdiction when translating the crimes of the *Rome Statute* into national law.⁷⁴ The *International Crimes and International Criminal Court Act 2000* allows New Zealand to prosecute a suspect of international crimes: “whether or not the person accused was in New Zealand at the time that the act constituting the offence occurred or at the time a decision was made to charge the person with an offence”.⁷⁵ Although jurisdiction can thus be asserted in prosecuting an international crime lacking any link with New Zealand, this will not lead to a trial as long as the alleged perpetrator is not present, as New Zealand’s domestic laws prohibit trials *in absentia*.⁷⁶

Germany did the same in codifying the crimes in the *Rome Statute*.⁷⁷ The *Völkerstrafgesetzbuch* (Code of Crimes against International Law) is similar to New Zealand’s law as it explicitly States that no link to Germany whatsoever is required for the German State to prosecute offenders of crimes against international law: “*Dieses Gesetz gilt für alle in ihm bezeichneten Straftaten gegen das Völkerrecht, für die in ihm bezeichneten Verbrechen auch dann, wenn die Tat im Ausland begangen wurde und keinen Bezug zum Inland aufweist.*”⁷⁸ The accused need therefore not to be present for the German State to assert universal

⁷² *Arrest Warrant* case, *supra* note 12, Dissenting Opinion Judge *ad hoc* Van den Wyngaert, 171-173, para. 55.

⁷³ *Ibid.*

⁷⁴ See Poels, *Universal Jurisdiction*, *supra* note 15, 75.

⁷⁵ New Zealand: *International Crimes and International Criminal Court Act 2000*, (24 May 2000) Section 8(1) (c), iii.

⁷⁶ J. Hay, ‘Implementing the ICC Statute in New Zealand’, 2 *Journal of International Criminal Justice* (2004) 1, 191, 196. It should also be noted that, as of 2010, no prosecutions based on the legislation providing for universal jurisdiction have been authorized by the Attorney-General: see UN Doc. A/65/181 (2010), *supra* note 10.

⁷⁷ G. Werle & F. Jessberger, ‘International Criminal Justice is Coming Home: The New German Code of Crimes Against International Law’, 13 *Criminal Law Forum* (2002) 2, 191, 192.

⁷⁸ Germany: *Völkerstrafgesetzbuch* (26 June 2002), Section 1, Part 1 (BGBl. I S. 2254), para. 1. Translation: ‘This Law shall apply to all criminal offences against international law designated under this Law, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany.’ (emphasis added) It has to be noted that Section 153f of the German *Strafprozeßordnung* [Code of Criminal Procedure] provides the prosecutor grounds not to prosecute crimes that would fall under Section 1, Part 1 of the ‘*Völkerstrafgesetzbuch*’. These grounds are invoked often – it is uncertain whether there has actually been a case on the basis of absolute universal

jurisdiction, but, as in New Zealand, German criminal law does not allow for trials *in absentia*.⁷⁹

Another State that had a similar provision in its legislation was Spain. Its *Ley Orgánica del Poder Judicial* (Judicial Power Organization Act) of 1985,⁸⁰ the basis for the well-known *Pinochet* case that will feature later, granted the Spanish authorities the power to prosecute any offender of international crimes.⁸¹ Due to judgments by the highest national Courts in Spain, the jurisdiction is no longer absolutely universal as there are now conditions in place that first have to be met.⁸² Next to Germany, New Zealand and Spain there are other States that allow or have allowed universal jurisdiction *in absentia* to be asserted, including Switzerland, Israel and Senegal.⁸³

Based on national legislation, there are known and less known individual criminal cases in which the prosecuting State based its competence on universal jurisdiction and that are therefore relevant when assessing State practice. I will briefly elaborate on a number of cases that are illustrative of the ambivalent case law with regard to the *in absentia* assertion of universal jurisdiction.

The first case to be addressed features a well-known suspect: the former president of Chile Augusto Pinochet, who was arrested in London in 1998 at the request of Spain. The relevant aspect for the purpose of this article is the basis on which Pinochet was arrested. The Criminal Division of the Spanish National Court allowed the arrest warrant to be based on universal jurisdiction while Pinochet was not present on Spanish territory.⁸⁴ The former Chilean ruler's arrest was thus the enforcement of Spain asserting universal jurisdiction without the defendant present on its territory. The British eventually, however, choose not to

jurisdiction. It is however clear that German law would allow for it. See Human Rights Watch, 'The Legal Framework for Universal Jurisdiction in Germany' (2014).

⁷⁹ Germany: *Strafprozeßordnung* (7 April 1987) (BGBl. IS. 1074, 1319), Section 230-231 [Code of Criminal Procedure].

⁸⁰ Spain: *Ley Orgánica del Poder Judicial* 'No. 6/1985' (1 July 1985) (Official Gazette No. 157 of 2 July 1985) [Judicial Power Organization Act].

⁸¹ Permanent Representation of the Kingdom of Spain to the United Nations, 'The Scope and Application of the Principle of Universal Jurisdiction', Response of the Kingdom of Spain to Agenda Item 84 of the Sixth Committee 66th Session of the UNGA for the Secretary-General's Report 'The scope and application of the principle of universal jurisdiction'; UN Doc. A/65/181 (2010), *supra* note 10, 4.

⁸² *Ibid.*, 7.

⁸³ Poels, *Universal Jurisdiction*, *supra* note 15, 75.

⁸⁴ The arrest warrant could have been based on the passive nationality principle since victims included Spanish nationals. Nonetheless, the Court decided to rely on the universality principle instead. See Rabinovitch, *supra* note 15, 515.

extradite Pinochet on medical grounds and allowed him to go back to Chile.⁸⁵ Since Spanish Criminal Procedure does not allow for trials *in absentia*,⁸⁶ the prosecution was not pursued any further. Due to the reputation of the accused, this case has become a well-known instance of criminal enforcement based on absolute universal jurisdiction. Pinochet is however not the only high-profile suspect in a case addressing universal jurisdiction *in absentia*.

