Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law

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This article outlines the present state of universal jurisdiction over the "core crimes"[1] of international criminal law and situates it within the overall development of that law. The article argues that, if regular enforcement is (as it should be) a goal of the emerging system of international justice, then universal jurisdiction will be an essential part of that system. At the same time, the doctrine's application is laden with difficulties, particularly because of its inherent reliance on national authorities to enforce international norms. A reticence to apply (or indeed to implement) this doctrine appears to rest, in important part, on uncertainty about the limits of its exercise. It is argued, that such limits are best imposed by a prosecutorial discretion structured to take into account certain legitimate factors – factors which nonetheless require more clarification than they have so far received. The article concludes that universal jurisdiction will not become a reliable pillar of the international rule of law until these difficulties are squarely faced, but that current developments give cause for optimism.

I. INTRODUCTION

Universal jurisdiction is at a turning point. After fifty years of relative neglect, and with renewed impetus lent by the *Pinochet* hearings in the United Kingdom[2] and by the adoption of the Rome Statute of the International Criminal Court,[3] this doctrine stands poised to become an integral, albeit supplemental, component of the emerging international justice system. At the same time, serious obstacles stand in the way of its realization

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1. The term "core crimes" refers here to crimes derived from the Nuremberg legacy of international criminal law, and is used primarily to encompass genocide, crimes against humanity and war crimes.

2. R. v. Bow Street Metropolitan Stipendiary Magistrate and Others, *ex parte* Pinochet Ugarte (No. 3), 2 All E.R. 97 (H.L. 1999).

3. Rome Statute of the International Criminal Court, 37 I.L.M. 999, arts. 5-8 (1998).

as a consistently available tool of fair and impartial enforcement. These obstacles are in some measure "technical," bearing on the need for implementing legislation and appropriate international agreements. They are also to some extent inherent in the nature of universal jurisdiction. Because universal jurisdiction relies on national authorities to enforce international prohibitions, pivotal decisions can be expected to reflect, to a greater or lesser extent, domestic decision-makers' calculations as to the interests of justice, the national interest and other criteria. The element of uncertainty that this introduces is likely to prove durable and resistant to control, even with all the necessary agreements and legislation in place. The practice of universal jurisdiction is, therefore, unlikely to become significantly more regular unless sustained awareness-raising initiatives, programs of law reform and a marked convergence of opinion affect domestic decision-makers over time.

In spite of such obstacles, it is clear that a number of governments, through the express provision for universal jurisdiction over core crimes during the process of International Criminal Court (ICC) implementation, are choosing a path that will speed rather than curb the entrenchment of this doctrine. The wave of legislative activity currently underway will in time give rise to cases, and these will oblige legal systems to find working solutions to problems which at present elude consensus. The extent to which universal jurisdiction becomes a reliable part of a system for promoting the international rule of law in practice depends in large measure on the unfolding of these developments over the coming years.

II. DEFINITION AND RATIONALE

Universal jurisdiction fills a gap left where other, more basic doctrines of jurisdiction provide no basis for national proceedings. Under universal jurisdiction, the fact that a crime did not occur within or have a discernible impact on the territory or security of a state (thus falling outside of territorial or protective principle jurisdiction), or that no national of the state perpetrated or was a victim of the act (active or passive personality jurisdiction) is no impediment to proceedings by that state's authorities.[4] Where international law recognizes this form of jurisdiction, states have in effect acknowledged that any other state may or must investigate and prosecute a given crime, even absent the usual jurisdictional links.

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4. *See* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 786-88 (1988); M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 227 (2d ed. 1999); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 303-14 (5th ed. 1998).

The words "may or must" conceal an important nuance. In ordinary usage, "universal jurisdiction" encompasses both *permissive* and *mandatory* forms, where a state *may* and where a state *must* exercise jurisdiction. This largely parallels the distinction between the doctrine's manifestations under customary and under conventional international law.

Treaties setting out a regime of "universal jurisdiction" typically define a crime and then oblige all parties either to investigate and (if appropriate) prosecute it, or to extradite suspects to a party willing to do so.[5] This is the obligation of *aut dedere, aut judicare* ("either extradite or prosecute").[6] Once a state ratifies or accedes to a treaty, it has no option in the matter.[7] Hence, this form of jurisdiction is not truly "universal," but is a regime of jurisdictional rights and obligations arising among a closed set of states' parties. Under customary law, states are (at least in the prevailing view) merely *permitted* to exercise universal jurisdiction over, for example, piracy on the high seas or crimes against humanity. The phrase "universal jurisdiction" more accurately describes matters of custom than it does the jurisdiction that arises only *inter partes* through a convention.

The rationales underlying international criminal law, in general, also support universal jurisdiction.[8] First, the serious crimes concerned are "of

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5. Examples are found in relevant articles of the Geneva Conventions (including Additional Protocol I). *See infra* notes 16-17. Additional examples can also be found in the U.N. Convention Against Torture. *See infra* note 19 and accompanying text. For treaties containing such provisions that do not deal with "core crimes" of international criminal law, see *infra* note 18.

6. For an extensive discussion, see M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW (1995).

7. A rare example of a treaty provision providing for permissive universal jurisdiction over a "core crime" is found in article 5 of the Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 246: "Persons charged with . . . [the crime of apartheid] *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. . . ." *Id*. (emphasis added).

With regard to the crime of piracy on the high seas, article 105 of the Convention on the Law of the Sea, Dec. 10, 1982, 516 U.N.T.S. 205, reads:

> On the high seas, or in any other place outside the jurisdiction of any State, every State *may* seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure *may* decide upon the penalties to be imposed, and *may* also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Id. (emphasis added).

