Reflecting on the Genocide Convention in its Eighth Decade

How Universal Jurisdiction Developed over Genocide

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Abstract

9 December 2018 marked the 70th anniversary of the adoption of the Genocide Convention by the United Nations General Assembly. Article 6 of the Convention explicitly grants adjudicatory jurisdiction to the territorial state and to an international penal tribunal. Yet, the textual content of the Article has not prevented other types of extraterritorial jurisdiction from applying to the crime, such as universal criminal jurisdiction. This article analyses the development of universal jurisdiction over the crime of genocide, and proposes that the main advancements occurred as a result of a number of key events in the 20th century. Providing a review of state practice and opinio juris, the article analyses how universal jurisdiction applies to genocide and outlines its scope.

1. Introduction

9 December 2018 marked the 70th anniversary of the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) by the United Nations General Assembly (UNGA).[1] Article 6 of the Convention expressly grants jurisdiction for the punishment

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1 Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

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of genocide to the territorial state and to an international penal tribunal.[2] On first reading, the provision appears to limit the authority to prosecute genocide to these two forums. However, the textual content of Article 6 has not prevented states from exercising other types of extraterritorial jurisdiction to prosecute *génocidaires*, including universal criminal jurisdiction.[3] Universal jurisdiction, also known as the universality principle, is a rule under international law that permits *any* state to prosecute the alleged perpetrator of an international crime, irrespective of the place of commission of the crime, or the nationality of the accused or victim(s).[4]

In theory, states prosecuting the crime of genocide under universal jurisdiction close an impunity gap: history shows that genocide is likely to be committed by the governing authority in a state or by an entity linked to it. If the onus to conduct a genocide prosecution is left to the territorial state, or indeed to an international penal tribunal with limited capacity and jurisdiction, impunity is likely to result, particularly where no regime change has occurred in the place of commission.[5] The complexities of the commission of genocide and the political nature of the crime mean that it may not be prosecuted in the (typically post-conflict) territorial state. However, the reality is that the crime is infrequently prosecuted before international penal tribunals and national courts, primarily due to the evidential challenges in proving the genocidal intent or *dolus specialis*.[6]

Article 5 of the Convention requires states parties to criminalize the crime in their national law, and since the 1990s, there is increasing support for the application of universal jurisdiction to genocide, as attested in national law.[7] This development has been widely recognized by international scholars.[8] Reflecting on the Genocide Convention in its eighth decade, this article

2 The article reads: 'Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.'

3 For example, see *Public Prosecutor v. Jorgić*, Oberstes Landesgericht Düsseldorf, 26 September 1997 (Appeal judgment); Bundesgerichtshof (Federal Supreme Court), 30 April 1999; *Prosecutor's Office of Salzburg v. Duško Cvjetković*, Supreme Court of Austria, 15Os99/94; Case of Baligira Félicien in France, see TRIAL and others, *Universal Jurisdiction Annual Review 2020* (2020), at 42, available online at https://trialinternational.org/wp-content/uploads/2020/03/TRIAL-International_UJAR-2020_DIGITAL.pdf (visited 1 December 2020).

4 See generally, L. Reydams, *Universal Jurisdiction: International and Municipal Perspectives* (Oxford University Press, 2002).

5 Moreover, an authority linked to the state that commits genocide can ensure that it is protected via immunity or amnesty.

6 For example, see the *Djajić* case in Germany, where the accused lacked the requisite *mens rea* for the crime of genocide: *Public Prosecutor v. Djajić*, Bayerisches Oberstes Landesgericht, 23 May 1997.

7 This growth has been quantified by scholars, see M. Langer, 'Universal jurisdiction is not Disappearing', 13 *Journal of International Criminal Justice* (*JICJ*) (2015) 245–256, at 247; B. Van Schaack and Z. Perovic, 'The Prevalence of ''Present-In'' Jurisdiction', 107 *Proceedings of the Annual Meeting (American Society of International Law)* (2013) 237–242, at 239.

8 W.A. Schabas, 'National Courts Finally Begin to Prosecute Genocide, the Crime of Crimes', 1 *JICJ* (2003) 39–63, at 42–43; V. Thalmann, 'National Criminal Jurisdiction over Genocide', in

provides a chronological analysis of the development of universal jurisdiction over genocide, and examines how the principle came to apply to the crime. It explains how the Convention has been interpreted so as not to impede the application of the universality principle to genocide, and illustrates how the advancement of universal jurisdiction over the crime has occurred outside of the limited literal content of Article 6. Providing an overview of state practice and *opinio juris*, it further argues that the application of universal jurisdiction to 'the crime of crimes' is based on the presence of the accused in the prosecuting state, rather than on universal jurisdiction *in absentia*, where the accused is not present in the prosecuting state.

Renowned genocide scholar, Raphael Lemkin, first proposed the application of universal jurisdiction, or 'universal repression' as it was then termed, to genocide.[9] Significantly, Lemkin also implied that the authority to punish the offender applied to neutrals as well as to belligerents.[10] This position was in contrast to the prevailing view at the time that the punishment of international crimes (principally, violations of the laws and customs of war) was a right of belligerents only.[11] In Section 2, it is argued that universality began to be applied to genocide, albeit, indirectly, during the operation of the United Nations War Crimes Commission (UNWCC), which operated from 1943 to 1948. Although, it must be noted that genocide was categorized as a type of crime against humanity until 1946.[12] The drafting of the Genocide Convention is addressed in Section 3. In particular, this segment looks to the *travaux préparatoires* and focuses on the discussions among states as to whether universal jurisdiction should be included as a provision in the treaty.

Section 4 examines the influence of the international penal tribunals created in the 1990s on the development of the principle. Section 5 conducts a brief review of state practice of the exercise of universal jurisdiction over genocide in order to identify the normative factors that contribute to such domestic prosecutions. Section 6 provides an overview of *opinio juris* on the exercise of universal jurisdiction for the crime. It does so by examining state opinion on the topic as expressed in the ongoing discussions before the Sixth Committee of the UNGA regarding the scope and application of the principle of universal jurisdiction. Finally, the article concludes with some general observations, and

P. Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford University Press, 2009) 231–258, at 232–233.

9 R. Lemkin, 'Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations' (James Fussell tr, 5th Conference for the Unification of Penal Law, Madrid, October 1933), available online at www.preventgenocide.org/lemkin/madrid1933-english.htm (visited 1 December 2020); R. Lemkin, *Axis Rule in Occupied Europe* (Carnegie Endowment for International Peace, 1944), at 93.

10 Lemkin, *Axis Rule*, *ibid.*, at 92.

11 See for example The Treaty of Versailles (adopted 28 June 1919; signed 10 January 1920), Art. 228; J.W. Garner, 'Punishment of Offenders Against the Laws and Customs of War', 14 *American Journal of International Law* (*AJIL*) (1920) 70–94, at 77.

12 GA Res. 96(I), 11 December 1946.

considers what can be learned from this phenomenon in the context of the legacy of the Genocide Convention.

2. The Beginning of the Prosecution of Genocide under Universal Jurisdiction: The UNWCC

Until the adoption of UNGA Resolution 96(I) in 1946, genocide was considered to be a type of crime against humanity, which, at the time, could only be committed during an international war. While the International Military Tribunal (IMT) at Nuremburg and the International Military Tribunal for the Far East (IMTFE) at Tokyo did not operate on the basis of universal jurisdiction, the principle was exercised over genocide during the operation of the UNWCC (1943–1948).[13] The institution permitted, for the first time, the exercise of universal jurisdiction over international crimes committed during international armed conflicts (IACs).

Each member state of the UNWCC was afforded much discretion in the operation of the trials it conducted and the crimes prosecuted. Some Member States carried out prosecutions in their national courts, while others conducted prosecutions before military tribunals.[14] Some tribunals punished genocide as a type of crime against humanity, while others prosecuted war crimes solely.[15] Similarly, Member States were given the autonomy to decide what adjudicatory jurisdiction they exercised. Primarily, the nationality and passive personality principles were utilized by member states, the latter being the particularly prevalent. Universal jurisdiction was a subsidiary form of jurisdiction exercised by some UNWCC member states. A further basis for jurisdiction, at least for the Allied Powers exercising local sovereignty, was

13 The UNWCC was a commission composed of jurists from 16 Allied nations that facilitated the network of localised tribunals that prosecuted minor enemy nationals or lower-level enemy officials accused of having committed international crimes. The trials took place in the member states' national or military courts or military commissions within their state territory, or in the Allies' zones of occupation. The UNWCC did not have jurisdiction to try offences committed by German nationals against other German nationals or stateless persons. Such crimes were to be tried by German courts, see Control Council Law (CCL) No. 10, Art 2(1)(d). See generally D. Plesch, and S. Sattler, 'A New Paradigm of Customary Criminal Law: The UN War Crimes Commission of 1943–1948 and its Associated Courts and Tribunals', 25 *Criminal Law Forum* (2014) 17–43.

14 For example, Britain and the US established military tribunals in their zones of occupation in Germany. France conducted prosecutions in pre-existing military courts, while Norway's trials took place in its national courts. See *Law Reports of the Trials of War Criminals: Digest of Laws and Cases*, vol. 15 (UNWCC, H.M. Stationary Office, 1949), at 28; Plesch and Sattler, *ibid.*, at 13.

15 For example, the British Military Tribunals did not try crimes against humanity and crimes against peace.See Royal Warrant dated 14th June 1945, Army Order 81/45, as amended. CCL No. 10 (from which the localized tribunals derived their competence to conduct the prosecutions under the UNWCC) criminalized crimes against peace, war crimes, crimes against humanity, and membership of a criminal group or organization declared criminal by the IMT in Art. 2(1)(a)–(d).

