UNIVERSITY OF NAIROBI

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THE APPLICATION OF UNIVERSAL JURISDICTION PRINCIPLE AND RELATIONS AMONG STATES: A CASE STUDY OF RWANDA

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DECLARATION

I. Jeannot Kibezi Ruhunga hereby declared that this Research thesis is my original work and has not been submitted for examination in this university or any other university.

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27 May 2016

Date

This Research Project has been submitted for examination with my Approval as the university supervisor

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DEDICATION

I dedicate this research project to the memory of my mother. late Adele Mukarugira who made me what I am.

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ABSTRACT

Universal jurisdiction can be traced back to the works of Grotius. and to the prosecution and punishment of the crime of piracy. However, it is after the Second World War that the concept of universal jurisdiction gained ground through the establishment of the International Military Tribunal and the adoption of new conventions containing explicit or implicit clauses on universal jurisdiction. The Nuremberg and Tokyo military tribunals were created after World War II to try war crimes and other crimes against humanity committed during the war.

Universal jurisdiction is a criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction. It is based on the notion that some crimes. such as genocide. crimes against humanity. war crimes. and torture are of such exceptional gravity that they affect the fundamental interests of the international community as a whole.

Ideally, universal jurisdiction is supposed to be a powerful instrument for the international system by protecting its interests, human rights and fighting against impunity. However, in practice the exercise of universal jurisdiction may violate the principle of sovereignty and sovereign equality and is easily subjected to political abuse including discrimination as manifested in selective prosecution, thus destabilizing international relations. This happens especially when universal jurisdiction is used as a tool for achieving other political ends. States may exercise universal jurisdiction as a means of gaining advantage over states with whom they are in conflict by prosecuting nationals of those opponent states for conduct unrelated to the conflict between the two states. The political nature of universal jurisdiction was manifested when the attempt to exercise universal jurisdiction by Belgium against US generals and politicians was detracted and the universal jurisdiction law was changed in 2003, after being threatened by the US to move NATO Headquarters away from Brussels.

The study has analysed the effects of universal jurisdiction on relations among states using two cases in which senior Rwanda government officials were indicted by a French and a Spanish judges respectively. These two cases were politically motivated and violated the principle of sovereignty and sovereign equality of states. This resulted in the destabilisation of international relations between Rwanda and other states such as France, German and United Kingdom.

The application of the principle should respect immunities of officials of States and the presence of the suspect should be required to avoid diplomatic tensions between states. Inter-state cooperation remains invaluable to ending impunity and denying safe havens for persons suspected of committing serious international crimes and to maintain good diplomatic relations among states.

ABBREVIATIONS

AU	African Union
DRC	Democratic Republic of Congo
ECHR	European Court of Human Rights
FIDH	Federation Internationale des ligues des droits de l'homme
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
LDH	Ligue des droits del'homme
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
OAU	Organisation of African Unity
RPA	Rwanda Patriotic Army
RTLM	Radio Television Libres Des Mille Collines
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda
UNGA	United Nations General Assembly

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CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

Universal jurisdiction allows states or international organizations to claim criminal jurisdiction over an accused person regardless of where the alleged crime was committed, and regardless of the accuser's nationality, country of residence, or any other relation with the prosecuting entity.

The concept of universal jurisdiction is therefore closely linked to the idea that some international norms are owed to the world community, as well as the concept of peremptory norm that certain international law obligations are binding on all states.

According to Randall, the principle of universal jurisdiction is classically defined as 'a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim'.[1] This principle is said to derogate from the ordinary rules of criminal jurisdiction requiring a territorial or personal link with the crime, the perpetrator or the victim.

Historically, universal jurisdiction can be traced back to the works of Grotius, and to the prosecution and punishment of the crime of piracy. However, after the Second World War the concept of universal jurisdiction gained ground through the establishment of the International Military Tribunal and the adoption of new conventions containing explicit or implicit clauses on

[1] Kenneth C. Randall, '*Universal jurisdiction under international law*', Texas Law Review, No. 66 (1988), pp. 785–8.

universal jurisdiction.[2] The Nuremberg and Tokyo military tribunals were created after World War II to try war crimes and other crimes against humanity committed during the war.

Cherif observes that the principle of universal jurisdiction holds that international law enables each state to assert jurisdiction over certain crimes on behalf of the international community "in a manner equivalent to the Roman concept of *actio popularis*, which gave every member of the public the right to take legal action in defense of public interest, whether or not one was affected." [3] International law, both customary and conventional, regulates a State's assertion of universal jurisdiction.[4] Currently, the principle of universal jurisdiction is yet to become an integral part of the international justice system. However, serious obstacles still stand on the way of its realization.

The principal of universal jurisdiction is considered a powerful instrument when it comes to the international system advancing its legal agendas, protecting human rights and fighting against impunity. Supporters of universal jurisdiction claim that it denies safe havens to perpetrators of heinous offenses. It is a crucial tool for bringing justice to victims, deterring state or quasi-state officials from committing international crimes, and establishing a minimum international rule of law by substantially closing the "impunity gap" for international crimes and ensuring that their crimes do not go unpunished due to a lack of will or means to prosecute.[5] Critics on the other side warn that universal jurisdiction disrupts international relations, international justice, and the rights of the accused. The principle provokes judicial chaos, and

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[2] Mary Robinson, '*Foreword*', *The Princeton Principles on Universal Jurisdiction*, Princeton University Press, Princeton, (2001), p. 16.

[3] Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 88 (2001), pp. 103 - 109.

[4] Ibid, pp. 103 - 109.

[5] Stephen Macedo, universal jurisdiction: national courts and the prosecution of serious crimes under international law, ed., 2003.

interferes with political solutions to mass atrocities.[6] These concerns among others have greatly affected the formation process of the international law in a way that thus far only universal jurisdiction over piracy has been openly embraced in international law.

There is no generally accepted definition of universal jurisdiction in conventional or customary international law. However, it generally amounts to the assertion of jurisdiction by any state over crimes that are so heinous regardless of "any nexus the State may have with the offence, the offender, or the victim even if its nationals have not been injured by the acts. Universal jurisdiction offenses are injuries to the international community as a whole.

The scope and application of universal jurisdiction must be clearly defined to avoid abuse of the principle, which could endanger international law, order and security.[7] The subject of universal jurisdiction had already appeared on the General Assembly's agenda due to abuse and politicization of the principle, particularly with regard to the African continent. The African Union Commission is looking into 'abusive' uses of universal jurisdiction by non-African states against African personalities. As part of this, an African Union-European Union (AU-EU) Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction was set up and produced a report on the practices and concerns of both African and European countries.[8]

The perceived abuse in recent years in the resort to universal jurisdiction, particularly over African officials, caused the Group of African States to request in February 2009 the inclusion of an additional item on the "Abuse of the principle of universal jurisdiction" in the agenda of the 63rd session of the United Nations General Assembly (UNGA).[9] The request was accepted and universal jurisdiction has been a subject of heated discussion in the UNGA since

[6] Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFF. 86, 90–91, 96 (2001).
[7] Ibid.
[8] Mark A. Drumbl, *Atrocity, Punishment and International Law*, Cambridge, (2007), pp. 169-173.
[9] Ibid, p. 201.

that time. Many debates were conducted on this principle in autumn of 2009. What is more troubling is that some States that have ratified the Rome Statute fail to include definitions of crimes under international law in their national laws. The case of Chad former President Hissène Habré illustrates this point. In 2000, a Senegalese court relied on the principle of universal jurisdiction to indict Hissène Habré on charges of torture, war crimes, and crimes against humanity committed while he was in office between 1982 and 1990.[10] Although Senegal implemented criminal laws that criminalized torture, these laws did not expressly provide for universal jurisdiction over the crime. Thus, in the case of Hissène Habré, the Chad's Supreme Court ruled that Senegalese courts did not have jurisdiction over the crimes committed by a foreign national outside its territory.

Although many African states such as Uganda, Kenya and South Africa have expressed approval of the principle of universal jurisdiction in treaties, they consider that the scope and applicability of the principle of universal jurisdiction outside the context of such treaties remain to be determined. In particular, the African Union has for some time been concerned that the principle is not being applied impartially and objectively by European states. Rwanda, for example, considers that the principle is open to abuse and has been used to serve political interests, which in its view endangers and undermines the very principles of universal jurisdiction and international law.

Despite AU's repeated concern with the application of universal jurisdiction, mainly by European States against African leaders, the AU has not rejected the principle of universal

[10] Robert Cryer, *International Criminal Law vs State Sovereignty: Another Round?* 16 EUR. J. INT'L L. (2005), pp. 979-985.

jurisdiction. In fact, it previously endorsed the view that universal jurisdiction is a principle of international law.[11]

At the Sixth Legal Committee of the United Nations (UN), Rwanda's representative said that while her country supported the appropriate use of the principle in good faith, it rejected its abuse and misuse of indictments by European judges against African leaders, subjecting them to the jurisdiction of European States. That was contrary to the sovereign equality and independence of states and evoked memories of colonialism.[12]

Basing on the universal jurisdiction principle, Jean Louis Bruguiere, a French judge issued on 17/11/2006, a controversial arrest warrants against former top Rwanda Patriotic Army (RPA) officers[13]. In 2008, based on the warrant, President Kagame's Head of Protocol Rose Kabuye was arrested in Germany and handed over to the French authorities, act by which Rwanda gave the Germany ambassador twenty four hours to leave the country. Rwanda had closed down the French embassy and expelled the ambassador two years earlier, after French judge issued indictments against senior Rwandan army officers. Rose Kabuye was later released by the French court.

Rwanda strongly protested against the arrest in London of its intelligence chief, Lt-Gen Karenzi Karake on 20 June 2015 who was released two months after. Karake is one of 40 officers of the Rwandan Patriotic Army (RPA) who are subject to an arrest warrant issued by Spanish judge Fernando Andre Merelles, on charges of genocide, crimes against humanity and terrorism allegedly committed against Hutus in northern Rwanda in 1994. Karake is accused in

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[11] John Dugard, '*Palestine and the International Criminal Court: Institutional Failure or Bias?*', Journal of International Criminal Justice, 11(3), (2013), pp. 563–570.

[12] The Sixth (Legal) Committee met today to take up consideration of the Secretary-General's report on the scope and application of the principle of universal jurisdiction (document A/69/174).

[13] Deliverance des mandats d'arrets internationaux, http://www.olny.nl/RWANDA/Lu Pour Vous/Dossier Special Habyarimana/Rapport Bruguiere.pdf. Accessed on 01/09/2015.

the deaths of many people, including three Spanish aid workers. Rwanda says the charges are baseless. Foreign Minister Louise Mushikiwabo in a Twitter post termed the arrest "an outrage" and dismissed it as "Western solidarity to demean Africans."[14]The case, opened in February 2008, led by the Spanish High Court Judge Fernando Andreu Merrelles and falls within the provisions of Spain's principle of universal jurisdiction in alleged cases of crimes against humanity, genocide, and terrorism.

1.2 Statement of the Research Problem

According to the African Union (AU), the abuse of the Principle of Universal Jurisdiction could endanger International law, order, and security; the political nature and abuse of the principle of universal jurisdiction by judges from some non-African States against African leaders, particularly Rwanda, is a clear violation of the sovereignty and territorial integrity of these States.[15] The abuse and misuse of indictments against African leaders have a destabilizing effect that may negatively impact on the political, diplomatic, security, social and economic development of States and their ability to conduct international relations.

The study observes that a majority of states around the world appear to recognize that they can and should exercise universal jurisdiction over international crimes such as torture and war crimes, by passing laws that permit the prosecution of such crimes. But practice has generally lagged far behind laws on the books. Concerns about the politicization of universal jurisdiction laws and the risk that cases implicating foreign government officials could be inconvenient to the country where the court is located have been a constant theme in debates about universal jurisdiction, and have led at least one country, Belgium, to significantly revise its

[14] BBC, *Monitoring*, 2015.
[15] The African Union. Eleventh Ordinary Session. 30 June – 1 July 2008. Sharm El-Sheikh, EGYPT. Assembly/AU/ Dec.199(XI).

laws. It is with these backgrounds that the study seeks to assess the impact of the application of universal jurisdiction principle on relations among states. using Rwanda as a case study.

1.3 Objectives of the Study

The study will aim to assess the impact of the application of universal jurisdiction principle on the relations among states, using Rwanda as a case study. Some of the specific objectives of the study will include;

i. To explain how and to what extent universal jurisdiction principle should be applied among states.

ii. To identify the types of actors and the practices of universal jurisdiction principle on the relations among states.

iii. To assess the impact of the application of universal jurisdiction principle on the relations among states.

1.4 Literature Review

The study will review the literature from scholars of both Realist and Liberalist schools. On one side Liberalists who support the importance of the universal jurisdiction principle, which according to them denies safe havens for perpetrators of heinous offenses by allowing states to prosecute crimes of exceptional gravity that affect the fundamental interests of the international community as a whole. Among them are Bruce Broomhall , Lyal Sunga and Henry J. Steiner. On the other side, Realists such as Henry Kissinger, Joe Verhoeven and Kenneth Randall, who argue that universal jurisdiction is a breach on each state's sovereignty and can affect diplomatic relations among states.

Universal jurisdiction is a criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction. It is based on the notion that some crimes, such as genocide, crimes against humanity, war crimes, and torture are of such exceptional gravity that they affect the fundamental interests of the international community as a whole. Accordingly, there is no condition that the suspect or victim be a citizen of the state exercising universal jurisdiction or that the crime directly harmed the state's own national interests.[16] The only condition for exercising universal jurisdiction is therefore not, as in traditional doctrines of jurisdiction nationality, location or national interests, but rather the nature of the crime.

Universal jurisdiction began as a modest and narrow doctrine applicable only to piracy, but the concept has grown along with the international legal order. While it applies only to the most serious of the crimes defined by international law there is some dispute as to exactly which such crimes qualify. As the fundamental values and norms of the international system have evolved, so too has the number of crimes established by international law. Some of these new international crimes have become subject to universal jurisdiction.[17] Multilateral negotiations leading to the adoption of the International Criminal Court (ICC) Statute were characterized by disputes over whether the ICC's three core crimes are truly subject to universal jurisdiction.

With the end of cold war, sovereignty became a liability and human security easily used as an excuse of the international community to intervene in internal affairs of states, which was

[16] Supranational Criminology, 'The Criminology of International Crimes and Other Gross Human Rights Violations' (2010).
[17] Roger O'Keefe, *Journal of International Criminal Justice*, 2 JICJ (2004), pp. 735-744.

unthinkable before. The New Century of sovereignty represents a period in which the human rights norm, along with "Responsibility to Protect" as one of the main tenets of human security, gradually prevailed over defined territorial boundaries and superseded the definition of the concept of sovereignty itself as a basic requirement. An environment supporting of the principle of universal jurisdiction was created following the establishment of the ad-hoc tribunals for the former Yugoslavia and Rwanda in 1993 and 1994, respectively, and extended to the establishment of the internationalized courts such as the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts for Cambodia. The efforts to ensure individual criminal accountability culminated in the establishment of the International Criminal Court on July 1, 2002.