8. The rationales outlined in the text following are those uniquely justifying the availability of universal jurisdiction (and the imposition of individual responsibility at international law). Of course, the rationales supporting the prosecution of all crimes at domestic law also apply – with all their uncertainties – to crimes giving rise

universal concern,"[9] deserving condemnation in themselves, and deemed to affect the moral and even peace and security interests of the entire international community.[10] Second, other bases of jurisdiction are insufficient to see perpetrators brought to account, as these acts are frequently committed by those who act from or flee to a foreign jurisdiction, or by those who act under the protection of the state. As a result of these normative and pragmatic rationales, universal jurisdiction does not arise with respect to any and all crimes (as does jurisdiction under for example the territorial principle), but rather arises only with respect to particular offences.[11] The pragmatic consideration is especially apparent with piracy on the high seas (the first crime to be subject to universal jurisdiction), slavery[12] and terrorism,[13] where the potential to evade justice through absconding and safe-havens is great. The normative impulse is more apparent with crimes against humanity and war crimes, the prosecution of which reinforces the declared interest of all states in upholding fundamental principles of humanity. Nonetheless, both pragmatism and normativity play a role with respect to all these crimes. Pirates were labeled enemies of mankind (*hostis humani generis*),[14] emphasizing the moral aspect of the condemna-

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to universal jurisdiction at international law. These include deterrence, obtaining justice, supporting the rule of law, facilitating social healing and reconciliation, revealing the truth, and providing protection from perpetrators. *See* INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, THINKING AHEAD ON UNIVERSAL JURISDICTION: REPORT OF A MEETING HOSTED BY THE INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY 14-21 (1999); *see also* INTERNATIONAL LAW ASSOCIATION, COMMITTEE ON INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE, LONDON CONFERENCE: FINAL REPORT ON THE EXERCISE OF UNIVERSAL JURISDICTION IN RESPECT OF GROSS HUMAN RIGHTS OFFENCES 3 (2000).

9. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1986).

10. *See* BASSIOUNI, *supra* note 4, at 228-29; Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 LAW & CONTEMP. PROBS. 153, 166-67 (1996).

11. *See* Steamship Lotus (France v. Turkey), 1927 P.C.I.J. (Ser. A) No. 10 (Sept. 7). If one accepts the doctrine set down in *Steamship Lotus*, that states are entitled by their sovereignty to exercise jurisdiction within their territory over acts committed abroad, without the requirement of any permissive rule of international law, provided only that to do so is not prohibited by a positive rule of international law, then universal jurisdiction could in principle arise with respect to any crime. *See id.* Nonetheless, the reluctance of states to exercise jurisdiction beyond the grounds traditionally sanctioned by international law without its specific authorization, has led to the development of the positive norms of universal jurisdiction for certain crimes. *See* INTERNATIONAL LAW ASSOCIATION, *supra* note 8, at 11.

12. Rubin dissents on the availability of universal jurisdiction with respect to slavery. *See* ALFRED P. RUBIN, THE LAW OF PIRACY 11 (2d ed. 1997).

13. *See infra* note 18 and accompanying text.

14. *See* SIR ROBERT JENNINGS & SIR ARTHUR WATTS, OPPENHEIM'S

tion, while war crimes and crimes against humanity are often committed by those whose political power renders their state a *de facto* safe-haven, a driving consideration in the post-War development of international criminal law generally.

The imperative to defend the fundamental interests of the international community through criminal process has frequently been said to endow national courts exercising universal jurisdiction with the *de facto* status of agents of the international community, the declared values of which the proceedings vindicate. To confer such a role on national authorities, however, raises complex practical difficulties which have only begun to be addressed in detail.

A. Scope

Since the end of World War II, a considerable number of international conventions have established a duty to prosecute certain crimes. Such a duty does not always entail universal jurisdiction. For example, article 4 of the 1948 Genocide Convention defines this crime, stating that "[p]ersons commiting genocide . . . shall be punished" and article 1 affirms that States Parties "undertake to prevent and to punish" it. However, article 6 of the Convention only refers to a trial before the tribunals of the State within the territory of which the acts of genocide occur or before an international criminal court, and does not provide for universal jurisdiction or the duty to extradite or prosecute.[15]

Universal jurisdiction – in the form of the obligation to "extradite or prosecute" – was recognized one year later in the four 1949 Geneva Conventions, which oblige all States Parties to prohibit "grave breaches" of them.[16] Grave breaches are those violations of the Conventions that entail individual responsibility. States Parties are under a duty to search for persons alleged to have committed grave breaches, regardless of their nationality, to bring them before their own courts or alternatively to hand them over to another State Party for prosecution. The "extradite or prosecute" obligation with respect to grave breaches under the Conventions was car-

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INTERNATIONAL LAW 746 (9th ed. 1996); *see also* BASSIOUNI, *supra* note 4, at 229.

15. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, arts. 1, 4, 6, 78 U.N.T.S. 277.

16. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, arts. 49, 50, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, arts. 50, 51, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 129, 130, 75 U.N.T.S. 135; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 146, 147, 75 U.N.T.S. 287.

ried forward to the additional grave breaches of the first 1977 Additional Protocol.[17] The mechanism also became a characteristic feature of the terrorism-related conventions of the 1960s and 1970s, as well as others that followed.[18]

Finally, the Convention Against Torture[19] provides an explicit duty to make the crime of torture as defined in the Convention an offence under national law (article 4). Each party is required to establish jurisdiction over the crime when committed on its territory, by one of its nationals, against one of its nationals (if the State feels it appropriate) or in any case in which the accused is present on its territory and it does not extradite him or her (article 5). The State Party is then obliged, if it does not extradite the person, to submit the case to its authorities for prosecution (articles 6, 7 and 12). Thus, at least in the Geneva Conventions and the Convention Against Torture, international law does provide a clear, mandatory form of "universal" jurisdiction as between States Parties.[20] Where genocide, crimes against humanity and other war crimes are concerned, one must turn to custom.