Germany's *debellatio* status.[16] Throughout the operation of the UNWCC, war crimes were the most commonly prosecuted crime, and crimes against humanity were prosecuted to a lesser extent.[17] Like the IMT and IMTFE, the UNWCC identified genocide as a type of crime against humanity committed during an international war.[18] Article 2(1)(c) of the CCL No. 10 severed the nexus between crimes against humanity and international war, as it did not require the crime to be committed during an international armed conflict.[19] However, this removal of the 'war nexus' was nullified by the legislation enacted by some of the UNWCC member states,[20] and in UNWCC state practice.[21] Some tribunals punished genocide as a crime against humanity, while others did not.[22] There were a number of trials before the United States (US) National Military Tribunals (NMTs) that addressed genocide, in which universality was relied.[23] Kevin Jon Heller notes that the first trial to rely on genocide as a legal concept was the *Rusha Trial*, where the concept of genocide was included in count one of the indictment relating to crimes against humanity.[24] The *Justice Trial* (in which universal jurisdiction was relied) represents the first conviction for genocide.[25]

The case law of the NMTs has had some lasting implications in respect of the law on genocide. As Heller notes, the *Justice Trial* was cited by the

16 For example, see the US National Military Tribunal trial of *Hadamar* in *Law Reports of the Trials of War Criminals*, vol. 1 (UNWCC, H.M. Stationary Office, 1947) 46–54, at 53.

17 The research in this article concerning the UNWCC trials is based on the data in the 15 volumes of the law reports that were published by H. M. Stationary Office, and the 15 volumes of trial reports published by the US Government. These combined reports detail 91 of approximately 2042 cases that were tried under the UNWCC.

18 For example, see *Rusha Trial* in *Law Reports of the Trials of War Criminals*, vol. 13 (UNWCC, H.M. Stationary Office, 1949) 36–69, at 41.

19 The CCL did not contain the word 'genocide'.

20 For example Australia, Canada, and the UK.

21 For example, the Australian, British and Canadian tribunals prosecuted war crimes only. The Polish tribunal punished crimes against humanity committed during the war period.

22 There is evidence of Polish and US Tribunals punishing genocide as part of crimes against humanity committed during the war. For example, in the *Rusha Trial*, the 'accused were charged with committing, in pursuance of a systematic programme of genocide, crimes against humanity and also war crimes between September, 1939, and April, 1945', *supra* note 18, at 1. See also *Trial of Gauleiter Artur Greiser*, vol. 13 (UNWCC, H.M. Stationary Office, 1949) 70–117, which took place before the Supreme National Tribunal of Poland. The US prosecutor, Telford Taylor, included the crime of persecution of the Jewish population in nearly all of his opening statements and in the 12 indictments at the US NMTs. See K.J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press, 2011), at 4. See also, the charges in the *Einsatzgruppen Case* in *Trials of War Criminals before the Nurenberg Military Tribunals under Control Council Law No 10*, vol. 4 (US Government Printing Office, 1946–1949) 3–598. Member States that did not prosecute crimes against humanity, for example, Australia, UK and Canada solely prosecuted conduct that qualified as war crimes.

23 See for example, *Einsatzgruppen Case*, *ibid*. See also Heller, *ibid.*, at 98–99, 103, 249.

24 Heller, *supra* note 22, at 249. See also Count five of the indictment in the *Ministries Case* in *Trials of War Criminals before the Nurenberg Military Tribunals under Control Council Law No 10*, vol. 12 (US Government Printing Office, 1950) 1–1000, at 44.

25 Heller, *supra* note 22, at 388; *Law Reports of the Trials of War Criminals*, vol. 6 (UNWCC, H.M. Stationary Office, 1948) 1–110.

International Criminal Tribunal for Rwanda (ICTR) in *Rwamakuba* as evidence of genocide being a 'crime under customary international law' during WWII.[26] On the one hand, the case law of the UNWCC demonstrates that the US played a leading role in advancing the application of universal jurisdiction to crimes against humanity (and to a lesser extent, genocide). On the other hand, Heller notes that the impact of the US NMTs on genocide has been minor, precisely because genocide was tried as a crime against humanity.[27] The approach taken by the UNWCC member states in their exercise of universal jurisdiction is the same as that asserted by scholars such as Lemkin and Henri Donnedieu de Vabres, where the principle was utilized under the *aut dedere aut judicare* framework. The presence of the accused in the custody of the prosecuting state was an important feature of the UNWCC prosecutions. Article 3(1)(a) of CCL No. 10 recognized the power of the occupying authority to punish war criminals found (or detained) within its zone of occupation. This position was reaffirmed in some of the UNWCC case law, in *The Trial of Hadamar*, the US NMT stated:

> [E]very independent State has, under International Law, jurisdiction to punish not only pirates but also war criminals *in its custody*, regardless of the nationality of the victim or of the place where the offence was committed, particularly where, for some reason, the criminal would otherwise go unpunished.[28]

This position also demonstrates that universal jurisdiction *in absentia*, where the accused was not in the custody of the prosecuting authority, was not part of the early examples of reliance on the principle.

Notwithstanding its limitations, of which there were many, the UNWCC provides evidence of the application of universal jurisdiction to genocide, as a type of crime against humanity committed during an IAC. Although it cannot be said that this was the primary policy of the Member States. Yet, it is clear that the Member State representatives were cognizant of the application of the principle of universality to genocide. Citing Lemkin, the Chairperson of the UNWCC, Lord Wright affirmed that genocide, 'becomes a *delictum iuris gentium* alongside offences such as piracy, trade in women and children, trade in slaves, the drug traffic, forgery of currency and the like'.[29] The idea that *any* state should be able to prosecute the crime of genocide gained ground in the post-war period, which in turn fed into the debates during the negotiation of the Genocide Convention.

26 *Rwamakuba* (ICTR-98-44C). Heller, *supra* note 22., at 388.

27 Heller, *supra* note 22. See also W. A. Schabas, 'The Contribution of the *Eichmann* Trial to International Law', 26 *Leiden Journal of International Law* (2013) 667–699, at 680.

28 *Hadamar*, *supra* note 16, at 53 (emphasis added). See also the *Hostages Trial* in *Law Reports of the Trials of War Criminals*, vol. 8 (UNWCC, H.M. Stationary Office, 1949) 34–92, at 54.

29 Commentary on *Rusha Trial*, *supra* note 18, at 41.

3. The United Nations, the Genocide Convention and *Eichmann*

The efforts to codify genocide began in 1946 at the UNGA with the adoption of the resolution on 'The Crime of Genocide', which declared genocide to be a distinct 'crime under international law'.[30] Although efforts to include a clause in the resolution affirming the application of universal jurisdiction to genocide were not successful, paragraphs one and four declared that steps were to be taken to create an international treaty specific to the crime. The resolution applied the language of international crimes to genocide, and it was within this context that Lemkin believed that the resolution provided for the application of universal repression to genocide.[31] In the following years, during the course of intense deliberations, two main draft conventions were formulated,[32] before the Genocide Convention (with the explicit aim to prevent and punish genocide) was adopted in 1948.[33]

The debate concerning the inclusion of universality in the Genocide Convention was centred on the principle being exercised by the state in which the accused was in custody (i.e. the custodial state).[34] Out of the two main drafts, the one created by the Secretariat was the only one to include a provision expressly authorizing the exercise of universal jurisdiction, which is unsurprising considering that Lemkin, Vespasian V Pella and Henri de Vabres (three proponents of the principle), prepared it. Draft Article 7 on 'universal enforcement of municipal criminal law' read:

> The High Contracting Parties pledge themselves to punish any offender under this Convention within any territory under their jurisdiction, irrespective of the nationality of the offender or of the place where the offence has been committed.

In addition, the Secretariat draft proposed that in the event of there being a lack of willingness of the custodial state to prosecute the offender, they could be extradited to another state (with a nexus to the offence), for trial.[35] In such instances, the custodial state would be 'released of their duty to bring the offender before their own courts'.[36] Thus, it was envisaged that genocide

30 GA Res. 96(I), 11 December 1946, § 1.

31 R. Lemkin, 'Genocide as a Crime in International Law', 41 *AJIL* (1947) 145–151, at 150. *Cf.*, W.A. Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn., Cambridge University Press, 2009), at 57.

32 The first of these, ECOSOC, *Draft Convention on the Crime of Genocide*, UN Doc. E/447, 26 June 1947 (Secretariat draft), was prepared under the auspices of the UN Secretary-General. The second main draft, ECOSOC, *Report of the Committee and Draft Convention drawn up by the Committee*, UN Doc. E/794, 24 May 1948 (Ad Hoc Committee draft), was composed by an ECOSOC Ad Hoc Committee.

33 A final draft of the treaty was agreed by the Sixth Committee of the General Assembly, and was then adopted by the UNGA on 9 December 1948.

34 William Schabas notes that a memo from the UN Secretariat seemed to propose *in absentia* trials as an option. See Schabas, *supra* note 31, at 411.

35 Secretariat draft, *supra* note 32, Art. 8 and commentary, at 39.

36 *Ibid.*, commentary.

would be prosecuted under what is now known as the framework of *aut dedere aut judicare*. However, it was the primary responsibility of the custodial state to conduct the prosecution.[37] The experts believed that national courts were the appropriate forum to punish genocide, and that if universal repression was not applied to genocide the objective of the Convention would be lost.[38] However, the drafters also thought that an international tribunal would be more suitable to punish very serious cases, and a draft convention for an international criminal court with jurisdiction to punish genocide was attached to the draft.