The concept received a great deal of prominence with Belgium's 1993 - law of universal jurisdiction, which was amended in 2003 in order to reduce its scope following a case before the International Court of Justice regarding an arrest warrant issued under the law, entitled Case Concerning the Arrest Warrant of 11 April 2000: Democratic Republic of the Congo vs. Belgium.

Lyal argues that some crimes are more heinous than others, as they pose a threat to the international community, and thus a State is required to take a moral and logical duty to prosecute all the persons responsible. According to him, no place should for example be a safe haven for individuals who have committed acts of genocide, extrajudicial killings, crimes against humanity, war crimes, forced disappearance and torture.[18] Hence real universal jurisdiction is purely based on the universal interest and concern character of the criminal issue in focus. When

[18] Sunga, Lyal. *Individual Responsibility in International Law for Serious Human Rights Violations*, Nijhoff (1992) p. 252.

it comes to universal jurisdiction, its logic is that each and every State ideally should have an interest in matters of universal human concern.

Universal jurisdiction is exceptional in criminal jurisdiction principles. Unlike other jurisdictional bases, all characterised by some sort of link between the crime and the prosecuting state, universal jurisdiction is defined by the very absence of it.[19] The rationale for this legal concept is closely intertwined with the idea that certain crimes are in their very nature so extreme and horrendous that they are perceived to be crimes against humankind.

Bosco argues that the principle of Universal Jurisdiction provides for jurisdiction of a State over certain crimes without requiring any of the normally required linkages, such as commission on its territory, nationality of either perpetrator or victim, or the threat towards its national security.[20] Thus, it enables a State to prosecute a person under its jurisdiction no matter where or against whom the crime, was committed, independent of the perpetrator's nationality.

Broomhall argues that universal jurisdiction is based on the notion that some crimes, such as genocide, crimes against humanity, war crimes, and torture are of such exceptional gravity that they affect the fundamental interests of the international community as a whole. Accordingly, there is no condition that the suspect or victim be a citizen of the state exercising universal jurisdiction or that the crime directly harmed the state's own national interests.[21] The only condition for exercising universal jurisdiction is therefore not as in traditional doctrines of jurisdiction nationality - location or national interests, but rather the nature of the crime. Scharf notes that recent years have seen a rising number of universal jurisdiction cases filed before

[19] Supranational Criminology, '*The Criminology of International Crimes and Other Gross Human Rights Violations*' (2010).
[20] Bosco, David. 'Why is the International Criminal Court Picking only on Africa?' *Washington Post*, 29 March 2013.
[21] Bruce Broomhall, *Universal Jurisdiction: Myths, Realities, and Prospects*: Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law, 35 New Engl. L. Rev. (2001), pp. 399-402.

national courts in Europe, North America, Latin America, and Africa.[22] This increase in cases can be attributed to a rising interest of the international community to hold accountable those responsible for the worst crimes, including torture.

National courts can exercise universal jurisdiction to prosecute and punish, and thereby deter, heinous acts recognized as serious crimes under international law.[23] When national courts exercise universal jurisdiction appropriately, in accordance with internationally recognized standards of due process, they act to vindicate not merely their own interests and values but the basic interests and values common to the international community.

Ryngaert holds that the jurisdiction of the International Criminal Court will, however, be available only if justice cannot be done at the national level. The primary burden of prosecuting the alleged perpetrators of these crimes will continue to reside with national legal systems.[24] Enhancing the proper exercise of universal jurisdiction by national courts will help close the gap in law enforcement that has favoured perpetrators of serious crimes under international law. Fashioning clearer and sounder principles to guide the exercise of universal jurisdiction by national courts should help to punish, and thereby to deter and prevent, the commission of these heinous crimes.[25]

According to Geneuss, the proponents of universal jurisdiction argue that the reality is that it is not always possible to prosecute crimes in the countries in which they were committed. For example, after a devastating conflict or war, a transitional state may lack the necessary legal

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[22] Michael P. Scharf. *The United States and the International Criminal Court: The ICC's Jurisdiction over the Nationals of Non-Party States*: A Critique of the U.S. Position, 64 Law & Contemp. Probs. (2001), pp. 6-8.

[23] Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions. The Principle of Complementarity*, Martinus Nijhoff, (2008), pp. 417.

[24] Cedric Ryngaert, "*Applying the Rome Statute"s Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting under the Universality Principle*", Institute for International Law, Working Paper, (2008), p. 14.

[25] Henry J. Steiner, '*Three cheers for universal jurisdiction – or is it only two?*' Theoretical Inquiries in Law, Vol. 5 (2004), pp. 201-229.

infrastructure and resources to carry out an investigation and prosecution. Alternatively, a country may intentionally fail or refuse to prosecute a crime that occurred within its territory for one reason or another.[26] In the case of Genocide against Tutsis in Rwanda for example, most of perpetrators fled the country and the only way they could be tried was through the application of universal jurisdiction by the national courts of the host country or by extradition, which case could not apply for states without such legal framework with Rwanda.

Steiner posits that another situation may be the lack of political will within the government to pursue investigations, thus preventing the prosecution of alleged crimes.[27] In the absence of accountability, other states may thus seek to initiate prosecutions on the basis of universal jurisdiction in order to prevent impunity and provide justice to victims.

The universal jurisdiction approach adopted at Nuremberg has found recognition in a number of international areas. Specific support for applying the universality principle to genocide under customary international law is found in the *Restatement (Third) of the Foreign Relations Law of the United States* which considers genocide an offence for which a state has universal jurisdiction to prescribe punishment because genocide is an offence recognized by the community of nations as of universal concern.[28]

Recently, an increasing number of suspected perpetrators of war crimes, committed during international and non-international armed conflict, have been tried in domestic courts on the basis of universal jurisdiction. It is significant that in most cases, the States to which the accused were affiliated by nationality did not object to the exercise of universal

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[26] Julia Geneuss, "*Fostering a Better Understanding of Universal Jurisdiction*", Journal of International Criminal Justice, (2009), vol. 7, p. 945-958.
[27] Henry J. Steiner, '*Three cheers for universal jurisdiction – or is it only two?*', Theoretical Inquiries in Law, Vol. 5 (2004), pp. 201-229.
[28] Restatement (Third) Foreign Relations Law of the United States (2000), p. 404.

jurisdiction.[29] Rwanda collaborated with states that prosecuted genocide fugitives such us Belgium, Switzerland, Canada, Netherlands, by availing witnesses and facilitating them to travel to those countries, and giving investigators from those countries freedom to operate freely in Rwanda.

On the other side, Realists do not believe in universal jurisdiction and argue that sovereign states are the principal actors in the international system, and special attention is afforded to large powers as they have the most influence on the international stage. With the Peace of Westphalia in 1648, nation state sovereignty was based on territoriality and the absence of a role for external agents in domestic structures.

According to Akande, Realists are convinced that there are no universal principles which may guide all states' actions. Instead, a state must always be aware of the actions of the states around it and must use a pragmatic approach to resolve problems as they arise, therefore, when universal jurisdiction is affirmed and exist, it may be relied upon by all States.[30]

Realists figured out war as recurrent event in world politics. Until the end of cold war, no other theory challenged its fundamental assumptions.[31] Realism theory posits that international relations are fundamentally based on State power politics. The state emphasizes an interest in accumulating power to ensure security in an anarchic world. Power is a concept primarily thought of in terms of material resources necessary to induce harm or coerce other states (to fight and win wars). The use of power places an emphasis on coercive tactics being acceptable to either accomplish something in the national interest or avoid something inimical to the national

[29] Christopher Keil Hall, Senior legal Adviser, International Justice Project, at the Second International Expert Meeting
on War Crimes, Genocide and Crimes against Humanity, 19 June 2005.

[30] Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. (2004), p. 407.

[31] Ian Wing, (2000) *Refocusing Concepts on Security: The Convergence of Military and Non-Military Tasks, Land Warfare Studies Centre*, Working Paper No. 111, November, pp 7-9.

interest.[32] The state is the most important actor under realism. It is unitary and autonomous because it speaks and acts with one voice. The power of the state is understood in terms of its military capabilities.

The increased application of universal jurisdiction reflects a renewed commitment to the kind of idealism that Carr understood to be so damaging to international peace and stability in the interwar years, considering the contested nature of international norms, the importance of power, and the possibility of abuse exacerbated by the absence of democratic accountability. Universal jurisdiction has the potential to be exploited by "ideologues and antagonists" intent on committing "lawfare" against countries such as the United States and Israel.[33]

A key concept under realism is the international distribution of power referred to as system polarity. The advocates of universal jurisdiction argue that the state is the basic cause of war and cannot be trusted to deliver justice. If law replaced politics, peace and justice would prevail. But even a cursory examination of history shows that there is no evidence to support such a theory.[34] The role of the statesman is to choose the best option when seeking to advance peace and justice, realizing that there is frequently a tension between the two and that any reconciliation is likely to be partial. The choice, however, is not simply between universal and national jurisdictions.

Henry Kissinger, argues that universal jurisdiction is a breach on each state's sovereignty, as all states being equal in sovereignty, as affirmed by the United Nations Charter;

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[32] Cedric Ryngaert, *The International Criminal Court and Universal Jurisdiction: A Fraught Relationship*, 12 NEW CRIM. L. REV. (2009), pp. 498 - 498.
[33] Van den Wyngaert, *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium),
Judgment, I.C.J. Reports, (2002), p. 3-6.
[34]Cedric Ryngaert, Ibid.

"Widespread agreement that human rights violations and crimes against humanity must be prosecuted has hindered active consideration of the proper role of international courts. Universal jurisdiction risks creating universal tyranny – that of judges."[35]

According to Kissinger, since any number of states could set up such universal jurisdiction tribunals, the process could quickly degenerate into politically driven show trails to attempt to place quasi-judicial stamp on a state's enemies or opponents.[36]He further argued that universal system should contain procedures not only to punish the wicked but also to constrain the righteous. It must not allow legal principles to be used as weapons to settle political scores.[37]

Luc believes distrusting national governments; many of the advocates of universal jurisdiction seek to place politicians under the supervision of magistrates and the judicial system. However, prosecutorial discretion without accountability is precisely one of the flaws of the International Criminal Court.[38] Definitions of the relevant crimes are vague and highly susceptible to politicized application. The dilemma of universal jurisdiction lies in the tension between law and politics in the pursuit of international criminal justice. Insofar as international criminal law depends on the political will of nation-states, for example in bringing prosecutions, extradition and other matters of trans-border cooperation, politics are inevitable.

The perceived abuse in recent years in the resort to universal jurisdiction, particularly over African officials, caused the Group of African States to request in February 2009 the inclusion of an additional item on the "Abuse of the principle of universal jurisdiction" in the agenda of the 63rd session of the United Nations General Assembly (UNGA). The request was accepted and universal jurisdiction has been a subject of heated discussion in the UNGA since

[35] Kissinger, Henry. *The Pitfalls of Universal jurisdiction.* Foreign Affairs (2001).
[36] Henry Kissinger, Ibid
[37] Ibid
[38] Black, Ian. Isreaili military cancels UK visit over arrest fears. *The Guardian,* London. (2010).

that time. Debates were conducted on this topic in autumn of 2009.[39] The UNGA then asked governments to submit observations and information on state practice.

Article 23.4 of the Spanish Fundamental Law of the Judiciary (Ley Organica del Poder Judicial) provided wide scope for the exercise of universal jurisdiction. Enacted on 1 July 1985, the law establishes that Spanish courts have jurisdiction over crimes committed by Spaniards or foreign citizens outside Spain when such crimes can be described according to Spanish criminal law as genocide, terrorism, or some other, as well as any other crime that, according to international treaties or conventions, must be prosecuted in Spain.[40]

Perhaps the most important issue is the relationship of universal jurisdiction to national reconciliation procedures set up by new democratic governments to deal with their countries' questionable pasts. One would have thought that a Spanish magistrate would have been sensitive to the incongruity of a request by Spain, itself haunted by transgressions committed during the Spanish Civil War and the regime of General Francisco Franco, to try in Spanish courts alleged crimes against humanity committed elsewhere.[41] Kingstone observes that on 25 July 2009 the Spanish Congress passed a law that limits the competence of the *Audiencia Nacional*, under Article 23.4 to cases in which Spaniards are victims, there is a relevant link to Spain, or the alleged perpetrators are in Spain.[42] The law still has to pass the Senate, the high chamber, but passage is expected because it is supported by both major parties.

In spite of these it is still assumed that the prosecution of these crimes is in the interest of the whole international community and a state that takes such an initiative acts on behalf of humanity and not out of its own national interest. Israel on the other hand argues universal

[39] Request and the Explanatory memorandum, see A/63/237 (3 February 2009) and annex ("African Union memo"). For summaries of development and documentation, see UN 6th Committee.
[40] Kingstone, Steve. Spain reins in crusading judges. BBC News. (25 June 2009).
[41] Idem
[42] Kingstone, Steve. Spain reins in crusading judges. BBC News. (25 June 2009).

jurisdiction based on the "universal character of the crimes in question" and that the crimes committed by Eichmann were not only in violation of Israel law, but were considered "grave offenses against the law of nations itself."[43]

It is also asserted that the crime of genocide is covered under international customary law. As a supplemental form of jurisdiction, a further argument is made on the basis of protective jurisdiction. Protective jurisdiction is a principle that, "...provides that states may exercise jurisdiction over aliens who have committed an act abroad which is deemed prejudicial to the security of the particular state concerned."[44]

Leonard argues that the concept of universal jurisdiction is not new, though states have shown an increasing willingness to enlarge the zone of their jurisdiction and to prosecute or extradite those in high places. The case of Chilean dictator Augusto Pinochet signaled changing international norms in the late 1990s.[45] The Pinochet case was brought by Spanish magistrate, Baltasar Garzón, and involving an extradition request to the United Kingdom, this case never came to trial, but it had a very broad legal impact. Because of the precedents of the Pinochet case, other leaders who have committed well-documented crimes have been pursued, including former US Secretary of State Henry Kissinger and Prime Minister Ariel Sharon of Israel. Kissinger has restricted his international travel, because he is wanted in so many jurisdictions either for trial or as a prosecution witness.[46]

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[43] *Attorney General of Israel v. Eichmann, Criminal Case 40/61,* (District Court of Jerusalem 1961). Transcripts, archived from the original on 11 June 2007.

[44] Reydams, Luc. *Universal Jurisdiction: International and Municipal Legal Perspectives.* Oxford University Press (2004).

[45] Eric Leonard, *Establishing an International Criminal Court: The Emergence of a New Global Authority?* Case # 258, Pew Case Studies in International Affairs, Ed. (2002), pp. 104-110.

