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The Principle of Complementarity in Rome Statute and Universal Jurisdiction of States

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Abbreviations

AC	Law Reports, Appeal Cases
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICJ Rep.	International Court of Justice Reports
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
IDI	Institut de Droit International
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
Interpol	International Criminal Police Organization
PCIJ	Permanent Court of International Justice
PRC	People's Republic of China
Rome Statute	Rome Statute of International Criminal Court
SCSL	Special Court for Sierra Leone
UN	United Nations
UNGAOR	United Nations General Assembly Official Records
UNTAET	United Nations Transitional Administration in East Timor
UNTS	United Nations Treaty Series
US	United States of America
UK	United Kingdom of Great Britain and Northern Ireland

Table of Cases

PCIJ

Lotus, Judgment No. 9, 1927, PCIJ, Series A, No. 10

ICJ

Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain) (1962-1970), Judgment of 5 February 1970

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996

Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment of 14 February 2002

Certain Criminal Proceedings in France (Republic of Congo v. France), 2003-

ICTY

Prosecutor v. Duško Tadić, Case No. IT-94-1-T, Decision on the Defence Motion on Jurisdiction, 10 August 1995

Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T, Judgment in the Trial Chamber, 10 December 1998

SCSL

Prosecutor v. Charles Ghankay Taylor, Case Number SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004

National Cases

Eichmann Case

District Court of Jerusalem, 12 December 1961; Supreme Court of Israel, 29 May 1962.

Guatemala Genocide Case

Spanish Supreme Court, February 25, 2003

Re Piracy Jure Gentium

AC 589 (Privy Council), 1934, UK

<i>Demjanjuk v. Petrovsky</i>	776 F. 2d 582 (6th Cir. 1985), US
<i>Filartiga v. Pena Irala</i>	630 F. 2d 890 (2d Cir. 1980), US
<i>Peruvian Genocide Case</i>	Spanish Supreme Court, May 20, 2003
<i>Re Pinochet Case</i>	National Court (Criminal Division)(Plenary Session), 5 November 1998, Spain
<i>Re Pinochet Case</i>	Court of Appeal (<i>Chambre du Conseil</i>), 11 February 1999, Luxembourg
<i>Adolfo Scilingo Case</i>	National Court (Criminal Division) (Plenary Session), 19 April 2005, Spain
<i>Butare Four Case</i>	Assize Court of Brussels, 8 June 2001, Belgium
<i>Military Prosecutor v. Niyonteze</i>	Tribunal Militaire, Division II, Lausanne, 30 April 1999; Tribunal Militaire d'appel 1A, Geneva, 26 May 2000 (appeals judgment); Tribunal Militaire de cassation, 27 April 2001 (cassation judgment), Switzerland
<i>Sharon Case</i>	<i>Chambre de mises en accusation</i> of Brussels, 26 June 2002, Belgium

1 Introduction

Crime of aggression, genocide, crime against humanity and war crimes are ‘the most serious crimes of concern to the international community as a whole’¹ or ‘the most serious crimes of international concern’.² They are also usually called as “core crimes”³. The nature of seriousness is usually based on the systematic or extensive commission of them by the state in the pretext of maintaining the public order. Therefore, they are also the most serious violation of human rights by the state. In order to punish the perpetrators of them, it is said that international law provides two mechanisms: the direct mode and the indirect mode. The former is through the establishment of an international criminal tribunal, and the later is through the national criminal jurisdiction. The relationship between the jurisdiction of the international criminal tribunal and the national criminal jurisdiction, however, is not consistent at all in every circumstance.

The two *ad hoc* international criminal tribunals established by the resolutions of the UN Security Council in the beginning of the 1990s, namely the ICTY and the ICTR⁴, established the primary jurisdiction over the national criminal jurisdiction. Paragraph 2 of article 9 of the Statute of the ICTY stipulates that ‘the International Tribunal shall have primacy over national courts’;

¹ See the preamble of the Rome Statute, where it reads ‘affirming that the most serious crimes of concern to the international community as a whole must not go unpunished...’ and also article 5 of the same Statute, where it reads ‘the jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.’ 2187 UNTS 90, also reprinted in 37 ILM (1998) 999.

² See article 1 of the Rome Statute, where it reads ‘an International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern.’ *Ibid.*

³ The meaning of the term “core crimes” in this article is limited to articles 5-8 of the Rome Statute.

⁴ Statute of the ICTY annexed to S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 and Statute of the ICTR annexed to S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955, respectively.

The Statute of the ICTR also contains such a similar provision.⁵ On the contrary, the Rome Statute of the ICC⁶, which is a treaty aimed to establishing a permanent international criminal court for the international community, have complementary jurisdiction over the national criminal jurisdiction.⁷

Since the ICTY and the ICTR are merely the *ad hoc* international criminal tribunals, and their mission will be done in the near future, the ICC will be the most important international criminal tribunal to punish the perpetrators of the core crimes as a direct mode, its jurisdiction with relation to the national criminal jurisdiction is the object of the present research. Of all the forms of the national criminal jurisdiction, universal jurisdiction⁸ is the most controversial one in international law.⁹ According to it, every state has the right to exercise its criminal jurisdiction over the most serious international crimes, whether the crimes are committed in its territory or not, whether the perpetrators or the victims of them are its citizens or not, and whether the crimes cause the damages to its particular national interests or not. Such a jurisdiction is most probable to be controversial, because it will be argued that the crimes have no any relevance with the state alleging to have such a jurisdiction. It is possible that the conflict between the territorial state, the nationality state of the perpetrators or victims, and the state alleging universal jurisdiction will take place in certain circumstances, or the so-called “horizontal conflict”.¹⁰ However, this article does not

⁵ See paragraph 2 of article 8 of the Statute of the ICTR.

⁶ 2187 UNTS 90, also reprinted in 37 ILM (1998) 999.

⁷ See paragraph 1 of article 17 of the Rome Statute. For the detailed meaning of this provision, please see part III of this article.

⁸ Sometimes it is termed as “universality principle”, “universal principle” or “universality of jurisdiction”.

⁹ See, *e.g.*, the debate between the former Secretary of State of the United States, Mr. Henry Kissinger and the executive director of Human Rights Watch, Mr. Kenneth Roth, in *Foreign Affairs* in 2001 about this issue: Herry Kissinger, ‘The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny’, 80 *Foreign Affairs* (2001), pp. 86-96; Kenneth Roth, ‘The Case for Universal Jurisdiction’, 80 *Foreign Affairs* (2001), pp. 150-154.

¹⁰ See, *e.g.*, Spanish Supreme Court: *Guatemala Genocide Case*, February 25, 2003, 42 *ILM* 686 (2003). For the comment of this case, see Michael Cottier, ‘What Relationship Between the Exercise of Universal and Territorial Jurisdiction? The Decision of 13 December 2000 of the Spanish

intend to deal with this issue. Rather, it deals with another possible conflict, namely, between the jurisdiction of the ICC and universal jurisdiction of states, or the so-called “vertical conflict”. As I said above, the relationship between the jurisdiction of the ICC and the national criminal jurisdiction has been established by the Rome Statute. However, it seems that the Rome Statute does not settle the issue of universal jurisdiction of states,¹¹ and that the relationship between the jurisdiction of the ICC and the universal jurisdiction of states will still be a problem in the future. In this respect, some scholars argue that the jurisdiction of the ICC is also complementary to the universal jurisdiction of states by interpreting the national criminal jurisdiction as covering the universal jurisdiction.¹²

The purpose of this article is to analyse the relationship between the jurisdiction of the ICC and the universal jurisdiction of states. The specific question which I have to answer is: is the jurisdiction of the ICC also complementary to the universal jurisdiction of states? The question is not purely an academic hypothesis. Rather, it will be a practical one. Since there are indications that quite a number of states allow them to exercise universal jurisdiction over certain core crimes by making the national legislations, it is possible that the so-called “vertical conflict” will take place. Furthermore, another number of states are preparing for the making of national legislations to implement the Rome Statute, it is usually inevitable to deal with the issue of “vertical conflict”. This article will be divided into five parts. Apart from the first part as introduction, I will analyse

National Court Shelving the Proceedings Against Guatemalan Nationals Accused of Genocide’, in Horst Fischer, Claus Kreß, Sascha Rolf Lüder (eds.), *International and National Prosecution of Crimes Under International Law: Current Developments* (Berlin Verlag Arno Spitz GmbH, 2001), pp. 843-857; see also Hervé Ascensio, ‘Are Spanish Courts Backing Down on Universality? The Supreme Tribunal’s Decision in *Guatemalan Generals*’, 1 *Journal of International Criminal Justice* (2003), pp. 690-702.

¹¹ See part 4.1 of this article.

¹² See, e.g., Henry J. Steiner, ‘Three Cheers for Universal Jurisdiction-Or Is It Only Two?’, 5 *Theoretical Inquiries* (2004), p.209; *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, International Law Association, London, 2002, p. 10, <<http://www.ila-hq.org/pdf/Human%20Rights%20Law/HumanRig.pdf>> (visited on August 21, 2005).

the legal status of universal jurisdiction in international law, including its definition and rationale in the second part. In the third part, the meaning of the principle of complementarity in the Rome Statute will be explored. The fourth part is the main content of this article, where I will deal with the relationship between the jurisdiction of the ICC and universal jurisdiction of states from the perspective of *lex lata* and *lex ferenda*. The last part is the concluding remarks.

2 Universal Jurisdiction over Core Crimes in International Law

As a rule, international law usually requires a particular legal nexus between the state and the offence if that particular state wishes to exercise its criminal jurisdiction over the offence. The universally recognized legal nexus includes the territory where the offence is committed, the nationality of the perpetrators of the offence, the nationality of the victims of the offence, and a certain national interest infringed upon by the offence. Reflected in the forms of national criminal jurisdiction, they are the principle of territory, the principle of active personality,¹³ the principle of passive personality¹⁴, and the principle of protection¹⁵, respectively.

As an exception, international law also recognizes a special form of national criminal jurisdiction, which does not require the existence of a particular legal nexus between the state and the offence. It is the so-called “universal” jurisdiction. In international law, it is a well-established rule that any state has the right to exercise its universal jurisdiction over piracy in the

¹³ This principle is also described as “the nationality principle”, see, e.g., Malcolm N. Shaw, *International Law* (5th ed.) (Cambridge University Press, 2003), p. 584.

¹⁴ In the penal codes of some states, the principle of passive personality is stipulated together with the principle of protection as one of its form. See, e.g., article 8 of the Criminal Code of the People’s Republic of China revised in 1997 stipulates that “this law may be applicable to foreigners, who outside the territory of the People’s Republic of China, commit crimes against the state of the People’s Republic of China or against its citizens, provided that this law stipulates a minimum sentence of not less than a three-year fixed term of imprisonment for such crimes; but an exception is to be made if a crime is not punishable according the law of the place where it was committed.”

¹⁵ Sometimes also called “the protective principle” or “the security principle”. For this principle, see generally Iain Cameron, *The Protective Principle of International Criminal Jurisdiction* (Dartmouth Publishing Co. Ltd., Aldershot, Brookfield, USA, 1994).

high sea.¹⁶ The state arresting the piracies in the high sea can bring them into justice in its own court. Such a rule has been a rule of customary international law perhaps since the early 19th century, and now is stipulated in article 105 of the UN Convention of the Law of the Sea in 1982.¹⁷

Beginning perhaps from the very end of the World War II in 1945, a thought arguing that the idea of universal jurisdiction used to suppress piracy in the high sea in traditional international law should be introduced to punish those perpetrators of core crimes including war crimes emerged then.¹⁸ However, such a thought had not been given much emphasis in practice until the end of the Cold War in the beginning of the 1990s, and gave rise to much controversy in the field of international law, because it is apparent that there are many differences between piracy and core crimes.¹⁹ In order to analyse the debate therein, it is necessary to revisit the definition of universal jurisdiction firstly.

2.1 The Definite of Universal Jurisdiction Revisited

There seems to be no universally accepted definition of universal jurisdiction in international law. Much debate about the

¹⁶ See, e.g., Separate Opinion of President Guillaume in *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* (hereinafter called “Arrest Warrant”), ICJ Rep., 14 February 2002, para. 5; Malcolm N. Shaw, *International Law* (5th ed.) (Cambridge University Press, 2003), p. 593.

¹⁷ Article 105 of the UN Convention of the Law of the Sea 1982 stipulates that “on the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.” 1833 UNTS 3. See also article 19 of the Geneva Convention on the High Seas 1958, which is the same as article 105 of the UN Convention of the Law of the Sea, 450 UNTS 82.

¹⁸ See, e.g., Willard B. Cowles, ‘Universality of Jurisdiction Over War Crimes’, 33 *California Law Review* (1945), pp. 177-194.

¹⁹ For the differences, see Part 2.2.1 of this article.

definition exists. In the case of *Arrest Warrant* in 2002 by the ICJ, the *ad hoc* judge of the Belgian party, Ms Van den Wyngaert, said in her dissenting opinion that ‘there is no generally accepted definition of universal jurisdiction in conventional or customary international law’.²⁰

The term “universal jurisdiction” is an academic term of international law referring to a special form of national criminal jurisdiction. Few treaties or national law uses the term “universal jurisdiction” therein directly, though some provision is described by the academia as the universal jurisdiction provision. The only provision in the official legal document, whether international or national, which clearly use the term “universal jurisdiction” therein, which I find, is the Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences by the UNTAET on 6 June 2000. Section 2.2 of the Regulations reads,

2.2 For the purposes of the present regulation, “universal jurisdiction” means jurisdiction, irrespective of whether:

- (a) the serious criminal offence at issue was committed within the territory of East Timor;
- (b) the serious criminal offence was committed by an East Timorese citizen; or
- (c) the victim of the serious criminal offence was an East Timorese citizen.²¹

Thus, according to such a stipulation, universal jurisdiction means jurisdiction, irrespective of the legal nexus of territory, the nationality of the perpetrator or victim of the criminal offence. However, it is apparent that such a definition is too broad, because it amounts to cover all the other forms of national criminal jurisdiction, apart from the territory principle, the active personality principle and the passive personality principle. For instance, the protective principle will be one form of universal jurisdiction in such a definition.