The proposal to codify universal jurisdiction over genocide was met with more opposition than support from states' delegations. This situation resulted in the removal of the proposal from the draft Convention at the Ad Hoc Committee stage, with France, the USA and the Soviet Union rejecting the idea.[39] Later in the Sixth Committee stage of the deliberations, the Iranian delegate submitted a further proposal for universal jurisdiction to be included in the Convention,[40] but this too was rejected.[41] States that objected to universality complained that it went against the traditional forms of jurisdiction, namely, the territorial and nationality principles, which provide a stronger nexus between the prosecuting state and the offence.[42]

The political implications that could result from the exercise of universal jurisdiction over genocide were a further reason cited in opposition to the inclusion of universality in the Convention.[43] It was argued that such action would violate the principle of state sovereignty in the UN Charter,[44] and that the jurisdiction could be abused.[45] Another state suggested that the custodial state should be able to punish the accused so long as the territorial state consented,[46] thus the wishes of the territorial state could be prioritized. The nature of genocide as a state crime was another justification for opposition to the inclusion of a universal jurisdiction provision in the Convention.[47] In this respect, Afghanistan was concerned about the exercise of universal jurisdiction

37 *Ibid.*, commentary, at 39.

38 *Ibid.*, commentary, at 18.

39 Ad Hoc Committee draft, *supra* note 32, at 33.

40 The proposal suggested the addition of the following paragraph to the draft Article on jurisdiction: 'They [*génocidaires*] may also be tried by tribunals other than those of the States in the territories of which the act was committed, if they have been arrested by the authorities of such States, and provided no request has been made for their extradition' (insertion added), as cited in Schabas, *supra* note 31, at 413.

41 Sixth Committee of the General Assembly, Summary records of 100th meeting, UN Doc. A/C.6/SR.100, 11 November 1948, at 406.

42 For example, see Ad Hoc Committee, summary record of 8th meeting, UN Doc. E/AC.25/SR.8, 13 April 1948. See also comments by UK in *ibid.*, at 402.

43 Ad Hoc Committee draft, *supra* note 32, at 32.

44 See comments of Venezuela on the Secretariat draft, UN Doc. A/401, 27 September 1947. See also comments from the USSR on the Iranian amendment in UN Doc. E/AC.25/SR.8, *supra* note 42, at 403.

45 See comments of the US in UN Doc. A/401, *ibid.* See also comments of the Netherlands on the Secretariat draft in UN Doc. E/623/Add.3, 22 April 1948.

46 As noted by P.N. Drost, *The Crime of State: Genocide* (A. W. Sythoff, 1959), at 27.

47 See comments of Egypt on the Iranian amendment in UN Doc. A/C.6/SR.100, *supra* note 41, at 398.

by foreign courts over heads of state.[48] Another concern was that the system of universal repression would mean that non-party states would come under the adjudicatory jurisdiction of the states parties.[49] The Norwegian Government believed that draft Article 7 of the Secretariat draft should not interfere with restrictions that already existed in the domestic law of states in respect of the prosecutor's decision to try a suspect.[50]

Conversely, the primary reason cited by states for the inclusion of a provision providing for universality in the Convention was to prevent impunity.[51] The Iranian delegate differentiated between 'primary universal punishment' and 'subsidiary universal punishment'.[52] The former being applicable to piracy, where the offender was tried by the state that arrested him, irrespective of an extradition request from the territorial state. The latter operated under the obligation to try or extradite framework where the custodial state could only prosecute the offence when other states were unwilling. Notably, it is clear that the universal repression proposed by Iran in its draft was not intended to be a duty.[53] The Iranian delegate disagreed that the system of universal repression would lead to international tensions between states, because the territorial state had the option to request the extradition of the offender for trial.[54] Thus, the primary right of prosecution of the territorial state would be preserved. Some delegates noted the unlikelihood of the territorial state exercising its enforcement jurisdiction on political grounds.[55]

Ultimately, the Ad Hoc Committee removed the reference to universal repression in the draft Article on jurisdiction, because the majority of states believed that the principle 'would violate the sovereign rights of a State by permitting a foreign State to punish acts committed outside of its territory or by foreigners'.[56] At the behest of Sweden, a declaration was adopted that allowed for the exercise of the passive personality principle over genocide.[57] At the Sixth Committee stage, draft Article 7 was renumbered Article 6, the final text of which explicitly granted jurisdiction for the punishment of genocide to the territorial state and to an international penal tribunal. A number of states made reservations attached to Article 6, which specifically related to the opposition of the exercise of universality to genocide committed in their territories.[58] Article 5 of the Convention obligates the states parties to criminalize

48 *Ibid.*, at 397. This concern was shared by other states; see N. Robinson, *The Genocide Convention: A Commentary* (Institute of Jewish Affairs, 1960), at 31–32.

49 See comments of the US on the Secretariat draft in UN Doc. A/401, *supra* note 44.

50 UN Doc. E/623/Add.2, 22 April 1948.

51 Ad Hoc Committee draft, *supra* note 32, commentary, at 32.

52 UN Doc. A/C.6/SR.100, *supra* note 41, at 394–395.

53 Schabas, *supra* note 27, at 691.

54 UN Doc. A/C.6/SR.100, *supra* note 41, at 396.

55 See comments of China and Venezuela on the Iranian amendment in *ibid.*

56 Robinson, *supra* note 48, at 31.

57 Sixth Committee, Summary records of 134th meeting held on 9 November 1948, UN Doc. A/C.6/SR. 134, 2 December 1948, at 716.

58 Algeria, the Union of Burma, Morocco and the US made such reservations.See Thalmann, *supra* note 8, at 237.

genocide and to provide effective penalties in domestic legislation. The latter provision also applies to extradition legislation and to measures taken to prevent the crime.[59] Overall, it is a wonder that states managed to ratify and implement the Genocide Convention, given that it granted adjudicatory jurisdiction to an international penal tribunal where none existed.[60]

With the adoption of the Genocide Convention in 1948, states agreed that genocide could be committed during peacetime as well as during war. Thus, to codify the application of universal jurisdiction to genocide would have opened up the possibility of racial discrimination in territories and colonies, where the genocide threshold was met. At the time, the UK and USA had concerns in respect of ethnic and racial groups within their territories.[61] Excluding universal jurisdiction from the Genocide Convention prevented the application of the principle to the violence being perpetrated by States against colonial peoples. There were of course other reasons for the exclusion of an express provision on universal jurisdiction in the Genocide Convention. Compared to war crimes, genocide and its punishment was a recent legal concept, notwithstanding that genocide had been committed long before the formation of an international definition in 1946. Additionally, during the drafting of the Genocide Convention, the Sixth Committee was concerned that the inclusion of universal jurisdiction in the Convention might lead to the proposal to try genocide before an international penal tribunal being abandoned,[62] as states may prefer to prosecute genocide in their national courts under the principle. A further apprehension was that the inclusion of universal repression in the text would discourage ratifications.[63]

It is clear that Article 6 does not expressly list the principle of universality as a means of punishing genocide. At the same time, if one looks to the *travaux préparatoires*, there is no clear intention on the part of the drafters to restrict adjudicatory jurisdiction for the crime to the two forums expressly listed.[64] Taking into account the object and purpose of the Genocide Convention, namely the prevention and punishment of the crime, Article 6 of the Convention cannot be interpreted so as to prohibit the application of the principle of universality to the crime. Indeed, during the drafting of the

59 Schabas, *supra* note 31, at 403.

60 For this reason, the Article posed problems for Belgium and the UK, see UK National Archives file HO 45/25308, International Convention on genocide: department interests and observations.

61 For example, in 1948, in the US, African Americans were being denied fundamental human rights, and public lynchings were still being carried out in some US states. As noted by the UK delegation during the negotiation of the Genocide Convention, '[T]he United States who are clearly afraid of accusations which may be made against them as a government in respect of the treatment of the negro and Red Indian populations of the United States', see UK National Archives file HO 45/25308, bundle 950025/15: telegram no 535 from UK delegation to the Foreign Office, dated 25 November 1948, at 4.

62 Robinson, *supra* note 48, at 32.

63 Drost, *supra* note 46, at 66.

64 B. Schiffbauer, 'Article VI' in C. Tams, L. Berster, and B. Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide* (C.H. Beck, Hart, Nomos, 2014), at 252.

Convention, the Greek delegation was aware of this position.[65] Subsequent national courts have also adopted this view when asserting their right to exercise the adjudicatory jurisdiction.[66] In addition, to restrict the prosecution of genocide to the forums expressly listed in Article 6 would impede the realization of Article 4, which states that 'Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals'.[67] In terms of the wording used in the Article, Björn Schiffbauer argues that 'a trial is obligatory, but only in the two alternatives mentioned'.[68] Indeed, Schiffbauer asserts that Article 6 thus takes into account possible future prosecutorial evolutions within international law.[69]

Despite the exclusion of universal jurisdiction from the Genocide Convention, in the decades since then, the link between genocide and universal repression has been formally recognized by a number of UN bodies.[70] In 1975, the UN Special Rapporteur on Prevention and Discrimination and Protection of Minorities and the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities recommended that universal jurisdiction be expressly included in the Genocide Convention,[71] which many states supported.[72] This proposal was reiterated in 1985, in a further report of the Sub-Commission.[73]

Irrespective of the exclusion of universal jurisdiction from the Convention, states began to exercise universal jurisdiction over genocide in domestic courts. *Attorney General v Eichmann* was the first reported judgment concerning the 1948 Genocide Convention.[74] The judgments and the controversies of the case

65 Thalmann, *supra* note 8, at 243–244, citing Sixth Committee of the General Assembly, Summary Records of Meetings, 21 September–10 December 1948, at 405.

66 See for example, *Attorney General of the Government of Israel v. Eichmann*, Israel Supreme Court 1962 published in 36 *International Law Reports* (1968) 277–344; *Attorney General of the Government of Israel v. Eichmann*, District Court of Jerusalem 1961 published in 36 *International Law Reports* (1968) 59 (*Attorney General v. Eichmann*; *Eichmann*). See also *Jorgić*, *supra* note 3.

67 Schiffbauer, *supra* note 64, at 252.

68 *Ibid.*

69 *Ibid.*, at 237.