In the Netherlands, the principle of universal jurisdiction played a decisive role in the 2001 *Bouterse* judgment of the *Hoge Raad* (Supreme Court).⁸⁷ The defendant, the then-serving democratically elected president of Suriname, was prosecuted for murder and torture⁸⁸ - the latter being considered an international crime under Dutch law. The *Hoge Raad* judged the State to lack jurisdiction, since national law required the suspect to be present on Dutch territory. It should however be noted that the unlawfulness of the assumed jurisdiction was based on national law;⁸⁹ the *Hoge Raad* refrained from making any findings regarding the unlawfulness of universal jurisdiction *in absentia* under international law.⁹⁰

This approach is not uncommon: three years before the *Bouterse* judgment the Prosecutor-General of Denmark reached a similar conclusion on the legality of absolute universal jurisdiction. Being requested to prosecute former Chilean President Pinochet – subject of many judicial decisions - the Prosecutor-General concluded Denmark to lack jurisdiction as a result of Pinochet not being present on Danish territory. Like the *Hoge Raad*, he came to the decision by invoking the Danish Criminal Code rather than international law.⁹¹

Similarly, the French *Code de Procédure Pénale* provides for universal jurisdiction to be asserted by the State, under the condition that the suspect is present on French territory.⁹² Under this jurisdiction, Ely Ould Dah was convicted

⁸⁵ C. Nicholls, 'Reflections on Pinochet', 41 *Virginia Journal of International Law* (2001) 1, 140, 144.

⁸⁶ N. Roht-Arriaza, 'The Pinochet Precedent and Universal Jurisdiction', 35 *New England Law Review* (2001) 2, 311, 312; C. A. E. Bakker, 'Universal Jurisdiction of Spanish Courts over Genocide in Tibet: Can It Work?', 4 *Journal of International Criminal Justice* (2006) 3, 595, 600.

⁸⁷ HR 23-10-2001, ECLI:NL:HR:2001:AD4727; ECLI:NL:PHR:2001:AD4727.

⁸⁸ L. Zegveld, 'The Bouterse case', 32 *Netherlands Yearbook of International Law* (2001) 97, 98.

⁸⁹ *Arrest Warrant* case, *supra* note 12, Joint Opinion, 70, para. 23.

⁹⁰ J. Stigen, 'The Right or Non-Right of States to Prosecute Core International Crimes under the Title of Universal Jurisdiction', 10 *Baltic Yearbook of International Law* (2010) 95, 117.

⁹¹ UN Doc. A/65/181 (2010), *supra* note 10, 22-23.

⁹² France: *Code de procédure pénale*, (19 February 2016), Article 689-1 [Criminal Procedure Code].

for torture committed in Mauritania without any link to France.⁹³ Interestingly, Ould Dah was convicted *in absentia*. This was possible since the law only requires the suspect to be present at the time the judicial investigation is opened. In this case, Ould Dah was present at the beginning of the investigations, but was consequently free to leave France.⁹⁴ It is worth noting that Ould Dah appealed to the European Court of Human Rights. Invoking article 7 of the European Convention on Human Rights,⁹⁵ he argued that he “could not have foreseen that French law would override Mauritanian law”.⁹⁶ The Court concluded that France’s prosecution of Ould Dah did not violate article 7 of the Convention,⁹⁷ allowing the State to apply its laws to a non-national for acts committed abroad without French citizens among the victims.

The last domestic judgment addressing the legality of absolute universal jurisdiction to be discussed here is the landmark *Zimbabwe Torture Docket* case in South Africa.⁹⁸ On 30 October 2014, the Constitutional Court unanimously ruled the State to have the *duty* to investigate acts of torture committed in Zimbabwe by Zimbabweans against their own nationals.⁹⁹ The Court reached this conclusion by – *inter alia* – assessing the legality of absolute universal jurisdiction.

The judges held that torture, war crimes, genocide and other international crimes “require states, even in the absence of binding international treaty law, to suppress such conduct”.¹⁰⁰ Relying largely on the *Lotus* paradigm¹⁰¹ and academic writings, the Court deemed presence of the suspect(s) in South Africa irrelevant. It was found not to be required for an investigation, since no international law rule imposing that requirement seemed to exist.¹⁰² Hence, the Court held that “the exercise of universal jurisdiction, for purposes of the investigation of an

⁹³ See Stigen, *supra* note 90, 117.

⁹⁴ Human Rights Watch, ‘The Legal Framework for Universal Jurisdiction in France’ (2014), 2.

⁹⁵ 1950 *European Convention on Human Rights*, Article 7, 213 UNTS 221.

⁹⁶ UN Doc. A/65/181 (2010), *supra* note 10, 22-23.

⁹⁷ M. Gavouneli, ‘Introductory Note to the European Court of Human Rights Decision: Ould Dah v. France’, 48 *International Legal Materials* (2009) 4, 869, 869.

⁹⁸ *Zimbabwe Torture Docket* case, *supra* note 6.

⁹⁹ M. J. Ventura, ‘The Duty to Investigate Zimbabwe Crimes Against Humanity (Torture) Allegations: The Constitutional Court of South Africa Speaks on Universal Jurisdiction and the ICC Act’, 13 *Journal of International Criminal Justice* (2015) 4, 861, 862.

¹⁰⁰ *Zimbabwe Torture Docket* case, *supra* note 6 para. 37.

¹⁰¹ Ventura, *supra* note 99, 876.