²⁰ Dissenting opinion of *ad hoc* judge Van den Wyngaert in *Arrest Warrant*, para, 42.

²¹ UNTAET/REG/2000/15, 6 June 2000.

There are various descriptions of the meaning of universal jurisdiction in the academia of international law. Some equates universal jurisdiction with the well-known maxim *judex deprehensionis* or *ubi te invenero ibi te judicabo*, meaning “wherever I find you, there I will try you”. For instance, the Harvard Research in International Law described ‘universal jurisdiction’ as ‘provides for jurisdiction over crimes committed by aliens outside the territory...on the sole basis of the presence of the alien within the territory of the State assuming jurisdiction’²². The Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences presented to the ILA also describes it in the same way.²³ Thus, universal jurisdiction can be exercised only if the suspect has been present in the state, irrespective of the legal nexus of territory, the nationality of the perpetrator or victim of the criminal offence, or the particular national interests. However, some argues that the exercise of universal jurisdiction does not require the presence of the suspect in the territory.²⁴ In their eyes, universal jurisdiction is actually universal jurisdiction *in absentia*, or the true, pure, absolute or unconditional universal jurisdiction, and the basis for universal jurisdiction is not the presence of the suspect in the territory, but the special nature of

²² Comment on Article 10 of the Harvard Research in International Law, Draft Convention on Jurisdiction with Respect to Crime, 29 *American Journal of International Law* (Supp.) (1935) p.573; Parry and Grant, *Encyclopedia Dictionary of International Law* (John P. Grant and J. Craig Bakker eds.)(Oceana Publications, Inc., New York, 2004), p. 535; Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia, Antwerp, 2005), pp. 25-26.

²³ The Report said, ‘under the principle of universal jurisdiction, a state is entitled, or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrators or the victim.’ See International Law Association, ‘Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences’, Committee on International Human Rights Law and Practice, London Conference, 2000, p. 2. The Report especially points out that ‘the only connection between the crime and the prosecuting state that may be required is the physical presence of the alleged offender within the jurisdiction of that state’. *Ibid.*

²⁴ See, e.g., Mohamed M. El Zeidy, ‘Universal Jurisdiction *In Absentia*: Is It a Legal Valid Option for Repressing Heinous Crimes?’, 37 *The International Lawyer* (2003), p.837.

certain crimes. In order to reconcile the conflicts, some even said that there are various versions of universal jurisdiction, thus describing the above different meanings all as universal jurisdiction.²⁵

2.1.1 Universal Jurisdiction and *Aut Dedere Aut Judicare*

Sometimes, the provision of *aut dedere aut judicare* in the conventional international law²⁶ is also described as universal jurisdiction.²⁷ In order to implement the provision in the national law, the state parties of the convention, mostly the state parties of the continental law system,²⁸ contain a provision in their national criminal law that they are competent to exercise criminal jurisdiction over a certain offence criminalized by the convention

²⁵ See, e.g., Antonio Cassese, *International Law* (Oxford University Press, 2001), p.261.

²⁶ See generally, M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff Publishers, Dordrecht, 1995), p. 3.

²⁷ In the Chinese academia of criminal law, many describe *aut dedere aut judicare* as universal jurisdiction, see, e.g., Huang Taiyun, 'On the Universal Jurisdiction over International Law' [Tan dui Guoji Fanzui de Pubian Guanxia Quan], *Journal of Legal Science* [Faxue Zazhi], 1990, No.4, p. 12; Li Haidong, 'On the Criminal Universal Jurisdiction' [Lun Xingshi Pubian Guanxia Yuanze], *Journal of Renmin University of China* [Zhongguo Renmin Daxue Xuebao], 1988, No.2, pp. 36-37; Xia Zhaohui and Tian Tian, 'On the Discussion of the Principle of Universal Jurisdiction in the Criminal Code of our Nation'[Guanyu Woguo Xingfa zhong de Pubian Guanxia Yuanze de Tanta], *Journal of Administration College of Procurators of China*[Zhongguo Jianchaguan Guanli Xueyuan Xuebao], 1998, No.4, p. 8.

²⁸ See, e.g., paragraph 1 (6) of article 64 of the Austrian Criminal Code, article 12bis of the Belgian Criminal Procedural Code, article 113 of the Polish Criminal Code, paragraph 1 (5) of article 8 of the Danish Criminal Code, paragraph 9 of article 6 of the German Criminal Code, paragraph 3 of article 12 of the Russian Criminal Code (together with the protective principle), paragraph 1 of article 689 of the French Criminal Procedural Code, article 7 of the Finnish Criminal Code, article 20a of the Czechic Criminal Code, article 12a of the Norwegian Criminal Code, paragraph 2 of article 4 of the Japanese Criminal Code, article 7 of the Swedish Criminal Code, article 6a of the Swiss Criminal Code, paragraph 5 of article 7 of the Italian Criminal Code, paragraph 1 of article 16 of the Israeli Criminal Code, and article 9 of the Chinese Criminal Code.

in accordance with the convention. For instance, paragraph 9 of article 6 of the German Criminal Code reads,

“German criminal law applies, irrespective of the law of the *locus delicti*, to the following acts committed abroad:

.....

(9) acts that are to be prosecuted by the terms of an international treaty binding on the Federal Republic of Germany even if they are committed outside the country.”²⁹

Such a provision in national criminal law is also described as universal jurisdiction provision by some scholars,³⁰ while sometimes it is argued that such a provision is not the universal jurisdiction provision, but at most the “quasi-universal” jurisdiction provision, or the “treaty-based” universal jurisdiction provision.³¹ Someone even argued that it is not universal jurisdiction at all,³² because the application of such a provision

²⁹ Criminal Code (Strafgesetzbuch, StGB), as promulgated on 13 November 1998 (Federal Law Gazette I, p. 945, p. 3322), see also <<http://www.iuscomp.org/gla/statutes/StGB.htm#7>> (visited on August 1, 2005).

³⁰ Luc Reydamas described it as “co-operative limited universal jurisdiction”, see Luc Reydamas, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, 2003), pp.29-42; Nicolaos Strapatsas described it as “delegated universal jurisdiction”, see Nicolaos Strapatsas, ‘Universal Jurisdiction and the International Criminal Court’, 29 *Manitoba Law Journal* (2002), pp. 3-11. Marc Henzelin described it also as “le principe de l’universalité déléguée”, see Marc Henzelin, *Le principe de l’universalité en droit pénal international: Droit et obligation pour les États de poursuivre et juger selon le principe de l’universalité* (Helbing & Lichtenhahn, Bruxelles, 2000), pp. 239-379.

³¹ See, e.g., Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford, 1994), pp. 64-65; Iain Cameron, *The Protective Principle of International Criminal Jurisdiction* (Dartmouth Publishing Co. Ltd., Aldershot, Brookfield, USA, 1994), p. 80; Bruce Broomhall, ‘Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law’, 35 *New England Law Review* (2001), p. 401.

³² See, e.g., Antonio Cassese, ‘Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction’, 1 *Journal of International Criminal Justice* (2003), p. 594; Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia, Antwerpen, 2005), pp. 121-123; Luis Benavides, ‘The Universal

depends on the binding treaties on the state. In other words, if the state does not ratify the treaty concerned, it does not have the obligation to exercise the criminal jurisdiction over the acts committed outside the territory by and against the aliens.

2.1.2 Universal Jurisdiction and Representation Jurisdiction

The criminal laws of some states, mostly Germany, Austria, and other central and a few eastern European states, as well as the Nordic states,³³ have a provision of the representation jurisdiction. It is sometimes called the “vicarious administration of justice”, or the domestic provision of *aut dedere aut judicare*. According to it, the state is competent to exercise the criminal jurisdiction if no country requests the extradition of the suspect present in the territory of the state, or if the request is refused due to various reasons. For instance, paragraph 2 (2) of article 7 of the German Criminal Code reads,

“German criminal law shall apply to other acts, which were committed abroad if the act is punishable at the place of its commission or the place of its commission is subject to no criminal law enforcement and if the perpetrator:

.....

2. was a foreigner at the time of the act, was found to be in Germany and, although the Extradition Act would permit extradition for such an act, is not extradited, because a request for extradition is not made, is rejected, or the extradition is not practicable.”³⁴

Jurisdiction Principle: Nature and Scope’, 1 *Anuario Mexicano de Derecho Internacional* (2001), p. 36.

³³ See, e.g., paragraph 1 (2) of article 65 of the Austrian Criminal Code, paragraph 2 of article 110 of the Polish Criminal Code, paragraph 1 (6) of article 8 of the Danish Criminal Code, article 8 of the Finnish Criminal Code, article 20 of the Czechic Criminal Code, paragraph 4 (2) of article 12 of the Norwegian Criminal Code, paragraph 3 of article 2 of the Swedish Criminal Code.

³⁴ Criminal Code (Strafgesetzbuch, StGB), as promulgated on 13 November 1998 (Federal Law Gazette I, p. 945, p. 3322), see also <<http://www.iuscomp.org/gla/statutes/StGB.htm#7>> (visited on August 1, 2005).

Some scholars also describe such a provision as universal jurisdiction provision,³⁵ while some other scholars clearly point out that such a provision is not the universal jurisdiction provision, because representation jurisdiction represents the states which have the jurisdiction, while universal jurisdiction represents the international community as a whole.³⁶

2.1.3 The Meaning of Universal Jurisdiction in this Article

Whatsoever there are various readings of the term “universal jurisdiction” among the academia of international law, in this article, it refers to the meaning of universal jurisdiction which has been generally accepted by the majority of the scholars with regard to piracy. That is to say, according to the principle of universal jurisdiction, every state is competent to exercise its criminal jurisdiction over a certain crime committed outside its territory by and against the aliens³⁷ and not infringing upon any specific national interests of that state. Many scholars interpret it as the above meaning. For instance, Malcolm N. Shaw said,

“Under this principle, each and every state has jurisdiction to try particular offences. The basis for this is that the crimes involved

³⁵ Luc Reydams described it as “co-operative general universal jurisdiction”, see Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, 2003), p.42; Nicolaos Strapatsas described it as “unilateral universal jurisdiction”, see Nicolaos Strapatsas, ‘Universal Jurisdiction and the International Criminal Court’, 29 *Manitoba Law Journal* (2002), pp. 3-11. Marc Henzelin also described it as “le principe de l’universalité unilatérale”, see Marc Henzelin, *Le principe de l’universalité en droit pénal international: Droit et obligation pour les États de poursuivre et juger selon le principe de l’universalité* (Helbing & Lichtenhahn, Bruxelles, 2000), pp. 123-237.

³⁶ See Rüdiger Wolfrum, ‘The Decentralized Prosecution of International Offences Through National Courts’, in Yoram Dinstein and Tabory Mala (eds.), *War Crimes in International Law* (Martinus Nijhoff Publishers, The Hague, 1996), pp. 235-236; see also Iain Cameron, ‘Jurisdiction and Admissibility Issues under the ICC Statute’, in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Political Issues* (Hart Publishing, Oxford, 2004), p.79.

³⁷ Here, the term “aliens” does not only cover the natural persons with the nationality of other states, but the stateless persons as well.

are regarded as particularly offensive to the international community as a whole.”³⁸

Many scholars, including Ian Brownlie³⁹, M. Cherif Bassiouni⁴⁰, Kenneth C. Randall⁴¹, and Luis Benavides⁴², interpret it also in a quite similar way.⁴³ In Luc Reydams’s *universal jurisdiction*, it is described as “unilateral limited universal jurisdiction”⁴⁴, while in Nicolaos Strapatsas’s *universal jurisdiction*, it is described as “absolute universal jurisdiction”.⁴⁵ Marc Henzeline described it also as “le principe de l’universalité absolue”.⁴⁶

A few states have already contained such a provision of universal jurisdiction in their national criminal law. For instance, section 1 of the German Act to Introduce the Code of Crimes against International Law of 26 June 2002 reads,

“This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany.”⁴⁷

³⁸ See Malcolm N. Shaw, *International Law* (5th ed.) (Cambridge University Press, 2003), pp. 592-593.

³⁹ See Ian Brownlie, *Principles of Public International Law* (6th ed.) (Oxford University Press, 2003), p.303.

⁴⁰ See M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Martinus Nijhoff Publishers, Dordrecht, 1992), p. 511.

⁴¹ See Kenneth C. Randall, ‘Universal Jurisdiction Under International Law’, 66 *Texas Law Review* (1988), p. 788.

⁴² See Luis Benavides, ‘The Universal Jurisdiction Principle: Nature and Scope’, 1 *Anuario Mexicano de Derencho Internacional* (2001), p. 28.

⁴³ See also Vishnu Dutt Sharma, ‘International Crimes and Universal Jurisdiction’, 42 *Indian Journal of International Law* (2002), p. 143.

⁴⁴ See Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, 2003), p. 42.

⁴⁵ See Nicolaos Strapatsas, ‘Universal Jurisdiction and the International Criminal Court’, 29 *Manitoba Law Journal* (2002), pp. 3-11.

⁴⁶ See Marc Henzelin, *Le principe de l’universalité en droit pénal international: Droit et obligation pour les États de poursuivre et juger selon le principe de l’universalité* (Helbing & Lichtenhahn, Bruxelles, 2000), pp. 381-450.

⁴⁷ Act to Introduce the Code of Crimes Against International Law 2002, 42 ILM (2003), 995.

Quite similar provision of universal jurisdiction can also be found in the 2003 Dutch International Crimes Act,⁴⁸ the 1985 Spanish Organic Law of the Judicial Organs,⁴⁹ the former 1999 Belgian Act concerning the Punishment of Grave Breaches of International Humanitarian Law,⁵⁰ as well as a few acts of the common law states, including Canada,⁵¹ New Zealand⁵², South Africa⁵³. Unlike the above provisions based on treaties of the

⁴⁸ Paragraph 1 (a) of Section 2 of the Dutch Rules Concerning Serious Violations of International Humanitarian Law (International Crimes Act) reads that ‘anyone who commits any of the crimes defined in this Act outside the Netherlands, if the suspect is present in the Netherlands’.