[46] Ibid, pp. 104-110.

Recent years, has seen several state governments limit the use of universal jurisdiction by their domestic courts, after pressure from countries like the United States (US), Israel and China. The creation of the International Criminal Court in 2002 has also reduced the need for domestic courts to apply the doctrine.

Other critics have challenged the legitimacy of universal jurisdiction on grounds relating to democratic values. In the wake of Pinochet's arrest in England, an American critic denounced the proceedings on the grounds that, morally and politically, what Pinochet's regime did or did not do is primarily a question for Chile to resolve.[47] A magistrate operating completely outside the Chilean system will effectively have imposed his will on the Chilean people. Some worry whether the courts of bystander states have either the wisdom or resources to pass fair judgment on crimes committed a world away.

The controversy over universal jurisdiction has only intensified in recent years. Such as, Belgium's attempt to prosecute an incumbent foreign minister of Congo, an exercise of universal jurisdiction, violated rules of international law concerning the official immunity of an incumbent foreign minister. Although courts have asserted more direct claims to jurisdiction in many of these cases, the trend has prompted contemplation of the theoretical and policy implications for international affairs of a move toward the broader use of universal jurisdiction.

Lohr and Lietzau argue that the potential pitfalls for the two primary justifications for universal jurisdiction, namely the universally heinous nature of certain crimes and the practical benefit that might often be derived from universal jurisdiction.[48] Randall examines the potential connections between trials based on universal jurisdiction and other forms of transitional justice

[47] John R. Bolton, Senior Vice President, American Enterprise Institute, Before the House Committee on International Relations, Hearing on H.R.4654, American Service members' Protection Act, July 25, 2000.
[48] Michael Lohr and William Lietzau, One Road Away from Rome: Concerns Regarding the International Criminal Court, 9 U.S.A.F. ACAD. J. LEGAL STUD. (1998-1999), p. 33.

such as truth commissions or amnesties.[49] Randall further argues these alternative mechanisms are best seen as complements to prosecution rather than as alternatives. States could only turn to the principle of universal jurisdiction or international criminal tribunals when other States had failed to act, according to Randall.[50] Although there was no need to internationally regulate the principle, it should always be applied with care and caution.

Randall continued to further state that Universal jurisdiction must not be confused with international criminal jurisdiction, which was exercised by international criminal tribunals.[51] Pointing out that the thirty three African States party to the Statute constituted the largest regional block, Randall notes that the fact the majority of African countries supported the establishment of the Court reinforced their commitment to the rule of law at the national and international levels.[52] According to Steiner while the increase of universal jurisdiction proceedings is a testament to the fact that universal jurisdiction is no longer a mere legal theory, there are still necessary components to ensure that cases are successful. These include, first and foremost, political will as well as dedicated individuals.[53] An international framework that provides for cooperation and exchange and that guarantees effective and efficient investigation and prosecution is equally important.[54]

According to Verhoeven, Western Nations have traditionally exercised universal jurisdiction to prosecute non-Western nationals and leaders. He perceives universal jurisdiction as a means of imposing Western values on weaker developing Nations.[55] A part from the

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[49] Kenneth Randall, Universal jurisdiction under international law, Texas Law Review, No. 66 (1988), pp. 785-8.
[50] Ibid, pp. 785-8.
[51] Ibid, pp. 785-8.
[52] Idem
[53] Henry J. Steiner, '*Three cheers for universal jurisdiction – or is it only two?*', Theoretical Inquiries in Law, Vol. 5 (2004), pp. 201-229.
[54] Ibid, (2001), pp. 67-81.
[55] Joe Verhoeven, *Vers un ordre reressifuniversel?* [Toward a Repressive Universal Order?], 45 Annuaire Francais de Droit Int'l 55, 63 (1999).

increased potential for neo-colonialist practices, a more frequent exercise of universal jurisdiction would mean an increase in the inequitable targeting of nationals of weaker and poorer States.

As Judge Bula-Bula points out in his individual opinion in arrest warrant, complaints have been instituted before Belgian courts on the basis of universal jurisdiction against Laurent Gbagbo of the Ivory Coast, Saddam Hussein of Iraq, Denis Sassou Nguesso of the Congo, Ariel Sharon of Israel, and Paul Biya of Cameroon.[56] Developing Nations, on the other-hand, being politically weaker in the international arena, and highly dependent on Western powers for humanitarian aid, are not in a position to initiate investigations and prosecutions of European and North American nationals, particularly where there is no personal or territorial connection with their countries.

However, even if more powerful and wealthy Nations are in a better position than developing countries to ensure that Western nationals are not insulated from liability, they cannot be expected to apply principles of international law consistently. Thus, for example, a request by seven Iraqi families that Belgian authorities investigate former U.S. President George H. W. Bush, U.S. Vice President Richard Cheney, U.S. Secretary of State Colin Powell and retired U.S. General Norman Schwarzkopf for perpetrating war crimes during the 1991 Gulf War ended in the abrogation of Belgium's expansive universal jurisdiction legislation altogether.[57] According to Belczyk, the political nature of universal jurisdiction is on full display when the attempt to exercise universal jurisdiction by States may indeed be tradable, as in the case of Belgium which decided in 2003 to scuttle its strong universal jurisdiction authorization when threatened by USA

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[56] Ibid.
[57] Joe Verhoeven, *Vers un ordre reressifuniversel?* [Toward a Repressive Universal Order?], 45 Annuaire Francais de Droit Int'l 55, 63 (1999).

the possibility of the North Atlantic Treaty Organization (NATO) Headquarters moving away from the country.[58]

The exercise of universal jurisdiction by states is a controversial tool for ending impunity. For its supporters, universal jurisdiction denies safe havens for perpetrators of heinous offenses and ensures that their crimes do not go unpunished due to a lack of will or means.[59] In contrast, critics warn that universal jurisdiction threatens international relations, international justice, and the rights of the accused. This debate highlights the difficulties of holding individuals criminally accountable in a historically state-centric system.[60] At the heart of this debate is a clash between principles of international law: the foundational principle of sovereign equality and the right of states to be free from external interference in their internal affairs on one hand, and the more recent principle of individual responsibility for international crimes on the other.

Given the nature of universal crimes, particularly their damaging effects on entire societies, it is very important that offenders do not escape justice, either by receiving impunity in their own country or by finding a safe haven in another country. However, the exercise of universal jurisdiction should not be arbitrary and should not be used to fulfill interests other than those of justice. State sovereignty should be respected to avoid diplomatic tensions among states.

1.5 Justification of the Study

In less than a decade, an unprecedented movement has emerged to submit international politics to judicial procedures. It has spread with extraordinary speed and has not been subjected

[58] Jaclyn Belczyk, Spain parliament passes law limiting reach of universal jurisdiction statute, 16 Oct 2009.
[59] Broomhall, Bruce, "Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law", 2010, *New England Law Review* [Vol.35:2], pp. 399-420.
[60] Broomhall, Bruce, "Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law", 2010, *New England Law Review* [Vol.35:2], pp. 399-420.

to systematic debate, partly because of the intimidating passion of its advocates. The danger with this concept lies in pushing the effort to extremes that risk substituting the tyranny of judges for that of governments; historically, the dictatorship of the virtuous has often led to inquisitions and even witch-hunts.

This study aims at contributing to scholarly literature on current application of the universal jurisdiction principle and generating new academic debates on its impact on international relations. Additionally it will provide new knowledge in universal jurisdiction that will help policy makers in rethinking its new approaches to this concept in Africa.

1.6 Theoretical Framework

The study intends to apply Realism in assessing emerging international issues of universal jurisdiction.

Realism surfaced as a stronger, valid and logical theory in explaining the world politics as well as domestic politics during 15th and 16th century. This theory of international politics remained successful in satisfying the answers to question about causes and effects of war. Realists figured out war as recurrent event in world politics. Until the end of cold war, no other theory challenged its fundamental assumptions.[61] Realism theory posits that international relations are fundamentally based on State power politics.

The state emphasizes an interest in accumulating power to ensure security in an anarchic world. Power is a concept primarily thought of in terms of material resources necessary to induce harm or coerce other states (to fight and win wars). The use of power places an emphasis on coercive tactics being acceptable to either accomplish something in the national interest or avoid

[61] Ian Wing, (2000) *Refocusing Concepts on Security: The Convergence of Military and Non-Military Tasks, Land Warfare Studies Centre*, Working Paper No. 111, November, pp 7-9.

something inimical to the national interest.[62] The state is the most important actor under realism. It is unitary and autonomous because it speaks and acts with one voice. The power of the state is understood in terms of its military capabilities.

A key concept under realism is the international distribution of power referred to as system polarity. The advocates of universal jurisdiction argue that the state is the basic cause of war and cannot be trusted to deliver justice. If law replaced politics, peace and justice would prevail. But even a cursory examination of history shows that there is no evidence to support such a theory. The role of the statesman is to choose the best option when seeking to advance peace and justice, realizing that there is frequently a tension between the two and that any reconciliation is likely to be partial. The choice, however, is not simply between universal and national jurisdictions.

Not too long ago it appeared as if exercises of extraterritorial (and universal) jurisdiction by domestic courts were going to be the method of choice to hold individual and corporate violators of human rights accountable for their misdeeds. Belgian courts were convicting Rwandans who had partaken in the Rwandan genocide, Spanish judge Baltasar Garzon used Spanish courts to prosecutor General Pinochet and other human rights violators in Latin America, and in the United States individuals used the Alien Tort Statute to obtain financial compensation from foreign and U.S. companies for human rights violations committed abroad.

It is hard not to see a common trend here that is driven by Realist reasoning, such as that expressed most famously by Henry Kissinger. Both the Belgian and the Spanish parliaments were clearly motivated by a desire to avoid the kind of diplomatic troubles they found themselves in as a consequence of the actions of their courts. International courts such as the

[62] Cedric Ryngaert, *The International Criminal Court and Universal Jurisdiction: A Fraught Relationship*, 12 NEW CRIM. L. REV. (2009), pp. 498 - 498.

International Court of Justice (ICJ) and the European Court of Human Rights have also afforded great respect for sovereignty as the fundamental principle of international relations even in cases that concern fundamental human rights violations such as torture and war crimes.

One of the contentious issues that arise in debates about universal jurisdiction is whether international law allows for what has been called "universal jurisdiction in absentia". The question is whether a State may initiate criminal proceedings, for international crimes, against persons who are not present within the territory of the prosecuting State.

The study concludes that in application of universal jurisdiction, most opinion points out that piracy does frequently occur within the territorial jurisdiction of another sovereign. The distinction is that the U.S. and most other states have a clear national interest in fighting piracy and there is unlikely to be diplomatic trouble over efforts to hold pirates accountable. The same is not true with alleged corporate human rights abuses abroad.

The conclusion that courts should therefore have no jurisdiction over the potentially more controversial issue is as Realist an argument as you will likely find in Supreme Court judgments.

1.7 Hypotheses

Some of the hypothesis of the study will include;

i. The application of universal jurisdiction principle has strained relations among states.

ii. The practice of the application of universal jurisdiction principle has been used as a political tool against various states.

iii. There is a double standard in the understanding of the universal jurisdiction principle and selectivity in its application when it comes to the case of Rwanda.

1.8 Methodology of the study

Research methodology is a way to systematically solve a research problem. It involves the steps taken by the researcher to solve a research problem. Research methodology has many dimensions and this study will apply qualitative research techniques.

Qualitative research is a type of scientific research. In general terms, scientific research consists of an investigation that, seeks answers to a question, systematically uses a predefined set of procedures to answer the question. collects evidence. produces findings that were not determined in advance and produces findings that are applicable beyond the immediate boundaries of the study.

Additionally, qualitative research seeks to understand a given research problem or topic from the perspectives of the local population it involves. Qualitative research is especially effective in obtaining culturally specific information about the values, opinions, behaviours, and social contexts of particular populations. This study will aim to utilize both primary and secondary data sources. The primary data sources will consist of a structured questionnaire, face to face interviews or discussions and telephone interviews. Secondary data will be collected through books, journals, periodicals, and articles on peace keeping.

The target population will include various key experts in universal jurisdiction, especially in Africa. People to be interviewed include Legal experts such as Dr Bizimana Jean Damascene who is an expert in International Law and Secretary General of the National Commission for the Fight against Genocide (CNLG), the director in charge of Europe in the Ministry of foreign affairs, the minister or permanent secretary in Ministry of justice and the prosecutor general in Rwanda.

The sampled size will be the key players mentioned – who have the necessary knowledge in the area of study, and who will be available at the time of the study. They will act as a true representative of the entire target group. In order to ensure the validity of the instruments used for data collection, they will be subjected to scrutiny in order to eliminate bias. The information that will be obtained will be cross-checked with independent sources for fair assessment and authenticity.

Thematic analysis will be performed through the process of coding in main phases (topics) under discussion, to create established, meaningful patterns. These phases will entail; familiarization with the data, generating initial codes, searching for themes among codes, reviewing themes, defining and naming themes, and then producing the final draft, which will become final report of the study.

1.9 Chapter Outline

Chapter One: Introduction to the Study

This chapter makes up the introduction. It highlights the background to the study and also makes a theoretical framework of the issues to be addressed and particularly, what is to be investigated, why and how. It also has other components such as problem statement, objectives, literature review, justification and it ends with the chapter outline of the study.

Chapter Two: The Principle of Universal Jurisdiction and its application

The chapter aims to illustrate through cases handled under Universal jurisdiction principle, its importance as a powerful instrument in the international system protecting human rights and fighting against impunity. However, the exercise of universal jurisdiction by one State can be abused and infringe the sovereignty and sovereign equality of another State and, thus destabilizing international relations.

Chapter Three: The application of Universal Jurisdiction Principle and Rwanda

This chapter will illustrate using cases. actors and practices in which universal jurisdiction has been cited as legal justification for prosecuting Rwandan citizens outside of Rwanda and in spite of The International Criminal Tribunal for Rwanda (ICTR).

Chapter Four: The impact of the application of Universal Jurisdiction on Rwanda's international relations

This chapter will present the results of the study. The main purpose will be to show what was observed, analysed and interpreted. The findings will be coined to the purpose of the study and are analysed within the theoretical framework. It will presents the collected data in a more organized and summarized way.

Chapter Five: Conclusion and Recommendations

This chapter will sum up the major findings in line with the objectives and hypotheses of the study. It will act as the final and ultimate verdict on the issues addressed in the research. It makes several key conclusions and important recommendations on the way forward.

CHAPTER TWO

THE PRINCIPLE OF UNIVERSAL JURISDICTION AND ITS APPLICATION

This chapter will provide an overview of different cases handled under the universal jurisdiction principle across the globe and examine its importance in the international system as well as the diplomatic and political impact caused by its application.