¹⁰² *Zimbabwe Torture Docket* case, *supra* note 6, para. 47.

international crime committed outside our territory, may occur in the absence of a suspect without offending our Constitution or international law.”¹⁰³

Very progressively, the Court subsequently invoked Paragraph 6 of the Preamble of the *Rome Statute*¹⁰⁴ in combination with the constitution and domestic law to establish a (restricted)¹⁰⁵ duty of the South African State to investigate international crimes.¹⁰⁶ The Court thus *obliged* the State to assert universal jurisdiction *in absentia*, making the *Zimbabwe Torture Docket* case seemingly one of a kind. It will be interesting to see to what extent this landmark case signifies a development in the acceptance of universal jurisdiction *in absentia* or whether it will remain unique.

It should be noted that the Constitutional Court limits the exercise of absolute universal jurisdiction to conducting investigations. As mentioned in the introduction and evidenced by the cases discussed above, it usually is national legislation prohibiting trials *in absentia* that leads to a limited interpretation of universal jurisdiction *in absentia*. South Africa is no exception here, as it is the State’s constitution that does not allow for trials in absentia.¹⁰⁷

The brief discussion of the cases above illustrates the status of absolute universal jurisdiction in case law: some States allow it unequivocally – with South Africa exceptionally obliging its assertion, while others require different sorts of conditions to be met. From the case law in general it is difficult to derive a rule allowing absolute universal jurisdiction to be asserted. This is due to a lack of both practice and *opinio juris* of States (not) asserting universal jurisdiction *in absentia*. It should therefore be concluded that a permissive rule of international customary law that allows for States to assert universal jurisdiction *in absentia* to prosecute international crimes does not seem to exist.¹⁰⁸ Hence, one should assess the existence of a prohibitive rule to come to a final conclusion its legality.

2. Absence of a Prohibitive Rule

To formulate a prohibitive rule of international law, it is once again necessary to identify both a consistent State practice and *opinio juris*. More concretely; the

¹⁰³ *Ibid.*

¹⁰⁴ *Rome Statute*, *supra* note 1, Preamble Paragraph 6, text: ‘Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’.

¹⁰⁵ *Zimbabwe Torture Docket* case, *supra* note 6, paras. 61-64.

¹⁰⁶ Ventura, *supra* note 99, 870.

¹⁰⁷ *Zimbabwe Torture Docket* case, *supra* note 6, para. 43.

¹⁰⁸ Rabinovitch, *supra* note 15, 516.

question that needs to be answered is whether there is an established, consistent and widespread practice of States¹⁰⁹ *not* asserting universal jurisdiction when the suspect is not present on their territory. To establish *opinio juris* the reason for States not doing so should lie with the perceived illegality of such an assertion under international law.¹¹⁰

As mentioned before, a great number of States require the offender to be present on their territory for universal jurisdiction to be asserted. Judge Van den Wyngaert notes this as well in her dissenting opinion to the *Arrest Warrant* case but argues that “this is not necessarily the expression of an *opinio juris* to the effect that this is a requirement under international law”.¹¹¹ Judges Higgins, Kooijmans and Buergenthal come to a similar finding in their separate opinion.¹¹² The same should also be concluded from case law such as the decision in the *Bouterse* case. So although there is a practice of States not asserting absolute universal jurisdiction, no *opinio juris* can be established since States have not acknowledged refraining from asserting this type of jurisdiction because of its perceived illegality under international law.

In literature too, the existence of a prohibitive rule has been difficult to prove. The Princeton Principles,¹¹³ for instance, consider absolute universal jurisdiction to be not prohibited under international law. Their definition of universal jurisdiction *in absentia* does not require “any [...] connection to the State exercising such [i.e. criminal universal] jurisdiction”.¹¹⁴ The reason for not including a territorial link was partly to “avoid stifling the evolution of universal jurisdiction”.¹¹⁵ The separate opinion in the *Arrest Warrant* case concludes that “the only prohibitive rule (repeated by the Permanent Court in the *Lotus* case) is that criminal jurisdiction should not be exercised, without permission, within the territory of another State”.¹¹⁶ States asserting absolute universal jurisdiction *in absentia* do not violate this rule.

¹⁰⁹ Thirlway, *supra* note 62, 102.

¹¹⁰ *Arrest Warrant* case, *supra* note 12, Dissenting Opinion of Judge *ad hoc* Van den Wyngaert, 173-174, para. 56.

¹¹¹ *Ibid.*, 171-173, para. 55.

¹¹² *Arrest Warrant* case, *supra* note 12, Joint Opinion, 77, para. 45.

¹¹³ The Princeton Principles are a set of principles on universal jurisdiction developed in a joint effort of eminent legal scholars that has been discussed in the UNGA. See S. Macedo (ed.), *Universal Jurisdiction National Courts and the Prosecution of Serious Crimes Under International Law* (2006).

¹¹⁴ Macedo, *supra* note 113, Principle 1.

¹¹⁵ *Ibid.*, 43.

¹¹⁶ *Arrest Warrant* case, *supra* note 12, Joint Opinion, 80, para. 53.