70 ILC, *Report on the Question of International Criminal Jurisdiction by Ricardo J. Alfaro, Special Rapporteur*, UN Doc. A/CN.4/15, 3 March 1950, at 13–14; Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Study on the Question of the Prevention and Punishment of the Crime of Genocide*, UN Doc. E/CN.4/Sub.2/416, 4 July 1978, at 187; Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Revised and updated report on the question of the prevention and punishment of the crime of genocide prepared by Mr. B. Whitaker*, UN Doc. E/CN.4/sub.2/1985/6, 2 July 1985; ILC, *Report of the International Law Commission on the Work of Its 48th Session*, UN Doc. A/51/10, 6 May–26 July 1996, at 28.

71 UN Doc. E/CN.4/Sub.2/416, *ibid.*, at 187.

72 *Ibid.*, at 53–56.

73 UN Doc. E/CN.4/sub.2/1985/6, *supra* note 70.

74 Schabas, *supra* note 27, at 667. Here, the Court also relied on the passive and protective personality principles.

are widely known and will not be re-analysed here.[75] For the purpose of this article, it is important to highlight that the defence's argument that Article 6 of the Genocide Convention restricted jurisdiction to punish genocide to the territorial state or to an international penal tribunal was rejected by the Israeli District Court and Supreme Court. The Courts concluded that the ICJ Advisory Opinion, in *Reservations to the Genocide Convention*,[76] that genocide was of a 'universal character' reflected principles that exist outside of treaty law.[77] Citing the declaration of the Sixth Committee authorizing the exercise of the passive personality principle over genocide, and the writings of by Pieter N Drost and Nehemiah Robinson, the District Court declared:

> Had Article 6 meant to provide that those accused of genocide shall be tried only by 'a competent court of the country in whose territory the crime was committed' (or by an 'international court' which has not been constituted), then that article would have foiled the very object of the Convention ''to prevent genocide and inflict punishment therefore''.[78]

Ultimately, the Israeli Courts believed that the exclusion of a provision providing for universality in the Genocide Convention was a separate matter to the right of states to exercise universality over the crime under customary international law.[79] As will be demonstrated, this expansive interpretation of Article 6 was followed in subsequent case law. The Supreme Court's classification of the exercise of universal jurisdiction as a 'power',[80] rather than a duty was in line with the practice of the UNWCC, where the application of the principle was not an obligation. Indeed, the case law of the UNWCC and academic commentary were cited in support of the exercise of the universality.[81] In addition, the Court acknowledged that the power to enforce universal criminal jurisdiction was not unlimited, and noted that the accused should be in the custody of the state exercising the right.[82]

4. The Influence of International Criminal Tribunals

There was a notable shift in the practice of universal jurisdiction over international crimes in general, and genocide in particular, following the creation of the international criminal tribunals in the 1990s. It was a period where anti-impunity sentiment prevailed among the international community, in part due

75 See for example, Schabas, *supra* note 27; V.E. Treves, 'Judicial Aspects of the Eichmann Case', 47 *Minnesota Law Review* (1963) 557–592; J.E.S. Fawcett, 'The Eichmann Case', 27 *British Yearbook of International Law* (1962) 181–215.

76 Advisory Opinion, *Reservations to the Convention on the Prevention and Punishment of Genocide* [1951] ICJ Rep 15.

77 *Eichmann*, Supreme Court judgment, *supra* note 66, § 11; *Eichmann*, District Court judgment, *supra* note 66, § 21.

78 *Eichmann*, District Court judgment, *ibid.*, § 23.

79 *Eichmann*, Supreme Court judgment, *supra* note 66, § 12.

80 *Ibid.*

81 *Ibid.*, § 11.

82 *Ibid.*, § 12.

to the number of atrocities that occurred during the decade. The Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), which was adopted in advance of the commencement of the work of the International Criminal Tribunal for the former Yugoslavia (ICTY), recognized the application of the principle of universal jurisdiction to the crime of genocide affirming that '[u]nder both crimes against humanity and the Genocide Convention, such prohibited acts are subject to universal jurisdiction'.[83] The statement is significant, given that the exercise of universal jurisdiction in respect of these crimes is not codified in an international treaty. What is more, it is evident that the Commission appeared to be of the opinion that the Genocide Convention itself provides for universal jurisdiction.

Two features of the ad hoc tribunals' statutes seem to have influenced the exercise of universal jurisdiction over international crimes, including genocide, in national courts. First, UN Member States were obligated to co-operate with each of the tribunals.[84] Second, the Statutes granted concurrent (but subsidiary) jurisdiction to national courts, to try offences within the jurisdiction of the tribunals.[85] In the German case of *Jorgić*, the Federal Supreme Court of Germany interpreted this reference to 'national courts' in Article 9(1) of the ICTY Statute (concerning concurrent jurisdiction) as not restricting prosecution to the territorial state, referring, inter alia, to the opinion of the ICTY Prosecutor and the Trial Chambers.[86] In addition, the Court cited the limited capacity of the ICTY to try cases as a reason for the exercise of universal jurisdiction.[87] In order to exercise their adjudicatory jurisdiction, a number of UN member states were first required to enact legislation implementing international crimes into their domestic legal orders, to give effect to the ICTY and ICTR Statute provisions. In order to prosecute international crimes, a number of states also incorporated extraterritorial jurisdiction, including universality, into their domestic law, which led to an increase in prosecutions of genocide, and other international crimes, committed abroad by foreigners.[88] However, the practice of domestic prosecutions of international crimes was not

83 *Final Report of the Commission of Experts established pursuant to Security Council Resolution 780*, UN Doc. S/1994/674, 27 May 1994, § 107.

84 Art. 29 ICTYSt.; Art. 28 ICTRSt.. The ICTRSt. obliged states to take 'any measures necessary under their domestic law to implement the provisions' of the ICTRSt.: see UNSC Res. UN Doc. S/RES/955, 8 November 1994, § 2.

85 Art. 9(1) ICTYSt.; Art. 8(1) ICTRSt.

86 *Jorgić*, Bundesgerichtshof (Federal Supreme Court), 30 April 1999, § 9. See also case excerpt in Reydams, *supra* note 4, 152–155, at 153.

87 *Jorgić*, Bundesgerichtshof (Federal Supreme Court), 30 April 1999, § 8.

88 For example, France temporarily adopted the universality principle in respect of its obligations under the ICTY and ICTR Statutes. See Thalmann, *supra* note 8, at 245. Belgium, incorporated universal jurisdiction over genocide and crimes against humanity. See M. Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Trasnational prosecution of International Crimes', 105 *AJIL* (2011) 1–50, at 26. See Reydams, *supra* note 4 for a description of universal jurisdiction cases that have taken place since the creation of the ICTY and ICTR.

uniform. Neither the ICTY nor ICTR Statute required states to adopt universality into domestic law, although, Luc Reydams has described Article 8 of the ICTR Statute as 'implicit recognition of universal jurisdiction over the crimes'.[89]

In the course of their work, the Tribunals reaffirmed the existence of the universality principle as a rule of international law.[90] The application of the universality principle to the crime of genocide was expressly noted in the ICTR case of *Ntuyahaga*, where the Trial Chamber encouraged 'all States, in application of the principle of universal jurisdiction, to prosecute and judge those responsible for serious crimes such as genocide . . . '.[91] Later, the UN Security Council (UNSC) urged the ICTR to transfer cases concerning the prosecution of lower and intermediary ranking *génocidaires* to national authorities, as part of its completion strategy.[92] Indeed, some cases were transferred from the ICTR to states that used universal jurisdiction to prosecute genocide;[93] this arguably demonstrates the influence of the international criminal tribunals on domestic prosecutions for genocide under universal jurisdiction. Universal jurisdiction was — and still is — exercised by national courts to prosecute *génocidaires* who have taken up residence in other countries, after fleeing Rwanda.[94]

The phenomenon of the influence of international criminal tribunals on the exercise of universal jurisdiction has continued following the creation of the International Criminal Court (ICC) in 1998. The perpetuation is due, in part, to the principle of complementarity, which underpins the operation of the ICC. The principle dictates that the Court cannot try a case where a state with jurisdiction over the offence is able or willing to do so.[95] Notably, a state with jurisdiction over an offence includes states that are prosecuting a core crime by

89 L. Reydams, 'Universal Jurisdiction over Atrocities in Rwanda: Theory and Practice', 4 *European Journal of Crime Criminal Law & Criminal Justice* (1996) 18–47, 32.

90 See for example, Judgment, *Furundžija* (IT-95-17/1-T), Trial Chamber, 10 December 1998, § 156 and Decision on Jurisdictional Appeals, *Tadić* (IT-94-1-A), Appeals Chamber, 2 October 1995, § 62.

91 Decision on the Prosecutor's Motion to Withdraw the Indictment, *Ntuyahaga* (IT-98-40-T), Trial Chamber, 18 March 1999, at 5.

92 UNSC SC Res. UN Doc. S/RES/1503, 28 August 2003, at 2.

93 This occurred in the case of Wenceslas Munyeshyaka and Laurent Bucyibaruta in France (see https://unictr.irmct.org/en/cases). However, the case against Munyeshyaka was terminated without a conviction, while the proceedings against Bucyibaruta are ongoing. The ICTR requested that the Netherlands take over the prosecution of Joseph Mpambara for genocide committed in Rwanda. However, the genocide charges against Mpambara were dropped, due to the lack of legislation allowing the Netherlands to exercise universal jurisdiction over genocide. See case note on *Public Prosecutor v. Joseph Mpambara*, available online at www.internationalcrimesdatabase.org/Case/770/Mpambara/ (visited 25 June 2021).

94 See for example, the cases of Fabien Neretsé (in Belgium), Eugène Rwamucyo (in France), in TRIAL and others, *Universal Jurisdiction Annual Review 2021* (2021), available online at https://trialinternational.org/latest-post/ujar-2021/ (visited 25 June 2021), at 21 and 43.