Customary law is less clear than law established by convention, but it has the advantage of applying to all States. For this same reason, its scope is often strongly contested. The clearly prevailing view is that genocide, crimes against humanity and war crimes (including not only grave breaches of the Geneva Conventions but also the "Hague law" applicable in international armed conflict, as well as crimes arising in non-international armed conflicts) give rise to permissive universal jurisdiction

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17. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, arts. 11, 85, 86, 88, 1125 U.N.T.S. 3, 16 I.L.M. 1391, Annex I to U.N. Doc. A/32/144 (1977).

18. *See* Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, art. 7, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, art. 7, 24 U.S.T. 565, 974 U.N.T.S. 177; International Convention Against the Taking of Hostages, Dec. 17, 1979, art. T.I.A.S. No. 11,081, 1315 U.N.T.S. 205; European Convention on the Suppression of Terrorism, Jan. 27, 1977, art. 7, 90 E.T.S. 3.

19. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Feb. 4, 1985, 23 I.L.M. 1027, U.N. Doc. A/39/51 (1984).

20. The limited effect of such jurisdiction is particularly noticeable where the convention involved is adopted by a regional organization, and is thus not even potentially universal. *See* The Inter-American Convention to Prevent and Punish Torture Dec. 9, 1985, art. 8, 67 O.A.S.T.S., 25 I.L.M. 519. The Inter-American Convention on the Forced Disappearance of Persons requires states parties either to extradite or to prosecute offenders. *See* Resolution adopted by the OAS General Assembly, 7th Plen. Sess., OEA /ser.P,AG/doc.3 114/94 rev.1 (June 9, 1994).

at international law.[21] That customary law provided universal jurisdiction for the further grave breaches set out in Additional Protocol I, or for acts committed in non-international conflicts – indeed, whether the latter attracted individual responsibility under international law at all – has recently become less difficult to support.[22] The Statutes and jurisprudence of the *ad hoc* tribunals for the Former Yugoslavia and for Rwanda, and the Rome Statute itself confirm the international criminality of at least some of these acts and strongly buttress claims that they give rise to customary universal jurisdiction.[23]

Some commentators go beyond the above view on permissive universal jurisdiction and argue with respect to some or all core crimes that such jurisdiction is mandatory at customary law, often adducing arguments of *jus cogens* and obligations *erga omnes* in support.[24] From this perspective, universal jurisdiction flows directly from the fact that the core crimes of international criminal law rest on norms of *jus cogens* that give rise to obligations *erga omnes*.[25] The evidence from practice and *opinio juris* none-

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21. For the view that customary international law supports only permissive and not mandatory universal jurisdiction at present, see Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROBS. 41, 52-59 (1996). Theodor Meron argues that universal jurisdiction is broadly available, but is not mandatory. *See* Theodor Meron, *International Criminalization of Internal Atrocities*, *in* WAR CRIMES LAW COMES OF AGE: ESSAYS 228, 251-52, 254-55 (1998). A leading text that is non-committal about the existence of universal jurisdiction at all (apart from either a conventional manifestation, or piracy at customary law) and concedes only a "gradual evolution" towards even permissive universal jurisdiction over crimes against humanity is JENNINGS & WATTS, *supra* note 14, at 998.

22. For a persuasive argument that permissive universal jurisdiction is long established for these, see Meron, *supra* note 21, at 249-53.

23. Canada's implementing legislation for the Rome Statute declares that "[C]rimes described in articles 6 [genocide] and 7 [crimes against humanity] and paragraph 2 of article 8 [war crimes in international and internal armed conflict] of the Rome Statute are, as of July 17, 1998, crimes according to customary international law, and may be crimes according to customary international law before that date." Crimes Against Humanity and War Crimes Act, ch. 24, § 6(4), 2000 S.C. 23 (Can.) (describing offenses outside Canada).

24. *See* BASSIOUNI, *supra* note 4, at 220, focusing on crimes against humanity:

> Since 'crimes against humanity' are international crimes for which there is universal jurisdiction . . . any and all states have the alternative duty to prosecute or extradite. Prosecution is premised not only on a state's willingness, but also on its ability to prosecute fairly and effectively. In the absence of these premises, the duty to extradite to a state willing and capable of prosecuting fairly and effectively arises.

Id; *see also* M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes, 59 LAW & CONTEMP. PROBS. 63 (1996).

25. *See* BASSIOUNI, *supra* note 4, at 210-17. *See also* Amnesty International's thoroughly documented submission to the House of Lords in the *Pinochet* litigation: *United Kingdom: The* Pinochet *Case–Universal Jurisdiction and the Absence of Im-*

theless falls short of supporting such arguments unequivocally, at least at present.[26] As a result, the best that can be said with certainty is that customary law allows a permissive, and may be evolving toward a mandatory, exercise of universal jurisdiction over genocide, crimes against humanity and some war crimes. This is less than ideal, as the *jus cogens* rationale would lend coherence to the ongoing evolution of international criminal law by pointing towards a vision of emerging international law that would incorporate as an integral part the protection of fundamental rights. The argument also makes practical sense, in that the ends of universal jurisdiction (to impose accountability for crimes of international concern and to eliminate safe havens) would be better served if the state where the perpetrator is found did not have any discretion – least of all a politically motivated discretion – as to whether to proceed. A permissive approach might be thought to tolerate the possibility of safe-havens and thereby undermine accountability. The crystallization of an emerging rule of customary law that would *oblige* states to extradite or prosecute those reasonably suspected of international crimes should therefore be encouraged.

Nonetheless, efforts to put into operation a workable system for the suppression of international crimes must be mindful of international life as it presently operates. While the coherence and effectiveness of the normative order should always be borne in mind, it is important not to put conceptual neatness ahead of the difficulties that arise in determining international law and in putting doctrine into practice. As discussed below, this requires that the hard legal problems be clarified in order to better realize the aims of this law.

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munity for Crimes Against Humanity (AI Index EUR 45/01/99) (London: Amnesty International, 1999), at 20.