V. Preliminary Conclusion on Legality

International law does not impede States asserting universal jurisdiction *in absentia* when prosecuting international crimes.¹¹⁷ It is generally accepted that the legal basis for this practice should be sought in international customary law, since no conventional law either permitting or prohibiting States asserting universal jurisdiction *in absentia* seems to exist. On the one hand, State practice appears ambivalent; many States have legislation that does not allow for prosecuting authorities to assert absolute universal jurisdiction, while the laws of other States do allow it – or, in the case of South Africa, oblige it under certain conditions. On the other hand, no custom can be established since an *opinio juris* for both a permissive and a prohibitive rule seems to be lacking. Yet considering the applicability of the *Lotus* paradigm – where one should keep in mind that the officer on watch of the *Lotus* was not prosecuted *in absentia*, a State is entitled to prescribe jurisdiction as long as it does not exercise this jurisdiction on the territory of another State and as long as there is no rule of international law prohibiting this. Hence, States asserting absolute universal jurisdiction when prosecuting international crimes do not violate international law. Although – as mentioned earlier – as a matter of domestic law, the legality is still likely to stand when the assertion leads to a trial *in absentia* if a State does not violate the right to a fair trial.¹¹⁸ Moreover, universal jurisdiction *in absentia* fits well within the development of international (criminal) law and its desire to end impunity. It should however be acknowledged that the absence of a permissive rule will likely lead to a “continuing debate” on universal jurisdiction *in absentia*.¹¹⁹

C. Should States Assert Universal Jurisdiction *in Absentia*?

I. Introduction

In the previous part it was established that international law allows States to assert universal jurisdiction *in absentia*. The primary reason for States to invoke this type of jurisdiction is to end impunity. In this part I will shortly elaborate on the rationale behind absolute universal jurisdiction, after which

¹¹⁷ I.e. genocide, war crimes and crimes against humanity – as defined in Section 2.1. See Poels, *Universal Jurisdiction*, *supra* note 15, 77.

¹¹⁸ See, e.g., Rabinovitch, *supra* note 15, 526-528; Poels, *Universal Jurisdiction*, *supra* note 15, 81-82; El Zeidy, *supra* note 11, 837.

¹¹⁹ UN Doc. A/65/181 (2010), *supra* note 10.

three arguments against States asserting universal jurisdiction *in absentia* will be considered as well as possible safeguards to mitigate these objections.¹²⁰ When approaching absolute universal jurisdiction from a normative rather than a legal point of view it has to be noted that the literature on this topic is rather scarce. Universal jurisdiction as it is commonly interpreted, i.e. with the requirement that the offender is in the custody of the prosecuting State, is however elaborately discussed among scholars. These writings, both supportive and disapproving, can be applied to absolute universal jurisdiction without much difficulty.

II. The Rationale Behind Universal Jurisdiction in Absentia

The assertion of universal jurisdiction *in absentia* can function as a weapon in the fight against impunity: where other States are reluctant or international criminal tribunals fail to act, a State can prosecute on the basis of universal jurisdiction,¹²¹ even when the suspect is not present on its territory. As mentioned before, the heinous nature of the crimes affect humankind and therefore the international community as a whole¹²² – an argument developed centuries ago by Grotius.¹²³ Hence, every member of this community has a legitimate interest in the repression of international crimes;¹²⁴ the gravity of these crimes transcends borders. The Court in the ICTY's *Tadic* case eloquently provides a philosophical justification¹²⁵ that could be read as a rationale for absolute universal jurisdiction:

“It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.”¹²⁶

¹²⁰ As suggested in *Arrest Warrant* case, Joint Opinion, *supra* note 12, 81-82, para. 59.

¹²¹ Poels, *Universal Jurisdiction*, *supra* note 15, 79.

¹²² M. Cherif Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice,’ 42 *Virginia Journal of International Law* (2001) 1, 81, 98-99.

¹²³ H. Grotius, *De Jure Belli Ac Pacis* (1925), 504; Rabinovitch, *supra* note 15, 516; Cherif Bassiouni, *supra* note 122, 88.

¹²⁴ V. Lowe and C. Staker, ‘Jurisdiction’, in Malcolm D. Evans (ed.), *International Law* (2010), 313, 326.

¹²⁵ El Zeidy, *supra* note 11, 844.

¹²⁶ *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-T, T. Ch. II, 2 October 1995.

The use of absolute universal jurisdiction *in absentia* is thus justified as an effective tool in the international fight against impunity. An assessment of the practical aspects of States asserting absolute universal jurisdiction will however demonstrate the flaws inherent in the concept.

III. Difficulties of Universal Jurisdiction *in Absentia* in Practice

The argument in favor of States asserting universal jurisdiction *in absentia* is compelling, but the counterarguments are at least equally convincing. Even if asserted with the best of intentions, (absolute) universal jurisdiction “can be used imprudently, creating unnecessary frictions between States, potential abuses of legal processes, and undue harassment of individuals prosecuted or pursued for prosecution”.¹²⁷ With many such objections being raised in literature, I will restrict myself here to three fundamental difficulties related to the practice of universal jurisdiction *in absentia*. It is argued that such assertions (i) only lead to partial fulfilment of the goals of criminal law, (ii) are likely to compromise the fundamental rights of the accused and (iii) may destabilize interstate relations.

1. Suboptimal Fulfilment of the Objectives of Criminal Law

A first argument to oppose the assertion of universal jurisdiction *in absentia* at the domestic level relates to the criminal law function of States asserting it. Arguably, the aims of criminal law (e.g. reconciliation and prevention)¹²⁸ cannot be satisfactorily fulfilled if prosecution takes place too far away from the community that was most directly harmed.¹²⁹ Kissinger phrases this objection plainly: “Should any outside group dissatisfied with the reconciliation procedures of, say, South Africa be free to challenge them in their own national courts or those of third countries?”¹³⁰ With this rhetorical question Kissinger touches a raw nerve, as prosecution could – paradoxically – be an impediment to justice. Since (absolute) universal jurisdiction is asserted for international crimes, such prosecution deals with crimes that have had a significant impact on the State in which they have been committed. If hostilities have ended by the time the trial starts, these States may be going through a process of transitional justice

¹²⁷ Cherif Bassiouni, *supra* note 122, 82.