95 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute), at Preamble and Art. 17.

way of universal jurisdiction, irrespective of whether they are a party to the Rome Statute.[96] Although legally not obliged to do so, in incorporating the Rome Statute into domestic law, some states enacted universal jurisdiction over international crimes including the crime of genocide,[97] which in turn has resulted in a number of domestic cases and investigations.[98]

In sum, it can be argued that one of the main triggers for the advancement of universal jurisdiction cases has been the creation international institutions. This spectacle can be seen since the national prosecutions that took place under the UNWCC and then decades later following the creation of ICTY and ICTR. In this sense it is ironic that once the international criminal tribunal referred to in Article 6 of the Genocide Convention came into existence, it acted as the impetus for the advancement of universal jurisdiction over the crime. What is more, it is the vilification of a certain nationality of *génocidaire* by the international community (as evidenced by the creation of an international prosecutorial mechanism) that will impact the trajectory of the principle. There are few complaints from other states, including the territorial state, when national courts exercise universal jurisdiction over genocide in situations where the UNSC has 'internationalised' the punishment of the crime by permitting an international tribunal to prosecute the crime. This reality provides evidence in support of the contention that the non-objection of the state of nationality of the accused person is also an element of the successful exercise of universality over international crimes.[99] This point accords with the quantitative research by Máximo Langer and Mackenzie Eason, which concludes that the universality principle is most frequently practiced against defendants who are Rwandan, German or Serbian.[100] Prosecutions of international crimes under universality are more likely to occur when utilized in a context that has gained the political support of the international community. Leaving aside the

96 Office of the ICC Prosecutor, *Informal expert paper: The principle of complementarity in practice*, ICC Doc. ICC-01/04-01/07-1008-AnxA, 2003, §§ 75–76.

97 On the national laws enacted to give effect to states parties' obligations under the Rome Statute see Amnesty International's *End Impunity Through Universal Jurisdiction: No Safe Haven* series; Amnesty International, *Universal Jurisdiction: A preliminary survey of legislation around the world – 2012 Update* (2012), available online at www.amnesty.org/download/Documents/24000/ior530192012en.pdf (visited 1 December 2020). For example, the German Code of Crimes Against International Law 2002 was enacted to give effect to the Rome Statute. It provides for universal jurisdiction over genocide. Section 51(2) of the UK's International Criminal Court Act 2001 and Art. 689-11 of the French Code of Criminal Procedure (which was enacted as part of the laws to implement the Rome Statute) allow for the exercise of universal jurisdiction on condition that the accused is legally resident.

98 In the UK, the Metropolitan Police are investigating four Rwanda suspect *génocidaires*.See *Universal Jurisdiction Annual Review 2021*, *supra* note 94, at 81. In France, see also the pending trial of Eugène Rwamucyo, *supra* note 94 and the ongoing proceedings in France against Laurent Bucyibaruta, *Universal Jurisdiction Annual Review 2021*, *supra* note 94, 43.

99 On this point in respect of the exercise of universality over war crimes committed in non-international armed conflicts, see J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. 1 (Cambridge University Press, 2005), at 605.

100 M. Langer and M. Eason, 'The Quiet Expansion of Universal Jurisdiction', 30 *European Journal of International Law* (*EJIL*) (2019) 779–817, at 809–810.

prosecutions that resulted from WWII, the reverse of this feature is that universal jurisdiction is more likely to come up against resistance from other states when it is utilized in a context that creates friction with the policy of strategically powerful states and their allies.

It can also be argued that the international response to genocide, when committed, is an important indicator as to whether a prosecution under the universality principle will be met with resistance from other states. The majority of cases reviewed in terms of state practice in the next section, stemmed from the genocide in Rwanda,[101] an atrocity that was met with universal condemnation from the international community after it occurred. The UNSC permanent five members agreed to the establishment of the ICTR, which in turn influenced states to contribute to the quest for justice. The setting up of the ICTR showed that the UNSC 'permanent five' veto powers were united in their judicial response.[102] There was regime change in Rwanda after the genocide, which in turn meant that suspect *génocidaires* had reason to flee the territorial state, and other states were faced with the presence of alleged *génocidaires* in their countries. In some cases, the Rwandan Government sought the extradition of the accused for prosecution.[103] The political landscape after the commission of the Rwandan genocide means that the post-conflict leadership does not protest the prosecutions under the universality principle.[104] Indeed, the Rwandan Government's Genocide Fugitive Unit has co-operated with the prosecutorial authorities in some genocide cases in Europe.[105] These geo-political factors contribute to the universal jurisdiction prosecutions in respect of the genocide in Rwanda, which are still ongoing decades after the conflict.

5. State Practice in the Exercise of Universal Jurisdiction over Genocide

There is general consensus that when universal jurisdiction is utilized by states to prosecute international crimes, where it is not expressly provided for in an

101 32 out of 50 of the examples related to the genocide in Rwanda.

102 In particular, the recent inability of the UNSC to address the commission of ongoing international crimes shows that such a unified judicial response to atrocity crimes cannot be presumed.

103 See for example, the case of Vincent Bajinja and others in the UK, case information in TRIAL and others, *Universal Jurisdiction Annual Review 2021*, *supra* note 94, at 80.

104 One exception is Rwanda's criticism of universal jurisdiction exercised against incumbent President Paul Kagame and other officials. See Rwandan Ministry of Justice, 'The Government of Rwanda's report on information and observations on the scope an application of the principle of universal jurisdiction' (Rwandan submission 2010), available online at www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Rwanda.pdf (visited 1 December 2020), at 2.

105 See case of Sadi Bugingo in Norway, TRIAL case information on Sadi Bugingo available online at https://trialinternational.org/latest-post/sadi-bugingo (visited 1 December 2020).

international treaty, that it is a right of states and not a duty.[106] In the *Bosnian Genocide* case, the ICJ affirmed:

> Article VI only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so.[107]

This right is said to originate in customary international law.[108] In *Eichmann*, the Israeli Supreme Court declared that its jurisdiction to prosecute the defendant originated from 'the universal power vested in every state to prosecute for crimes of this type committed in the past-a power which is based on customary international law'.[109] In the *Guatemala Genocide Case*, the Spanish Constitutional Court explicitly acknowledged universal jurisdiction over genocide, reasoning that it was necessary to prevent impunity.[110]

Although, it is clear that genocide has been recognized as a crime under customary international law for some time,[111] it is less clear as to whether the application of the universality principle to the crime of genocide forms part of customary international law, if one relies on the traditional two-component test of *opinio juris* and state practice. This situation has arisen because there are difficulties in pronouncing the crystallization of this rule in customary international law, under the two traditional components of customary rule formation.[112] There is little evidence of sufficient state practice to warrant the realization of the principle as a rule under customary international law,[113] given the few examples of domestic prosecutions of genocide under

106 *Polyukhovitch v. The Commonwealth* (1991) 172 CLR 501, § 35; *Jorgić*, *supra* note 3. See also W.B. Cowles, 'Universality of Jurisdiction Over War Crimes', 33 *California Law Review* (1945) 177–218, at 217.

107 Judgment, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Rep (2007), 43, § 442.

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

109 *Eichmann*, Supreme Court judgment, *supra* note 66, § 12.

110 *Guatemala Genocide Case*, *supra* note 108, § 5; N. Roht-Arriaza, 'Guatemala Genocide Case', 100 *AJIL* (2006) 207–213, at 210.

111 In the Canadian case of *Munyaneza*, the Court of Appeal asserted that genocide was a crime under customary international law 'long before 1994', *Prosecutor v. Munyaneza*, Court of Appeal, 2014 QCCA 906, at § 26.

112 On this point see D. Hovell, 'The Authority of Universal Jurisdiction', 29 *EJIL* (2018) 427–456, at 433.

113 Furthermore, it is questionable whether the practice of states exercising universality would meet the standard set by the ILC in its examination of the 'Identification of Customary

the principle of universal jurisdiction. As Devika Hovell notes, '[t]he customary international law yardstick—requiring proof of state practice and *opinio juris*, where the relevant state practice must be ''widespread and representative, as well as consistent'' – proves a difficult measure in the case of universal jurisdiction'.[114] Perhaps, this fact is one reason why former President of the ICJ, Gilbert Guillaume, asserted '[I]nternational law knows only one true case of universal jurisdiction: piracy' in the famous *Arrest Warrant Case*.[115] Yet, this lack of evidence of the crystallization of a concrete rule has not prevented states from relying on the principle, and citing customary international law as the source permitting them to do so.[116]

This situation leads one to affirm that when states exercise universal jurisdiction over genocide, they are ultimately relying on the methodology in the *Lotus* principle,[117] which permits that extraterritorial jurisdiction can be exercised to the extent that it does not conflict with a rule of international law.[118] But, there is a problem in national judges citing customary international law to source a right to exercise universal jurisdiction, where there is insufficient state practice. If a judge comes to a positive conclusion as to a finding of the existence of universal jurisdiction under customary international law (where there is a lack of sufficient *opinio juris* and state practice), they can also come to the opposite conclusion, and find that the principle does not exist under customary international law. As Hovell notes, '[a]cceptance or dismissal of a case on ''jurisdictional grounds'' can mask a violent political contest, imposing a particular form of political authority on others or denying recognition to rival claims to authority'.[119]

Since the early 1990s there have been a number of cases where genocide has been prosecuted under the principle of universal jurisdiction. An overview of state practice sheds some light on the common denominators across the cases,[120] most of which apply to the exercise of universal jurisdiction over all

International Law'. See ILC, 'Identification of Customary International Law: Text of the draft conclusions as adopted by the Drafting Committee on second reading', UN Doc. A/CN.4/L.908*, 17 May 2018.

114 *Supra* note 112, at 433.

115 Separate Opinion of President Guillaume, *Case Concerning the Arrest Warrant of 11 April 2000*, ICJ, 14 February 2002, at § 12. See also the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal.