⁴⁹ Paragraph 4 of article 23 of the 1985 Spanish Organic Law of the Judicial Power reads that ‘furthermore, Spanish Courts have jurisdiction over acts committed abroad by Spaniards and foreigners, if these acts constitute any of the following offences under Spanish law: (a) genocide; (b) terrorism; (c) sea or air piracy; (d) counterfeiting; (e) offences in connection with prostitution and corruption of minors and incompetents; (f) drug trafficking; (g) any other offence which Spain is obliged to prosecute under an international treaty or convention’.

⁵⁰ Article 7 of this Act 1999 reads that ‘the Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed.’ 38 ILM (1999) 918. Note, this Act has been repealed in August 2003, Belgium’s Amendment to the Law of June 15, 1993 (As Amended by the Law of February 10, 1999 and April 23, 2003) *Concerning the Punishment of Grave Breaches of Humanitarian Law* [August 7, 2003], 42 ILM 1258 (2003).

⁵¹ Article 8 (b) of the 2000 Canadian Crimes against Humanity and War Crimes Act reads that ‘a person who is alleged to have committed an offence under article 6 or 7 may be prosecuted for that offence if …… (b) after the time the offence is alleged to have committed, the person is present in Canada.’

⁵² Article 8 (1)(c) of the International Crimes and International Criminal Court Act of New Zealand 2000 reads that ‘proceedings may be brought for an offence, --- (c) against section 9 or section 10 or section 11 regardless of--(i) the nationality or citizenship of the person accused; or(ii) whether or not any act forming part of the offence occurred in New Zealand; or (iii) whether or not the person accused was in New Zealand at the time that the act constituting the offence occurred or at the time a decision was made to charge the person with an offence.’

⁵³ Article 4 (3) (c) of the Implementation of the Rome Statute of the International Criminal Court Act 2002 of South Africa reads that ‘in order to secure the jurisdiction of a South African court for purpose of this Chapter, any person who commits a crime contemplated in subsection (1) outside the territory of the Republic, is deemed to have committed that

national criminal laws of many continental law states, such a provision does not require the ratified treaties as the basis. Also, unlike the above provisions of representation jurisdiction, such a provision does not require the request of extradition or the extradition as the precondition. However, there is a disparity between such provisions, because some states require the presence of the suspect in their territory as the precondition to exercise jurisdiction, while some do not require such a precondition. This disparity does not make difference for this article. In this article, the treaty-based universal jurisdiction and the representation jurisdiction are not considered as universal jurisdiction.

2.2 Various Rationales for Universal Jurisdiction

In order to justify the universal jurisdiction for the crimes committed outside the territory of the prosecuting state by and against aliens, various rationales have been raised in the academia of international law. Among the others, the following theories are the most noted ones.

2.2.1 *Hostis Humanis Generis*

According to this theory, the rationale for universal jurisdiction is that “some crimes are so universally condemned that the perpetrators are the enemies of all people”.⁵⁴ *Hostis humanis generis* (enemies of all people) is the rationale for the universal jurisdiction over piracy in the high sea in traditional international law because piracy attacks everyone in the high sea and is a great

crime in the territory of the Republic, if ……(c)that person, after the commission of the crime, is present in the territory of the Republic; or ……’.

⁵⁴ See, e.g., Eric S. Kobrick, ‘The *Ex Post Facto* Prohibition and the Exercise of Universal Jurisdiction over International Crimes’, 87 *Columbia Law Review* (1987), p. 1520; see also *In re Piracy Jure Gentium*, [1934] AC 589 (Privy Council), citing Hugo Grotius, *De Iure Belli ac Pacis*, Vol.2, Cap. 20, pt. 40 (1625); *Demjanjuk v. Petrovsky*, 776 F. 2d 582 (6th Cir. 1985); *Filartiga v. Pena Irala*, 630 F. 2d 890 (2d Cir. 1980).

threat or damage to the international maritime transportation or commerce. However, it is quite questionable to introduce this rationale for universal jurisdiction over piracy in the high sea to universal jurisdiction over core crimes, because there are quite a number of differences between these two scenarios. Firstly, piracy is usually committed in high sea, which is not the territory of any state, while core crimes are usually committed in the territory of a particular state. Secondly, piracy is usually committed by the private individuals, while core crimes are usually committed by the public servants or even the high-level state officials. Thirdly, it is easy to have a consensus that piracy is the common enemy to the mankind due to the remote relation with the politics, while it is difficult to have a similar consensus to core crimes due to the close relation with the politics. The perpetrators of core crimes are criminals in the eyes of some states, while they might be heroes in the eyes of some other states. In other words, core crimes could have been subject to the jurisdiction of every state where they are committed at least in theory, because every state should have been presumed to have such a capacity and willingness to do so.

In my opinion, the reason why every state has the right to exercise criminal jurisdiction over piracy in the high sea is not the so-called “*hostis humanis generis*”, but the legal fact that high sea does not belong to the exclusive jurisdiction of any particular state. The rationale of so-called “*hostis humanis generis*” is most possible to be abused by the powers to some political motivations. Other crimes are more serious in nature than the piracy or may be the same as piracy, such as murder, armed robbery, rape and arson. Why are they not the crimes which are subject to universal jurisdiction?⁵⁵ The argument of equating core crimes with piracy on the basis of the most serious nature is even more questionable. For instance, wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial may have committed war crime.⁵⁶ However, in peacetime, if a person murders a number of other persons, he or she simply commits the crime of murder in many states. In my

⁵⁵ See Vaughan Lowe, ‘Jurisdiction’, in Malcolm D. Evans (ed.), *International Law* (first edition) (Oxford University Press, 2003), p. 343.

⁵⁶ See paragraph 2 (a) (vi) of article 8 of the Rome Statute.

opinion, the latter is more serious than the former in terms of the nature of the crime. Why is it claimed that every state can exercise universal jurisdiction over the former, but not the latter?

2.2.2 *Jus Cogens*

Some scholars argue that every state can exercise universal jurisdiction over core crimes, because the prohibition of core crimes is *jus cogens* in international law. For instance, the Trial Chamber of the ICTY in the case of *Anto Furundžija* said,

“Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that *every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction* (emphasis added). Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad...”⁵⁷

Some scholars further argued that the prohibition of core crimes as *jus cogens* in international law does not only confer every state on the right to exercise universal jurisdiction over them, but require them to do so. For instance, M. Cherif Bassiouni said,

“To this writer, the implications of *jus cogens* are those of a duty and not of optional rights; otherwise *jus cogens* would not constitute a peremptory norm of international law. Consequently, these obligations are non-derogable in times of war as well as peace. Thus, recognizing certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite, the non-applicability of statutes of limitation for such crimes, and universality of jurisdiction over such crimes irrespective of where they were committed, by whom

⁵⁷ See *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment in the Trial Chamber, 10 December 1998, para. 156; See also Kenneth C. Randall, ‘Universal Jurisdiction Under International Law’, 66 *Texas Law Review* (1988), p. 830.

(including Heads of State), against what category of victims, and irrespective of the context of their occurrence (peace or war).”⁵⁸

In my opinion, such arguments are also questionable. It might be questionable whether all of core crimes have been already *jus cogens* in international law. The prohibition of crime of aggression, genocide, crime against humanity and war crimes as *jus cogens* in international law seems to have got some authoritative supports from judicial practices and publicists.⁵⁹ However, it is still questionable whether war crimes committed in non-international armed conflicts have been already *jus cogens* in international law because it is questionable whether it has been accepted and recognized by “the international community of States as a whole”⁶⁰. A quite number of states are against this notion, including China, India, Pakistan, Indonesia, Turkey, Iran, Sudan and other Arabic states.⁶¹ Even if all of the core crimes have been already *jus cogens* in international law, it could not necessarily entitle every state to exercise universal jurisdiction over them, let alone require them to do so, because it is a

⁵⁸ See M. Cherif Bassiouni, ‘International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*’, 59 *Law and Contemporary Problems* (1996), pp. 65-66.

⁵⁹ See, e.g., *Yearbook of International Law Commission* (1966), Vol. II, p. 248, where the prohibition of genocide was exemplified as *jus cogens*; *Barcelona Traction, Light and Power Company, Limited* (New Application: 1962) (*Belgium v. Spain*) (1962-1970), Judgment of 5 February 1970, ICJ Rep., para. 34, where the prohibition of aggression and genocide were exemplified as obligations *erga omnes*; In the commentary to article 26 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 by the International Law Commission, the prohibition of aggression, genocide and crimes against humanity were exemplified as *jus cogens*, see James Crawford (ed.), *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), p. 188; see also <http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm> (visited on August 2, 2005).

⁶⁰ See article 53 of the 1969 Vienna Convention on the Law of the Treaties, 1155 UNTS 331.

⁶¹ See Andreas Zimmermann, ‘Preliminary Remarks on para. 2 (c)-(f) and para. 3: War Crimes committed in armed conflict not of an international character’, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Nomos Verlagsgesellschaft, Baden-Baden, 1999), p. 269.

question whether a norm is *jus cogens* in international law or not, it is another question whether every state can exercise universal jurisdiction over a particular crime or not.⁶² There exist no automatic relation between these two questions. Whether every state can exercise universal jurisdiction over a particular crime depends on whether there is such a rule of customary international law, and the formation of such a rule depends on the state practices and *opinio juris*.

2.2.3 The Theory of Humanitarian Intervention

Sometimes, it is argued that every state can exercise universal jurisdiction over core crimes because universal jurisdiction is a form of humanitarian intervention, and because humanitarian intervention is not prohibited by international law. For instance, a report delivered by the International Commission on Intervention and State Sovereignty in 2001 argues that “intervention for human protection purposes, including military intervention in extreme cases, is supportable when major harm to civilians is occurring or immediately apprehended, and the state is unable or unwilling to end the harm or is itself the perpetrator”, it also acknowledges “lesser” forms of intervention including political, diplomatic, economic, and legal measures. In the category of legal measures, the Report recognizes a role for the exercise of universal jurisdiction over core crimes.⁶³

If the rationales of *hostis humanis generis* or *jus cogens* have somewhat legal colour, this rationale in the colour of intervention for the humanitarian purposes is really a naked and overt

⁶² For the quite similar view, see also Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia, Antwerpen, 2005), p. 125.

⁶³ This Commission was established under the auspices of the Canadian government. For the Report, see *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001), <<http://www.iciss.ca/>> (visited on August 2, 2005), para. 3.31, pp. 24-25. See also Jonathan H. Marks, ‘Mending the Web: Universal Jurisdiction, Humanitarian Intervention and the Abrogation of Immunity by the Security Council’, 42 *Columbia Journal of International Law* (2004), pp. 475-477.

instigation of intervention. Universal jurisdiction has been the legal tool to the intervention in someone's eyes. Such a thought has fully proved that universal jurisdiction has been politicised and abused. Although there are controversies about the meaning of "humanitarian intervention", it is agreed by the majority that it means the use of force by one state or group of states against another state for the humanitarian purposes, such as stopping the ongoing genocide. It is a highly controversial issue in international law.⁶⁴ The use of force has been regulated by the UN Charter.⁶⁵ If the use of force for the humanitarian purposes is tolerated in international law,⁶⁶ it will be very dangerous for the

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See generally,

Richard B. Lillich (ed.), *Humanitarian Intervention and the United Nations* (University of Virginia Press, 1973); Thomas M. Frank and Nigel S. Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force', 67 *American Journal of International Law* (1973), pp.275-305; Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *European Journal of International Law* (1999), pp. 1-22; Antonio Cassese, 'Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' 10 *European Journal of International Law* (1999), pp. 23-30; W. Michael Reisman, 'Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention', 11 *European Journal of International Law* (2000), pp. 3-18.

⁶⁵ See article 2 (4) of the UN Charter on one of the principles of the UN and its member states: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.' For the exceptions of this principle, see (1) article 51 of the UN Charter on the right of self-defense: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'; and (2) the use of force according to the resolution of the Security Council in Chapter VII, in particular, article 42: 'Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.'

⁶⁶ Someone argues that humanitarian intervention is permitted by customary international law, or is not prohibited by international law. Such a view is very questionable; I cannot find the sufficient basis of state practices and *opinio juris* for such a so-called "customary international law". In practices, every case of using of force in the name of "humanitarian intervention" is

peace and security of the international community, because the powers using of force will unilaterally interpret the meaning of “humanitarian”. Similarly, even if the term “humanitarian intervention” could be interpreted to cover the intervention by other measures, including the legal measures, it will cause damage to the imagine of the courts as independent and impartial, because some may feel the courts are the political tools for a particular purpose. Therefore, the theory of “humanitarian intervention” as the rationale for universal jurisdiction should not advocated. If it is recognized as the rationale for universal jurisdiction, this amounts to declare that the courts are the political tools in the prosecuting state. Furthermore, the envisaged function, or the rationale for the legality of humanitarian intervention in international law is to prevent or stop the ongoing core crimes, in particular genocide, by using of force by a third party. Even if it were established in positive international law, it could not be used as the rationale for universal jurisdiction over core crimes, because there is no such comparability. The alleged exercise of universal jurisdiction over core crimes is usually against the perpetrators who have committed them, and cannot have the function of preventing or stopping the ongoing core crimes. The so-called deterrence function is simply fictitious and in practice, to what degree it can have such a function is unclear.⁶⁷ Therefore, the theory of humanitarian intervention is irrelevant to the exercise of universal jurisdiction over core crimes.

2.2.4 Fight against Impunity

According to my observation, many writers arguing for the exercise of universal jurisdiction over core crimes is out of the pragmatic or functional purposes, and of the philosophical belief

for the purpose of a particular political purpose and for the interest of the state or group of states using force.