2.1 A conceptual analysis of the application Universal Jurisdiction

In international law, there are five fundamental principles of jurisdiction namely territoriality; nationality; passive personality; protection principle and universality. The first four forms of jurisdiction are attached to territorial or national link with the prosecuting state, while universal jurisdiction does not have limitations, thus making it the most expansive, but also the least employed of these jurisdictional justifications.[63] The principle of universal jurisdiction is a legal principle allowing a state to bring criminal proceedings in respect of certain crimes, irrespective of the location of the crime and the nationality of the perpetrator or the victim'.[64] The principle derogates from the ordinary rules of criminal jurisdiction, which requires a territorial or personal link with the crime, the perpetrator or the victim. But the rationale behind it is broader: 'it is based on the notion that certain crimes are so harmful to international interests that states are entitled to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim'.[65]It is assumed that every state has

[63] Joyner, Christopher C. (2005) International Law in the 21st Century: Rules for Global Governance (Lanham: Rowman & Littlefield) 149–151.
[64] Randall, Kenneth C. (1988) Universal Jurisdiction Under International Law,^ Texas Law Review, pp. 785–8
[65] Mary Robinson, 'Foreword', The Princeton Principles on Universal Jurisdiction, Princeton University Press, Princeton, 2001, p. 16.

an interest in exercising jurisdiction to combat egregious offenses that states universally have condemned."[66]

It is important to recognize that the primary actor in applying this principle is the state, via its national legal infrastructure. International tribunals, whether they are ad hoc in nature or permanent, tend not to fulfill the basic requirements of universality[67]. Ad hoc tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are predicated on the notion of universality but remain limited in their jurisdictional capacity to a particular territory. Therefore, these courts may exercise their jurisdiction over universally defined crimes, but the establishing states or institution (in the case of the ICTY and ICTR, the United Nations Security Council) has prescribed a territory in which the offense must have occurred thus creating a territorial limitation to the legal proceedings[68].

In the case of a permanent court, such as the International Criminal Court (ICC), only the UN Security Council can grant the court such jurisdictional reach. In all other cases (meaning those referred by the prosecutor or state party), certain preconditions must be met prior to the court exercising its jurisdiction. These preconditions establish the territorial jurisdiction of the court and limit the application of its power.[69] In short, Article 13 of the Rome Statute does not give the ICC universal jurisdiction because a state party cannot refer any situation to the prosecutor and the prosecutor cannot investigate any situation. Spatial and national considerations determine where and when the court may exercise its power. As stipulated in

[66] Randall, Kenneth C. (1988) Ibid, p 788
[67] Orentlicher, Diane F. (2006) BThe Future of Universal Jurisdiction in the New Architecture of Transnational Justice,^ in Macedo (ed.), Universal Jurisdiction, 214–239.
[68] United Nations Security Council. (1993) Resolution 827, available at: http://www.un.org/icty/legaldoc-e/basic/statut/S-RES-827_93.htm.; United Nations Security Council. (1994) Resolution 955, available at: http://www.un.org/ictr/english/ Resolutions/955e.htm.
[69] Eric K. Leonard 2015, Global Governance and the State: Domestic Enforcement of Universal Jurisdiction, Springer Science Business Media Dordrecht

Article 12, the ICC has jurisdiction if the crime was committed within the territory of a party or on board a vessel or aircraft that is registered within a member state. The ICC's jurisdiction also extends to a situation in which the perpetrator of the crime is a national of a state that is party to the Rome Statute. Therefore, only in instances of UN Security Council referral, such as the Darfur case against President Bashir and the Libya case against Kaddafi, does the ICC reflect the principle of universality.

2.1.1. Historical background of the application of the principle of Universal jurisdiction

Universal jurisdiction as a concept in international law, was most commonly used to explain the illegal status of piracy, since the time of the Roman Empire. It allowed any court in any country to capture pirates anywhere, seize their possessions, and prosecute them for their crimes. These crimes were likely to have occurred on the high seas against foreign interests; that is, without a link to a particular court. A national court was regarded as an agent of world order, serving the common interest in the suppression of piracy, and its proceedings were not considered an encroachment upon the sovereign rights of any state.[70]

Initially, universal jurisdiction targeted acts committed only in areas outside State sovereignty, and this did not cause any problem. It was a matter of a customary principle, which attributed universal jurisdiction to all the States towards piracy in high seas. Thus, a State of the monopoly of coercion on its territory could not "*commit acts of coercion on the territory of another State*"[71]. The extraterritorial jurisdiction was justified by three classical principles: that of the capacity to bring proceedings, to defend proceedings or jurisdiction based on the

[70] John Borneman 2004, The Case of Ariel Sharon and the Fate of Universal Jurisdiction, (Editor) Princeton, NJ: Princeton Institute for International and Regional Studies of Princeton University.
[71] See the Case of the Corfu, IC J Recueil, 1949, p.18.

nationality of the suspect and protection of the entire humanity against the above-mentioned crimes.

The idea of universal jurisdiction goes as far back as the Roman times, where the Institutional Treatise published under the authority of Roman Emperor Justinian (c. 482-565); state that all nations are governed partly by their own particular laws, and partly by those laws which are common to all, those that natural reason appoints for all mankind. A Dutch Jurist Grotius expounding on the classical understanding of universal law accessible by reason, initiated that solid foundation of universal jurisdiction in modern international law.[72] Hence crimes prosecuted under universal jurisdiction are considered crimes against all, too serious to tolerate jurisdictional arbitrage.

Historically, the application of universal jurisdiction started its journey with piracy and skipped directly to Nuremberg, in between occasionally making a brief reference to slavery.[73] Nuremberg, usually acknowledged as the birth of the modern form of universal jurisdiction, is followed by a few references to events that have become milestones or precedents since World War II, such as the drafting of the Geneva Conventions, the development of multilateral human rights instruments, and the Eichmann Trial. The most notable and influential precedent for universal jurisdiction were in the mid-20th century Nuremberg Trials. U.S. Justice Robert H. Jackson then chief prosecutor, famously Slated that the International Military Tribunal could prosecute Nazi "crimes against the peace of the world" even though the acts might have been perfectly legal at the time in Fascist Germany.[74] The universal jurisdiction allowed Israel to try Adolf Eichmann in Jerusalem in 1961. Treaties such as the Geneva Conventions of 1949 and the

[72] Louis Henkin, "*How Nations Behave" quoted in William W. BurkeWhite*, "A Community of Courts: Toward a System of International Criminal Law Enforcement" (2002), p. 414.
[73] Madeleine H. Morris, "*Universal Jurisdiction in a Divided World: Conference Remarks*" 35 New Eng. L. Rev. 337, 339350 (2001); p. 3.
[74] Ibid, (2001); p. 3.

United Nations Convention against Torture of 1984, which requires signatory states to pass municipal laws that are based on the concept of universal jurisdiction. widespread international acceptance of the principle of universal jurisdiction.[75]

Crimes against humanity also obtained status in customary international law with the UN affirmation of the Nuremberg Principles. One of the milestones in the prosecution of crimes against humanity is the famous Eichmann trial in Jerusalem in 1962, based on the principle of universality. Significantly. no other country that also could have raised jurisdictional claims over Eichmann, such as Germany or Poland, protested to Israel's use of universal jurisdiction in his case.[76] Protest was limited only to Argentina over the matter of his abduction. For support, the Eichmann court used the postwar trials as precedents as well as making the similar analogy to piracy.

The end of the Cold War and its bipolar framework further opened up the landscape for universal jurisdiction prosecutions. Both ideas of universal jurisdiction and of an international criminal court are associated with what Fukuyama described as "end of history, end of politics, and end of the Westphalian State".[77] In a post ideological and increasingly borderless world, deterritorialization of criminal justice became conceivable for "gross human rights violations" (and "terrorism").[78] A globalized world called for global jurisdiction over universal wrongs. During the 1990s, various investigations and prosecutions were conducted against Nazis, former Yugoslavs, Rwandans, and a few others.[79] The application of universal jurisdiction was

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[75] Ibid, (2001); p. 3.
[76] Georges AbiSaab, "*The Proper Role of Universal Jurisdiction*" (2003), p. 601.
[77] F. Fukuyama, The End of History and the Last Man, New York: Free Press, 1992.
[78] Luc Reydams, The Rise and fall of Universal Jurisdiction, Working Paper No. 37 - January 2010
[79] Antonio Cassese, "*When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v Belgium Case*" (2002), p. 113.

reinforced by the the creation of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for Yugoslavia (ICTY), and other national courts.

2.1.2 The application of Universal Jurisdiction by states

As of 1 September 2012, at least 118 (approximately 61.1%) UN member states have included genocide as a crime under national law and at least 94 (approximately 48.7%) UN member states have provided for universal jurisdiction over genocide. In addition, at least 25 (approximately 13.0%) UN member states, although they have not expressly included genocide in their national law have provided their courts with universal jurisdiction over ordinary crimes, which means that they can try persons based on universal jurisdiction for at least some conduct, such as murder, assault, rape and abduction, that if committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, could amount to genocide.[80] Although some definitions of genocide under national law are broader than in the Genocide Convention, by including more protected groups and more prohibited acts, other definitions fall short of international law by excluding certain protected groups or omitting certain prohibited conduct.[81]

Although the principle of universal jurisdiction is widely supported, there are many problems and limitations in its practical application. Not least among these is the element of the political in such cases. Many African states are concerned that universal jurisdiction is not being

[80] O'Keefe, Roger, "Universal Jurisdiction. Clarifying the Basic Concept", *Journal of International Criminal Law*, (2) 2004, pp 735-760.
[81] Reydams, Luc, "Universal Jurisdiction- International and Municipal Perspectives, 2003, *Oxford University Press*, 288 pages.

applied impartially and objectively by European states, and these concerns have led to a UN review of the scope and application of the principle of universal jurisdiction.[82]

Different states have applied the principle of Universal Jurisdiction over the years, some cases were handled successfully without causing diplomatic problems with defendants' states, and others have created diplomatic tensions leading to the termination of diplomatic relations. In our research, we have selected four states that have most applied the principle to illustrate the impact it had on their relationship with defendants' states. Those are Belgium, Spain, France, and Canada.

2.1.2.1. Belgium

In 1993, the Belgian legislature passed a law (The Act Concerning the Punishment of Grave Breaches of the Geneva Conventions and their Additional Protocols) that provided Belgian courts with jurisdiction over 20 specific war crimes regardless of where they were committed, who committed them, or who the victim was. In essence, the 1993 statute implemented the Geneva Conventions and its two Protocols into Belgian domestic law and although it is not imperative that a state's domestic legislation contains a universal jurisdiction law, it certainly strengthens the state's right to prosecute. This was a first step towards universal jurisdiction although it remained limited in the crimes covered (only war crimes) in relation to the crimes considered universally abhorrent. The 1999 amendment broadened the original act to cover the crime of genocide and crimes against humanity (now titled The Act Concerning Grave Breaches of International Humanitarian Law).[83]

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[82] Roht-Arriaza, Naomi: "Universal Jurisdiction: Steps Forward, Steps Back", Leiden Journal of International Law, 17 (2004) pp 375-389.

[83] Sienho Yee, *The Tu Quoque Argument as a Defence to International Crimes, Prosecution, or Punishment*, 3 Chinese JIL (2004), 87-133.

In the application of universal jurisdiction, Belgium handled two categories of cases: those related with Rwandan fugitives that were accused of genocide and cases involving officials from others countries whose cases were filed by victims or human rights. The former were handled without any diplomatic problem while the latter created diplomatic tensions between Belgium and the defendants' states.

2.1.2.1.1 Non- politicized Cases

One of the most prominent of these is Belgium's use of its universal jurisdiction law to prosecute four Rwandan citizens for war crimes committed in the Butare region of Rwanda. Over an eight-week period in the spring of 2001, a Belgian national court sat in judgment over Alphonse Higaniro, Vincent Ntezimana, Sister Gertrude (Consolata Mukangano), and Sister Maria Kisito (Julienne Mukabutera) for crimes committed during the Rwanda genocide. None of the accused was a Belgian citizen, none of the victims were Belgian citizens, and none of the crimes were committed on Belgian territory. This truly was a case of universal, not simply extraterritorial, jurisdiction. The trial itself began in the spring of 2001 and lasted for 8 weeks. The basis for the case was the original (1993) war crimes legislation. Although the 1999 legislation could have been employed, the fact that all of the allegations were considered war crimes made such measures unnecessary. The allegations brought against the defendants encompassed a broad range of crimes including: the establishment of ethnic lists, the drafting of document employed to incite mass killings, the passing of provisions to the Interhamwe militia, the delivery of Tutsis for killing, the failure to protect refugees, and personal responsibility for killings[84]. In the end, all four defendants were found guilty and sentenced to between 12 and 20 years in prison.

[84] Reydams, Luc.(2003) Belgium's First Application of Universal Jurisdiction: the Butare Four Case,^ Journal of International Criminal Justice, 1, 428–436

The basis for the case was the original (1993) war crimes legislation. Although the 1999 legislation could have been employed, the fact that all of the allegations were considered war crimes made such measures unnecessary. The allegations brought against the defendants encompassed a broad range of crimes including: the establishment of ethnic lists, the drafting of document employed to incite mass killings, the passing of provisions to the Interhamwe militia, the delivery of Tutsis for killing, the failure to protect refugees, and personal responsibility for killings.[85] In the end, all four defendants were found guilty and sentenced to between 12 and 20 years in prison.

2.1.2.1.2 Politicized Cases

In January 1999, Belgian and Congolese nationals who had sought refuge in Belgium filed a complaint and asked to be civil parties against the leaders of the Democratic Republic of the Congo for war crimes and crimes against humanity allegedly committed in the territory of the DRC since 1997. An arrest warrant was issued in 2000 under universal jurisdiction law against Abdoulaye Yerodia Ndombasi, the then Foreign Affairs Minister of the Democratic Republic of the Congo. On 11 April 2000, the Belgian investigating judge issued an international arrest warrant against Abdulaye Yerodia Ndombasi, the DRC minister for foreign affairs, for allegedly having made speeches inciting racial violence in August 1998.[86] The arrest warrant was challenged before the International Court of Justice on 17 October 2000, in the case entitled "Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)". The DRC instituted proceedings against Belgium before the International Court of Justice, arguing that, in its purported exercise of universal jurisdiction, Belgium had violated the principle of sovereign

[85] Idem

[86] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v .Belg.), 2002 ICJREP .3 (Feb. 14)[hereinafter Arrest Warrant] (Higgins, Kooijmans, & Buergenthal, JJ., joint sep. op.). www.law.georgetown.edu/academics/law journals/gjil/recent/upload/zsx00315000803.PDF accessed on 12/01/2016.

equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United. Under which article a state cannot exercise its authority on the territory of another State. Additionally, DRC complained about the violation of the diplomatic immunity of minister for foreign affairs of a sovereign state.[87]The ICJ as a whole concentrated on the issue of immunity under universal jurisdiction and the Court concluded that, given the nature and purpose of the arrest warrant, its mere issuance violated the immunity that Yerodia enjoyed as the incumbent DRC minister for foreign affairs. The Court held that Belgium was required to cancel the warrant and to inform the relevant authorities that it had done so.[88]

The case highlighted the likely conflict between holding individuals accountable for heinous international crimes and preserving sovereign immunity. Immunity was recognized for incumbent foreign ministers, as long as he is still holding that post. The Court's reasoning was the importance of maintaining proper international relations and respecting the function of a foreign minister. According to the court judgment, immunity would cover all acts irrespective of whether they were international criminal acts. Immunity could also be lifted by the defendant's state or before an international criminal tribunal. The customary international law status of sovereign immunity could not be trumped by the emerging state practice and international law governing international crimes that preclude sovereign immunity. The case is also significant for the discussion by several judges on universal jurisdiction as well as remedies available to the parties. For the latter, the Court called upon Belgium to withdraw the arrest warrant since its mere issuance caused a moral injury to the Democratic Republic of Congo, therefore requiring

[87] Charles Chernor Jalloh, Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction, 21 CRIM. L.F. 1, 3–4 (2010)
[88] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3, 45 (Feb. 14). http://www.icj-cij.org/docket/files/121/8136.pdf., accessed on 21/11/2016.

restitution. On universal jurisdiction, it was conceded by most of the judges in the majority that its status was not reflective of customary international law.