26. Even the most prominent advocate of the *jus cogens* approach, Bassiouni, admits:

> Positive ICL does not contain . . . an explicit norm that characterizes a certain crime as part of *jus cogens* and the practice of states does not conform to the scholarly writings that espouse the views expressed above [by Professor Bassiouni]. States' practice evidences that, more often than not, impunity has been allowed for *jus cogens* crimes, the theory of universality has been far from universally recognized and applied, and the duty to prosecute or extradite is more inchoate than established, other than when it arises out of specific treaty obligations.

M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*, *in* I INTERNATIONAL CRIMINAL LAW 39-40 (M. Cherif Bassiouni ed., 2000).

III. CURRENT DEVELOPMENT OF UNIVERSAL JURISDICTION

To date, the exercise of universal jurisdiction over core crimes of international criminal law has been sporadic at best, responding to selected situations at particular times. With the movement towards the entry into force of the Rome Statute, however, a process of national law reform has begun which could develop into a trend that would entrench universal jurisdiction as a more widely available means of accountability.

It was not until after World War II that universal jurisdiction was explicitly recognized for the core crimes of international criminal law. However, post-war activity subsided into the stasis of the Cold War, leaving universal jurisdiction to fall into neglect. The *Eichmann* [27] case brought the doctrine back to international attention in 1961. Although the case did not lead to any similar prosecutions in the short term, it did inspire efforts to secure accountability for crimes committed during World War II, which bore fruit in the legislative activity and related cases that arose in the 1980s and 1990s. During these years, a number of countries passed legislation and undertook proceedings, generally without great success, against those alleged responsible for crimes during World War II.[28]

The establishment by the Security Council of *ad hoc* tribunals to try those responsible for crimes committed in the Former Yugoslavia and Rwanda led to a number of national prosecutions related to these situations.[29] The need to pass national cooperation legislation and the presence of suspected criminals among refugee populations facilitated these proceedings, although the Security Council imprimatur, declaring the crimes a threat to international peace and security, may have contributed to the willingness of governments to act.[30] Despite their limited temporal application and the limited success (in terms of the number and completion of proceedings) to this point, these activities did reflect an underlying endorse-

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27. Att. Gen. of Israel v. Eichmann, 36 I.L.R. 277, 298-99 (Isr. S. Ct. 1962)

28. For a survey of several national jurisdictions, see the relevant chapters in THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES (Timothy L. H. McCormack & Gerry J. Simpson eds., 1997).

29. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, adopted by Security Council on May 25, 1993, U.N. Doc. S/Res/827 (1993), adopting the Statute proposed by the Secretary-General in the Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704 at 36. International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1January 1994 and 31 December 1994, adopted by Security Council on 8 November 1994, U.N. Doc. S/Res/955 (1994).

30. *See* Amnesty International, *International Criminal Tribunals: Handbook For Government Cooperation* (AI Index: IOR 40/07/96, 1996).

ment of universal jurisdiction, and opened the door for later developments in establishing a role to national courts in enforcing fundamental norms of humanity.

Previous failings in the implementation and use of universal jurisdiction have recently been compensated for – at least in part – by a combination of the U.K. *Pinochet* proceedings and the adoption of the Rome Statute for the ICC (with its related process of national implementation). These two events have made universal jurisdiction a subject of sustained debate in many countries.

That the Rome Statute should stimulate the incorporation of universal jurisdiction into national law was widely unforeseen, since the Statute imposes no obligation on States Parties to prosecute the crimes it defines, whether on a universal or any other basis. Rather, it provides a limited incentive to prosecute crimes committed by the nationals or on the territory of other States Parties. Yet, this incentive has been enough to prompt a wave of legislative activity as countries that have ratified or are contemplating ratification move to enable their domestic courts to meet the criteria of "complementarity" set out in the Rome Statute. The question of whether to provide for universal jurisdiction over these crimes has also arisen.

The logic of providing for universal jurisdiction at the national level as part of the regime of international justice foreseen by the Rome Statute is compelling. The Rome Statute is premised on a desire to diminish impunity for the most egregious conceivable crimes. It anticipates, through its complementarity mechanism, that national courts will bear the greater part of the burden in ensuring accountability, with the ICC playing a role only where national courts are unwilling or unable to act themselves. At the same time, it cannot be expected that the ICC will have the resources to try more than a very limited number of cases.[31] Thus, although the incentive provided by the complementarity mechanism is limited to crimes committed on the territory or by the nationals of State Parties, a role for universal jurisdiction presents itself clearly. If the ICC will be unable to try more than a fraction of alleged perpetrators at any one time, and if the most obvious states to exercise jurisdiction (the territorial state of the crime or the

31. One document has assumed a "plausible" budget of $100 million for an ICC with 60 states parties and called upon to deal with "one or two major situations." Cesare Romano & Thordis Ingadottir, *The Financing of the International Criminal Court: A Discussion Paper* (Project on International Courts and Tribunals New York University), at 11. As this amount is slightly less than the 1999 budget of the ICTY, *see id.* at 29, the jurisdiction of which is limited to one (former) country, one gets some idea of how limited the capacity of even a well-provisioned international court will be.

national state of the accused) will typically be unwilling or unable to act in a genuine manner, the sole choice remaining will often be between universal jurisdiction and impunity. The argument for national provision of universal jurisdiction is, therefore, a forceful one. Without the supplementary recourse that universal jurisdiction could provide via the courts of individual states, both the means of obtaining accountability and the credibility of the international community's claim that it desires accountability would be seriously reduced. States with the declared aim of ensuring that their courts are able to serve as complements to the ICC are, therefore, open to the argument that they must, to do so effectively, make universal jurisdiction available for genocide, crimes against humanity and war crimes. Without such a decision by a critical mass of states, the ICC's aim of eroding impunity for the worst of crimes is likely to be seriously impaired.

A skeptic might reply that, while this argument has some force as part of a doctrinal effort to achieve a coherent vision of individual accountability at international law, it would not necessarily be compelling to states engaged in questioning how best to legislate in their national interest. From this prospective, there could be a gap between the international interest in the rule of law and the immediate interests of an individual state or government. It remains, at the time of this writing, too early to describe, definitively, the direction of the emerging trend, but at the early stage of the process of ICC implementation, a number of states have shown a willingness to follow the above reasoning.