¹²⁸ J. de Hullu, *Materieel Strafrecht* (2015), 5-14.

¹²⁹ G. P. Fletcher, ‘Against Universal Jurisdiction’, 1 *Journal of International Criminal Justice* (2003) 3, 580, 583.

¹³⁰ H. A. Kissinger, ‘The Pitfalls of Universal Jurisdiction’, 80 *Foreign Affairs* (2001) 4, 86, 91.

to which prosecution might form a barrier.¹³¹ During South Africa's process of transitional justice, for example, amnesties were conditionally granted to offenders who testified before the Truth and Reconciliation Commission.¹³² If a third State had then started prosecuting offenders and, as Kissinger notes,¹³³ "substituting the magistrate's own judgment for the reconciliation procedure of even incontestably democratic societies where alleged violations of human rights have occurred", this would have been counterproductive.

Another essential element of criminal law is to have the offender convicted for all her/his unlawful deeds,¹³⁴ which is difficult to achieve when the proceedings take place in a State (far) away from the location of the crime and without the defendant present. As argued by States at the UN, the territorial State is "often best placed to obtain evidence, secure witnesses, enforce sentences, and deliver the 'justice message' to the accused, victims and affected communities".¹³⁵ The success of the proceedings is prone to be jeopardized due to the unfamiliarity of those involved with the peculiarities and specifics of the crimes and the situation in the State where the crimes were committed. It may also be unlikely that, for instance, witnesses are aware of the criminal procedure in the prosecuting State if the defendant is not even in custody there.¹³⁶ In the administration of evidence, too, there will be all sorts of obstacles owing to language, location of goods and people, culture, etc.¹³⁷ Many people might prefer a flawed prosecution over impunity; I cannot disagree with this. Means of achieving justice other than criminal prosecution should nevertheless not be disregarded. Moreover, in light of the objections that will be raised in the following sections, the mere partial fulfilment of the objectives of criminal law should at least be considered a suboptimal starting point.

¹³¹ M. Freeman, 'Transitional Justice: Fundamental Goals and Unavoidable Complications', 28 *Manitoba Law Journal* (2000) 1, 113.

¹³² See, e.g., P. van Zyl, 'Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission', 52 *Journal of International Affairs* (1999) 2, 647.

¹³³ Kissinger, *supra* note 130.

¹³⁴ de Hullu, *supra* note 128.

¹³⁵ UN Doc. A/65/181 (2010), *supra* note 10, 4.

¹³⁶ Poels, *Universal Jurisdiction*, *supra* note 15, 83.

¹³⁷ Vandermeersch, *supra* note 66, 410; Rabinovitch, *supra* note 15, 529.

2. Compromising the Rights of the Accused

The second objection to absolute universal jurisdiction, passionately debated in academic literature,¹³⁸ relates to the fundamental rights of the accused that might be undermined if States do actually exercise absolute universal jurisdiction.¹³⁹ As Fletcher rightly points out, the defendant should be at the center of any criminal proceeding.¹⁴⁰ In international criminal law, however, the victim has become central.¹⁴¹ This development comes at the expense of the rights of the accused.

Where compromising the rights of the accused is seen as a shortfall of international criminal law in general,¹⁴² it is especially troublesome with regard to universal jurisdiction. The low threshold for States to assume jurisdiction might result in undesired situations. These could *inter alia* include prosecution in a State with an underdeveloped judicial system or lead to ‘show trials’ to escape an *aut dedere aut judicare* obligation. Yet with States asserting *absolute* universal jurisdiction, the risk of an accused not receiving a fair trial, for instance due to complications with regard to the defendant’s right of defense, is even more present.¹⁴³

The presence of an accused at her/his own trial is valued so highly that multiple authoritative international law instruments require that “all alleged perpetrators and accused be given the rights to appear in person before the courts”.¹⁴⁴ The value of this right has been confirmed in many individual cases; from *Hopt v. Utah*¹⁴⁵ before the United States Supreme Court in 1884 to *Colozza v. Italy*¹⁴⁶ at the European Court of Human Rights in 1985. In the latter case the defendant’s presence was deemed so fundamental to his rights that the Court

¹³⁸ Fletcher, *supra* note 129, 580; A. Eser, ‘For Universal Jurisdiction: Against Fletcher’s Antagonism’, 39 *Tulsa Law Review* (2004) 4, 955.

¹³⁹ See Fletcher, *supra* note 129, 580.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*, 582.

¹⁴² *Ibid.*

¹⁴³ See, e.g., M. Proulx, ‘The Presence of the Accused at Trial’, 25 *Criminal Law Quarterly* (1982-1983) 2, 179; J.A. Strazzella, ‘The Concept of Presence in the Law’, *ACTA Universitatis Lucian Blaga* (2010) 1, 211, 213-16.

¹⁴⁴ See, e.g. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 222; *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 17; Poels, *Universal Jurisdiction*, *supra* note 15, 73.

¹⁴⁵ *Hopt v. Utah*, 110 U.S. 574 (1884), 579.

¹⁴⁶ *Colozza v. Italy*: ECtHR Application No. 9024/80, Judgment of 12 February 1985, 11, para. 29.

decided that a defendant who has become aware of proceedings against him, has a right to obtain a “fresh determination of the merits of the charge”.¹⁴⁷ In a strict legal sense a State does not infringe on a defendant’s rights when it asserts absolute universal jurisdiction as they do not prohibit the accused to be present (on the contrary, they might very much welcome it if the accused voluntarily shows up). In practice, however, this right might be compromised because the accused might not be aware of her/his prosecution in a third State and hence be unable to assert this right.