116 See for example, *Eichmann*, *supra* note 66; *Guatemala Genocide Case*, *supra* note 108.

117 Judgment, *Lotus Case (France v Turkey)*, PCIJ Rep Series A. No 10, 7 September 1927.

118 An example of a conflicting rule is the immunity granted to heads of state under customary international law, Judgment, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3.

119 Hovell, *supra* note 112, at 427.

120 The author calculates at least 50 attempts to exercise universal jurisdiction over the crime of genocide since the beginning of the 1990s until July 2021. These examples include attempted prosecutions at complaint stage, investigation stage, trial stage, as well as completed cases. In most instances, the accused acquired the nationality or residency of the forum state after the alleged genocide was committed. The data for this review of state practice was gathered from the reports of the cases in the annual report on universal jurisdiction published by TRIAL and

international crimes. Practice shows that more often than not, when universal jurisdiction is exercised over genocide, the accused is present in the prosecuting state.[121] Their presence is often secured by voluntary entry into the forum state, as the accused may seek asylum or residence there, after fleeing the place of commission of the crime. Here, the accused will live freely in the state, unless prosecuted.[122] In these instances, the prosecuting state is utilizing universal jurisdiction under the 'no safe-haven' approach, which originates in the writings of Hugo Grotius.[123] Where the accused is present in the forum state and is not extradited to a state with a closer nexus to the crime, the forum state is in effect relying on *aut dedere aut judicare*. Notwithstanding that the obligation to try or extradite is not expressly provided for in the Genocide Convention, some states view the principle as being inferred from the Convention.[124] Some scholars have also come to this conclusion.[125] The case law also demonstrates that when universal jurisdiction is used to prosecute an accused person who is not present in the forum state, it is met with considerable resistance from the state of nationality, which has led to some states reducing the scope of their universal jurisdiction laws.[126]

In the cases where the principle has been used to prosecute genocide, as in most universal jurisdiction trials, it is notable that 'low rank' officials are more

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others, the case details on the TRIAL website and in the Asser Institute International Crimes database, reports of the EU Genocide Network, the reports of international NGOs, the case studies in Reydams, *supra* note 3, and cases referred to in academic writing and in news reports.

121 In at least 36 of the 50 examples, the accused was present in the forum state at the time of the complaint or the initiation of the legal proceedings. In 4 examples, the accused was not present at the complaint stage/ initiation of proceedings, but was present for the trial.

122 Presence is a feature of some of the national legislation on universal jurisdiction, see H.L. Trouille, 'France, Universal Jurisdiction and Rwandan génocidaires: The *Simbikangwa* Trial', 14 *JICJ* (2016) 195–217, at 210. In the German national case of *Prosecutor v. Tadić*, Bundesgerichtshof, 13 February 1994, the examining magistrate noted that it would be unjust to allow the accused live freely in Germany, where he had sought asylum, as cited in Reydams, *supra* note 4, at 151.

123 H. Grotius, *Mare Liberum* (David Armitage ed., Liberty Fund 2004), at 128; Hugo Grotius, *The Rights of War and Peace* (Richard Tuck ed., Liberty Fund 2004), at 1021–1024. These books were first published in 1609 and 1625 respectively.

124 For example, in July 1994, an Austrian Court found that Austria could exercise universality in respect of genocide under the Genocide Convention so long as extradition to the territorial state was not possible. *Public Prosecutor v. Cvjetković*, *supra* note 3, case excerpt in Reydams, *supra* note 4, at 100. Here, the territorial state, Bosnia, was in the midst of war and an international criminal court was not yet functional, which made the possibility of prosecution elsewhere unlikely.

125 Schiffbauer, *supra* note 64, at 236; G. Mettraux, *International Crimes: Volume 1, Genocide* (Oxford University Press, 2019), at 110–113.

126 In Spain, attempts to prosecute Rwandan President, Paul Kagame, and senior Chinese officials for genocide led to a reduction in the scope of universal jurisdiction laws. In Belgium, a complaint against the former Prime Minister of Israel, Ariel Sharon, resulted in Israel recalling its Ambassador to Belgium. This incident of was one of the reasons why the scope of the Belgian law on universal jurisdiction was reduced in 2003. See Langer, *supra* note 88, at 29–32 and 37–41.

commonly punished,[127] compared to 'high rank' senior officials. The reality is that the exercise of universal jurisdiction against lower level ranked state officials, present in the forum state, is less likely to negatively impact relations with the state of nationality of the accused. The recent history of universal jurisdiction shows that when universal jurisdiction is used against high-rank leaders or heads of state, it has a negative impact on international relations between the forum state and the state of nationality.[128] Moreover, there also appears to be a correlation between attempts to initiate a universal jurisdiction trial in respect of senior state officials and the lack of presence of the accused in the forum state.[129] The problem with the utilization of universal jurisdiction against low rank officials is that it restricts the scope of the principle and impedes the exercise of universal jurisdiction as an impunity prevention tool. Genocidal policy is often orchestrated from the highest echelons of state power. Thus, it begs the question whether universal jurisdiction is an effective way to punish those most responsible for genocide, instead of relying on another type of adjudicatory jurisdiction or an international court to prosecute the crime. Moreover, it highlights the selective application of universal jurisdiction, and questions the true rationale for the principle, not only in respect of genocide, but for all the crimes to which it applies.

The role of civil society in initiating legal proceedings is another factor in the investigations and cases concerning universal jurisdiction over international crimes including genocide. Individuals and NGOs play an extremely important role in cases under the principle.[130] In a number of instances, it was the refugee diaspora community in the forum state that alerted the authorities to the presence of the alleged perpetrators of international crimes, including *génocidaires* in its territory.[131] It is also important to note that the countries that have exercised universal jurisdiction over, inter alia, genocide, have set up specialized units within their policing or prosecutorial office to investigate and prosecute persons present in the territory who are accused of having

127 See Langer and Eason, *supra* note 100, at 782.

128 This state of affairs occurred in Belgium, Spain and the UK.See Langer, *supra* note 88; S.R. Ratner, 'Belgium's War Crime Statute: A Postmortem', 97 *AJIL* (2003) 888–897; 'United Kingdom Adds Barrier to Private Prosecution of Universal Jurisdiction Crimes-Police Reform and Social Responsibility Act 2011', 125 *Harvard Law Review* (2012) 1555–1561.

129 For example see the complaint against Aung San Suu Kyi and others in Argentina. See *Universal Jurisdiction Annual Review 2021*, *supra* note 94, at 19; Case against Rwandan General Karenzi Karake and other high ranking army officials in Spain, see TRIAL and others, *Universal Jurisdiction Annual Review 2016: Make Way for Justice #2 (2016)*, available online at https://trialinternational.org/wp-content/uploads/2016/06/Universal-jurisdiction-annual-review-2016-publication.pdf (visited 1 December 2020), at 41–42; Tibet Case in Spain against eight Chinese officials, see *Universal Jurisdiction Annual Review 2016*, at 43.

130 See O. Bekou, 'Doing Justice for the Liberian Victims of Mass Atrocity: NGOs in Aid of Universal Jurisdiction', 13 *JICJ* (2015) 219–227; F. Mégret, 'The ''Elephant in the Room'' in Debates about Universal Jurisdiction: Diasporas, Duties of Hospitality and the Constitution of the Political', 6 *Transnational Legal Theory* (2015) 89–116.

131 Hovell has termed this the 'access to justice model' of universal jurisdiction, where it is the victims of international crimes, including genocide, who seek the prosecution. See Hovell, *supra* note 112, at 437.

committed international crimes abroad.[132] In European Union (EU) Member States, the creation of such investigative units was largely facilitated under the EU Genocide Network. In some of the cases reviewed for this article, arrests of suspected *génocidaires* occurred with the assistance of Interpol.[133]

The national courts of some states, namely Germany and Spain, have interpreted the Genocide Convention as providing for the principle of universal jurisdiction, notwithstanding the exclusion of an explicit provision authorizing the application of universal jurisdiction to the crime. In the German case of *Jorgić*, the Court held that the obligation to prevent and punish genocide in Article 1 of the Genocide Convention encompassed the right of states to exercise universal jurisdiction to prosecute genocide in order to meet the duties under the Convention.[134] This approach is in line with the interpretation of treaties set out in Article 31(2) of the Vienna Convention on the Law of Treaties, which allows for the purpose of a treaty to be taken into account when a treaty is being interpreted. Adopting this method, some scholars argue that when read together, Articles 4 and 6 of the Genocide Convention contain a duty on states parties to prosecute genocide under the obligation to try or extradite (or *aut dedere aut judicare*).[135] In the *Guatemala Genocide Case*, the Spanish Constitutional Tribunal, affirmed that the explicit forums for punishment listed in Article 6 could not be interpreted as explicit limitations, as they list the 'minimum obligations on states'.[136] The Court reasoned that restricting the prosecution of genocide to the territorial state or to an international penal tribunal was at odds with the obligation of states under customary international law to prevent impunity.[137] In at least one case, the view was upheld that the textual requirements of Article 6 limit the adjudicatory jurisdiction to the

132 France, Germany, the Netherlands and Sweden have set up specialized units to prosecute international crimes, see Human Rights Watch, *The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany and the Netherlands* (September 2014), available online at www.hrw.org/sites/default/files/reports/IJ0914_ForUpload.pdf (visited 1 December 2020); Human Rights Watch, *These are the Crimes We Are Fleeing: Justice for Syria in Swedish and German Courts* (October 2017), available online at www.hrw.org/sites/default/files/report_pdf/ijsyria1017_web.pdf (visited 1 December 2020); In the UK, the responsibility for such investigations is with the War Crimes Team of the Metropolitan Police Counter Terrorism Command, see www.cps.gov.uk/publication/war-crimescrimes-against-humanity-referral-guidelines (visited 1 December 2020).

133 For example, see case of Onesphore Rwabukombe in Germany, TRIAL case information, available online at https://trialinternational.org/latest-post/onesphore-rwabukombe (visited 1 December 2020).