Canada, the first country to pass legislation implementing the Rome Statute, established the jurisdiction of its national courts over genocide, crimes against humanity and war crimes as defined by customary or conventional international law, declaring the definitions of the Rome Statute to constitute custom as of at least July 17, 1998.[32] With regard to acts committed outside of Canada, the legislation applies to conduct prior to its entry into force, to the extent that international law allows. The jurisdiction is limited by the requirements that: the accused was a Canadian or was a national of a state engaged in an armed conflict against Canada; the victim was Canadian or was the national of state allied with Canada in an armed conflict; or subsequent to the alleged offence, the suspect was present in Canada.[33] This last criterion constitutes the "universal jurisdiction" provision. New Zealand has legislated more broadly in some respects, giving its courts jurisdiction to try Rome Statute crimes regardless of: the

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32. *See supra* note 23.

33. *See* Crimes Against Humanity and War Crimes Act, ch. 24, §§ 8-11, 2000 S.C. 23 (Can.). It appears that the presence requirement will prevent Canada from opening an investigation with respect to an alleged perpetrator known not to be present in Canada, thus foreclosing the possibility of extradition requests. The shortcoming of this limitation is discussed further at *infra* p. 418.

nationality of the accused; whether or not any act forming part of the offence occurred in New Zealand; or whether the accused was present in New Zealand at the time of the alleged crime or at the time the decision to charge was made.[34] Belgium, which amended its legislation even before ratification of the Rome Statute, provided for similar jurisdiction.[35] Switzerland, Germany and others have expressed intention to follow suit.[36] On the other hand, the United Kingdom, a third example among members of the Commonwealth, declined to include such jurisdiction in the first draft of its own legislation.[37]

The provision of universal jurisdiction even by a significant minority of ratifying states will be an enormous advance for the doctrine. More importantly, the jurisprudence that could be expected to follow from this legislative process will offer an opportunity to wrestle with the thorny legal and political problems that attend universal jurisdiction.

IV. PRACTICAL AND POLITICAL PROBLEMS TO BE ADDRESSED

The political and practical problems that arise in attempting to put universal jurisdiction into practice are neither few nor lightly dismissed. The political will of states to go forward with the legislative changes necessary to make universal jurisdiction effective is conditioned in part by their un-

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34. *See* International Crimes and International Criminal Court Act 2000, §§ 8-11, and in particular § 8(1). The legislation appears to open the door for extradition requests.

35. *See Loi relative à la répression des violations graves de droit international humanitaire* (Feb. 10 1999), published in the *Moniteur Belge* (Mar. 23 1999), § 7. This law amends an existing statute (the 1993 *Loi relative à la répression des violations graves du droit international humanitaire*) to add genocide and crimes against humanity (as defined in the Rome Statute) to serious violations of the 1949 Geneva Conventions and their Additional Protocols, for all of which Belgian law now provides universal jurisdiction.

36. See the discussion in Michael Cottier, *The Case of Switzerland*, *in* I THE ROME STATUTE AND DOMESTIC LEGAL ORDERS: GENERAL ASPECTS AND CONSTITUTIONAL ISSUES 219 (Claus Kress & Flavia Lattanzi eds., 2000) [hereinafter Kress & Lattanzi]. Germany will refer to the principle of universality in its planned *Code of Crimes Against International Law*, which will enable Germany to meet the complementarity requirements of the Rome Statute. *See* Frank Jarasch & Claus Kress, *The Rome Statute and the German Legal Order*, *in* Kress & Lattanzi. At a conference on the International Criminal Court held at Pretoria on July 5-9, 1999, officials from 13 member states of the Southern African Development Community (SADC) adopted the *Pretoria Statement of Common Understanding on the International Criminal Court*, which recommended a (non-binding) *Model Enabling Act* developed at the conference (on file). This act would provide for universal jurisdiction over all Rome Statute crimes: § 5(ii).

37. *See Crimes Against Humanity and War Crimes Bill*, presented to the House of Commons on July 24, 2000 <http://www.ishr.org/icc/detail/wense.htm>.

derstanding of how these problems are to be dealt with. Although cases pursued under the legislation passed during the process of ICC implementation will undoubtedly uncover new difficulties, the main contours of the obstacles to come appear to be well known, and have recently become the object of increasing scrutiny and discussion.

A. Basic Legislative Shortcomings

The first level of difficulties relates to the legislative basis for the exercise of universal jurisdiction by national authorities. Even assuming the will and resources were present, prosecutors or investigating judges in many countries simply would not have the necessary legal means to investigate or prosecute on the basis of universal jurisdiction. For example, in the United States torture alone is subject to universal (in fact, merely extraterritorial) jurisdiction.[38] Genocide,[39] other crimes against humanity and war crimes[40] are not. Many countries are in a similar position.[41] For universal jurisdiction to fulfil its potential as part of an international system for the suppression of impunity, such legislation should also be of adequate scope and not subject to temporal, spatial and other restrictions. In principle, such legislation could even be retroactive to the extent that the conduct gave rise to individual responsibility in international law at the time it was committed; politically, this will often be difficult. While adoption of the Rome Statute, with its reasonably comprehensive definitions, is likely to lessen dispute at least about the scope of universal jurisdiction at customary law, broader doubts about the application of the doctrine will still have to be overcome.

The incorporation of definitions and provisions of jurisdiction at national law are not the end of the task. Even once jurisdictional and definitional difficulties are overcome, the full implementation of universal jurisdiction into national law requires the adaptation of adjacent areas of law affecting the exercise of such jurisdiction. These areas include laws relating to immunity (not dealt with here), mutual legal assistance (to facilitate the exchange of evidence, witnesses, etc.) and extradition. Without a

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38. *See* 18 U.S.C. § 2340A (1999) (This statute applies only to acts committed outside the United States.).