⁶⁷ See, e.g., Naomi Roht-Arriaza, ‘Punishment, Redress, and Pardon: Theoretical and Psychological Approaches’, in Naomi Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (Oxford University Press, New York, 1995), p. 14; Jaime Malamud-Goti, ‘Transitional Governments in the Breach: Why Punish State Criminals?’, in *12 Human Rights Quarterly* (1990), p. 9.

that everyone should be responsible for one's conduct. Impunity will not be tolerated and everyone should be held individual criminal responsibility for the crimes committed somewhere.⁶⁸ In some cases, the perpetrators may be with impunity because the state where the crimes committed has no capability of prosecuting them or is unwilling to do so. In order to fight against impunity, universal jurisdiction could be a possibility of making them held criminal responsibility. In their eyes, the exercise of universal jurisdiction by a third state can make it impossible that the perpetrators can find a safe haven somewhere in the world. And it is said that the exercise of universal jurisdiction by a third state can make the perpetrators find no place to hide.

2.3 The Legal Status of Universal Jurisdiction over Core Crimes in International Law

Universal jurisdiction *per se* is well-established in international law, at least when it refers to piracy, few doubts about it. The question, therefore, is not the legal status of universal jurisdiction *per se* in international law, but what crimes are subject to universal jurisdiction. Since universal jurisdiction is deemed to be without any legal nexus between the prosecuting state and the location and nationality of the perpetrators or victims of the crimes, it is generally recognized that every state could only exercise universal jurisdiction over an extremely limited crimes, usually international crimes.

But, besides piracy, are there any other international crimes subject to universal jurisdiction? If yes, which are they? In this respect, various crimes are put forward. Core crimes are usually exemplified therein by the scholars.⁶⁹ However, as one writer

⁶⁸ See, *e.g.*, Kenneth Roth, 'The Case for Universal Jurisdiction', 80 *Foreign Affairs* (2001), pp. 150-154.

⁶⁹ See, *e.g.*, Menno T. Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses', 23 *Human Rights Quarterly* (2001), pp. 947-948; Luis Benavides, 'The Universal Jurisdiction Principle: Nature and Scope', 1 *Anuario Mexicano de Derecho Internacional* (2001), p. 51; Bartram S. Brown, 'The Evolving Concept of Universal Jurisdiction', 35 *New England Law Review* (2001), p.

correctly points out that most of them is just the “assertion”⁷⁰ without sufficient proving. As we know, since every state has the right to exercise such a particular jurisdiction, the legal source can only be the customary international law. Conventional international law is impossible to create such a particular jurisdiction, because it is limited by the principle of relativity of the treaties,⁷¹ unless such a particular treaty is ratified by all the states. In order to establish such a rule of customary international law, it is not only that such a particular crime has been the crime in customary international law, but also such a particular jurisdiction also has been the rule in customary international law.⁷² Therefore, it is extremely strict to prove that every state can exercise universal jurisdiction over a particular crime as a rule of customary international law.

2.3.1 Is there such a Rule of Customary International Law?

Article 38 (1) (b) of the Statute of the ICJ stipulates that international custom is “as evidence of a general practice accepted as law”. Therefore, in order to prove the existence of such a rule, the state practices as “usage” and legal conviction as “*opinio juris*” must exist simultaneously. Now, let’s firstly look at the picture of state practices on the issue of universal jurisdiction over core crimes. Although it is reported that more

384; Michael Scharf, ‘The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes’, 59 *Law and Contemporary Problems* (1996), pp. 52-59; Bruce Broomhall, ‘Expanding United States Codification of Universal Jurisdiction: Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law’, 35 *New England Law Review* (2001), p. 407.

⁷⁰ See, e.g., Robert Cryer, Book Review: Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives*. Oxford: Oxford University Press, 2003, 258pp +xxvii. ISBN 0-19-925162-2, 9 *Journal of Conflict and Security Law* (2004), p. 127.

⁷¹ See article 34 of the 1969 Vienna Convention on the Law of Treaties, namely, a treaty does not create either obligations or rights for a third State without its consent.

⁷² In this respect, see also the theory of “double *opinio juris* criteria” raised by Luis Benavides, see Luis Benavides, ‘The Universal Jurisdiction Principle: Nature and Scope’, 1 *Anuario Mexicano de Derencho Internacional* (2001), p. 41.

than 125 states in the world have established the universal jurisdiction provision over some core crimes in their national criminal laws,⁷³ we must examine what kind of universal jurisdiction provision they are. According to my observation, most of the so-called “universal jurisdiction” provisions in the national criminal laws are merely the “treaty-based” universal jurisdiction provisions,⁷⁴ not the universal jurisdiction in the meaning of this article. Since the application of the “treaty-based” universal jurisdiction provisions depends on whether that particular state has ratified the treaty and whether that treaty has a universal jurisdiction provision therein, it is almost impossible to rely on the “treaty-based” universal jurisdiction to exercise the universal jurisdiction over core crimes in the sense of this article. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide does not provide a universal jurisdiction over genocide for the state parties. Article 6 of that Convention only stipulates that “persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”⁷⁵ There is no convention specially used to prevention and punishment of crime of aggression and crime of against humanity in international law as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The only convention punishing the perpetrators of committing some war crimes in international armed conflicts is the 1949 four Geneva Conventions, where the common criminal

⁷³ See, e.g., the Legal Memorandum on Universal Jurisdiction by Amnesty International, *Universal Jurisdiction: The duty of states to enact and implement legislation*, AI Index: IOR 53/002-018/2001; see also <<http://web.amnesty.org/library/index/engior530022001?OpenDocument>> (visited on August 3, 2005).

⁷⁴ For instance, in almost all the Latin American states, almost all the universal jurisdiction contained in their national criminal law is based on the treaties, see Hugo Relva, ‘The Implementation of the Rome Statute in Latin American States’, 16 *Leiden Journal of International Law* (2003), pp. 331 – 336. The Chinese universal jurisdiction provision is also based on the treaties, see Zhu Lijiang, ‘The Chinese Universal Jurisdiction Clause: How Far Can It Go?’, 52 *Netherlands International Law Review* (2005), pp. 85-107.

⁷⁵ 78 UNTS 277.

sanction provision requires the state parties to bring the suspects into justice before their courts.⁷⁶ Since the 1949 four Geneva Conventions have been ratified by almost all the states,⁷⁷ it could be said that every state has the legal obligation to exercise universal jurisdiction over some war crimes in international armed conflicts on the basis of the Conventions. However, it is not yet clear whether such a common criminal sanction provision has been crystallized into customary international law.⁷⁸ Furthermore, the crimes are very limited. Only those “grave breaches” of the four Geneva Conventions could be subject to such a universal jurisdiction obligation.⁷⁹ For other war crimes

⁷⁶ “Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.” See article 49 of the *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* [first Geneva Convention], Geneva, 12 August 1949, 75 UNTS 31; article 50 of the *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* [second Geneva Convention], Geneva, 12 August 1949, 75 UNTS 85; article 129 of the *Convention Relative to the Treatment of Prisoners of War* [third Geneva Convention], Geneva, 12 August 1949, 75 UNTS 135; article 146 of the *Convention Relative to the Protection of Civilian Persons in Time of War* [fourth Geneva Convention], Geneva, 12 August 1949, 75 UNTS 287. See also article 85 (1) of the *Protocol Additional (I) to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts*, Geneva, 8 June 1977, UNGAOR, doc. A/32/144, 15 Aug. 1977.

⁷⁷ As of April 12, 2005, 192 states have ratified the 1949 four Geneva Conventions, and 163 states have ratified the Additional Protocol I of the four Geneva Conventions. See <<http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>> (visited on August 3, 2005).

⁷⁸ See, e.g., Mark A. Summers, ‘The International Court of Justice’s Decision in *Congo v. Belgium*: Has It Affected the Development of a Principle of Universal Jurisdiction that Would Obligate All States to Prosecute War Criminals?’ 21 *Boston University International Law Journal* (2003), p. 84.

⁷⁹ For the “grave breaches” of the 1949 four Geneva Conventions, see article 50 of the first Geneva Convention, article 51 of the second Geneva Convention, article 130 of the third Geneva Convention, article 147 of the

committed in international armed conflicts, as well as war crimes committed in non-international armed conflicts, there is no such conventions authorize or require states to do so.

Let's turn back to the universal jurisdiction provision in this article, namely, those so-called "unilateral limited universal jurisdiction" or "absolute universal jurisdiction". According to my observation, it is quite questionable to say that there has been already a rule of customary international law authorizing every state to exercise universal jurisdiction over core crimes at the present stage of international law. Firstly of all, only a few states have established the universal jurisdictions in this sense in their national criminal laws. Those states include Canada, Germany, the Netherlands, New Zealand, South Africa, and Spain.⁸⁰ Most of them just follow the Rome Statute as the implementation measures in their national law, and therefore, most are quite new. All of those states which have established such a provision do not apply it in their national judicial practices. A limited number of cases have been reported to apply such provisions.⁸¹ All of these national judicial cases do not support the application of universal jurisdiction. For instance, in 1999, the Luxembourg Court of Appeal rejected the argument that according to customary international law, every state can exercise universal jurisdiction

fourth Geneva Convention, and article 85 (2) of the Additional Protocol of the four Geneva Conventions.

⁸⁰ See Part 2.1.3 of this article.

⁸¹ For the Belgian national judicial practices, see, *e.g.*, Damien Vandermeersch, 'Prosecuting International Crimes in Belgium', 3 *Journal of International Criminal Justice* (2005), pp. 406-407; for the German national judicial practices, see, *e.g.*, Ruth Rissing-van Saan, 'The German Federal Supreme Court and the Prosecution of International Crimes Committed in Former Yugoslavia', 3 *Journal of International Criminal Justice* (2005), pp. 381-399; for the Dutch national judicial practices, see, *e.g.*, Gö ran Sluiter, 'Implementation of the ICC Statute in the Dutch Legal Order', 2 *Journal of International Criminal Justice* (2004), p.175; for the Canadian national judicial practices, see, *e.g.*, Williams A. Shabas, 'Canadian Implementing Legislation for the Rome Statute', 3 *Yearbook of International Humanitarian Law* (2000), pp. 337-346; for the Spanish national judicial practices, see, *e.g.*, Angel Sánchez Legido, 'Spanish Practice in the Area of Universal Jurisdiction', 13 *Spanish Yearbook of International Law* (2001-2002), pp. 17-52.

over crimes against humanity.⁸² Recently, the Spanish Supreme Court also amount to reject the universal jurisdiction in the so-called “Guatemala Genocide” case⁸³ and the “Peruvian Genocide” case⁸⁴. Secondly, even for those states that have established such a provision, they are quite inconsistent in the content. Some extend very far. For instance, the German provision does not only cover all the core crimes in Rome Statute, but also those not contained in it.⁸⁵ The Spanish provision only covers genocide, excluding aggression, crime against humanity and war crimes. The inconsistency of the content of the universal jurisdiction provision is also demonstrated in another point. That is, some require the presence of the suspects as the precondition of the exercise of universal jurisdiction, while some do not require it.⁸⁶ Thirdly, from the perspective of geographical allocation, they are mainly within the West Europe. One is within the North America, one within South Africa, and two within Oceania. They do not represent all the main legal systems and civilizations in the world. This fact shows the immature of such a development in international law. Fourthly, there seems to be inconsistency even for the same state, and the position seems to be unsteady. For instance, the Belgian provision was established as early as 1992, but repealed in August 2003 due to the high pressure from the United States and Israel.⁸⁷ Fifthly, it seems that

⁸² See *Re Pinochet*, Luxembourg, Court of Appeal (*Chambre du Conseil*), 11 February 1999, 119 ILR 2002, p. 366.

⁸³ See Luis Benavides, *Introductory Note to the Supreme Court of Spain: Judgment on the Guatemalan Genocide Case*, 42 ILM 683 (2003).

⁸⁴ See Spanish Supreme Court: *Peruvian Genocide Case* [May 20, 2003], 42 ILM 1200 (2003).

⁸⁵ Some offences are also criminalized in the 2002 German Act, though they are not criminalized in the Rome Statute, for instance, ‘use of starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival or impedes relief supplies in contravention of international humanitarian law’ in connection with an armed conflict not of an international character may constitute war crimes therein, see paragraph 5 of section 11 (1) of the 2002 Act.

⁸⁶ For instance, the Dutch provision, the Canadian provision, the South African provision require the presence of the suspect in their respective territory as the precondition of exercise of universal jurisdiction, while the German provision, the New Zealand provision and the former Belgian provision do not require such a precondition.

⁸⁷ See Belgium’s Amendment to the Law of June 15, 1993 (As Amended by the Law of February 10, 1999 and April 23, 2003) *Concerning the*

some states are unhappy to see that their nationals have been subject to universal jurisdiction by other states, while they themselves claim the exercise of universal jurisdiction over the nationals of other states in the name of various purposes. For instance, the United States calls upon other states to exercise universal jurisdiction over some suspects of core crimes,⁸⁸ but it itself does not establish universal jurisdiction over core crimes, and is actively against the Belgian exercising universal jurisdiction over its nationals.⁸⁹ Israel is also the case.⁹⁰ And finally, it seems there is lack of sufficient *opinio jus* among the states to the exercise of universal jurisdiction over core crimes. For instance, when Spain tried to apply its universal jurisdiction provision to the former Chilean president Pinochet, a number of South American states, especially Chile, protested strongly against such attempts.⁹¹ Similarly, when Belgium tried to apply its universal jurisdiction provision to the Foreign Minister of the Democratic Republic of Congo, it was also protested by the latter, and was referred to the ICJ finally, though the latter abandoned the request to judge the legality of Belgian universal jurisdiction provision.⁹² When France attempted to apply its universal jurisdiction, even not the “absolute universal jurisdiction” provision to the President and the Minister of Interior Affairs and other high level officials of the Republic of Congo, the latter also protested against it very strongly and referred it to the ICJ. Unlike the Democratic Republic of Congo, the Republic of Congo does not abandon the request of the ICJ to judge the

Punishment of Grave Breaches of Humanitarian Law [August 7, 2003], 42 ILM 1258 (2003).