Another more specific right of the accused that might be compromised if a State asserts universal jurisdiction *in absentia* is the principle of *ne bis in idem*. This principle, known to the vast majority of legal systems – be it in slightly different forms¹⁴⁸ – protects the accused against new trials for the same facts. Although supporting universal jurisdiction, Eser acknowledges the risk of *ne bis in idem* violations.¹⁴⁹ He notes that international instruments usually¹⁵⁰ only oblige their State parties to prevent a second prosecution within their own national jurisdiction.¹⁵¹ Eser refers to Article 14(7) *International Covenant on Civil and Political Rights* and Article 4 of Protocol No. 7 of the *European Convention on Human Rights* as prominent examples of provisions that only prohibit *ne bis in idem* violations in the same country.¹⁵² This ‘lacuna in international law’¹⁵³ results in many transnational violations of the *ne bis in idem* principle.¹⁵⁴

The United States, for example, principally ignore foreign convictions or proceedings completely while other States ignore *ne bis in idem* when the suspect is accused of committing international crimes¹⁵⁵ or only take past proceedings

¹⁴⁷ *Ibid.*

¹⁴⁸ Fletcher, *supra* note 129, 581; G. Conway, ‘Ne Bis in Idem in International Law’, 3 *International Criminal Law Review* (2003) 3, 217, 218.

¹⁴⁹ Eser, *supra* note 138, 964.

¹⁵⁰ The European Union is an exception. See Article 50 of the *Charter of Fundamental Rights of the European Union* (2000/C 364/01); See also A. Poels, ‘A Need for Transnational Non Bis in Idem Protection in International Human Rights Law’, 23 *Netherlands Quarterly of Human Rights* (2005) 3, 329, 336 [Poels, Ne Bis in Idem].

¹⁵¹ Eser, *supra* note 138, 964.

¹⁵² *Ibid.*

¹⁵³ Poels, *Ne Bis in Idem*, *supra* note 150, 339.

¹⁵⁴ *Ibid.*, See also J. A. E. Vervaele, ‘Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU’, 9 *Utrecht Law Review* (2013) 4, 211; R. Echle, ‘The Passive Personality Principle and the General Principle of Ne Bis In Idem’, 9 *Utrecht Law Review* (2013) 4, 56, 64; Poels, *Ne Bis in Idem supra*, note 150.

¹⁵⁵ UN Doc. A/65/181 (2010), *supra* note 10, 19.

into consideration when determining the sentencing.¹⁵⁶ And even if States in their national laws prohibit new proceedings for a fact already adjudicated in a foreign court,¹⁵⁷ it might be difficult for the State prosecuting on the basis of absolute universal jurisdiction to always be aware of previous trials. Not respecting foreign judgments will likely result in less impunity,¹⁵⁸ but this should not be at the cost of such fundamental rights of the defendant.

3. Destabilizing International Relations

The third argument against absolute universal jurisdiction is the probable destabilization and juridification of international relations. With juridification of international relations I understand what Kissinger describes as “the movement [...] to submit international politics to judicial procedures”.¹⁵⁹ With international politics becoming more juridical, the juridical will be increasingly political. States could (threaten to) use universal jurisdiction as a political tool or could be perceived as doing so in their relations with other States.¹⁶⁰ This is confirmed by Belgium experiencing a *politicization of the law* as a result of their absolute universal jurisdiction legislation.¹⁶¹ This politicization, Judge Guillaume argues, could lead to “total judicial chaos”.¹⁶²

Even if not resulting in total chaos, States asserting universal jurisdiction will likely face a reaction from the national State of the suspect or the State that harbors the suspect on its territory. This is indeed what happened in the *Ould Dah* case mentioned before. The French conviction of Ould Dah, a Mauritanian national, for committing torture, led to a serious deterioration of the relations between France and Mauritania.¹⁶³ The measures Mauritania took to retaliate against France included the expulsion of French (aid) workers and military trainees. Military cooperation between France and other African countries was also disturbed.¹⁶⁴ This naturally was a setback for France trying to stabilize different situations in Africa and to prevent the sort of acts for which Ould Dah

¹⁵⁶ Eser, *supra* note 138, 965; See also Echle, *supra* note 154.

¹⁵⁷ See, e.g., Netherlands, *Wetboek van Strafrecht*, Article 68(2) [Dutch Criminal Code].

¹⁵⁸ de Hullu, *supra* note 128, 540-541.

¹⁵⁹ Kissinger, *supra* note 130.

¹⁶⁰ M. Langer, ‘The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes’, 105 *The American Journal of International Law* (2011) 1, 1, 28.

¹⁶¹ UN Doc. A/65/181 (2010), *supra* note 10, 22.

¹⁶² *Arrest Warrant* case, *supra* note 12, Separate Opinion of President Guillaume, 44, para 15.

¹⁶³ Langer, *supra* note 160, 21.

¹⁶⁴ *Ibid.*

was prosecuted.¹⁶⁵ So although French authorities probably prosecuted Ely Ould Dah with the best of intentions, the result might have been counterproductive.

Mauritania's reaction is likely to be illustrative of the interaction between States that will result from States asserting absolute universal jurisdiction. Debatably, asserting universal jurisdiction *in absentia* could also be beneficial to interstate relations as such assertions would signal a dispute that could subsequently be resolved in a diplomatic manner.¹⁶⁶ I think this however highly unlikely, because it assumes that States are willing to discuss these assertions or to negotiate a solution, while the example of Mauritania demonstrates the more probable reaction – one of agitation and anger.