The ICJ considered state official immunity in Arrest Warrant, stating that: *"certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister of Foreign Affairs, in addition to diplomatic and consular agents, enjoy immunity from civil and criminal prosecution by foreign states while they hold office, such that, issuing a warrant for the official's arrest would violate the issuing state's obligations to the official's state."*[89]

As a result of the success of the "Butare four cases" again, other leaders who have committed grave crimes have been pursued before Belgian courts. The Case of Ariel Sharon illustrates an effort to impose criminal accountability on an individual accused of heinous crimes. Accused of complicity in the 1982 massacres at the Sabra and Shatila Palestinian refugee camps, Ariel Sharon case was initiated in Brussels by survivors of the massacres, taking advantage of a 1993 Belgian law that allowed such criminal actions to proceed on the basis of universal jurisdiction. That is, when there is absence of any link between the country where the court is situated and the locus of the crime and its victims.

In this case, Palestinians of varying nationality resident in Lebanon in 1982 used the Belgian legal system to charge Israeli individuals with crimes committed on Lebanese territory more than ten years before the Belgian law was adopted. Israel outraged by the idea that the behavior of their elected leader would be legally challenged in a foreign court of law, disrupted diplomatic relations and threatened Belgium with adverse economic consequences if it persisted with the legal proceedings. Despite these rumblings, the proceedings went forward. It is

[89] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3, 45 (Feb. 14). http://www.icj-cij.org/docket/files/121/8136.pdf., accessed on 21/11/2016.

mportant to recall that Israel basing on universal jurisdiction used its national judicial tribunals o prosecute and punish individuals for war crimes committed in a foreign country by a non-sraeli citizen in the previously aforementioned Eichmann case. Whilst it is true that many of the ictims of Eichmann's crimes were either Jews or Israelis, it should also be noted that the crimes n question were committed more than fifteen years prior to the trial, and that the defendant was rought before the Israeli tribunal after being illegally abducted in Argentina by Mossad agents.

During the same period, another controversial initiative launched in the Belgian legal ystem, was the indictments brought against American high-level officials then still in overnment for their roles in both the First Gulf War of 1991 and the Iraq War. The indictment f George H.W. Bush and American military and political officials in Brussels including former JS Secretary of State Henry Kissinger and the then Secretary of State Colin Powell prompted an xplicit American reaction. Through the Secretary of Defense Donald Rumsfeld, USA threatened o move the headquarters of NATO away from Brussels and to take punitive economic action if elgium did not immediately abandon criminal proceedings against foreign leaders. He nnounced, "the United States would refuse to pay for a new NATO headquarters building in elgium and would consider barring U.S. officials from traveling to meetings in Belgium unless t rescinded the universal jurisdiction law, because Belgium appears not to respect the overeignty of other countries."[90]

Due to those political pressures, Belgium backed down and initiated an amendment of the ct in April 2003, removing the right of victims to initiate a universal jurisdiction prosecution, nd introducing immunity provisions in accordance with international law.[91] On 23 September

[90] Steven R. Ratner, Belgium's War Crimes Statute: A Postmortem, 97 AJIL 888 (2003); http: //www. defense.gov / ranscripts/transcript.aspx?transcriptid2742); see also Walleyn, supra note 139, at 403.
[91] John Borneman 2004, The Case of Ariel Sharon and the Fate of Universal Jurisdiction, (Editor) Princeton, NJ: rinceton Institute for International and Regional Studies of Princeton University

2003, Belgium's highest court on dismissed war crimes complaint against Prime Minister Ariel Sharon and the case against former U.S. President George Bush and Secretary of State Colin Powell and the Israeli embassy in Brussels released a statement saying, "the ruling will enable us to rehabilitate the relations between the two nations."[92]

2.1.2.2. Spain

Spain is one the countries that handled cases based on universal jurisdiction that attracted diplomatic threats from the defendants' states and has compelled it to change its legislation about the principle. Those cases include the Pinochet case, the President of China and other Chinese officials on alleged Tibet genocide, and the case of war crimes against Rwandan senior officials.

On the Pinochet case, the former president of Chili travelled to London in September 1998 for back surgery. By that time, the Spanish Judge Garzon had started investigations on atrocities committed by him in Chile while president. When he learnt about Pinochet presence in UK, the Spanish judge consulted with British police, issued an international arrest warrant charging him with the crimes of genocide and terrorism for the murder of Spanish citizens in Chile, and ordered his pretrial detention. Following the Spanish judge request, Scotland Yard arrested Pinochet without informing Home Secretary Jack Straw.[93] British public opinion was divided over the action; the Conservatives criticized it and the left applauded it, the year-old Blair administration having vowed to implement an "ethical foreign policy." In Spain, Garzon's investigation and extradition enjoyed strong popular support, which the conservative Popular Party government clearly recognized. In both Britain and Spain, political leaders concluded that the most prudent course of action was to leave this issue to the courts. However, shortly

[92] The Associated Press and Haaretz Service Sep 24, 2003, http://www.haaretz.com/news/belgium-s-highest-court-throws-out-case-against-sharon-1.101075 accessed on 11/01/2016

[93] Geoffrey Bindman, UK Prosecutions for Crimes Under International Law, in JUSTICE FOR CRIMES AGAINST HUMANITY 365, 370 Mark Lattimer & Philippe Sands eds., 2003

afterward the political climate changed dramatically, as Chile's governing center-left coalition became increasingly concerned that Pinochet's arrest was jeopardizing its chances of carrying the upcoming presidential election. Spain's prime minister Jose´ Marı´a Aznar had gone on record as saying that he did not want "Spain to become an International Criminal Tribunal." Moreover, over time the Chilean government had moved from protesting the arrest of Pinochet as an attack on its sovereignty to promising that he could be tried in Chile. Returning Pinochet to Chile would thus be less politically costly for the Labor government than it would have been earlier in the extradition process. It is believed that the Chilean, Spanish, and British governments struck a deal to release Pinochet on humanitarian grounds.[94] A British appointed a medical team to examine the former president, and concluding that he was not fit to stand trial and that no change in his condition could be expected. Home Secretary Straw announced the termination of the extradition proceedings on 2 March 2000, and Pinochet returned to Chile.[95]

In a second case against Chinese defendants, on 28 June 2005, two NGOs and an individual filed a complaint and asked to be considered, respectively, people's prosecutors and a private prosecutor against former president Jiang, Li Peng, and six other Chinese officials for their alleged participation in genocide in Tibet. Through its embassy in Spain, China denounced the decision as interference in its internal affairs.[96] On April 9, 2009, investigating judge Ismael Moreno requested that the Chinese government interrogate Jiang and six other defendants on the charges of genocide and torture in Tibet since 1950. The Chinese Embassy responded by demanding that the Spanish government take "immediate and effective measures "directed to the

[94] idem
[95] The Pinochet Papers 183, 184 (Reed Brody & Michael Ratner eds., 2000) in MÃximo Langer, the diplomacy of universal jurisdiction: the political branches and the transnational prosecution of international crime. http://www.jstor.org/stable/10.5305/amerjintelaw.105.1.0001, accessed on 13/09/2015.
[96]Christine A E Bakker, Universal Jurisdiction of Spanish Courts over Genocide in Tibet: Can It Work? 4J. INT'L CRIM. JUST. 595, 599 (2006).

rapid dismissal of the case,"to avoid possible obstacles and damages to the bilateral relations between China and Spain."[97]

In February 2008, the Spanish investigative magistrate Fernando Andreu Merelles issued an indictment alleging 40 current and former high-ranking Rwandans military officers to have committed serious crimes notably, genocide, crimes against humanity, war crimes, and terrorism. It was on the basis of this indictment that General Karenzi Karake was arrested in UK on 20 June 2015 and released on 10 august 2015. The case was later on dismissed by the Spanish Supreme court.

2.1.2.3. Canada

Canada was the first state to adopt implementing legislation following its ratification of the ICC Statute. Adopted in 2000, the Crimes against Humanity and War Crimes Act was tested for the first time in the Munyaneza case. In May 2009, in collaboration with the Rwandan Justice, Canada court convicted Munyaneza on genocide, crimes against humanity and war crimes charges. In October the same year, he was found guilty and sentenced to life imprisonment. Munyaneza appealed his case, but in May 2014 his 25-year sentence was upheld.[98]

2.1.2.4. United Kingdom

In United Kingdom, only two defendants have been prosecuted and tried in England and Wales pursuant to the universal jurisdiction provisions. The first case under the War Crimes Act was Anthony Sawoniuk's case who was tried at the Old Bailey in London in 1999 on charges of murder of Jews in his German-occupied hometown during World War II. The jury found him

[97] China pide "medidas efectivas" para que la Audiencia abandone el caso sobre el Tı'bet,E L PA´ IS, May 7, 2009, cited by Maximo Langer, the diplomacy of universal jurisdiction

[98] Fannie Lafontaine, Canada's Crimes against Humanity and War Crimes Act on Trial An Analysis of the Munyaneza Case. http://www.ccij.ca/content/uploads/accessed on 22/01/2016

guilty of one charge by unanimous decision and of the other by a ten to one majority.[99] The other universal jurisdiction case involving torture was against Afghan warlord Faryadi Sarwar Zardad. After the Soviet Union withdrew from Afghanistan, Zardad, who controlled a checkpoint on the route between Kabul and Pakistan between 1992 and 1996, was said to have terrorized, tortured, imprisoned, and blackmailed civilians on this route.[100]

2.1.2.4. France

France has tried two cases under universal jurisdiction provisions so far where defendants were condemned in abscentia, other cases are pending including the case against Rwandans officials. The two cases have raised diplomatic tensions between France and defendants' state. The first case was of Captain Ely Ould Dah, an intelligence officer from the former French colony of Mauritania. Ould Dah was prosecuted for the alleged torture in 1990–1991 of black African members of Mauritania's military suspected of inciting a coup d'état. In August 1998, when Captain Ould Dah, went to France for military training, the Federation internationale des ligues des droits de l'homme (FIDH) and the Ligue des droits del'homme (LDH) submitted a simple complaint against him and the prosecutor requested a judicial investigation. Following interrogation by an investigating judge, Ould Dah was placed in pre-trial detention. Mauritania responded by expelling French citizens working there in lieu of military service, repatriating the Mauritanian military trainees in France, and reestablishing a visa requirement for French citizens entering the country. The arrest also worried military or security service members of some former French colonies in Africa who feared a similar fate if they went to France, which

[99] Maximo Langer, the diplomacy of universal jurisdiction: the political branches and the transnational prosecution of international crimes Source: The American Journal of International Law, Vol. 105, No. 1 (January 2011), pp. 1-49

[100]Maximo Langer Ibid

disturbed military cooperation with those countries. [101] When the French minister of foreign affairs sent the prosecutor a note stressing the dangers of deterioration in French-Mauritanian relations, the court of appeal released the defendant under house arrest and confiscated his passport. Few days after, the defendant, with the complicity of French authorities, returning Mauritania and was welcomed home as a hero.[102]France went ahead and tried the defendant in abscentia, convicted, and sentenced him to ten years in prison on 1 July 2005.

The second universal jurisdiction case tried in France concerned Khaled Ben Said. vice consul of Tunisia in Strasbourg, France by the time he was sued. According to complainant. Zoulaikha Majouhbi, Ben Said who was the chief of a Tunisian police station at the time of the alleged offense, participated in her torture and interrogation in 1996 at the station in connection with an investigation of her husband who was suspected to belong to an illegal religious group. After the prosecutor ordered a police investigation, the police telephoned Ben Said and summon him to appear, but he invoked his diplomatic status and refused the verbal summons. In the following months, Ben Sai¨d fled France back to his country.[103]In January 2002, the prosecutor initiated a formal investigation by an investigating judge and in December 2008, the trial court of Bas-Rhin convicted Ben Said in absentia for complicity in the crime of torture and other barbaric acts and sentenced him to eight years in prison.[104] Tunisia responded by denouncing the decision as an invention of Islamists aimed at undermining the country. The prosecution, which in the end had requested an acquittal of the defendant at trial, challenged the conviction but, on appeal, a

[101] Idem
[102] Mauritanie: Affaire ELY OULD DAH 32 (June2005),at http://www.fidh.org/IMG/pdf/Elyoulddah juin 2005_dpi 200.pdf; cited in MÃ¡ximo Langer, ibid.
[103] Courd'assisesBas-Rhin,Ordonnance de mise en accusation de Khaled Ben Sai¨d,No.J.20009/01(Feb. 16,2007) available at http://www.fidh.org/IMG/pdf/ Bensaid512fr2008_FINAL.pdf [hereinafter L'affaire Ben Sai¨d].
[104] ibid

new court confirmed the conviction and increased the penalty to twelve years of imprisonment.[105]

Among pending cases are two categories of Rwandan cases; the first category is comprised of Rwandans who fled the country after being involved in genocide and seek asylum in France and another case of senior most Rwandan officials who are under international warrant arrest by a French Judge Jean Louis Bruguiere. The complaints against the first category on the role their playing in the mass atrocities against Tutsi and moderate Hutu in 1994 started in 1995. [106] The case involving Wenceslas Munyeshyaka, a Rwandan priest, and Laurent Bucyibaruta, who occupied various leadership positions in Rwanda for having played a role in organizing the 1994 genocide in 1995 and 2000, respectively. The case against Munyeshyaka has been pending for almost fifteen years, while Bucyibaruta's took ten years despite interventions by the French Court of Cassation, the European Court of Human Rights, and the ICTR. These two cases are still open up to date. In both cases, the prosecutor requested a judicial investigation and the defendants were interrogated, put in pre-trial detention, and later released. Another high profile pending case is against Agathe Kanziga Habyarimana, the widow of the formal Rwandan president Juvenal Habyarimana. On 13 February 2007, the Collective of Civil Parties for Rwanda submitted a complaint and asked to be made civil parties against Kanziga Habyarimana, who is exiled in France, for her participation, organization, and direction of the genocide. A judicial investigation was opened on March 13, 2008.