⁸⁸ See David Scheffer, ‘Opening Address’, 35 *New England Law Review* (2001), pp. 234-236.

⁸⁹ See Luc Reydam, ‘U. S. Reaction to Belgian Universal Jurisdiction Law’, 97 *American Journal of International Law* (2003), p. 986.

⁹⁰ See *Attorney General of Israel v. Eichmann*, District Court of Jerusalem, 12 December 1961; Supreme Court of Israel, 29 May 1962. 36 ILR 5; Cf., ‘Belgian move against Sharon angers Israel’, February 13, 2003, <http://news.bbc.co.uk/2/hi/middle_east/2756709.stm> (visited on August 3, 2005).

⁹¹ See Jaume Ferrer Lloret, ‘Impunity in Cases of Serious Human Rights Violations: Argentina and Chile’, 3 *Spanish Yearbook of International Law* (1993-1994), pp. 3-41, p. 29.

⁹² See *Arrest Warrant*, Judgment of February 14, 2002, ICJ Rep., paras. 45-46.

legality of the French universal jurisdiction, and now the case is pending before the ICJ.⁹³

2.3.2 International Judicial Cases

The ICJ has never judge the legality of universal jurisdiction over core crimes. In the *Arrest Warrant* case, the ICJ did not judge it because the Democratic Republic of Congo abandoned the request of judging the Belgian universal jurisdiction on the basis of “*non ultra petita*” rule.⁹⁴ Although some judges expressed their view of the legality of the Belgian universal jurisdiction provision in separate opinions, individual opinions or dissenting opinions, they are in great disparity.⁹⁵ The ICTY has declared that universal jurisdiction is legal in international law in the *Anto Furundžija* case, provided that the suspect is present in a territory under the jurisdiction of the prosecuting state.⁹⁶ However, the ICTY is not the appropriate judicial body to do so. It is only the international judicial body to deal with the individual criminal responsibility in international law, not the international judicial

⁹³ See *Certain Criminal Proceedings in France (Republic of Congo v. France)*, Application and request for the indication of provisional measures by the Republic of Congo, <<http://www.icj-cij.org/icjwww/idocket/icof/icofframe.htm>> (visited on August 3, 2005).

⁹⁴ See *Arrest Warrant*, Judgment of February 14, 2002, ICJ Rep., para. 43.

⁹⁵ See, e.g., President Guillaume noted that universal jurisdiction *in absentia* is unknown to international conventional law, see Separate Opinion of President Guillaume in *Arrest Warrant*, para. 9; Judge Rezek observed that ‘if the application of the universality principle would not presuppose the presence of the accused person on the territory of the forum State, all co-ordination becomes impossible and the very international system of co-operation in the repression of crime would collapse.’ See Separate Opinion of Judge Rezek in *Arrest Warrant*, para. 10; Judge Higgins, Koojimans and Buergenthal jointly wrote that ‘in short, national legislation and case law—that is, state practice—is neutral as to the exercise of universal jurisdiction.’ See Joint Separate Opinion of Judges Higgins, Koojimans and Buergenthal in *Arrest Warrant*, para. 45; Judge Koroma stated that ‘Belgium is entitled to invoke its criminal jurisdiction against anyone, save for a Foreign Minister in office.’ See Separate Opinion of Judge Koroma in *Arrest Warrant*, para. 8.

⁹⁶ See *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment in the Trial Chamber, 10 December 1998, para. 156.

body to deal with the legality of the national criminal jurisdiction. The opinion expressed by the ICTY in that particular case is only persuasive for the judgment of that case, not the official declaration of the legality of universal jurisdiction, and therefore, has no binding force for the states. The PCIJ did not judge the legality of universal jurisdiction over core crimes, either. And it is impossible for it to judge it because the concept of core crimes grew in international law basically after the World War II. However, it delivered the very famous *dicta* on the national criminal jurisdiction generally in the *Lotus* case, namely,

“Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.”⁹⁷

These famous *dicta* have been used by some scholars as the supportive evidence for the universal jurisdiction over core crimes.⁹⁸ According to their understandings, every state can exercise every kinds of criminal jurisdiction over every crime, so long as it is not prohibited by international law, because what is not prohibited could be done by states freely. This also amount to declare the non-existence of *non liquet* in international law. I will not deal with the question whether the exercise of universal jurisdiction over core crimes constitutes the intervention of the internal affairs of other states or the illegal exercise of public power in the territory of other states or the violation of the principle of the equality of state sovereignty for the moment,⁹⁹ the assertion that every state can do anything which is not prohibited by international law freely is itself questionable in

⁹⁷ See “*Lotus*”, Judgment No. 9, 1927, PCIJ, Series A, No. 10, p. 19.

⁹⁸ See, e.g., dissenting opinion of *ad hoc* judge Van den Wyngaert in *Arrest Warrant*, para. 51, where she said “it follows from the ‘*Lotus*’ case that a State has the right to provide extraterritorial jurisdiction on its territory unless there is a prohibition under international law. I believe that there is *no prohibition* under international law to enact legislation allowing it to investigate and prosecute war crimes and crimes against humanity committed abroad.”

⁹⁹ See part 2.3.3 of this article.

international law. In the *Nuclear Weapons* case, the opinions of the states are divided on the issue of the *dicta* in the *Lotus* case: some support it, while others challenge it. Whatsoever the disparity of opinions between the states may be, the ICJ concluded in its operative part of the advisory opinion that “in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”¹⁰⁰ Such a conclusion amounts to overthrow the *dicta* of the *Lotus* case by the PCIJ, because it recognizes the possibility of *non liquet* of international law in certain circumstances.¹⁰¹

If it is tolerated that every state can exercise any criminal jurisdiction over any crime which it wishes to do so long as it is not prohibited by international law, it seems very ridiculous in certain circumstances. Professor Vaughan Lowe gives an example against such an argument. He said, if Zimbabwe were to act a law that made it an offence for anyone, of whatever nationality and wherever in the world they might be, to make a complaint to a UN body alleging that any state had violated its international human rights obligations, and if a British citizen, on holiday in Zimbabwe, was arrested and charged with breaking that law by writing to the UN Human Rights Committee from his home in Birmingham with a complaint that, say, Iraq had violated its obligations. Could it really be supposed that the onus would be upon the United Kingdom to prove that some prohibitive rule of international law forbade such exercises of legislative jurisdiction by Zimbabwe?¹⁰² It is apparent that there is no such a rule of international law directly prohibiting such

¹⁰⁰ See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep. 1996, para. 105.

¹⁰¹ See Ige F. Dekker and Wouter G. Werner, ‘The Completeness of International Law and Hamlet’s Dilemma: Non Liquet, the Nuclear Weapons, and Legal Theory’, in Ige F. Dekker and Harry H. G. Post (eds.), *On the Foundations and Sources of International Law* (T.M.C. Asser Press, The Hague, 2003), pp. 5-30, p. 10.

¹⁰² See Vaughan Lowe, ‘Jurisdiction’, in Malcolm D. Evans (ed.), *International Law* (first edition) (Oxford University Press, 2003), p. 335.

legislation by Zimbabwe, but it is also apparent that such legislation by Zimbabwe is ridiculous.

In fact, the dicta of the *Lotus* case is robustly challenged and questioned by President Guillaume in *Arrest Warrant* case. He said,

“The absence of a decision by the Permanent Court on the point was understandable in 1927, given the sparse treaty law at that time. The situation is different today, it seems to me totally different. The adoption of the United Nations Charter proclaiming the sovereign equality of States, and the appearance on the international scene of new States, born of decolonization, have strengthened the territorial principle. International criminal law has itself undergone considerable development and constitutes today an impressive legal *corpus*. It recognizes in many situations the possibility, or indeed the obligation, for a State other than that on whose territory the offence was committed to confer jurisdiction on its courts to prosecute the authors of certain crimes where they are present on its territory. International criminal courts have been created. But at no time has it been envisaged that jurisdiction should be conferred upon the courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found. To do this would, moreover, risk creating total judicial chaos. It would also be to encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined “international community”. Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward.”¹⁰³

Whatever the *status quo* of the dicta of the *Lotus* case in international law, the correct way to test the legal status of universal jurisdiction over core crimes should be based on the examination whether there exists such a rule of customary international law at the present stage.

2.3.3 Universal Jurisdiction over Core Crimes, Intervention of Internal Affairs of Other States, and the Exercise of Public Power over the Territory of Other States

Sometimes, it is said that the exercise of universal jurisdiction over core crimes is in contravention to some principles of

¹⁰³ See Separate Opinion of President Guillaume in *Arrest Warrant*, para. 15.

international law, including the principle of non-intervention of internal affairs of other states, the principle of non-exercising public power over the territory of other states.¹⁰⁴ In fact, both of the above principles come from a further basic principle of international law, namely, the principle of equality between the sovereignties.

It is very difficult to answer the question whether universal jurisdiction over core crimes violates the principle of non-intervention of internal affairs of other states because of the dynamic, vague and highly political the term of “internal affairs”. Most probably, the situation of core crimes could not constitute “internal affairs”,¹⁰⁵ if they are proved to be existent. However, before they are proved, how could it say that they are core crimes? As I mentioned above, core crimes are usually intertwined with the high political factors, it is almost inevitable to judge the policies of the state when judging whether a natural person has committed core crimes. It would be not tolerated for one state to judge the public policies of another state by their national courts

¹⁰⁴ See, e.g., the arguments raised by the Republic of Congo in *Certain Criminal Proceedings in France (Republic of Congo v. France)*, Application and request for the indication of provisional measures by the Republic of Congo, <<http://www.icj-cij.org/icjwww/idocket/icof/icofframe.htm>> (visited on August 3, 2005).

¹⁰⁵ See, e.g., the ICTY states that ‘the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world’, *Prosecutor v. Duš co Tadić*, Case No. IT-94-1-T, Decision on the Denfence Motion on Jurisdiction, 10 August 1995, para. 42; Principle 6 of the Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences states that ‘the principle of non-interference in the internal affairs of states, as enshrined in article 4 (g) but qualified by article 4 (h) of the Constitutive Act of African Union, shall be interpreted in light of the well established and generally accepted principle that gross human rights offences are of legitimate concern to the international community, and give rise to the prosecution under the principle of universal jurisdiction.’see Edward Kwakwa, ‘The Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: Developing the Frontiers of the Principle of Universal Jurisdiction’, 10 *African Yearbook of International Law* (2002), p. 421; Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia, Antwerpen, 2005), p. 136.

because states are legally equal in international law. If it finds that the public policies of another state constitute one of core crimes, then you may say those public policies are not the internal affairs. If it cannot find it, it will be clearly the intervention of internal affairs of other states. Therefore, the result depends on whether you can find it or not. But still, there will be risk of the intervention of internal affairs of other states. The best and safest way is not to judge the public policies of other state through the national courts of one state. Such kind of matters should be left to the some kind of international organizations, such as the UN.

As to whether the exercise of universal jurisdiction over core crimes constitute the illegal exercise of public power in the territory of other states, it should bear in mind that the so-called “universal jurisdiction” does not mean the enforcement jurisdiction, but the legislative and judicial enforcement.¹⁰⁶ It is very clear that any state cannot make enforcements in the territory of other states without the consent of the latter, such as arrest of the suspects, establishment of courts, or evidence-takings.¹⁰⁷ It is a borderline case whether the question of the issuing arrest warrant through the red notice system of the Interpol or the requesting extradition constitute the exercise of public power in the territory of other states without the consent. Such a scenario is usually the so-called situation of “universal jurisdiction *in absentia*”. The purpose of red notice is to request the state where the suspect is found to provisionally arrest him or her for the preparation of the extradition.¹⁰⁸ The state where the suspect is found has no obligation to provisionally arrest the suspect, unless required by the treaty concerned or the resolution

¹⁰⁶ See Roger O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’, 2 *Journal of International Criminal Justice* (2004), pp. 735-760.

¹⁰⁷ See, e.g., “Lotus”, Judgment No. 9, 1927, PCIJ, Series A, No. 10, p. 19., pp. 18-19; Separate Opinion of President Guillaume in *Arrest Warrant*, para. 4; Joint Separate Opinion of Judge Higgins, Koojimans and Buergenthal in *Arrest Warrant*, para. 54; Dissenting Opinion of *ad hoc* Judge Van den Wyngaert in *Arrest Warrant*, para. 49.

¹⁰⁸ See the introduction of the international notices system by the Interpol, <<http://www.interpol.int/Public/ICPO/FactSheets/FS200105.asp>> (visited on August 4, 2005).

of the UN Security Council.¹⁰⁹ As Judge Oda points out in his dissenting opinion in *Arrest Warrant*,

“The arrest warrant is an official document issued by the State’s judiciary empowering the police authorities to take forcible action to place the individual under arrest. Without more, however, the warrant is not directly binding on foreign authorities, who are not part of the law enforcement mechanism of the issuing State. The individual may be arrested abroad (that is, outside the issuing State) only by the authorities of the State where he or she is present, since jurisdiction over that territory lies exclusively with that State. Those authorities will arrest the individual being sought by the issuing State only if the requested State is committed to do so pursuant to international arrangements with the issuing State. Interpol is merely an organization which transmits the arrest request from one State to another; it has no enforcement powers of its own.”¹¹⁰

Therefore, if a state just request the Interpol to issue the red notice to the suspect found in the territory of other states, or just directly request the state where the suspect is found in its territory to extradite him or her, I don’t think it a form of the exercise of public power by the prosecuting state in the territory of another state. On the contrary, it is a manifest of the respect for the territorial sovereignty of other states. However, the measures of the request to issue a red notice or extradite the suspect fall within the scope of enforcement jurisdiction, not the legislative or judicial jurisdiction, they have to be based on the well-established principle of legislative or juridical jurisdiction. If there is no such a basis in international law, such measures are rootless, and should not be supported.