134 *Jorgić*, Federal Supreme Court, excerpt in Reydams, *Universal Jurisdiction*, *supra* note 4, at 154. The same conclusion was reached by the Audiencia Nacional in the Spanish case of *Unión Progresitsa de Fiscales de España et al v Pinochet*, Order of the Criminal Chamber of the Spanish *Audiencia Nacional*, 5 November 1998, available in R. Brody and M. Ratner (eds), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (Kluwer Law International, 2000), at 95.

135 Schiffbauer, *supra* note 64, at 236. See also Mettraux, *supra* note 125, at 110–113.

136 Roht-Arriaza, *supra* note 110, at 210.

137 *Ibid.*

two forums expressly listed.[138] The justification of the exercise of universal jurisdiction on the basis of the nexus between the application of universal jurisdiction and certain *jus cogens* offences has been acknowledged in the legislation,[139] and in the case law of some states.[140]

6. Discussions in the Sixth Committee of the UNGA

Since the Sixty-Fourth session of the UNGA in 2009, the topic of 'the scope and application of the principle of universal jurisdiction' has been on the agenda of the Sixth Committee of the UNGA. Although the discussions centre on universal jurisdiction in general, *opinio juris* on the application of the principle to the crime of genocide can be evidenced from the records. The deliberations illustrate a wide variety of opinions from countries in the Global North and the Global South. In general, there is vast support for the principle and its justifications, but there are differences as to how it should operate in practice. It is likely that the result of the discussions will include the codification of conditions or guidance on the exercise of universal jurisdiction, should consensus be reached.

The records of the Sixth Committee show that many states have incorporated universal jurisdiction over genocide into their domestic law,[141] and many states believe that universality applies to genocide.[142] Indeed, a number

138 See the French case of *Javor et al v. X*, Cour de Cassation (chamber criminelle), 26 March 1994.

139 In the Swiss Federal Council justifies the legislation permitting the exercise of universal jurisdiction over genocide in title 12*bis code penal Suisse*, on the grounds of 'the imperative character (*jus cogens*) of the prohibition of genocide and its effect *erga omnes*', see Reydams, *Universal Jurisdiction*, *supra* note 4, at 195.

140 For example, see the Canadian case of *Prosecutor v. Munyaneza*, *supra* note 111.

141 For example, see Australian submission (2010), available online at www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Australia.pdf (visited 1 December 2020), at 2; views of Dominican Republic in *Report of the Secretary-General: The scope and application of the principle of universal jurisdiction*, UN Doc. A/66/93/Add.1, 16 August 2011, § 2, at 2; submission of Ghana (2012), available online at www.un.org/en/ga/sixth/67/ScopeAppUniJuri/Ghana_Eng.pdf (visited 1 December 2020), at 2; submission of Moldova (2013), available online at www.un.org/en/ga/sixth/68/UnivJur/Moldova.pdf (visited 1 December 2020), at 2. Some states have attached conditions to the exercise of universal jurisdiction in their legal system, while other states require a 'relevant link' to their state for the prosecution to proceed. In a number of states, the principle of universal jurisdiction can be exercised only where the accused foreigner is resident in the state. Some states require the criminalization of the offence in the territorial state in order to proceed with the prosecution.

142 For example, see submission of Armenia (2010), available online at www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Armenia.pdf (visited 1 December 2020); submission of El Salvador (2011), available online at www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/El%20Salvador%20(S%20to%20E).pdf (visited 1 December 2020), at 10. See also Rwandan submission 2010, *supra* note 104. See views of Togo in *Report of the Secretary-General: The scope and application of the principle of universal jurisdiction*, UN Doc. A/72/112, 22 June 2017 (2017 UNSG report), § 48, at 11. See comments by the African Union that many of its members support the application of universal jurisdiction to genocide in *Report of the Secretary-General: The scope and application of the principle of universal jurisdiction*, UN Doc. A /66/93, 20 June 2011 (2011 UNSG report), § 108, at 21.

of states have listed the Genocide Convention as a source from which the principle emanates.[143] Additionally, some states have also cited customary international law as a source for the application of universal jurisdiction to genocide.[144] The discussions also show that not all states support the application of universality to genocide, and some states with universal jurisdiction over international crimes, have not legislated for the principle over genocide.[145] In its submission, the United Kingdom noted:

> . . .[u]nder international law, universal jurisdiction in its true sense is only clearly established for a small number of specific crimes: piracy and war crimes, including grave breaches of the Geneva Conventions. The United Kingdom acknowledges that there is a further limited group of crimes which some States consider to attract universal jurisdiction, including genocide and crimes against humanity, but there is a lack of international consensus on the issue. These crimes are not underpinned by treaties providing for universal jurisdiction.[146]

It is also evident from the debate that there is a clear belief among many states that the accused be present in the prosecuting state for the prosecution to occur.[147]

The difficulties of completing the legal proceedings when the accused is not present in the forum state have also been recognized by two countries, Belgium and Spain, whose laws on universal jurisdiction were restricted after attempts

143 For example, Cyprus views universality as applying to genocide by virtue of the Convention, see *Report of the Secretary-General: The scope and application of the principle of universal jurisdiction*, UN Doc. A/73/123, 3 July 2018 (2018 UNSG report), § 11, at 3. See views of Mexico and Bahrain in 2018 UNSG report, Table 3, at 13.

144 See *Report of the Secretary-General: The scope and application of the principle of universal jurisdiction*, UN Doc. A/65/181, 29 July 2010 (2010 UNSG report), § 54, at 14, citing the views of Belgium, Malta and Slovenia.

145 For example, Sierra Leone has legislated for universal jurisdiction over war crimes, but not genocide, see *Report of the Secretary-General: The scope and application of the principle of universal jurisdiction*, UN Doc. A/74/144, 11 July 2019 (2019 UNSG report), Table 1, at 14 and table 2 at 19.

146 United Kingdom submission (2011), available online at www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/UK&Northern Ireland.pdf (visited 1 December 2020), at 3–4.

147 See Australian submission 2010, *supra* note 141, at 2; views of Austria in *Report of the Secretary-General: The scope and application of the principle of universal jurisdiction*, UN Doc. A/70/125, 1 July 2015 (2015 UNSG report), § 8, at 3; views of Bahrain in 2019 UNSG report, *supra* note 145, § 33, at 9; views of Bosnia and Herzegovina in 2011 UNSG report, *supra* note 142, § 65, at 13; views of Colombia in *Report of the Secretary-General: The scope and application of the principle of universal jurisdiction*, UN Doc. A /68/113, 26 June 2013 (2013 UNSG report), § 11, at 3; views of Cuba in 2015 UNSG report, § 19, at 5; views of Czech Republic in 2015 UNSG Report, § 22, at 5; views of Iraq in 2019 UNSG report, *supra* note 145, § 13, at 4; views of Kuwait in *Report of the Secretary-General: The scope and application of the principle of universal jurisdiction*, UN Doc. A/67/116, 28 June 2012 (2012 UNSG report), § 16, at 5; views of Paraguay in *Report of the Secretary-General: The scope and application of the principle of universal jurisdiction*, UN Doc. A/69/174, 23 July 2014 (2014 UNSG report), § 41, at 9; views of Qatar in 2011 UNSG report, *supra* note 142, § 30, at 7; views of Senegal in 2017 UNSG report, *supra* note 142, § 12, at 3; views of Switzerland in 2018 UNSG report, *supra* note 143, § 30, at 6. See also the views of the ICRC in 2011 UNSG report, *supra* note 142, § 136, at 26.

to prosecute individuals *in absentia*.[148] This position supports the contention that universal jurisdiction is best enforced as part of the obligation to try or extradite. Here, the prosecuting state exercises universal jurisdiction only where the accused is present in their territory, and is not extradited to another state (normally, the territorial state or the state of nationality). Moreover, under this framework, universal jurisdiction is relied on as a subsidiary basis, i.e. where the accused cannot be extradited to a state with a closer nexus to the crime. Indeed, as already mentioned above, some states have commented that the principle of *aut dedere aut judicare* is contained in the Genocide Convention.[149] In its submission, Sweden affirmed, 'States have a right and an obligation to either prosecute or extradite persons suspected of having committed genocide'.[150] Within the ongoing discussions, the link between universal jurisdiction and *aut dedere aut judicare* was addressed by some states,[151] and by international organizations.[152] Whilst the distinction between the two principles has been noted by a number of states, as well as in the UN Secretary General's general comments on the topic.[153]

There is general consensus that the primacy for the prosecution rests with the territorial state or the state of nationality,[154] with many states confirming that universal jurisdiction is an exceptional tool of last resort. There are practical reasons for this position (as the territorial state and state of nationality have best access to witnesses and evidence), as well as political reasons. A number of states have also commented that priority for prosecution should be given to an international criminal tribunal, such as the ICC.[155] However, the problem with this stance is that it is a reversal of the principle of complementarity, given that the ICC operates on a subsidiary basis to national criminal

148 See views of Spain in 2011 Secretary General report, *Ibid*., § 98, at 19 and views of Belgium in submission of Belgium (2010), available online https://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Belgium_E.pdf (visited 12 August 2020), § 14, at 5.

149 For example, see submission of Mexico (2018) (Mexican submission 2018), available online at www.un.org/en/ga/sixth/73/universal_jurisdiction/mexico_e.pdf (visited 1 December 2020), at 2. Not all states agree with this position.

150 2014 UNSG report, *supra* note 147, § 92, at 18.

151 For example, see views of Argentina in 2018 UNSG report, *supra* note 143, § 40, at 8; views of Paraguay in 2014 UNSG report, *supra* note 147, § 90, at 18. See also UK submission 2010, *supra* note 146, at 3.

152 Views of the International Maritime Organisation in 2019 UNSG report, *supra* note 145, § 43, at 10.

153 For example, see 2010 UNSG report, *supra* note 144, §§18–22, at 6–8; views of Colombia, see 2013 UNSG report, *supra* note 147, § 41, at 9.