Despite the many complaints against Rwandans in France, none of these cases have reached trial. The situation has been attributed to various factors. First, victims' groups and

[105] FIDH, Condamnation en appel d'un diplomate tortionnaire tunisien (Sept. 25, 2010), at http://www.fidh.org/Condamnation-en-appel-d-un-diplomate-tortionnaire accessed on 09/01/2016
[106] Collectif des parties civiles pour le Rwanda,Affaires, at http://www.collectif parties civiles rwanda.fr/affaires judiciaire.html accessed on 09/01/2016

human rights NGOs have claimed that in the Rwandan cases and in universal jurisdiction cases more generally the French Office of the Prosecutor has not taken the initiative and it is up to the victims to become civil parties to break the prosecutor's inertia. Second, human rights NGOs have claimed that investigating judges in Paris have neither the means nor the time to investigate these complex cases.[107]Complicating the situation is the fact that France provided the Hutu government with support and training. Consequently, French officials have been accused of complicity in the genocide, a charge they have hotly denied.[108]

Another case that created diplomatic tensions between France and Rwanda was the international arrest warrants against nine Rwandan officials issued by the French Judge Bruguiere on 22 November 2006 on the charge of terrorism.[109]The accused persons were all former high-ranking military officers who served in Rwanda Patriotic Army and stopped genocide. On 24 November 2006, in reaction to the arrest warrants the Government of Rwanda breaks diplomatic relations with France and French Ambassador to Rwanda is given 24 hours to leave the country and the rest of diplomats and employs of the Embassy, French school, and cultural center given 72 hours. On 9 November 2008, Rose Kabuye, Rwandan President Paul Kagame's Chief of State Protocol, was arrested by German police officers at Frankfurt airport basing on the judge Jean-Louis Bruguière's arrest warrant. Consequently, on 11 November 2008, Rwanda ordered the expulsion of the German ambassador and recalled its own from Berlin for consultations. Two months after, the two countries announced that they would reappoint ambassadors in the respective countries. The case will be discussed more under chapter three.

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[107] FIDH,Lare'pressiondespre'sume'sge'nocidairesrwandaisdevantlesjuridictionsfranc,aises:Etat des lieux (Apr. 6, 2004), at http://www.fidh.org/La-repression-des-presumes-genocidaires-rwandais

[108] Yves Beigbeder,judging war crimes and torture:french justice and international criminal tribunals and commissions (1940–2005) at 12 (2006).

[109] Tribunal de grande instance[TGI][ordinary court for original jurisdiction]Paris,De'livrancedemandats d'arret internationaux, Ordonnance de soit-communique' 6, No. 97.295.2303/0 (Nov. 17, 2006).

2.1.3 Statistics of cases handled by National Courts based on Universal Jurisdiction Principle

Under this section, the study will examine cases filed before foreign national courts on the universal jurisdiction principle and those tried by those courts to establish the gap between cases presented to courts and those tried.

2.1.3.1 Cases filed before national courts on Universal Jurisdiction basis (1961-2010)

Since the Eichmann trial in 1961 to 2010, 1051 complaints or cases were presented before national tribunals by victims, human rights groups on the four core international crimes in world on universal jurisdiction basis[110]. Out of 1051 cases filed, only 32 have actually been brought to trial. As his research indicates, the largest number of complaints are against Nazi 359 out of which 5 were tried; former Yugoslav 185 cases, 8 tried; Argentine 121 cases, 1 tried; U.S. 55 cases, none tried; Rwandan 44 cases, 11 tried; Chinese 44 cases, none tried; and Israeli 44 cases, none tried. From Langer's findings, it is evident that none of the cases of nationals from powerful countries like US, Chine and Israel was tried under the universal jurisdictions principal, and states that received complaints against them were threatened and forced to change their legislations as it happened to Belgium and Spain.[111]

[110] Maximo Langer, the diplomacy of universal jurisdiction: the political branches and the transnational prosecution of international crime. The American Journal of International Law, Vol 105, No. 1 (January 2011), pp. 1-49 http://www.jstor.org/stable/10.5305/amerjintelaw.105.1.0001, accessed on 13/09/2015.
[111] Maximo Langer, Ibid.

2.1.3.2 Cases tried under Universal Jurisdiction principle (1961 to 2010)

Prosecuting State	Number of cases	Defendant's Nationality
Australia	1	German (Nazi)
Austria	1	Former Yugoslav
Belgium	8	Rwandan
Canada	2	Nazi, Rwandan
Denmark	1	Former Yugoslav
France	2	Mauritanian, Tunisian
Germany	4	Former Yugoslav
Israel	2	German (Nazi)
Netherlands	5	Afghan(3), Congolese, Rwandan
Norway	1	Former Yugoslav
Spain	1	Argentine
Switzerland	2	Former Yugoslav, Rwandan
United Kingdom	2	Afghan, German (Nazi)
Total	32	

Maximo Langer, p 42

As the above table indicates, out of the 32 defendants, 24 have been Rwandans, former Yugoslavs, and Germans that represent three-quarters of all defendants tried under universal jurisdiction. These are cases that that could not affect international relations because defendants were accused of genocide and crimes against humanity and had fled their countries to the prosecuting states. The latter collaborated with their countries of nationality in handling the cases, because they had interests in seeing those fugitives being arrested and tried.

2.1.4 Ad Hoc International Tribunals

The end of the Cold War was marked by a wave of intrastate wars and violent conflicts where war crimes, genocide, and other human rights abuses were committed. In order to put an end to such violations and contribute to the restoration and maintenance of peace, the UN Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) on 11 February 1993 and 8 November 1994 respectively, to prosecute persons responsible for flagrant violations of international humanitarian law.

Ad hoc tribunals are predicated on the notion of universality but remain limited in their jurisdictional capacity to a particular territory. Therefore, these courts may exercise their jurisdiction over universally defined crimes, but the establishing states or institution (in the case of the ICTY and ICTR), the United Nations Security Council has prescribed a territory in which the offense must have occurred thus creating a territorial limitation to the legal proceedings[112].

2.1.4.1. The International Criminal Tribunal for the former Yugoslavia (ICTY)

ICTY is a United Nations court of law dealing with war crimes that took place during the conflicts in the Balkans in the 1990's. The Tribunal was established by the United Nations in May 1993, in response to mass atrocities then taking place in Croatia and Bosnia and Herzegovina. Reports depicting horrendous crimes, in which thousands of civilians were being killed and wounded, tortured and sexually abused in detention camps and hundreds of thousands expelled from their homes, caused outrage across the world, and spurred the UN Security

[112] United Nations Security Council. (1993) Resolution 827, available at: http://www.un.org/icty/legaldoc-e/basic/statut/S-RES-827_93.htm.; United Nations Security Council. (1994) Resolution 955, available at: http://www.un.org/ictr/english/Resolutions/955e.htm.

Council to act.[113]The ICTY was the first war crimes court created by the UN and the first international war crimes tribunal since the Nuremberg and Tokyo tribunals.

Situated in The Hague, the Netherlands, the ICTY has charged over 160 persons. Those indicted by the ICTY include heads of state, prime ministers, army chiefs-of-staff, interior ministers and many other high- and mid-level political, military and police leaders from various parties to the Yugoslav conflicts. Its indictments address crimes committed from 1991 to 2001 against members of various ethnic groups in Croatia, Bosnia and Herzegovina, Serbia, Kosovo and the Former Yugoslav Republic of Macedonia. The key objective of the ICTY is to try those individuals most responsible for appalling acts such as murder, torture, rape, enslavement, destruction of property and other crimes listed in the Tribunal's Statute. By bringing perpetrators to trial, the ICTY aims to deter future crimes and render justice to thousands of victims and their families, thus contributing to a lasting peace in the former Yugoslavia.[114]

2.1.4.2. International Criminal Tribunal for Rwanda (ICTR)

The United Nations Security Council established the International Criminal Tribunal for Rwanda to "prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighbouring States, between 1 January 1994 and 31 December 1994". The Tribunal is located in Arusha, Tanzania, and has offices in Kigali, Rwanda. Its Appeals Chamber is located in The Hague, Netherlands. This tribunal will be discussed more in the next Chapter.

The ICTY and ICTR though had jurisdiction over nationals from sovereign states, this did not cause any diplomatic problem between defendants' states and the UN or the Tribunals

[113] United Nations, The International Criminal Tribunal for the former Yugoslavia, http://www.icty.org/en/about accessed on 11/01/2016
[114] Ibid

because not only it was in the interest of the states to see their fugitives being arrested and tried, but also the tribunals cooperated with the concerned states in conducting investigations.

2.1.5 International Criminal Court

Since the established ad hoc tribunals of Rwanda (ICTR) and the one of former Yugoslavia (ICTY) were to try crimes committed only within a specific time frame and during a specific conflict, there was general agreement that an independent, permanent criminal court was needed.

On 17 July 1998, the international community reached an historic milestone when 120 States adopted the Rome Statute, the legal basis for establishing the permanent International Criminal Court. The Rome Statute entered into force on 1 July 2002 after ratification by 60 countries. The International Criminal Court was established by the Rome Statute of the International Criminal Court, so called because it was adopted in Rome, Italy on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.[115]

In the case of the International Criminal Court (ICC), only the UN Security Council can grant it the universal jurisdiction competence. In all other cases (meaning those referred by the prosecutor or state party), certain preconditions must be met prior to the court exercising its jurisdiction. These preconditions establish the territorial jurisdiction of the court and limit the application of its power. In short, Article 13 of the Rome Statute does not give the ICC universal jurisdiction because a state party cannot refer any situation to the prosecutor and the prosecutor cannot investigate any situation. Spatial and national considerations determine where and when the court may exercise its power. As stipulated in Article 12, the ICC has jurisdiction if the crime

[115] International Criminal Court https://www.icc-cpi.int/ accessed on 12/02/2016

was committed within the territory of a party or on board a vessel or aircraft that is registered within a member state. The ICC's jurisdiction also extends to a situation in which the perpetrator of the crime is a national of a state that is party to the Rome Statute. Therefore, only in instances of UN Security Council referral, such as the Darfur case and the Libya case, does the ICC reflect the principle of universality.[116]

On 31 March 2005, the UN Security Council referred the situation regarding Sudan, a non-member state of the ICC. to the ICC Prosecutor, Luis Moreno-Ocampo, pursuant to Article 13(b) of the Rome Statute.[117] On June 1, 2005, the prosecutor elected to investigate the situation in accordance with Article 53 of the Rome Statute. After investigating, Moreno-Ocampo requested arrest warrants for six individuals involved in the Darfur situation, including President Al Bashir.[118] Out of the six, five individuals were indicted. Two of the five appeared at The Hague voluntarily, the other three remain at large. On 14 July 2008, Moreno-Ocampo requested an arrest warrant for President Al Bashir for genocide, crimes against humanity, and war crimes against members of the Fur, Masalit, and Zaghawa groups from 2003 to 2008. President Al Bashir was indicted on 4 March 2009 as an indirect perpetrator, for having used the Sudanese military as well as Sudan's Government to carry out criminal activity.[119] He was indicted for committing five counts of crimes against humanity and two counts of war crimes; however, the ICC did not find that enough evidence existed to indict him for genocide. President Al Bashir was the first sitting head of state to be issued with an arrest warrant by the ICC. On 5 March 2009, the ICC requested that Sudan arrest and surrender President Al Bashir, the next day,

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[116] Idem

[117] Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 1 1 (March 4, 2009), http://www.ice-cpi.int/iccdocs/doc/doc639096.pdf

[118] Situation in Darfur, Sudan, INTERNATIONAL CRIMINAL COURT, http://www.icc cpi.int/menus/icc/situations%20and%20cases/situations/ situation%20icc%200205

[119] Prosecutor vs Al Bashir, Case No. ICC-02/05-01/09, available at http://212.159.242.180/iccdocs/doc/doc642283.pdf accessed on 12/03/2013

pursuant to Article 89(1) of the Rome Statute, the Court requested that member states arrest and surrender President Al Bashir if presented with the opportunity to do so.[120] Despite that appeal to ICC member states, Bashir has avoided arrest despite travelling to countries that have signed up to the ICC statute such as Tchad, Kenya and South Africa.

The issue of the international arrest warrant against Sudan's incumbent President Al Bashir has prompted African political leaders to close ranks. The AU has formally requested the UN Security Council to use its powers under Article 16 of the Rome Statute in order to suspend the process against Al Bashir, arguing that the prosecution might impede the prospects for peace in Sudan.[121]

Another sitting African President that was issued with a arrest warrant was the Libyan President Muammar al Kadhafi. On 27 June 2011, ICC judges issued arrest warrants for, his son Sayf al Islam al Qadhafi, and intelligence chief Abdullah al Senussi for crimes against humanity, including murder and "persecution." In his application for the warrants, filed on May 16, the Prosecutor alleged that Qadhafi "conceived and implemented, through persons of his inner circle" such as Sayf al Islam and Al Senussi, "a plan to suppress any challenge to his absolute authority through killings and other acts of persecution executed by Libyan Security Forces. They implemented a State policy of widespread and systematic attacks against a civilian population, in particular demonstrators and alleged dissidents."[122]

The indictment of Uhuru Kenyatta by the ICC, in connection with post-election ethnic violence in 2007-08 in Kenya, in which 1,200 people died, when he was the deputy prime minister and minister of finance, created discontent among AU member states. He was accused

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[120] Idem

[121] Assembly of the AU, Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Art.16 ICC.

[122] International Criminal Court Cases in Africa: Status and Policy Issues, July 22, 2011 https://www.fas.org/sgp/crs/row/RL34665.pdf, accessed on 11/01/2016.

of the crimes against humanity of murder (article 7(l)(a)); deportation or forcible transfer (article 7(l)(d)); rape (article 7(l)(g)); persecution (articles 7(l)(h)); and other inhumane acts (article 7(l)(k)) of ICC statute. Mr Kenyatta was the first head of state to appear before the ICC, after he was charged in 2012.