2.3.4 The Opinions of Civil Society

The opinions of the scholars in this respect are also divided. It seems that quite a number of scholars support it.¹¹¹ However, most are just the “assertion” without sufficient proving. They

¹⁰⁹ See *Prosecutor v. Charles Ghankay Taylor*, Case Number SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004, para. 57, <www.sc-sl.org/SCSL-03-01-I-059.pdf> (visited on August 4, 2005).

¹¹⁰ See dissenting opinion of Judge Oda in *Arrest Warrant*, para. 13.

¹¹¹ See part 2.3 of this article.

usually just wrote that according to customary international law, every state could exercise universal jurisdiction over core crimes. Some scholars doubt whether there is such a rule of customary international law already in international law. For instance, one write said, “however, apart from a few examples, there has not developed an established practice on the exercise of jurisdiction on the basis of universality principle alone.”¹¹². Meanwhile, some are clearly against it.¹¹³

Quite a number of the reports made by the NGOs also assert that every state has universal jurisdiction over core crimes, such as the 14 Principles on the Effective Exercise of Universal Jurisdiction by Amnesty International in 1999,¹¹⁴ The Princeton Principles on Universal Jurisdiction in 2002,¹¹⁵ Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences in 2001 by the ILA.¹¹⁶ However, most of them make no difference between *lex lata* and *lex ferenda*. They are more the urges to the states to do so than the statement of the existing laws.

¹¹² See Ilaria Bottigliero, *Redress for Victims of Crimes under International Law* (Martinus Nijhoff Publishers, Leiden, 2004), p. 52.

¹¹³ See, e.g., George P. Fletcher, ‘Against Universal Jurisdiction’, 1 *Journal of International Criminal Justice* (2003), pp. 580-584; Gene Bykhovsky, ‘An Argument Against Assertion of Universal Jurisdiction by individual states’, 21 *Wisconsin International Law Journal* (2003), page 161-184.

¹¹⁴ *14 Principles on the Effective Exercise of Universal Jurisdiction*, AI Index: IOR 53/001/1999, 1 May 1999.

¹¹⁵ *The Princeton Principles on Universal Jurisdiction*, <http://www.law.uc.edu/morgan/newsdir/unive_jur.pdf> (visited on August 4, 2005).

¹¹⁶ *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, <<http://www.ila-hq.org/pdf/Human%20Rights%20Law/HumanRig.pdf>>(visited on August 4, 2005).

3 The Principle of Complementarity in Rome Statute

This article does not intend to make extensive research on the detailed content of the principle of complementarity in the Rome Statute.¹¹⁷ The central issue of this article is to compare the jurisdiction of the ICC and universal jurisdiction of states. However, it is inevitable to relate the principle in the course of resolving the central issue. Therefore, this part will briefly deal with the principle, mainly the historical perspective and the positive perspective.

Unlike the Statute of the ICTY and the Statute of the ICTR, the Rome Statute establishes the principle of complementarity to the national criminal jurisdiction, though the term “the principle of complementarity” has never been shown in the text of the Statute.

¹¹⁷ There have been a lot of literatures concerning this principle, see, e.g., Héctor Olásolo, ‘The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of Office of the Prosecutor’, 5 *International Criminal Law Review* (2005), pp. 121-146; Markus Benzing, ‘The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity’, 7 *Max Planck Yearbook of United Nations Law* (2003), pp. 591-632; G. Tugral and H. Tzimitras, ‘Complementarity of the Jurisdiction of the ICC’, in Kalliopi Koufa (ed.), *The New International Criminal Law* (Sakkoulas, Athens, 2003), pp. 1137-1152; Mohamed M. El Zeidy, ‘The Principle of Complementarity: A New Machinery to Implement International Criminal Law’, 23 *Michigan Journal of International Law* (2002), pp. 869-975; John T. Holmes, ‘The Principle of Complementarity’, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International, Dordrecht, 1999), pp. 41-78; Sharon A. Williams, ‘Article 17: Issue of Admissibility’ in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes, Article by Article* (Nomos Verlagsgesellschaft, Baden-Baden, 1999), pp.383-394; Bartram S. Brown, ‘Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals’, 23 *Yale Journal of International Law* (1998), pp. 383-436.

Paragraph 10 of the preamble of the Statute does stipulate that the ICC established under this Statute shall be “complementary” to national criminal jurisdictions, and also, article 1 reiterates it by stating that the Court shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern as referred to in this Statute, and shall be “complementary” to national criminal jurisdictions. The essence of complementarity can be more clearly discerned in paragraph 1 of article 17 of the Statute concerning the “issues of admissibility”, where it reads,

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
 - (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
 - (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
 - (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
 - (d) The case is not of sufficient gravity to justify further action by the Court.

In this paragraph, (a) and (b) especially establishes the principle of complementarity in the relation between the national criminal jurisdiction and the jurisdiction of the ICC, while (c) and (d) are not much related with this principle, because (c) is actually the manifestation of the principle of *ne bis in idem* contained in article 20 of the Statute¹¹⁸ and (d) is totally not related with the national criminal jurisdiction.

¹¹⁸ Article 20 of the Statute reads, ‘1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not

3.1 The Birth of the Principle of Complementarity in the Rome Statute

3.1.1 Draft Statute for an International Criminal Court by the ILC

Although the UN Security Council conferred the primary jurisdiction of the ICTY and the ICTR to the national criminal jurisdiction, the draft Statute of the ICC by the ILC, however, conferred the complementary jurisdiction of the ICC to the national criminal jurisdiction. The Draft Statute for an International Criminal Court declared in the third paragraph of the preamble that “such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective”.¹¹⁹ Article 35 of the Draft Statute further stipulates that,

“The Court may, on application by the accused or at the request of an interested state at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this Statute set out in this preamble, that a case before it is inadmissible on the ground that the crime in question:

(a) has been duly investigated by a state with jurisdiction over it, and the decision of that state not to proceed to a prosecution is apparently well founded;

(b) is under investigation by a state with jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or

(c) is not of such gravity to justify further action by the Court.”¹²⁰

3.1.2 The *ad hoc* Committee on the Establishment of an

conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.’

¹¹⁹ See Report of the International Law Commission on the Work of Its Forty-Sixth Session, 2 May-22 July 1994, UN Doc.A/49/10, p. 44.

¹²⁰ *Ibid.*, p. 105.

International Criminal Court

During the debate of the Draft Statute in the *ad hoc* Committee on the Establishment of an International Criminal Court¹²¹, many delegations referred to the commentary to the preamble as clearly indicating that the ILC did not intend the proposed court to replace national courts.¹²² A number of delegations stressed that the principle of complementarity should create a strong presumption in favor of national jurisdiction. Such a presumption, they said, was justified by the advantages of national judicial systems, which could be summarized as follows: (a) all those involved would be working within the context of an established legal system, including existing bilateral and multilateral arrangements; (b) the applicable law would be more certain and more developed; (c) the prosecution would be less complicated, because it would be based on familiar precedents and rules; (d) both prosecution and defense were likely to be less expensive; (e) evidence and witnesses would normally be more readily available; (f) language problems would be minimized; (g) local courts would apply established means for obtaining evidence and testimony, including application of rules relating to perjury; and (h) penalties would be clearly defined and readily enforceable. It was also noted that states had a vital interest in remaining responsible and accountable for prosecuting violations of their laws - which also served the interest of the international community, inasmuch as national systems would be expected to maintain and enforce adherence to international standards of behavior within their own jurisdiction.¹²³ Other delegations pointed out that the concept of complementarity should not create a presumption in favor of national courts. Indeed while such courts should retain concurrent jurisdiction with the court, the latter should always have primacy of jurisdiction.¹²⁴ The view was also expressed that in dealing with the principle of

¹²¹ This *ad hoc* Committee was established by the UN General Assembly in 1994, see A/RES/49/53, 9 December 1994.

¹²² See Report of the *ad hoc* Committee on the Establishment of an International Criminal Court, para. 29, General Assembly, Official Records, Fiftieth Session, Supplement No. 22 (A/50/22), p. 6.

¹²³ *Ibid.*, para. 30.

¹²⁴ *Ibid.*, para. 31.

complementarity a balanced approach was necessary. According to such view, it was important not only to safeguard the primacy of national jurisdictions, but also to avoid the jurisdiction of the court becoming merely residual to national jurisdiction.¹²⁵ It seems that the principle was basically agreed by most delegations, although some expressed their views against it. The principle was also harshly criticized by some experienced international criminal law personalities as the Prosecutor of the *ad hoc* tribunals harshly criticized it. Louise Arbour argued essentially that the regime would work in favour of rich, developed countries and against poor countries.¹²⁶ The main concern of the most delegations was actually not the principle, but the content of the principle, and they considered that the principle should have more clear expressions.¹²⁷

3.1.3 The Preparatory Commission on the Establishment of an International Criminal Court

During the debates of the Draft Statute in the Preparatory Commission on the Establishment of an International Criminal Court, it was observed that complementarity, as referred to in the third paragraph of the preamble to the draft statute, was to reflect the jurisdictional relationship between the ICC and national authorities, including national courts. It was generally agreed that a proper balance between the two was crucial in drafting a statute that would be acceptable to a large number of states. Different views were expressed on how, where, to what extent and with what emphasis complementarity should be reflected in the statute.¹²⁸

The delegations debated deeply on various aspects of paragraph 3 of the preamble and article 35 of the Draft Statute. In an inter-

¹²⁵ *Ibid.*, para. 32.

¹²⁶ See Williams A. Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2004), Second Edition, p. 86.

¹²⁷ See Report of the *ad hoc* Committee on the Establishment of an International Criminal Court, para. 157.

¹²⁸ See Report of the Preparatory Committee on the Establishment of an International Criminal Court, para. 153, General Assembly, Official Record, Fifty-First Session, Supplement No. 22 (A/51/22 and Add. 1). p. 36.

sessional meeting in Zutphen, the Netherlands, the Preparatory Commission put forward a new Draft Statute after taking the various views expressed by the delegations into consideration. The new Draft Statute did not change the expression of paragraph 3 of the preamble of the Draft Statute by the ILC, but paragraph 2 of article 35 of the Draft Statute by the ILC was changed into the following:

Having regard to paragraph 3 of the preamble, the Court shall determine that a case is inadmissible where:

(a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) the case has been investigated by a State which has jurisdiction over

it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under paragraph 2 of article 13;

(d) the case is not of sufficient gravity to justify further action by the Court.¹²⁹

This draft is almost the same as the final paragraph 1 of article 17 of the Rome Statute. The final report of the Preparatory Commission followed such a draft about the admissibility.

3.1.4 The Rome Conference

In the Rome Conference, the new draft article was not reopened to be negotiated, though some delegations tried to do so. However, some delegations expressed their opposition to the expression of paragraph 3 of the preamble and asked that the wording be consistent with article 1 and thus read “emphasizing further that such a court shall be complementary to national criminal justice.” Such a suggestion was accepted finally.¹³⁰

¹²⁹ See Report of the Inter-Sessional Meeting from 19 to 30 January 1998 held in Zutphen, The Netherlands, A/AC.249/1998/L.13, para. 42.

¹³⁰ See Sharon A. Williams, ‘Article 17: Issue of Admissibility’ in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International*

3.2 The Content of the Principle of Complementarity in the Rome Statute

As can be seen from the drafting history of the principle of complementarity, the key problem of this principle is not the principle *per se*, rather the detailed content of it. Most delegations endorsed this principle in dealing with the relation between the jurisdiction of the ICC and the national criminal jurisdiction because this principle meets the need of the respect of state sovereignty in the way of suppressing the crimes. In fact, this principle could reflect the proper balance between the state sovereignty and the effective operation of the ICC.¹³¹ According to this principle, the jurisdiction of the ICC is residual, and if the national criminal jurisdiction could be exercised duly and properly, there will be no need to have the ICC intervene the case.

As mentioned above, the core provision which reflects the principle is paragraph 1 (a) and (b) of article 17 of the Statute. According to paragraph 1 (a), if the case is being investigated or prosecuted by a State which has jurisdiction over it, the Court shall determine that a case is inadmissible, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; and according to paragraph 1 (b), if the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, the Court shall also determine that a case is inadmissible, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute. Therefore, the meaning of “unwillingness” or “inability” is very important to judge whether the ICC shall declare a case inadmissible or not. Furthermore, who has the final power to judge whether one situation constitutes “unwillingness” or “inability” is even more important than the meaning themselves.

Criminal Court: Observer's Notes, Article by Article (Nomos Verlagsgesellschaft, Baden-Baden, 1999), p.391.

¹³¹ *Ibid.*, p. 392.

3.2.1 The Meaning of “Unwillingness” or “Inability”

According to paragraph 2 of article 17 of the Statute, in order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

This provision envisages such three scenarios as the “unwillingness” of the national proceedings. Are there any other scenarios which could demonstrate the unwillingness of the national proceedings? In other words, paragraph 2 of article 17 is exhaustive or exemplified? During the drafting negotiations of paragraph 1 of article 17, some delegations criticized the use of “unwilling” because it is too subjective and inclined to be abused by political motivations.¹³² Though it was finally contained, the interpretation of the meaning of it should be narrow and strict. Therefore, paragraph 2 of article 17 is exhaustive. This is also supported by some scholars.¹³³

¹³² See John T. Holmes, ‘The Principle of Complementarity’, in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Kluwer Law International, The Hague, 1999), p. 49.

¹³³ See, e.g., Sharon A. Williams, ‘Article 17: Issue of Admissibility’ in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes, Article by Article* (Nomos Verlagsgesellschaft, Baden-Baden, 1999), p.393.