154 For example, see views of Mali in 2019 UNSG report, *supra* note 145, § 57, at 13; views of Australia in 2018 UNSG report, *supra* note 143, § 41, at 8; views of Spain in *Report of the Secretary-General: The scope and application of the principle of universal jurisdiction*, UN Doc. A/71/111, 28 June 2016 (2016 UNSG report), § 22, at 5; views of the EU in 2015 UNSG report, *supra* note 147, § 50, at 10; views of Chile in 2010 UNSG report, *supra* note 144, § 114, at 26.

155 See views of Paraguay in 2014 UNSG report, *supra* note 147, § 19, at 5; views of Spain in 2011 UNSG report, *supra* note 142, § 75, at 15; views of Czech Republic in 2015 UNSG report, *supra* at note 147, § 22, at 5. In Croatia, universality operates on the basis of a prosecutorial priority being granted to the ICC or another state, see 2015 UNSG report, *supra* at note 147, § 46, at 9–10.

jurisdiction. Moreover, it is questionable whether the ICC has the capacity to be the primary venue to prosecute genocide, not to mention its limited jurisdictional scope. The African Union (AU) has mooted the idea that the consent of the territorial state and state of nationality should be required before the forum state exercises universal jurisdiction.[156] The ongoing discussions show that the language of complementarity, as well as the concept itself, is being utilized in the application of universal jurisdiction. A number of states affirm that universal jurisdiction can only be used where the territorial state or state of nationality is 'unable or unwilling' to conduct the prosecution.[157] The general comments of the UN Secretary General also reflect this opinion,[158] which suggests that the framework of complementarity may be applied to the scope of the application of universal jurisdiction in the future.

The similarities between the concerns raised by states during the negotiations of the Genocide Convention are re-emerging before the Sixth Committee. Contributors continuously make reference to the importance of the jurisdiction being exercised in accordance with the principles of international law. States have requested that guidelines be formulated regarding how and when the jurisdiction is utilized, in order to prevent it from being used as a tool for interference in the internal matters of another state. Here, a number of states have commented that the principles of sovereignty and non-interference must be upheld when universal jurisdiction is used. Unsurprisingly, most of these comments have been expressed from countries in the Global South.[159] Qatar commented that universality must be exercised in accordance with the UN Charter,[160] while political abuse and misuse of the principle was a concern for Turkey.[161] Politically motivated reliance on the principle has also been raised.[162] The negative affect of universal jurisdiction proceedings in respect of international relations between the prosecuting state and the state of nationality of the accused is also recognized by some states.[163] Indeed, the need

156 2011 UNSG report, *supra* note 142, § 161, at 31. Notably, the AU Model National Law on Universal Jurisdiction (2012), lists genocide as a crime to which to principle applies, see www.un.org/en/ga/sixth/71/universal_jurisdiction/african_union_e.pdf (visited 1 December 2020), Art. 9. The Model Law also grants priority for the prosecution to the territorial state, see Art. 4(b).

157 For example, see views of Argentina in 2018 UNSG report, *supra* note 143, § 39, at 8; views of Spain in UNSG report 2016, *supra* note 154, § 22, at 5; views of Vietnam in 2012 UNSG report, *supra* note 147, § 41, at 10; views of Lebanon in 2011 UNSG report, *supra* note 142, § 146, at 29; views of Chile in 2010 UNSG report, *supra* note 144, § 114, at 26. See Australian submission 2010, *supra* note 141, at 1–2.

158 2010 UNSG report, *supra* note 144, § 11, at 5.

159 For example, see views of Mali in 2019 UNSG report, *supra* note 145, § 57, at 13. See also submission of Togo available online at www.un.org/en/ga/sixth/72/universal_jurisdiction/togo_e.pdf (visited 1 December 2020), at 1; views of Cuba in 2014 UNSG report, *supra* note 147, §§ 79–87, at 17–18; submission of El Salvadore 2011, *supra* note 142, at 3.

160 See submission of Qatar, available online at www.un.org/en/ga/sixth/74/universal_jurisdiction/qatar_e.pdf (visited 1 December 2020) § 1, at 1.

161 2019 UNSG report, *supra* note 145, § 62, at 14.

162 Rwandan submission, *supra* note 104.

163 For example, see views of Croatia in 2015 UNSG report, *supra* note 147, § 78, at 16; views of Hungry in 2013 UNSG report, *supra* note 147, § 23, at 6.

to preserve international relations while exercising the principle was highlighted by the AU.[164] Concerns for the fair trial rights of the accused have also been highlighted, and it is likely that this will feature in the codification of any guidelines that result from the discussions.[165]

It is clear that states' views reflect their experiences with the principle of universal jurisdiction, whether as a forum state or the state of nationality of the accused. There are differences as to what crimes universal jurisdiction applies, and some states have demonstrated a misunderstanding of the principle.[166] As noted by the UN Secretary General, some states legitimize universality by citing the Rome Statute,[167] which is an interesting development given that the treaty does not obligate states parties to incorporate universal jurisdiction over the ICC core crimes. It is also evident that the clearly defined international crimes in the Rome Statute have positively influenced the definition of the ICC core crimes in national legislation.

7. Conclusion

This article attempted to analyse the evolution of the principle of universal jurisdiction over genocide. It is clear that the express forms of jurisdiction listed in Article 6 of the Convention do not impede the application of universal jurisdiction to genocide. The central theme throughout this evolution appears to be that, although the Genocide Convention does not expressly assert universal jurisdiction, it does not prohibit the exercise of the principle, as otherwise its aims (the prevention and punishment of the crime) would not be met. While this development is to be welcomed, it is important to note the lack of prosecutions for genocide under international law, at both a national and an international level. Merely because a situation has been labelled as genocide does not mean that it will then result in a prosecution, and tragically, allegations of genocide persist.[168] The brief analysis of state practice and *opinio juris*, on the application of universal jurisdiction conducted for this article, demonstrate

164 2011 UNSG report, *supra* note 142, § 109, at 21.

165 For example, see views of Sweden in 2012 UNSG report, *supra* note 147, § 25, at 7. Notably, Turkey allows for the exercise of universality where the accused has been acquitted abroad, views of Turkey in 2019 UNSG Report, *supra* note 145, § 19, at 5.

166 For example, Lebanon, which is party to and has ratified UNCAT and the UN Convention on the Law of the Sea, declared that it is not party to any treaty with universal jurisdiction, see 2013 UNSG report, *supra* note 147, § 17, at 5.

167 2010 UNSG report, *supra* note 144, § 24, at 8.

168 See the ongoing complaint by the Gambia against Myanmar before the ICJ in respect of possible violations of the Genocide Convention. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, provisional measures of 23 January 2020, available online at www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf (visited 1 May 2020). See also UN Human Rights Council, *Report of the independent international fact-finding mission on Myanmar*, UN Doc. A/HRC/39/64, 12 September 2018, at §§ 84–87; Global Legal Action Network, 'Legal opinion concludes that treatment of Uyghurs amounts to crimes against humanity and genocide' (GLAN website, 8 February 2021), available online at www.glanlaw.org/single-post/legal-opin

that the presence of the accused in the forum state is most certainly crystalizing as an element of the principle. It is clear that many states support the contention that the principle is to be used on a subsidiary basis, whereby primacy for the prosecution should rest with the territorial state or the state of nationality of the accused. The principle of universal jurisdiction should work also in tandem with international penal tribunals, such as the ICC. Moreover, universal jurisdiction is one way that states can fulfil their primary responsibility to prosecute 'those responsible for international crimes'.[169] The vital role that the principle plays in prosecuting genocide is exemplified in cases where universality is the jurisdictional basis in situations over which the ICC has no jurisdiction, and where a UNSC referral is unlikely.[170]

The development of universal jurisdiction over genocide also tells us something about the wider question of the development of international rules based on humanitarian norms under international law. The foundations of universality over genocide under customary international law may be weak, however, states are exercising the principle. The history of the exercise of universal jurisdiction over genocide shows that the lack of a concretely established customary rule has not prevented states legislating for and exercising the principle over the crime. In addition, the ongoing discussions on the scope and application of universal jurisdiction before the UNGA demonstrate that many states support the application of universality to the crime of genocide. In turn, this supports the argument that *opinio juris* is stronger than state practice in the development of humanitarian based customary international rules,[171] a position which questions the suitability of the application of the traditional two-component test of customary rule formation to humanitarian based norms. In particular, the historical development of the principle of universal jurisdiction to genocide also demonstrates the important role played by academic scholars in advancing the cause,[172] as is evident in the case law. Reflecting the Genocide Convention in its eighth decade, one can see that Lemkin's proposition that universal jurisdiction should apply to genocide has come to fruition. Importantly, the evolution of the application of universal jurisdiction to genocide gives international lawyers food for thought with respect to the application of the principle to other atrocity crimes.

ion-concludes-that-treatment-of-uyghurs-amounts-to-crimes-against-humanity-and-genocide (visited 23 July 2021).

169 Rome Statute, Preamble, at § 6.

170 For example, see the ongoing prosecution of Taha A-J in Germany, where the accused is being tried in the first ever trial of genocide committed against Yazidi in Northern Iraq. See A. Lily Kather and A. Schwarz, 'First Yazidi Genocide Trial Commences in Germany' (Just Security, 23 April 2020) available online at www.justsecurity.org/69833/first-yazidi-genocide-trial-commences-in-germany (visited 2 December 2020).

171 T. Meron, *Human Rights and Humanitarian Norms* (Clarendon Press, 1989); A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006), at 88; R.B. Lillich, 'The Growing Importance of Customary International Human Rights Law', 25 *Georgia Journal of International & Comparative Law* (1995/96) 1–30.

172 Which in turn illustrates the importance of academic writing as a source of international law, see Art. 38(d) ICJSt.