Following President Uhuru's indictment, the Ethiopian Prime Minister and AU chairperson Hailemariam Dessalegn commented in the AU the summit that the ICC's cases against the Sudanese and Kenyan presidents could hamper peace and reconciliation efforts in their countries. "The unfair treatment that we have been subjected to by the ICC is completely unacceptable," he said. Addressing the summit, Mr Kenyatta accused the court of bias and "race-hunting". "The ICC has been reduced into a painfully farcical pantomime, a travesty that adds insult to the injury of victims. It stopped being the home of justice the day it became the toy of declining imperial powers."[123]

On 5 December 2014, the Prosecutor filed a notice to withdraw charges against Mr. Kenyatta, and it was on 13 March 2015 that the Trial Chamber V (B), after noting the Prosecution's withdrawal of charges against Mr Kenyatta, decided to terminate the proceedings against him.[124]

The ICC's investigations in Africa have stirred concerns over African sovereignty, in part due to the long history of foreign intervention on the continent. President Paul Kagame of Rwanda, a country which is not a party to the Court, has portrayed the ICC as a form of

[123] African Union urges ICC to defer Uhuru Kenyatta case, http://www.bbc.com/news/world-Africa-24506006 accessed on 12/02/2016.
[124] ICC-01/09-02/11 Trial, The Prosecutor v. Uhuru Muigai Kenyatta, www.icc cpi. int/en_menus /icc/situations %20and% 20cases

"imperialism" that seeks to "undermine people from poor and African countries, and other powerless countries in terms of economic development and politics."[125]

2.2 Politicization of the principle

There is credence to the claim that more powerful states are less likely to have their nationals and officials subject to extraterritorial prosecutions—and not solely because those states have the capacity to investigate and prosecute alleged international crimes internally. This reality is illustrated by Belgium's experience when a Belgian prosecutor sought to investigate Israeli Prime Minister Sharon for war crimes allegedly committed while he was Israel's defense minister in the 1980s.[126] Belgium held the E.U. presidency when the investigations were proposed, and Israel indicated that it would make it difficult for Europe to broker Middle East peace negotiations successfully if Belgium proceeded.[127] Similarly, investigations in Spain regarding alleged torture by Americans in Guantanamo Bay led to "high-level political controversies between the concerned governments," while "diplomatic steps were immediately taken and the relevant indictments were quashed." Since Belgium and Spain restricted their universal jurisdiction legislation following such controversies, it is undeniable that the identity of the potential accused plays a role in determining whether and how universal jurisdiction is exercised, and the prospects for its use in the future.[128]

The indictment of nine Rwandan officials in France (including Kabuye, the presidential officer of protocol) and the issuance of forty arrest warrants for current or former Rwandan

[125] AFP, "Rwanda's Kagame says ICC Targeting Poor, African Countries," July 31, 2008; Rwanda Radio via BBC Monitoring, "Rwandan President Dismisses ICC as Court Meant to 'Undermine' Africa," August 1, 2008. https://www.fas.org/sgp/crs/row/RL34665.pdf, accessed on 16/02/2016.
[126] David A. Tallman, Universal Jurisdiction: Lessons from Belgium's Experience, in ACCOUNTABILITY FOR ATROCITIES 375, 389–92 (Jane E. Stromseth ed., 2003).
[127] Idem
[128] Charles Chernor Jalloh, Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction, 21 CRIM. L.F. 1, 3–4 (2010)

officials by a Spanish investigative judge sparked the African Union reaction.[129] In Africa, the arrest warrants were perceived as part of a legal campaign against African states and violations of Rwandan sovereignty and territorial integrity.[130] In response to the arrest warrants, Rwanda attempted to initiate proceedings at the ICJ, asking the Court to find that France "has acted in breach of the obligation of each and every State to refrain from intervention in the affairs of other States," and "is under a duty to respect [Rwandan] sovereignty. The case could not proceed because France refused the ICJ's jurisdiction.[131]

In July 2008, the A.U. General Assembly noted that the "abuse" of universal jurisdiction could "endanger international law, order and security" and declared that "the political nature and abuse of the principle of universal jurisdiction by judges from some non-African States against African leaders, particularly Rwanda, is a clear violation of the sovereignty and territorial integrity of these States."[132] It warned that the prosecutions would have a "destabilizing effect" on "the political, social and economic development of States and their ability to conduct international relations," and instructed A.U. member states to not execute the warrants. Denying immunities violates the sovereign equality and territorial independence of states when their officials are brought under the jurisdiction of the indicting state; this "evokes memories of colonialism" for African states. Such indictments may also impair the state's ability to conduct international relations, which would "severely constrain the capacity of African states to discharge the functions of statehood on the international plane."[133]

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[129] Jalloh, Ibid
[130] Julia Geneuss, Universal Jurisdiction Reloaded?: Fostering a Better Understanding of Universal Jurisdiction, 7 J. INT'L CRIM. JUST. 945, 949 (2009).
[131] Idem, p32
[132] African Union (A.U.) Ass., Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, para 5(i)-(ii), A.U. Doc. Assembly/AU/Dec.199(XI) (July 2008).
[133] African Union (A.U.) Ass, ibid.

The African Union response further illustrates the risk of deteriorating international relations when states exercise universal jurisdiction without the support of the more closely connected state(s). This risk becomes higher when the suspect is a current or former high-ranking official. For example in the case of Rwanda, it fully supported Belgium's prosecution in 2001 of the "Butare Four" for crimes committed in Rwanda against Rwandans, and cooperated with the conviction in Canada of a Rwandan for genocide, crimes against humanity, and war crimes in 2009. In contrast. Rwanda contested energetically the arrest warrants issued for its officials in 2008.[134]

The reaction of African Union prompted the international community to address outstanding issues regarding the exercise universal jurisdiction. One of the tangible results was the African Union-European Union Report, which provided a number of recommendations regarding the exercise of universal jurisdiction. Further, due to a Tanzanian request, universal jurisdiction was placed on the U.N. General Assembly agenda in 2009.[135] Pursuant to a General Assembly resolution, the Secretary-General requested member states to provide their views on the scope and application of universal jurisdiction.[136]

It is important to note that given the territorial nature of enforcement jurisdiction, inter-state cooperation is often a prerequisite to achieving justice; without such cooperation, an accused located abroad may avoid prosecution (unless prosecuted in absentia). This is currently the case for President Al-Bashir, who remains at large and against whom some African states are refusing to execute the ICC arrest warrant pursuant to a decision of the A.U. Assembly.[137]

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[134] Jalloh, Ibid
[135] Amnesty International, Universal Jurisdiction: Un General Assembly should support this essential international justice tool (2011).
[136] G.A. Res. 64/117, para 1, U.N. Doc. A/RES/64/117 (Dec. 16, 2009).
[137] A.U. Ass., Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), para 10, http://www.sudantribune.com/ South-Africa-warns-Sudan-s-Bashir,35214.

2.3 Conclusion

This chapter has examined the application of the Universal Jurisdiction across the world and identified concerns in the application of the principle especially when it comes to cases touching citizens from powerful states. The study has also observed that Universal jurisdiction was an important tool to fight impunity and its application on criminal fugitives has been very effective and agreed upon among States. However, the application of universal jurisdiction principle on cases implicating state officials always create diplomatic tensions especially when the defendant state is not involved in the process.

CHAPTER THREE

THE APPLICATION OF THE PRINCIPLE OF UNIVERSAL JURISDICTION AND RWANDA

3.1 Introduction

This chapter will focus on the case study of Rwanda, from the background of the conflict in Rwanda, the post genocide problems related to justice, the establishment of ICTR and the intervention of foreign national courts in bringing fugitives to justice. The study will further explore the impact of the application of universal jurisdiction principle on the diplomatic relations between Rwanda and other states.

3.2 Brief Historical Background of Rwanda

For centuries, Rwanda existed as a centralized monarchy under a succession of Tutsi kings from one clan, who ruled through cattle chiefs, land chiefs, and military chiefs. The King was supreme but the rest of the population, Bahutu, Batutsi and Batwa, lived in symbiotic harmony. In 1899, Rwanda became a German colony and, in 1919, the system of indirect rule continued with Rwanda as a mandate territory of the League of Nations, under Belgium.[138]

In 1933, Belgians carried out a census in which they differentiated the Tutsi from the Hutu and the Twa on the basis of ten-cow-rule and on physical anthropometry such as height and size of the nose. In 1934, the colonial administration introduced a discriminatory identification card system based on 'ethnicity' with mention of Hutu-Tutsi-Twa on it. Therefore, socio-economic mobility was effectively halted and the ethnic groups artificially constructed.[139]

In the 1950s, the demand for independence by the Tutsi elites led the Belgians to fight these political ambitions. This marked the beginning of new alliances between the Belgians and

[138] Brief History of Rwanda, http://www.gov.rw/home/history/ accessed on 11/02/2016
[139] Brief History of Rwanda, ibid

Hutu who were now regarded as good people. Under the Belgian supervision, the first massacres of the Tutsi by the Hutu occurred in 1959. causing hundreds of thousands of deaths and sending almost two million of them into exile in neighboring countries. [140]

On 1 July 1962, Rwanda gained her independence from Belgium. Subsequently, the monarchy was abolished and Gregoire Kayibanda became the first President of the Republic of Rwanda. The post independence regimes did nothing to rebuild the national unity that had been destroyed by the colonialists. The First Republic, under President Gregoire Kayibanda, and the Second, under President Juvenal Habyarimana, institutionalized discrimination against Batutsi and subjected them to periodic massacres, which climaxed into the 1994 genocide.[141]

In 1987, Rwandans in exile conceived a revolutionary movement known as the Rwanda Patriotic Front (RPF). The RPF fruitlessly pursued several peaceful means to initiate changes within the dictatorial regime in Kigali and on 1 October 1990, the Rwanda Patriotic Army (RPA) launched a major attack on Rwanda from Uganda. The government started a deliberate propaganda against all Tutsis inside the country labeling them as accomplices of the RPA and Hutu members of the opposition parties as traitors. Media, particularly national radios, continued to spread rumours to fuel the ethnic conflict.[142]

In August 1993, through the peacemaking efforts of the Organisation of African Unity (OAU) and the governments in the region, the signing of the Arusha peace agreements appeared to have brought an end to the conflict between the then Hutu dominated government and the opposition Rwandan Patriotic Front (RPF). In October 1993, the Security Council established the United Nations Assistance Mission for Rwanda (UNAMIR) with a mandate encompassing

[140] Brief History of Rwanda, ibid
[141] Idem
[142] The Causes of Refugee Militarization - Deep Blue https://deep blue.lib.umich.edu/bitstream/handle/2027.42/85327 /scjustin. Pdf, accessed on 10/02/2016.

peacekeeping, humanitarian assistance and general support for the peace process. From the outset, however, the will to achieve and sustain peace was subverted by some of the Rwandan political parties participating in the Agreement. With the ensuing delays in its implementation, violations of human rights became more widespread and the security situation deteriorated.[143]

Between 1990 and 1994, the Government of Rwanda intensified mobilisation for genocide against Tutsi branding them as cockroaches. On 6 April 1994, Presidents Habyarimana of Rwanda and Ntaryamira of Burundi were killed in a plane crash near Kigali International Airport. The long planned genocide sparked off claiming the death of over one million tutsi and hutu in opposition within a period of 100 days. An estimated 150,000 to 250,000 women were also raped. Members of the presidential guard started killing Tutsi civilians in a section of Kigali near the airport. Less than half an hour after the plane crash, roadblocks manned by Hutu militiamen often assisted by gendarmerie (paramilitary police) or military personnel were set up to identify Tutsis.[144]

On 7 April, Radio Television Libres Des Mille Collines (RTLM) aired a broadcast attributing the plane crash to the RPF and a contingent of UN soldiers, as well as incitements to eliminate the "Tutsi cockroach". Later, on the same day, the Prime Minister Agathe Uwilingiyimana and 10 Belgian peacekeepers assigned to protect her were brutally murdered by Rwandan government soldiers in an attack on her home. Other moderate Hutu leaders were similarly assassinated. After the massacre of its troops, Belgium withdrew the rest of its force. On 21 April, after other countries asked to withdraw troops, the UNAMIR force reduced from an initial 2,165 to 270.[145]

[143] Rwanda: A Brief History of the Country at http://www.un.org/en/preventgenocide/rwanda/education/Rwanda genocide.shtml accessed on 11/02/2016.
[144] Idem
[145] Idem

The RPA under the command of Paul Kagame fought a double battle to defeat the genocidal Government and stop the genocide. On 4 July 1994, after 100 days of fighting, the RPA eventually liberated Kigali. However, just before their defeat, the genocidal politicians propagated fear among the Hutu that RPF had planned revenge against them. This led some Hutu to flee the country and by August 1994, an estimated 1.2 million Rwandans had fled into former Zaire (now DRC). Aided by the French under "Operation Turquoise", the entire genocidal political and military establishment crossed into DRC and took the refugees hostage. The UN-supported refugee camps in DRC thus became a base for recruitment and training in order to attack Rwanda.[146]

3.3 The Aftermath of the Genocide and Transitional Justice

After the genocide was stopped, about 125000 suspects were arrested and put in prison. Others were still in the community and not yet identified. The Rwandan judiciary system was uprooted by the genocide; the country had lost most of its judicial personnel, not to mention the destruction to courts, detention facilities and other infrastructure. At the same time when both genocide survivors and presumed genocide perpetrators were expecting justice from the new government as soon as possible. In 1999, Five years after the Genocide, only 5000 people out of 120000 had been tried, which means that it would have taken more than 100 years to try all those people.[147] On the other hand, the priority of the new government was to reconcile the society in order to build a new stable and peaceful country. It was against this background that in 2001, the government of Rwanda introduced a participatory justice system, known as Gacaca, in order to

[146] Rwanda: A brief History of the Country, ibid.
[147] PRI, The contribution of the Gacaca jurisdictions to resolving cases arising from the genocide: Contributions, limitations and expectations of the post Gacaca phase, www.penalreform.org accessed on 23/01/2016

address the enormous backlog of cases and help the community participate in the process of justice and reconciliation in the country.

3.3.1 Establishment of the International Criminal Tribunal for Rwanda

At the international level, the Security Council on 8 November 1994 set up the International Criminal Tribunal for Rwanda, based in Arusha, Tanzania. Investigations began in May 1995. The first suspects were brought to the court in May 1996 and the first case began in January 1997. The UN Tribunal had jurisdiction over all violations of international human rights that happened in Rwanda between January and December 1994. It had the capacity to prosecute high-level members of the government and armed forces that may have fled the country and would otherwise have gone unpunished.

Key suspects were transferred to the International Criminal Tribunal for Rwanda (ICTR) located in Arusha, Tanzania, which was established by the UN Security Council in November 1994. The ICTR was created to prosecute those most responsible for genocide, crimes against humanity and war crimes committed in Rwanda and neighbouring countries between 01 January and 31 December 1994.