39. Genocide is prohibited under U.S. law, but only when committed within the U.S. or when the alleged offender is a U.S. national. *See* 18 U.S.C. § 1091 (1999).

40. The 1996 *War Crimes Act* made punishable certain war crimes only when committed by or against members of the U.S. armed forces. *See* 18 U.S.C. § 2441 (1991).

41. "Until recently, only a few dozen states had provided their courts with the specific competence to try certain gross human rights offences under the principle of universal jurisdiction. Even in those states legislation tended to be quite a patchwork." INTERNATIONAL LAW ASSOCIATION, *supra* note 8, at 12.

comprehensive system of laws at the national level, and without such laws being adopted by a sufficient number of states, universal jurisdiction cannot be expected to function in practice as a working pillar of the international justice system. This is an area of legal reform that has only begun to receive sustained attention in the wake of the U.K. *Pinochet* proceedings.

B. Evidence/Mutual Legal Assistance[42]

The exercise of universal jurisdiction raises special evidentiary challenges because the majority of the evidence necessary to make out a case may lie in the control of another jurisdiction – and indeed, of the jurisdiction where the alleged crime occurred and where the accused may be a standing official. State officials may make difficult or impossible visits to sites or access to witnesses and documents indispensable to proving the alleged crime. Even where documents can be obtained, courts outside the jurisdiction of the crime may sometimes find it difficult to assess their authenticity.

Such problems are the traditional domain of mutual legal (or judicial) assistance. Mutual legal assistance is a complex area of law governed by many bilateral and multilateral treaties or agreements, with corresponding national implementing legislation. Typically, these agreements and this legislation allow the requested state a wide latitude of discretion, and may allow the state to refuse to provide assistance on a number of grounds, including because: the offence is not recognized under its own law; the proceedings in the requested state would be unfair (in the requested state's judgment); or the national interest of the requested state dictates that assistance be refused. Given the legal problems attendant on the exercise of universal jurisdiction and the politically sensitive matters that typically arise in cases involving crimes under international law, these factors pose obvious problems.

Mutual legal assistance agreements do not at present deal specifically with the issue of crimes under international law and universal jurisdiction. Despite the fact that on a number of occasions international instruments have called for a high degree of cooperation in this area.[43] Partly as a result

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42. See the discussion in INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 8, at 48-50.

43. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), June 8, 1977, art. 8, 1125 U.N.T.S. 609:

> 1. The High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in

of the evidentiary problems arising in the absence of an effective system of international cooperation, most cases based on universal jurisdiction have relied essentially on eyewitness testimony that was available in the prosecuting state.[44] States legislating for universal jurisdiction should, therefore, review their mutual assistance arrangements, taking into account the exercise of this doctrine with respect to international crimes, and should revise laws or agreements as necessary to address relevant issues, including:

a) *On site investigations*: It may be desirable for investigators, counsel for the defense or prosecution, judges or juries to visit or examine sites related to the alleged crime. Such visits require the permission of the requested state, as well as adequate facilities for their proper conduct (such as protection for the investigators, where necessary).[45]

b) *Obtaining evidence*: This would include "conducting searches and seizures, interviewing witnesses, excavating graves, producing documents, and supplying material evidence."[46] Agreements could provide for making evidence available across borders either in writing or by audio or video link, but would have to take into account problems of verification, cross-examination, and the sanctioning of false testimony.

> respect of grave breaches of the Conventions or of this Protocol . . . . 3. The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters.

Id; *see also* 1984 Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, *supra* note 19, art. 9:

> 1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings. 2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

Id; *see also*, *Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, G.A. Res. 3074 (XXVIII) (Dec. 3, 1973), ¶6.

44. *See* INTERNATIONAL LAW ASSOCIATION, *supra* note 8, at 17.

45. In the *Niyonteze* case, arising from the 1994 genocide in Rwanda, the Swiss court (a military tribunal) visited Rwanda to collect statements from witnesses who would be unable to attend trial in Switzerland. *See* INTERNATIONAL LAW ASSOCIATION, *supra* note 8, at 28 (citing *Jugement en la cause Fulgence Niyonteze*, Tribunal militaire de division 2, Lausanne, Apr. 30, 1999).

46. Christopher Keith Hall, *Outline of Some Legal and Practical Obstacles to Prosecution Based on Universal Jurisdiction and Some Possible Solutions, in* INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY 50 (1999) (paper prepared for the International Council on Human Rights Policy meeting on Universal Jurisdiction, 6-8 May 1999).

c) *Protection of victims and witnesses*: The prosecuting state is not in a good position to provide protection for witnesses abroad either during trial or in the long-term. A practical precondition to obtaining the cooperation of witnesses may, therefore, be obtaining verifiable assurances that they will be protected by authorities in their home state, or even allowing the witness to relocate to the prosecuting state. Without such assurances, witnesses may understandably be reluctant to testify, particularly where the accused and his or her supporters retain significant power in the state of the crime.

d) *Reasons for refusal to provide assistance*: In the case of serious crimes under international law, such refusal should be subject to restrictions, including restrictions on the national security and political offence grounds for refusal.

Systematic amendments to mutual assistance arrangements no doubt entail a comprehensive review and reform of commitments in this complex and often overlapping area of law. Nonetheless, such changes to the mutual legal assistance regime are potentially indispensable to the eventual effective exercise of universal jurisdiction.

C. Extradition[47]

The primary shortcoming with respect to extradition relating to crimes under international law is the lack of comprehensive and express treaty obligations. As international law treats extradition generally as a matter of comity, subject to the discretion of the requested state in the absence of a treaty obligation,[48] obligations to extradite must either emerge through treaty,[49] through a limiting rule of customary law, or conceivably through

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47. See the discussion in INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 8, at 45-46.

48. *See* I.A. Shearer, EXTRADITION IN INTERNATIONAL LAW 23-27 (1971).

49. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 7 (that states parties pledge themselves to grant extradition "in accordance with their laws and treaties in force"); The Geneva Convention of 12 August 1949, art. 49 (Convention I), art. 50 (Convention II), art. 129 (Convention III), art. 146 (Convention IV) (that a High Contracting Party is obliged to bring those responsible for grave breaches, whatever their nationality, before its own courts or, if it prefers, to hand them over to another Party that has made out a *prima facie* case); Protocol I, *supra* note 43, art. 8 (that subject to the obligations under the Geneva Conventions, "and when circumstances permit, the High Contracting Parties shall cooperate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred."); Convention Against Torture, *supra* note 43, art. 7(1) ("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

the unilateral decision on the part of the state to pass legislation allowing such extradition. The emergence of an obligation to extradite or prosecute at customary international law would represent an important development and would do away with the need for an international convention or conventions setting out a duty to prosecute or extradite for crimes beyond those covered by existing treaties (grave breaches, torture, and apparently genocide). With or without such a customary duty, however, changes to national extradition laws are needed.

Yet, once the basic possibility of extradition for crimes under international law is established, a host of difficulties remain. *Pinochet* made clear the extent to which national laws relating to extradition can impose problems and delay in the exercise of universal jurisdiction. The intricacies that mark extradition law often make proceedings exceedingly slow. Issues include those raised in the U.K. proceedings (primarily, whether the offence was punishable under the law of the requested state at the relevant time) and go farther to encompass a range of other matters. These may involve such restrictions as the bar in many constitutions of extradition of nationals,[50] political offence exceptions,[51] national interest or national security factors, statutes of limitation,[52] the perceived possibility of unfairness in the proceedings, humanitarian grounds, *non bis in idem*, and more. Importantly, such factors are often left to the discretion of political rather than judicial authorities, without adequate transparency and possibility of review.

While some of these factors would (at least in certain circumstances) remain legitimate in cases involving international crimes (fair trial guarantees, *non bis in idem*), others would not (political offence exception, statutes of limitation). As with mutual legal assistance, each state that wishes to have an effective international system for the exercise of universal jurisdiction will have to undertake a thorough review of its extradition laws to ensure that they treat crimes under international law appropriately.[53]

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competent authorities for the purpose of prosecution"). *See also Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*, G.A. Res. 3074 (XXVIII) (3 December 1973), ¶5.

50. *See generally* Michael Plachta, *(Non-)Extradition of Nationals: A Neverending Story?*, 13 EMORY INT'L L. REV. 77 (1999).

51. *See* 1948 Genocide Convention, *supra* note 15, art. 7 (stating that genocide shall not be considered a political crime for purposes of extradition).

52. *See* Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 8 I.L.M. 68 (1969) (adopted by the U.N. General Assembly Nov. 26, 1968).

53. Canada, in implementing the Rome Statute into domestic law, modified its extradition act to eliminate ordinary reasons for refusal in proceedings related to surrender to the ICC. *See* Crimes Against Humanity and War Crimes Act, *supra* note 23, § 52. This streamlining was not extended (in relevant part) to extradition proceedings

D. The Decision to Proceed

Even where the legal basis is adequate, the questions of who makes the decision to proceed, based on which factors, are likely to become pivotal as universal jurisdiction shifts from an aspiration to a working legal reality. Because these questions will determine how often universal jurisdiction will be exercised, and on what conditions, they call for more sustained examination than they have so far received. The ability of proceedings to withstand criticisms that they are politically motivated or represent "jurisdictional imperialism,"[54] and the consequent support of governments for the exercise of universal jurisdiction, will clearly be affected by the manner in which discretion is exercised in the prosecuting state.

The discretion of the relevant officials – be they political or legal – should be structured to take into account certain legitimate factors for limiting the exercise of universal jurisdiction. These (cumulative) factors include:

(a) *The presence of the defendant*: If the defendant is not present, authorities in the prosecuting state will have to assess the likelihood of cooperation from the relevant state or states in his or her extradition (if extradition requests are possible under national law).[55]

(b) *Availability of sufficient evidence*: An inability to acquire adequate evidence (particularly where the state of the accused is not disposed to assist) can effectively block proceedings. Absent sufficient evidence, the possibility of cooperation will again have to be weighed. In this context, the need to provide adequate protection for victims and witnesses must also be considered.

(c) *Severity*: Prosecuting authorities could also take into account the seriousness of the acts with which the accused is charged, the rank and role of the accused in the crimes alleged, the impact of the relevant situation on the international community, and the presence in the prosecuting state of a victim community or of some other connection to the country or conflict in question.

(d) *Situation in the territorial state*: If the territorial state is demonstrably willing and able to prosecute the accused in a fair manner, or if there is another, clearly more appropriate forum, the state considering universal jurisdiction should ordinarily defer to its courts. If the territorial state is not in a position to proceed effectively, authorities in the investigating

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to states seeking to exercise universal jurisdiction over Rome Statute Crimes.

54. *See* INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 8, at 26.

55. *See supra* notes 34-35 and accompanying text.

state will have to consider the attitude towards prosecution of civil society (victims, non-governmental organizations, society at large) in the territorial state,[56] as well as the possibilities that proceedings will either prevent or deter further abuses (particularly where the conflict to which they relate is ongoing), or will stimulate more robust action in the territorial state itself. The stability of the other country, the attitude of the government there towards impunity, including the occurrence and context of a 'truth commission' or of an amnesty, will all be relevant to this important, notoriously difficult calculation.[57] It might be that a prosecutor could legitimately choose not to proceed in light of all the circumstances, even for example, where a decision to limit prosecutions has been made in the context of a credible 'truth commission' process in which full disclosure of the accused's acts were made and the right of victims to reparations was fully respected.