The subparagraph (a) envisages the scenario of shielding the suspect from criminal responsibility. It is without doubt that such situation will take place in certain circumstances. The problem, however, is that it is very difficult for the Prosecutor to prove the existence of such a situation, as pointed out by the two commentators, that is, “the Prosecutor must prove a devious intent on the part of a State, contrary to its apparent actions.”¹³⁴ The subparagraph (b) envisages the scenario of unjustifiable delay of the proceedings which in the circumstances is seen to be inconsistent with an intent to bring the person concerned into justice. It is also difficult to determine, because it is not only for the Prosecutor to prove the existence of the unjustifiable delay, but also to prove the intent not to bring the suspect to justice in the colour of unjustifiable delay. The last subparagraph envisages the scenario of lack of impartiality of the national proceedings which in the circumstances is seen to be inconsistent with an intent to bringing the person to justice. Like the subparagraph (b), it is also difficult to prove. Moreover, the subparagraph (b) and (c) have to be considered in connection with the international judicial standards of human rights protection, especially article 14 of the ICCPR.¹³⁵

According to paragraph 3 of article 17, in order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings. However, the meaning of “total or

¹³⁴ See, Louise Arbour and Morten Bergsmo, ‘Conspicuous Absence of Jurisdictional Overreach’, in H. von Hebel (ed.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (Kluwer Law International, The Hague, 1998), p. 131.

¹³⁵ Paragraph 1 of article 14 of the ICCPR stipulates that “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” Paragraph 3 (c) also stipulates that “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (c) To be tried without undue delay.” 999 UNTS 171.

substantial collapse” or “unavailable” of the national judicial system is still to be clarified. According to one writer’s interpretation, the situation of inability does not only refer to the situation of national armed conflicts running for years or natural disasters causing the total or substantial collapse of its national judicial system, *e.g.* the chaos and war on the territory of the former Yugoslavia and of Rwanda during the 1990s, but also to that in which the national judicial systems have totally or substantially collapsed or are unavailable so that States are unable to carry out criminal proceedings. The inability in the latter case may refer to the lack of substantive law or the existing legislation that does not meet the standards of the recognized international human rights.¹³⁶

3.2.2 The Subject to Determine the Meaning of “Unwillingness” or “Inability”

In some sense, the issue who has the power to determine the meaning of “unwillingness” or “inability” is even more important than the issue of their meanings *per se*. In this regard, the Rome Statute conferred the ICC itself on the power to make such determinations. Paragraph 2 of article 17 of the Statute stipulates that “in order to determine unwillingness in a particular case, the Court shall consider...”; also, paragraph 3 of the same article stipulates that “in order to determine inability in a particular case, the Court shall consider...”.

There were quite lots of debates on this issue in the process of drafting the Statute. According to the Report of the Preparatory Commission on the Establishment of an International Criminal Court, as regards who is to decide on whether the Court should exercise jurisdiction, three views emerged. According to one view, taking into account that the exercise of penal jurisdiction was the prerogative of states, the Court’s jurisdiction was an exception to be exercised only by state consent. An optional clause regime, according to this view, was consistent with this

¹³⁶ See Lijun Yang, ‘On the Principle of Complementarity in the Rome Statute of the International Criminal Court’, 4 *Chinese Journal of International Law* (2005), p. 123.

approach. According to another view, the Court itself should make the final determination of jurisdiction, but in accordance with precise criteria set out in the Statute. According to yet a third view, while agreeing that the Court should decide on its own jurisdiction in accordance with the Statute, the Statute should leave some discretion to the Court.¹³⁷ Those views arguing that the power for the determining of the meaning of “unwillingness” or “inability” should be left to the national criminal jurisdiction are considered to undermine the effective and independent operation of the ICC. In the future cases, how the ICC will interpret the meaning of “unwillingness” or “inability” of national criminal justice is still to be seen, and it will inevitably cause the suspicion of political elements in the borderline cases.

¹³⁷ See Report of the Preparatory Committee on the Establishment of an International Criminal Court, para. 162, General Assembly, Official Record, Fifty-First Session, Supplement No. 22 (A/51/22 and Add. 1). p. 38.

4 Does the Principle of Complementarity in the Rome Statute Apply to Universal Jurisdiction Exercised by States?

Although the principle of complementarity in the Rome Statute has been already explored much by the scholars, it seems that they concern much about the meaning of “unwillingness” or “inability” of the national criminal jurisdiction and the relation between the jurisdiction of the ICC and the non-judicial forms for the past core crimes in a state, such as the Truth and Conciliation Commission and pardon or amnesty. Few concern the object of this principle. In other words, to whom the jurisdiction of the ICC is complementary?

Suppose a state, whether the contracting party to the Rome Statute or not, claims to exercise universal jurisdiction over core crimes committed in the territory of a state party to the Statute, shall the ICC apply to the principle of complementarity? In such circumstance, it is inevitable for the ICC to make judgment of the legality of universal jurisdiction by states.

4.1 The Rome Statute Itself Does Not Regulate the Forms of National Criminal Jurisdictions

From the perspective of *lex lata*, the Rome Statute itself does not regulate the forms of national criminal jurisdiction. Paragraph 10 of the preamble of the Statute simply reads that “the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions”, and article 1 also simply reads that the ICC “shall be complementary to national criminal jurisdictions.” Paragraph 1 (a) of article 17 uses the expression that the case is being investigated or prosecuted “by a State which has jurisdiction over it”, and paragraph 1 (b) of article 17 also uses the same expression. Paragraph 6 of the

preamble of the Statute also simply reads that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. All of them do not mention any form of such criminal jurisdiction, whether territoriality principle, active or passive personality principle, protective principle or universality principle. The majority of the academia also supports the conclusion that the Rome Statute *per se* does not regulate the issue of universal jurisdiction over state parties.¹³⁸ What it regulates is the jurisdiction over the ICC and its relation with national criminal jurisdictions. The issue of universal jurisdiction of states over core crimes has to be resolved through other treaties or customary international law. In fact, it is also almost impossible for the ICC to regulate the issue of universal jurisdiction of states, because the Rome Statute is a treaty in nature, and universal jurisdiction of states is an issue of customary international law in nature, as I have mentioned above in this article.¹³⁹

4.2 Universal Jurisdiction over Core Crimes in Customary International Law Is Not Well-Established

As I have concluded above in this article, it is still questionable that every state can exercise universal jurisdiction over core crimes under customary international law at the present stage of international law.¹⁴⁰ The argument that there has been already

¹³⁸ See Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia, Antwerpen, 2002), p. 56; Sonja Boelaert-Suominen, ‘Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for All Armed Conflicts?’, 5 *Journal of Conflicts and Security Law* (2000), p. 88; Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia, Antwerpen, 2005), p. 86. Cf. Richard van Elst, ‘Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions’, 13 *Leiden Journal of International Law* (2000), p. 840.

¹³⁹ See part 2.1.3 of this article.

¹⁴⁰ See part 2.3 of this article.

such a rule in customary international law, in my opinion, is more *lex ferenda* than *lex lata*. Such a hesitation of legal situation concerning universal jurisdiction over core crimes is not helpful for the argument that universal jurisdiction of states should be primary to the jurisdiction of the ICC. On the contrary, I am of the view that such a situation about universal jurisdiction over core crimes in customary international law is supportive to the argument that the jurisdiction of the ICC should be primary to universal jurisdiction claimed to exercise by some states.

4.3 National Implementation Measures of the Rome Statute

National implementation measures of the Rome Statute are also supportive to the argument that the jurisdiction of the ICC is primary to universal jurisdiction claimed to exercise by some states.¹⁴¹ The following national implementation measures could be used as the evidence for the above arguments.

4.3.1 German Act to Introduce the Code of Crimes against International Law of 26 June 2002

Article 3 of the Act is the Amendment to the Code of Criminal Procedure. Paragraph 5 of article 3 reads,

“The following section 153f shall be inserted after section 153e:

...

(2) In the cases referred to under Section 153c subsection (1), numbers 1 and 2, the public prosecution office can, in particular, dispense with prosecuting an offence punishable pursuant to section 6 to 14 of the Code of Crimes against International Law, if:

...

4. The offence is being prosecuted *before an international court* (emphasis added) or by a state on whose territory the offence was committed, whose national is suspected of its commission or whose national was harmed by the offence.

¹⁴¹ For the national implementation of the Rome Statute generally, see <<http://web.amnesty.org/pages/icc-implementation-eng>> (visited on August 10, 2005).

The same shall apply if a foreign accused of an offence committed abroad residing in Germany but the requirements pursuant to the first sentence, numbers 2 and 4, have been fulfilled and *transferred to an international court* (emphasis added) or extradition to the prosecuting states is permissible and is intended.”¹⁴²

4.3.2 Act Amending Belgium’s Act Concerning Serious Violations of International Humanitarian Law of 5 August 2003

Article 18 of the Act reads that

“article 12 (b) of the same Preliminary Title, as inserted by the Act of 17 April 1986 and replaced by the Act of 18 July 2001, is subject to the following modifications:

...

(4) The article is completed by the following paragraphs:

...

(4) Given the material facts of the case, it emerges that, in the interests of the proper administration of justice and with a view to respecting Belgium’s international obligations, the case should be brought before either *an international court* (emphasis added), a court in the jurisdiction where the offences were committed, a court in the state where the offender is a citizen or a court in the jurisdiction where the offender may be found, and providing that such court can demonstrate the particular qualities of independence, impartiality and equality as may be required by relevant international commitments binding on Belgium and on such a state. If the federal prosecutor decides to abandon a case, he shall notify the Minister of Justice of his decision by referring to the various points in the preceding paragraph on which his decision was based.

If such a decision is based exclusively on points (3) and (4) above, or exclusively on point (4), and if the offences in question were committed after 30 June 2002, the Minister of Justice shall inform the *International Criminal Court* (emphasis added) of these offences.”¹⁴³

¹⁴² <http://www.iuscrim.mpg.de/forsch/online_pub.html#legaltext> (visited on August 10, 2005).

¹⁴³ Belgium’s Amendment to the Law of June 15, 1993 (As Amended by the Law of February 10, 1999 and April 23, 2003) *Concerning the Punishment of Grave Breaches of Humanitarian Law* [August 7, 2003], 42 ILM 1258 (2003).

This is the amendment of the 1999 Act Concerning the Punishments of Grave Breaches of International Humanitarian Law, and this article is actually the recognition of the primacy of the jurisdiction of the ICC to the universal jurisdiction by Belgium.¹⁴⁴

4.3.3 The Dutch International Criminal Court Implementation Act of 20 June 2002

The Dutch International Criminal Court Implementation Act of 20 June 2002 is one of the Dutch national implementation acts of the Rome Statute. Paragraph 1 of Section 11 of this Act reads,

“1. At the request of the ICC and subject to the provisions of this chapter, persons shall be surrendered to the ICC:
(a) for prosecution and trial in respect of criminal offences over which the ICC has jurisdiction under the Statute;
...¹⁴⁵

4.4 The Negative Impacts of Universal Jurisdiction over Core Crimes More Than Those of the Jurisdiction of the ICC

From the functional or pragmatic perspective, it is better for the ICC to exercise the jurisdiction over core crimes than for the individual states to exercise the jurisdiction on the basis of universality principle. Compared with the jurisdiction of the ICC, universal jurisdiction over core crimes will have more negative

¹⁴⁴ There are Belgian writers who argue that ‘Belgium will allow both the States most closely connected (except the State of which the victim has the nationality) and the ICC to exercise their jurisdiction but will retain universal jurisdiction, even in absentia, in case they fail to do so.’ see Leen De Smet and Frederik Naert, ‘Making or Breaking International Law? An International Law Analysis of Belgium’s Act Concerning the Punishments of Grave Breaches of International Humanitarian Law’, *Revue Belge de Droit International* (2002), p. 496.

¹⁴⁵

<http://www.minbuza.nl/default.asp?CMS_ITEM=24AF968413274FB1BDFBCA32C4BD96D6X3X70402X77> (visited on August 8, 2005).

effects for the suppression of core crimes than the jurisdiction of the ICC. Among the others, the following is the most evident.

4.4.1 Destroy the Inter-State Relations

It is obvious that in most circumstances, the exercise of universal jurisdiction over core crimes is proved to destroy the inter-state relations, because as I mentioned above, unlike piracy, core crimes are usually intertwined with the extremely high political elements.¹⁴⁶ They usually can only be committed by the high-level public officials in the name of exercising the public power in order to maintain the social order. Core crimes are usually committed in this process. Therefore, it is extremely difficult to separate core crimes from the normal exercise of public power. In order to judge whether core crimes have been committed, it will be extremely difficult not to judge the policies of exercising the public powers, which will be rebutted by any state, because every state attaches much importance of the equality of sovereignty and will not tolerate the intervention of its internal affairs by other states without its consent.¹⁴⁷ Experiences also show that the exercise of universal jurisdiction over core crimes damages the inter-state relation between the prosecuting state and the nationality state of the suspects.¹⁴⁸ Some writers argue that the exercise of universal jurisdiction over core crimes does not damage the inter-state relation, but promote their relation.¹⁴⁹ In

¹⁴⁶ See part 2.2.1 of this article.

¹⁴⁷ For the relation between the exercise of universal jurisdiction over core crimes and the prohibition of intervention of internal affairs, see part 2.3.3 of this article.

¹⁴⁸ See, *e.g.*, the tension between Spain, the UK and Chile due to the Spanish claim of universal jurisdiction over Pinochet; the tension between Israel and Belgium due to the Belgian claim of universal jurisdiction over Sharon; and the tension between the US and Belgium due to the Belgian claim of universal jurisdiction over George W. Bush and other high level officials and militarists of the US. The Minister of Defence of the US also warned Germany about its possible claim to exercise universal jurisdiction over him, see 'Lawsuit Against Rumsfeld Threatens US-German Relations' (December 14, 2004), Deutsche Welle, <<http://www.globalpolicy.org/intljustice/universal/2004/1214rumsfeld.htm>> (visited on August 11, 2005).

¹⁴⁹

my opinion, such a result is exceptional, not normal, if there is such a result. The argument that the inter-state relations will not be damaged but promoted through the exercise of universal jurisdiction over core crimes is not realistic. If the jurisdiction over core crimes is exercised by the ICC, the risk of damaging the inter-state relations will be less because the ICC is based on the Rome Statute, and the ratification of the Rome Statute is the voluntary choice of a state.