The relationship between France and Mauritania has not been the only relationship pressured under the (possible) assertion of universal jurisdiction. Belgium's absolute universal jurisdiction laws undermined its relations with several States.¹⁶⁷ Pressure from the United States, among others, threatening to move the NATO Headquarters out of Brussels, eventually led to Belgium amending its legislation.¹⁶⁸ Spain experienced similar pressure to adjust its legislation, with China demanding "immediate and effective measures to avoid possible obstacles and damages to the bilateral relations between China and Spain".¹⁶⁹ This statement was issued as a result of a Spanish investigation into sitting Chinese cabinet ministers.¹⁷⁰

The neo-colonialist argument that is familiar in critiques of the ICC is another aspect of the risk that absolute universal jurisdiction poses to interstate relations. As evidenced by the case law mentioned in this paper, it is often Western (-European) States that assert (absolute) universal jurisdiction.¹⁷¹ The accused, on the other hand, are usually nationals of non-Western States.¹⁷² This may be explained by reference to the more developed judicial system in Western States, enabling them to pursue complicated cases such as the prosecution of international crimes. Furthermore, developing States are often dependent on Western aid and hence not in the position to initiate proceedings against

¹⁶⁵ *Ibid.*

¹⁶⁶ Colangelo, *supra* note 29, 566.

¹⁶⁷ Rabinovitch, *supra* note 15, 524.

¹⁶⁸ Vandermeersch, *supra* note 66, 403; Yee, *supra* note 57, 510; Baker *supra* note 65, 155; Langer, *supra* note 160, 30; Stigen, *supra* note 90, 111.

¹⁶⁹ *Ibid.*

¹⁷⁰ Langer, *supra* note 160, 38.

¹⁷¹ See the cases mentioned in section 2.4.1. and Langer, *supra* note 160, 47.

¹⁷² Rabinovitch, *supra* note 15, 522.

nationals of a Western State.¹⁷³ Those who wish to refute this allegation of neo-colonialism might argue that the accused are often nationals from developing States because international crimes are more common in these States. Yet one only has to think of the military missions in which Western States were involved during the last decade (e.g. Iraq, Afghanistan) to understand that suspects of international crimes might be of Western origin as well. This also appears from the list of people Belgian magistrates were asked (and refused) to indict on the basis of universal jurisdiction, which included incumbent heads of State or government of *Western* States, such as US President George Bush Sr. and Israeli Prime Minister Ariel Sharon.¹⁷⁴ The practice of universal jurisdiction has hence led some commentators to suggest that universal jurisdiction would be imposing Western values on developing States.¹⁷⁵

If not a neo-colonialist instrument, the practice of absolute universal jurisdiction should at least be deemed generally inconsistent and arbitrary.¹⁷⁶ Comments to this effect were voiced by governments in the UN Secretary-General's report on universal jurisdiction. It was noted that "universal jurisdiction may be invoked selectively, on the basis of political motivations, to target particular individuals and [...] thus prone to abuse".¹⁷⁷ In the words of Guillaume: "[universal jurisdiction *in absentia*] encourage[s] the arbitrary, for the benefit of the powerful, purportedly acting as agent for an ill-defined 'international community'".¹⁷⁸

Consequently, there clearly is a tension between friendly interstate relations and the battle against impunity. The difficulty is that friendly interstate relations are desired, as they might facilitate the prevention of acts that too often go unpunished. The negative effect that the assertion of absolute universal jurisdiction could have on international relations is therefore a factor that has to be taken into account.

¹⁷³ *Ibid.*, 523.

¹⁷⁴ Vandermeersch, *supra* note 66, 408.

¹⁷⁵ Rabinovitch, *supra* note 15, 522.

¹⁷⁶ D. Hoover, 'Universal Jurisdiction Not So Universal: Time to Delegate to the International Criminal Court', 8 *Eyes on the ICC* (2011-2012) 1, 73, 95.

¹⁷⁷ UN Doc. A/65/181 (2010), *supra* note 10, 24.

¹⁷⁸ *Arrest Warrant* case, *supra* note 12, Separate Opinion of President Guillaume, at 44, para. 15.

IV. The Lack of Effective Safeguards to Mitigate the Objections

Supporters of universal jurisdiction (*in absentia*) are aware of the objections against it. In their joint separate opinion relative to the *Arrest Warrant* case, Judges Higgins, Kooijmans and Buergenthal propose four safeguards that are “absolutely essential to prevent abuse” to mitigate these objections.¹⁷⁹ These conditions are that (1) the asserting State must respect immunities, (2) before asserting absolute universal jurisdiction, the prosecuting State should request the national State to instate proceedings first, (3) the prosecutor or investigating judge should be independent from the government and, (4) for the sake of friendly interstate relations, there must be special circumstances justifying the assertion of absolute universal jurisdiction.¹⁸⁰ This section will argue that these conditions are inadequate in mitigating the abovementioned objections.

The first dilemma is the non-binding character of the safeguards. Of all proposed conditions, only condition (1) that calls upon prosecuting States to respect immunities is a rule under international law – as confirmed in the *Arrest Warrant* case. The other safeguards, on the contrary, are far from established rules, hence risking being ignored. But their optional or voluntary nature is not the only aspect that renders the proposed safeguards unconvincing, as will be demonstrated below.

Safeguard (2), for example, requires a State contemplating asserting universal jurisdiction *in absentia* to “first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned”.¹⁸¹ This condition would be easy to comply with seeing as prosecution by States that do have a more direct link to the crime or criminal is exactly what is lacking. This safeguard is therefore more descriptive of the situation than it is a condition. Moreover, it is debatable to what extent this condition would mitigate possible *ne bis in idem* violations. This fundamental right of an accused is still likely to be infringed upon with the proposed limited interaction between the State considering prosecution and the national State. A more elaborate notification system between States contemplating absolute universal jurisdiction should be in place to prevent prosecution based on universal jurisdiction by multiple States at the same time.