(e) *Resources available to the prosecutor*: Apart from other constraints, prosecutors may be loath to expend resources on crimes having no or only slight direct connection to their own jurisdiction. Having budgetary limits to consider, prosecutors will want to examine the cost implications of universal jurisdiction proceedings. Even where evidence is available, the cost of such proceedings can be exorbitant, with correspondingly high opportunity costs in terms of resources available to pursue local matters potentially important in themselves. Prosecutors, particularly in over-stressed systems, will eventually have to struggle with the question of when the service to the international community of a universal jurisdiction prosecution is counterbalanced by the need for prosecution of local crime. While the cost of exercising jurisdiction often will not be unmanageably high, and would not in any event excuse inaction (as extradition to a state willing to take proceedings would still be possible), the reality of the resource factor points at the least to the need for sensitizing the responsible officials to the crucial role of national courts in enforcing international law.

(f) *Relation to other country*: Universal jurisdiction contains what is probably an irreducible element of political friction. Jurisdiction may be unlikely to be exercised where the government is able to influence the decisions of national prosecutors and where national interests might, in the view of the government, be harmed by prosecution. At present, the law of

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56. *See* INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 8, at 34.

57. For preliminary proposals on the evaluation of national amnesties and truth commissions respectively, see generally Priscilla B. Hayner, *International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal*, 59 LAW & CONTEMP. PROBS. 173 (1996); Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 LAW & CONTEMP. PROBS. 197 (1996).

many states accord a pivotal role to political officials.[58] Yet, political officials are typically required to take the full national interest into account when making their decisions, and this typically involves the weighing of a multiplicity of trade, strategic and other factors. To eliminate this "interference," one must either structure the discretion of the political officer, or eliminate it. The rule of law would presumably be better served if all relevant decisions were taken in a transparent and accountable manner by prosecutors and judges. If states remain reluctant to eliminate the discretion of political officials, the second-best alternative would be to subject the exercise of ministerial discretion to controls that ensured, to the extent possible, the legitimacy of the decisions. This might include provision for public guidelines outlining the factors to be considered, followed by provision for judicial review in which the exercise of discretion could be challenged.

At present, officials have little experience and little authoritative guidance on the appropriate exercise of discretion, in the specific context of universal jurisdiction, over the often politically charged core crimes of international criminal law. Those who promote universal jurisdiction should recognize that states have a legitimate desire to ensure that the caseload, likely to lay claim to the resources of their authorities, is manageable. Similarly, even governments that are committed proponents of accountability will want to have a reasonable degree of clarity as to the potential political fallout of universal jurisdiction proceedings. Concerns about the potentially real consequences of universal jurisdiction proceedings on interstate relations are not trivial. It would be one thing for France to prosecute a former head of state of Haiti before its domestic courts, and quite another for the Marshall Islands to prosecute a former President of the United States. If regular enforcement – the rule of law – is to become even a clearly *emergent* reality, then supporters of universal jurisdiction will have to propose credible means of addressing the complex decisions and (sometimes political) value-judgments faced by those operating in real-world situations.

VI. CONCLUSION

It may be that the requirement of the presence of the accused in the investigating country (as in the legislation of Canada and others)[59] should be

58. Examples include Canada (Crimes Against Humanity and War Crimes Act, *supra* note 23, § 9(3)) and New Zealand (International Crimes and International Criminal Court Act 2000, *supra* note 34, § 13).

59. *See supra* note 33 and accompanying text.

conceived of simply as a place-holder, putting an imperfect limit on litigation until the international community develops the experience and some measure of consensus about how best to make the complex and critical decisions for the effective exercise of universal jurisdiction. It is not difficult to imagine circumstances in which the international community, and the particular states involved, would favor extradition and trial in another country. Yet, the full presence requirement will prevent this without providing answers as to when universal jurisdiction is best exercised by the forum contemplating it. It would be preferable to enable authorities to open an investigation of a suspect absent from the investigating state's territory, with the aim of requesting extradition, in the context of a clear understanding of the grounds on which the decision to proceed has been made. Yet for a greater number of states to take this step, they will have to become comfortable that universal jurisdiction proceedings will neither become a financial drain nor an unmanageable political or diplomatic burden. Thus, practical concerns about the feasibility of universal jurisdiction will have to be addressed thoroughly and convincingly, in terms relevant to those confronting them most directly (that is, working prosecutors and policy-makers). Still once this is done, the weightiness of the decisions to be made, affecting as they may the internal situation of the country in question, as well as the prosecuting state's interests in its relations with that country, is all but certain to make many governments hesitate before reforming their law to allow for the full and effective exercise of universal jurisdiction.

Despite these difficulties, there are substantial reasons to believe that universal jurisdiction is deeply consonant with the underlying aim of international justice. As part of a comprehensive regime for ensuring accountability for the core crimes of international criminal law, such jurisdiction will be indispensable as a complement to, and a surrogate for, the ICC. At the same time, such jurisdiction will, by its nature, always be a jurisdiction of secondary recourse, and it will often not be feasible to exercise it. Even with the wide provision of an adequate legal basis and full and transparent prosecutorial (not political) control, universal jurisdiction will always be subject to "political" and resource judgments that themselves create tensions involving consideration of a wide range of justice and reconciliation factors. Such judgments will require the development of special expertise and administrative arrangements for the establishment of such jurisdiction as a working norm. Nonetheless, judgments about the wisdom of proceeding will vary among good faith actors from state to state, resulting in a certain irreducible element of controversy. This tension is inherent in delegating to national authorities the enforcement of international law.

These problems have scarcely begun to be addressed in the way that a working legal system requires. Until now, the exercise of universal jurisdiction has depended on the largely fortuitous convergence of the presence

of a defendant, of members of the public interested in a case, availability of evidence (in particular from victims or other eyewitnesses), the necessary legal regime, political and prosecutorial will and the necessary resources. An element of the fortuitous is probably inherent in the exercise of this form of jurisdiction, given the many contingencies involved. Nonetheless, its entrenchment in the international system as a means of fair and regular enforcement will require wide-ranging law reforms and education, the difficulties of which should not be underestimated.