4.4.2 Negative Impacts on the Rights of the Suspect

The biggest negative impact on the rights of the suspect by the exercise of universal jurisdiction of states is that the suspect might enjoy the quite different treatments in the national criminal proceedings.¹⁵⁰ In theory, the human rights of the suspects in the criminal proceedings could be equal and unified in the different corners of the world, because the international community has the unified standards for it, especially those contained in the ICCPR.¹⁵¹ In practice, it is almost impossible to achieve such a unified standard because the different states have different legal systems and traditions, and their understanding to the related provisions of the ICCPR would not be extremely consistent. In such a situation, the suspect cannot foresee which kind of treatment he or she will be subject to in the allegation of universal jurisdiction. Someone might argue that in fact, the states claiming universal jurisdiction over core crimes are usually the states with high-standard treatment or the “Northern” states. I don’t want to comment on whether such states have a high-standard treatment for the suspect here, the problem is that how to guarantee that no low-standard state or the “Southern” states will claim universal jurisdiction. And even if there will be no low-standard treatment states or the “Southern” states will claim universal jurisdiction, there will be no consistent treatments even in the high-standard states or the “Northern” states. And the

¹⁵⁰ See Gabriel Bottini, ‘Universal Jurisdiction after the Creation of the International Criminal Court’, 36 *New York University Journal of International Law and Politics* (2004), pp.550-555.

¹⁵¹ See article 9 and 14 of the ICCPR, 999 UNTS 171.

differentiated treatments themselves are problematic for the human rights of the suspects.

At the same time, in theory, if universal jurisdiction over core crimes is recognized under customary international law, there shall be the uniform provision of universal jurisdiction and the uniform provisions of core crimes in different states. However, in practice, it is also impossible to achieve this. Take a look at the current state practices about the universal jurisdiction provisions in a few states, their contents are quite different.¹⁵² Moreover, the provisions of core crimes in their national criminal laws are even more different from each other.¹⁵³ Even if every state provides quite the same elements of core crimes in their national criminal laws, the application of them is an even bigger problem. Different prosecutors and judges in different legal systems are likely to interpret those provisions in different ways.

If the jurisdiction over core crimes could be exercised by the ICC, such kinds of concerns will not be the problem, because in the ICC there is only one uniform treatment of the suspect¹⁵⁴ and

¹⁵² For instance, the German universal jurisdiction provision in its 2002 Act to Introduce the Code of Crimes Against International Law allows universal jurisdiction *in absentia* (article 3), while the Dutch universal jurisdiction provision in its International Criminal Court Implementation Act of 20 June 2002 requires the presence of the suspect before it could be initiated (section 2).

¹⁵³ For instance, the South African Implementation of the Rome Statute of the International Criminal Court Act of 2002 just incorporates the concepts of core crimes in the Rome Statute, see chapter 1 “Definitions” and Annex, while the German Act to Introduce the Code of Crimes Against International Law of 2002 unilaterally extend the scope of the concept of core crimes in the Rome Statute and laid down many crimes not stipulated in the Rome Statute, such as ‘use of starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival or impedes relief supplies in contravention of international humanitarian law’ in connection with an armed conflict not of an international character may constitute war crimes therein, see paragraph 5 of section 11 (1) of the 2002 Act.

¹⁵⁴ See part 3 of the Rome Statute “General Principles of Criminal Law”; see also the Rules of Procedure and Evidence, in particular, right to facilitate the protection of confidentiality [rule 20(1)(a)], right to assist in obtaining legal advice and the assistance of legal counsel [rule 20 (1)(c)], right to establish criteria and procedures for the assignment of legal

the prosecutor and the judges have been selected and sitting there.

4.4.3 Double Standard and Politically Abused

It is without doubt that the exercise of universal jurisdiction over core crimes by individual states will be subject to double standards and politically abused, because it is exercised unilaterally by the states. Some states claiming to exercise universal jurisdiction over core crimes allow the private individuals to initiate the criminal proceeding.¹⁵⁵ In this circumstance, they cannot guarantee the abuse of universal jurisdiction because the private individuals or groups might be the political tools of certain powers that do not like the accused of one particular state. In other few states, the initiation of criminal proceedings has to be subject to the consent of the Prosecutor or the Attorney-General.¹⁵⁶ However, even in such a circumstance, there still exists the risk of being politically abused. The motivation of the Prosecutor or the Attorney-General could not be guaranteed to without any political impacts from one particular power.

In practice, there are few cases which are the truly exercise of universal jurisdiction over core crimes. More or less “nexus” is always intertwined with the practical exercise. The *Eichmann*

assistance [rule 21(1)], <<http://www.icc-cpi.int/defence/defaccused.html>> (visited on August 11, 2005).

¹⁵⁵ See, for instance, like that of many states, Belgium’s criminal procedure incorporates the system of plaintiff-prosecutors or *constitution de partie civile*, whereby victims may initiate cases before an investigation judge, see Code de Procédure Pénale, article 63.

¹⁵⁶ See, for instance, the Belgian amendment of the 1999 Loi relative à la répression des violation grave de droit international humanitaire on April 23, 2003 that only the federal prosecutor could initiate cases if violations was overseas, the offender was not Belgian or located in Belgium, and the victim was not Belgian or had not lived in Belgium for three years, see 42 ILM 749 (2003). Also, according to New Zealand International Crimes and International Criminal Court Act of 2000, proceedings for an offence against section 9 or section 10 or section 11 may not be instituted in any New Zealand court without the consent of the Attorney-General (article 13 (1)).

case,¹⁵⁷ the so-called classical exercise of universal jurisdiction over core crimes, was a highly political case from the perspective of positive law. In my opinion, even if it is recognized as a legal case, it would be the exercise of the passive personality jurisdiction rather than the exercise of universal jurisdiction. Spain seems to be very active in the exercise of universal jurisdiction, but ironically, all of its cases are against the nationals of the Latin American states which are its former colonies.¹⁵⁸ It never exercised a case against the nationals of any other states. Belgium was also the same case at the early stage. It exercised universal jurisdiction over the Former Foreign Minister of the Democratic Republic of Congo, which is its former colony.¹⁵⁹ It also exercised universal jurisdiction over the “Butare Four” from Rwanda, which is also its former colony.¹⁶⁰ Although Belgium also claimed to exercise universal jurisdiction over the nationals of other states, they are objected

¹⁵⁷ See *Attorney General of Israel v. Eichmann*, District Court of Jerusalem, 12 December 1961; Supreme Court of Israel, 29 May 1962. 36 ILR 5

¹⁵⁸ See, for instance, *Re Pinochet*, Spain, National Court (Criminal Division)(Plenary Session), 5 November 1998, 119 ILR 2002, pp.335-336; Luis Benavides, *Introductory Note to the Supreme Court of Spain: Judgment on the Guatemalan Genocide Case*, 42 ILM 683 (2003); Spanish Supreme Court: *Peruvian Genocide Case* [May 20, 2003], 42 ILM 1200 (2003); Audiencia Nacional of Spain: Sentence for Crimes Against Humanity in the Case of Adolfo Scilingo (April 19, 2005), <<http://www.asil.org/ilib/2005/04/ilib050426.htm#j3>> (visited on August 11, 2005); see also <<http://www.asil.org/insights/insigh122.htm>>(visited on August 11, 2005); Elizabeth Nash, ‘Argentinean Officer Jailed by Spain for Dirty War Crimes’, *Independent*, April 20, 2005, <<http://www.globalpolicy.org/intljustice/universal/2005/0420scilingo.htm>> (visited on August 11, 2005).

¹⁵⁹ *Arrest Warrant*, Judgment of February 14, 2002, ICJ Rep.

¹⁶⁰ See, e.g., Luc Reydam, ‘Prosecuting Crimes Under International Law on the Basis of Universal Jurisdiction: The Experience of Belgium’, in Horst Fischer, Claus Kreß, Sascha Rolf Lüder (eds.), *International and National Prosecution of Crimes Under International Law: Current Developments* (Berlin Verlag Arno Spitz GmbH, 2001), pp. 802-807; Luc Reydam, ‘Belgium’s First Application of Universal Jurisdiction: the Butare Four Case’, 1 *Journal of International Criminal Justice* (2003), pp.428-436; Damien Vandermeersch, ‘Prosecuting International Crimes in Belgium’, 3 *Journal of International Criminal Justice* (2005), pp. 403-406.

severely by those states.¹⁶¹ Therefore, someone comments that it is a form of “New Colonialism” or “Judicial Tyranny”.¹⁶²

If core crimes are exercised by the ICC, the risk of being politically abused will be less than the unilateral exercise of universal jurisdiction. Of course, it should be recognized that the Prosecutor of the ICC also has the potential of abusing its prosecuting discretion out of certain political motivations. However, the Prosecutor and judges of the ICC are limited and they could be re-elected by the member states. In other words, the risk of politically abusing of the power of the ICC can be controlled more easily. On the contrary, it is almost impossible to control the same risk of the unilaterally exercising of universal jurisdiction by individual states because most of the states have a huge number of national prosecutors and judges.

4.4.4 The Envisaged Function of Universal Jurisdiction Is Extremely Restricted

As I have mentioned above, the envisaged function, or the true rationale of the exercise of universal jurisdiction over core crimes, is to make everyone who committed core crimes held individual criminal responsibility through all possible means.¹⁶³ In other words, everyone has to be held individual criminal responsibility if he or she has committed core crimes. If not in his or her territorial state, or nationality state or the state of the victims, there has to be a place where he or she could be brought to justice. Therefore, it is suggested that universal jurisdiction could be a tool to achieve this purpose so that the suspect cannot find a safe haven in the world. In the eyes of such advocates, impunity is intolerable.

However, if they take a look at the practical picture of the exercise of universal jurisdiction over core crimes, they might be

¹⁶¹ See, e.g., Luc Reydam, ‘U. S. Reaction to Belgian Universal Jurisdiction Law’, 97 *American Journal of International Law* (2003), p. 986.

¹⁶² See, e.g., Herry Kissinger, ‘The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny’, 80 *Foreign Affairs* (2001), pp. 86-96.

¹⁶³ See part 2.2.4 of this article.

very disappointed. Few cases have achieved such an envisaged function.¹⁶⁴ In most cases, the suspect even did not show up in the territory of the prosecuting states. Most of the exercises of universal jurisdiction over core crimes are simply the political shows. In practice, if one state does have the willingness to haven the suspect in its territory, the prosecuting state cannot do anything to bring him or her to justice. There is no duty of extraditing a person to from one state to another in positive international law, unless there exists the duty from the extradition treaty or from the principle of reciprocity.¹⁶⁵ Therefore, the sole effect of the claims of exercising universal jurisdiction *in absentia* is to block the suspect from entering its territory or the territories of other states which have the extradition duty with the prosecuting state. If the suspect stays in the state where he or she is found in its territory, he or she can live there well. Even if the suspect is found in the territory of the prosecuting state and prepared to be prosecuted on the basis of universal jurisdiction, the effects are also very restricted, if the state where the crimes are committed does not provide any cooperation or assistance in terms of the collection of evidence, the protection of victims or witnesses, and any other related criminal matters. In such a circumstance, it will be very difficult for the prosecuting state to find the suspect guilty.

If the jurisdiction of core crimes are to be exercised by the ICC, it will be very difficult for the state party where core crimes were committed or whose national the suspect is not to surrender the suspect to the ICC, provided that the ICC has the jurisdiction over the case, because the state is the contracting party of the Rome Statute. Of course, in some extreme cases, the state party

¹⁶⁴ Only a few cases have achieved the envisaged functions, including (1) the “Butare Four” case in the Belgian courts; (2) *Military Prosecutor v. Niyonteze*, Tribunal Militaire, Division II, Lausanne, 30 April 1999; Tribunal Militaire d’appel 1A, Geneva, 26 May 2000 (appeals judgment); Tribunal Militaire de cassation, 27 April 2001 (cassation judgment); 96 *AJIL* (2002), pp. 231-236; and (3) Audiencia Nacional of Spain: Sentence for Crimes Against Humanity in the Case of Adolfo Scilingo (April 19, 2005), <<http://www.asil.org/ilib/2005/04/ilib050426.htm#j3>> (visited on August 11, 2005); *see also* <<http://www.asil.org/insights/insigh122.htm>>(visited on August 11, 2005).

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might not be willing to surrender the suspect to the ICC if their very vital interests are at stake. However, if they do so, the political cost will be huge for such a state, and it is easier to say that the state violates its commitment to the Rome Statute.

5 Concluding Remarks

Considering that whether there has been a well-established rule of customary international law authorizing every state to exercise universal jurisdiction over core crimes is still questionable in positive international law, and considering that the unilateral exercise of universal jurisdiction over core crimes by individual states might produce more negative effect to the international relations, the human rights of the suspect, as well as the more restricted functions than the jurisdiction of the ICC, it is suggested that the exercise of jurisdiction over core crimes by the ICC is better than the unilateral exercise of universal jurisdiction by individual states from the perspective of the policy orientation. What the international community should strive to do is to call upon more states to ratify the Rome Statute, to amend the Rome Statute to make it consistent with the development of international law, and to persuade the permanent members of the UN Security Council to conduct duly, not to tolerate or even encourage the exercise of universal jurisdiction over core crimes. In other words, the matter of suppressing core crimes should be centralized to the ICC, not decentralized to the individual states. According to my understanding, this should be the development direction of international law.

Since the Rome Statute *per se* does not regulate the issue of universal jurisdiction over core crimes by individual states, when applying to the principle of complementarity in the future cases, it is suggested that the ICC should take the above conclusion into consideration. In other words, when the state party where core crimes were committed or the state party the national of which is the suspect is not willing to or unable to exercise their criminal jurisdiction, and when another state claims to exercise the criminal jurisdiction on the basis of universality principle, the ICC should catch the case, primary to the claimed universal jurisdiction, provided that it has the jurisdiction over the case, the other conditions of exercise its jurisdiction in the Rome Statute being met.

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