Condition (3) of the Joint Opinion requires the prosecutor or investigating judge to be “without links to or control by the government of that State”. The

¹⁷⁹ *Arrest Warrant* case, *supra* note 12, Joint Opinion, 81-82, para. 59.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

complete independence of prosecuting authorities is, however, not generally accepted as very common; there oftentimes is some relation to the executive branch.¹⁸² This is especially true for States where the prosecution is institutionally part of the executive branch rather than being a body of the judiciary. In the Netherlands, for example, the Minister of Security and Justice has instructive powers in individual criminal cases. Indeed, in some States the prosecutor expressly requires an order or authorization from superiors to prosecute a criminal offence committed abroad. These States include Finland, Cameroon, the Czech Republic, Germany, Australia, New Zealand, Israel and Norway.¹⁸³ Moreover, some States allow for *actio popularis* – the initiation of criminal proceedings by private persons. It is hence unrealistic to expect a prosecutor to have the freedom to take such a politically sensitive decision, which the assertion of absolute universal jurisdiction is likely to be, in complete independence. This renders prosecutions based on absolute universal jurisdiction prone to be used as a political tool.

Despite the objections against politics influencing the prosecutor's decisions, political involvement may sometimes be precisely what is required to prevent a destabilization of international relations. If the prosecutor is completely independent, governments would be unable to control a prosecution that would undermine their relations with the State(s) involved, with all its associated consequences. The impasse between on the one hand the desire for an independent prosecutor and on the other hand the possibility for States to take their international relations into account is illustrative of the tension between the juridical and the political that is inherent to absolute universal jurisdiction.

The last condition (4) requires special circumstances to sustain the “desired equilibrium between the battle against impunity and the promotion of good interstate relations”.¹⁸⁴ Such a circumstance would, for example, be a request for prosecution by individuals related to the victims.¹⁸⁵ Circumstances like these will however usually occur, since the option of absolute universal jurisdiction is only pursued when States more closely linked to the crime fail to prosecute. Moreover, the determination of ‘special circumstances’ is likely to be subjective and thus easily complied with.

Finally, in addition to the critique above, it should be noted that the Joint Opinion does not consider a number of objections. No safeguard, for instance,

¹⁸² UN Doc. A/65/181 (2010), *supra* note 10, 17.

¹⁸³ *Ibid.*

¹⁸⁴ *Arrest Warrant* case, *supra* note 12, Joint Opinion, 81-82, para. 59.

¹⁸⁵ *Ibid.*

is proposed with regard to the possible interference of the prosecuting third State with local justice efforts in the State where the crime was committed. Furthermore, the proposed set of conditions fails to address the arbitrary application of absolute universal jurisdiction resulting from the dominance of developed States with an advanced judicial system capable of prosecuting complicated international crimes. So next to the debated effectiveness of the proposed conditions, the list of safeguards seems inconclusive and therefore unlikely to prevent the abuse rightly feared for in the Separate Opinion.

V. Preliminary Conclusion on Desirability

The international community justly considers the fight against impunity of perpetrators of international crimes a priority. Universal jurisdiction *in absentia* would be a powerful weapon in this battle, but the (potential) risks inherent to its use are just too high. Compromising the fundamental rights of the accused and destabilizing international relations for a suboptimal result with regard to the aims of criminal law are impossible to accept. Unfortunately, the safeguards proposed by Judges Higgins, Kooijmans and Buergenthal do not prevent these undesired consequences. So although the fight against impunity is a noble one, absolute universal jurisdiction should not be used as a weapon.

D. Conclusion

This article discussed the concept of universal jurisdiction *in absentia* or absolute universal jurisdiction when prosecuting international crimes from both a legal and a normative point of view. First, absolute universal jurisdiction was defined as universal jurisdiction that does not require the prosecuting State to have the alleged perpetrator in custody or, in the words of Judge Guillaume as “jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question”.¹⁸⁶ Applying the *Lotus* paradigm that allows States to assert criminal jurisdiction as long as international law does not prohibit this, the legality of universal jurisdiction *in absentia* was assessed using both conventional and customary international law. No rule of conventional law permitting or prohibiting the assertion of absolute universal jurisdiction seemed to exist. The same was subsequently concluded with regard to customary law, as the limited State practice seemed to lack the required *opinio juris* for both a permissive and a

¹⁸⁶ *Arrest Warrant* case, *supra* note 12, Separate Opinion of President Guillaume, 30, para. 9.

prohibitive rule. It was consequently established that international law does not prohibit States from asserting universal jurisdiction *in absentia* when prosecuting international crimes before domestic courts – with the lack of a clear permissive rule likely resulting in further discussion.

This finding is, however, a purely legal one. Whether States *should* or *should not* assert absolute universal jurisdiction is a normative question that was addressed in the third part of this article. Policy-wise, absolute universal jurisdiction is asserted as an instrument in the fight against impunity. Since it allows all States to prosecute alleged perpetrators of international crimes, the likelihood of such a criminal to live an unconcerned and free life is lowered. States asserting universal jurisdiction *in absentia* will however have undesired consequences. Three major objections have been discussed. Firstly, the aims of criminal law, such as full accountability and reconciliation, will be difficult to achieve if prosecution takes place in a State that has no link whatsoever to the crime. Secondly, absolute universal jurisdiction is likely to compromise fundamental rights of the accused, such as the *ne bis in idem* principle. Thirdly, the destabilizing effect on international relations could lead to assertions of absolute universal jurisdiction eventually being counterproductive. The gravity of these consequences render the following conclusion inevitable: although not prohibited under international law, it is undesirable for States to assert universal jurisdiction *in absentia* before domestic courts when prosecuting international crimes – disqualifying it as an alternative to the ICC in the fight against impunity.