3.3.2 Role of ICTR in handling genocide cases

As an ad-hoc Tribunal, the ICTR mission was not the prosecution of all suspects allegedly involved in the 1994 genocide. It was expected to try a small number of suspects focusing primarily on those who played a leading role in the genocide and due to its limited resources, States hosting suspects were expected to play an active role in complementing the ICTR's efforts to hold perpetrators accountable. By 2009, about 77 fugitives from 24 countries have been transferred to the Tribunal, including from Zambia, Cameroon, Senegal, Togo, the

United States, the United Kingdom, Belgium, France, Germany, the Democratic Republic of Congo, Uganda and Tanzania transferred suspects found on their territory to the ICTR for trial.[148]

Since it opened in 1995, the Tribunal has indicted 93 individuals whom it considered responsible for serious violations of international humanitarian law committed in Rwanda in 1994. Those indicted include high-ranking military and government officials, politicians, businessmen, as well as religious, militia, and media leaders. Among the indicted; 61 individuals were convicted; 14 were acquitted;10 referred to national jurisdictions; 3 deceased; 3 fugitives and 2 were withdrawn from the court.[149]

The ICTR was only ever expected to try a small number of suspects: primarily those who played a leading role in the genocide. To some extent, it has performed this task, and has tried and convicted several prominent figures, including former Prime Minister Jean Kambanda, former army Chief of Staff General Augustin Bizimungu, and former Ministry of Defence Chief of Staff Colonel Théoneste Bagosora. The court has been able to apprehend 15 former ministers from the genocidal government out of a cabinet of 19 ministers. The guilty plea and subsequent conviction of Jean Kambanda, former Prime Minister of Rwanda, set a number of precedents. This was the first time that an accused person acknowledged his guilt for the crime of genocide before an international criminal tribunal. It was also the first time that a head of government was convicted for the crime of genocide. The ICTR also set important precedents in the development of international criminal law, such as the first-ever prosecution of rape as genocide in the case of a former bourgmestre (mayor), Jean-Paul Akayesu. It underscored the fact that rape and sexual violence may constitute genocide in the same way as any other act of serious bodily or mental

[148]REDRESS and African Rights, Closing the Impunity Gap: Southern Africa's Role in Ensuring Justice for the 1994 Genocide in Rwanda, 30 June and 1 July 2011 Johannesburg, South Africa
[149]The ICTR in Brief, http://unictr.unmict.org/en/tribunal, accessed on 12/03/2016.

harm, as long as such acts were committed with the intent to destroy a particular group targeted as such. It also the first international court to convict a suspect for rape as a crime against humanity and a crime of genocide. The court also tried three media owners accused of using their respective media to incite ethnic hatred and genocide. [150]

Among the achievements, is the "Media case" of 2003 in which the role of the media was examined in the context of international criminal justice. This was the first judgment since the conviction of Julius Streicher at Nuremberg after World War II. Another important case handled by the ICTR was "Military I case" involving four former high ranking officers of the Rwandan army such as the former army Chief of Staff General Augustin Bizimungu, former Ministry of Defence Chief of Staff, Colonel Colonel Théoneste Bagosora, Brigadier General Gratien Kabiligi, Major Aloys Ntabakuze and Lieutenant Colonel Anatole Nsengiyumva. The five accused were charged with conspiring together and with others to commit genocide in Rwanda. Other prominent suspects tried by the ICTR include a Rwanda's most famous singers, Simon Bikindi, was sentenced to 15 years imprisonment for inciting violence during the genocide, and Emmanuel Rukundo, a priest and former army chaplain, who was given a 25-year jail sentence for committing genocide, sexual assault and kidnapping during the genocide.[151]

3.3.3 Application of Universal Jurisdiction by National Courts

After the Rwanda Patriotic Army defeated of the genocidal forces and stopped genocide, the biggest number of those who were involved in killings fled the country and seek asylum in different countries around the globe. Among those claiming to be refugees were individuals suspected of having participated in the genocide. Since the ICTR was mainly interested by the

[150] ICTR in brief, Ibid
[151] BBC News/Africa 'Rwanda Priest Jailed for Genocide', Available at: <http://news.bbc. co.uk/go/pr/fr/-/2/hi/africa/7915388.stm>

prosecution of those leaders who were at the planning levels, other suspects were supposed to be either tried by the host countries or extradited to Rwanda to face justice. Some countries were cooperative and extradited the suspects who were on their territories, other because of lack of extradition treaty with Rwanda decided to try using universal jurisdiction principle. However, other countries due to political reasons, decided to protect those fugitives despite of civil parties and UN.

Most of the countries that tried or extradited genocide suspects did it in cooperation with the Rwandan Justice that facilitated the access to witnesses. Under this section, we are going to analyze two different categories of cases involving Rwandans that were handled under the principle of Universal Jurisdiction. The first category concerns cases of suspects who were tried by courts of the host countries under the universal jurisdiction. These cases did not cause any diplomatic problem between the prosecuting countries and Rwanda because the whole processes were done conjointly by the two countries. The second category to be examined concerns cases of the current Rwandan government senior officials, who were issued with arrest warrants by a French and Spanish Judges basing on Universal Jurisdiction principle.

3.3.3.1 Cases involving genocide fugitives

Under this section, the study will look at cases tried in foreign courts under the universal jurisdiction principle and cases transferred to Rwanda under the extradition arrangement to be tried by the Rwandan courts.

3.3.3.1.1 Cases tried in foreign national courts

Over the past 22 years, national authorities in some of the countries where Rwandan genocide suspects are living have conducted investigations into these individuals' alleged involvement in genocide-related crimes, leading to a number of trials before the domestic courts

of these countries, under the principle of universal jurisdiction. Trials of Rwandan genocide suspects have taken place in several countries including Belgium. Switzerland. Germany. Canada, Finland, Norway, Sweden, the Netherlands, and France.

Belgium applied for the the first time the principle of universal jurisdiction on Rwandans suspected to have participated in genocide in 1994. The case was code named "The Butare Four" and was involving four Rwandans from Butare namely, Alphonse Higaniro, Vincent Ntezimana, Sister Gertrude (Consolata Mukangano) and Sister Maria Kizito (Julienne Mukabutera). The last two were nuns at the time they were participating in genocide. The allegations against the defendants encompassed a broad range of crimes including: the establishment of ethnic lists, the drafting of document employed to incite mass killings, the passing of provisions to the Interahamwe militia, the delivery of Tutsis for killing, the failure to protect refugees, and personal responsibility for killings. The trial started in the spring of 2001 and lasted for 8 weeks. On 8 June 2001, the Belgian court found all the four defendants guilty and sentenced to between 12 and 20 years in prison.[152]

Although all of the accused were residing in Belgium at the time of their arrest, none of the "Butare Four" was Belgian citizens, none of the victims was Belgian citizens, and none of the crimes was committed on Belgian soil. The trial and prosecution of "the Butare Four" was a case of pure universal jurisdiction, one of the few in human rights' legal history[153]. The defendants had fled Rwanda in the aftermath of the armed conflict and genocide in 1994. They applied for political asylum in Belgium but were arrested after being denounced by other Rwandan refugees. Extradition to Rwanda was legally impossible under Belgian law and under the European

[152] Reydams, Luc.(2003) Belgium's First Application of Universal Jurisdiction: the Butare Four Case,^ Journal of International Criminal Justice, I, 428–436

[153] Human Rights Watch. (2000) BThe Pinochet Precedent: How Victims Can Pursue Human Rights Criminal Abroad.^ Human Rights Watch Update, March. Accessible at: http://www.hrw.org/campaigns/chile-98/brochfln.htm.

Convention for the Protection of Human Rights and Fundamental Freedoms. The International Criminal Tribunal for Rwanda (ICTR) declined to take over the proceedings and therefore Belgium was faced with a dilemma of granting asylum to people accused of genocide, or prosecuting them.[154]

In Germany On 18 February 2014, a court delivered a guilty verdict in the case of former mayor Onesphore Rwabukombe and sentenced him to 14 years' imprisonment for aiding and betting genocide.[155] Another instructive case is the successful conviction in 1999 before the Swiss Military Tribunal of a Rwandan bourgmestre, Fulgence Niyonteze. Under Swiss universal jurisdiction law, an investigation into applicable crimes can be opened only if there is a geographical or personal link with Switzerland. In this case, Switzerland embarked on a two-year investigation, locating and interviewing witnesses in Rwanda, before the trial commenced.[156] Twenty-two witnesses were flown to Switzerland to testify, and the court went physically to Rwanda to hear the other witnesses who could not or would not come to Switzerland.[157]

In Sweden, Stanislas Mbanenande was indicted in November 2012 for genocide and other crimes. Mbanenande fled to Sweden after the genocide, where he was granted citizenship. The Swedish government decided that Mbanenande's trial will be held in Sweden because he is a Swedish citizen, but that victims and witnesses will be questioned at the Kigali Supreme Court while the Swedish district court monitors the examinations through video link. This will be the first genocide trial before a Swedish court.[158]

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[54] Luc Reydams, op cit, p 23.
[55] Rwanda: Justice After Genocide—20 Years On, https://www.hrw.org/news/2014/03/28/rwanda-justice-after-genocide-20-years accessed on 19/02/2016
[56] Jean Paul Sartre, quoted in Michael J. Kelly, "*Can Sovereigns Be Brought to Justice? The Crime of Genocide's Evolution and the Meaning of Milosevic Trial*" 76 St. John's L. Rev. 257, 264 (2002).
[57] idem
[58] Rwanda: Justice after Genocide—20 Years on, Ibid.

In Norway, Sadi Bugingo was convicted in February 2013 of complicity in the premeditated killings of at least 2,000 Tutsis, and was sentenced to 21 years in prison—the maximum he could get from a Norwegian court. Bugingo had lived in Norway since 2001, and was granted a residence permit in 2005. This trial was the first genocide case in a Norwegian court.[159]

In the Netherlands, on 1 March 2013 a Dutch court convicted Yvonne Basebya of inciting genocide, and sentenced her to six years and eight months in prison—the maximum available prison term at the time of the crimes. Basebya emigrated to the Netherlands in 1998, and gained citizenship in 2004. She is now the first Dutch citizen to be convicted of incitement to genocide in a Dutch court.[160]

Some countries also pursued other kinds of criminal sanctions against genocide suspects. For example, in February 2013, Beatrice Munyenyezi was convicted in USA before a New Hampshire federal court for denying having any role in the genocide or affiliation with any political party at the time and entering the U.S. unlawfully by making the same false statements on her refugee and green card applications. Beatrice Munyenyezi is now serving a 10-year prison sentence.

In some of these countries, many years elapsed before trials began. For example, in France, a country to which a number of known genocide suspects had fled after the genocide, it was not until February 2014 that the first Rwandan genocide suspect Pascal Simbikangwa, a former intelligence chief under the Habyarimana government was tried. This was the first case brought to trial by a newly created war crimes unit in France. It was a significant moment, as France had backed the former government of Rwanda and supported and trained some of the

[159] Idem
[160] Ibid

forces which went on to commit genocide. On March 14, 2014, a court in Paris found Simbikangwa guilty of genocide and complicity in crimes against humanity and sentenced him to 25 years in prison.

These cases are important milestones in the demonstration of the importance of the Universal Jurisdiction principle and international commitment to ensuring that perpetrators of the genocide are held accountable, wherever they are found.

3.3.3.1.2 Cases Extradited to Rwandan courts

In the past years, Rwanda has sought extradition of Rwandans from other countries to face prosecution in Rwanda, but with mixed success for different reasons. In some instances, there is lack of extradition treaty between Rwanda and the host country, but in other cases, it is lack of political will. For example, France has refused to extradite genocide suspects to Rwanda, fearing that they would be denied a fair trial. In one case from July 2012, the French High Court of Appeal ruled that Claude Muhayimana could not be extradited to Rwanda to face genocide-related charges, unless the lower French court verified that Muhayimana would receive the proper guarantees to a fair trial in Rwanda.

However, Following the ICTR decision to transfer its first genocide case (Uwinkindi) to Rwanda in 2011, courts in several countries, including Sweden and Norway, followed suit and agreed to extraditions. A ruling by the European Court of Human Rights (ECHR) in October 2011 that it was safe to extradite Sylvère Ahorugeze, a Rwandan genocide suspect arrested in Sweden, reinforced this trend. In February 2012, Canada deported Léon Mugesera to Rwanda, where his trial for genocide-related crimes began in December 2012.[161]

[161] http://www.trial-ch.org/en/ressources/trial-watch/trial-watch/profils/profile/476/ action/show/controller/ Profile/tab/ legal-procedure.html

Genocide cases tried under the principle of Universal Jurisdiction did not antagonize diplomatic relationship between the trying states and Rwanda mostly because of the interest that Rwanda had to see those fugitives being tried but also those countries involved Rwanda in the investigation processes. This is in conformity with the realism theory which explains that states are always driven by their national interests.

3.3.3.2 Cases involving Rwanda senior officials

In 2006 and 2008. investigating magistrates Jean-Louis Bruguière of France and Fernando Andreu Merelles of Spain, respectively issued an arrest warrant of Rwanda's civilian, political, and military higher authorities, accusing them of involvement in serious crimes such as genocide, crimes against humanity, war crimes and terrorism, committed both in Rwanda and in the Democratic Republic of Congo (hereinafter called DRC). These judges based their investigative power on the Universal jurisdiction principle. These arrest warrants were requesting the immediate arrest of the suspects and their transfer to France and Spain. We are going to analyse each indictment and its impact on international relations.

3.3.3.2.1 French Indictment and the arrest of Madam Rose Kabuye

Judge Bruguière began his investigation on 27 March 1998, following the complaint submitted on 31 August 1997 by the daughter of the co-pilot of President Habyarimana's airplane, Jean-Pierre Minaberry, who died in the crash. Subsequently, the families of the other members of the crew associated also in the court action with the public prosecutor in the case. In 2006 a Judge in France, Jean-Louis Bruguière, issued arrest against nine senior leaders of the Rwandan Government without any investigations, using genocide fugitives and political opponents of the Rwandan Government as witnesses[162]. Magistrate Bruguiere went ahead and urged the UN Secretary-General to direct the International Criminal Tribunal for Rwanda to

[162] Vanessa Thalmann, French Justice Endeavours to Substitute for the ICTR,6JICJ 995, 995 (2008).

prosecute President Kagame. The French judge had concluded that immunities apply in respect of the President in office and therefore he could not indict him.[163] He argued that the ICTR could because, as an international criminal court, it is not bound to respect international law immunities. He however indicted other o□cials, three of whom enjoyed diplomatic immunity (that is, James Kabarebe, then Chief of General Sta□ of the Rwandan Defence Forces; Madame Rose Kabuye, the then Chief of Protocol attached to the Presidency and Faustin Nyamwasa Kayumba. then Ambassador to India).[164]

On 9 November 2008, basing on the above arrest warrant, the Germany police arrested Rose Kabuye in Frankfurt while on official mission as head of protocol of the president of Rwanda. Kabuye was transferred to Paris shortly after and was brought before investigating magistrates, interrogated and released on conditional bail. Charged with 'complicity to murder in relation to terrorism' under France's universal jurisdiction laws, Kabuye was accused of involvement in the assassination of Rwanda's former President Juvenal Habyarimana, which had sparked the genocide in 1994.[165] The fact that the court had been entitled under France's law to initiate a criminal proceeding against a non-national for an offence committed outside French territory where the victims were not French citizens was to trigger a series of diplomatic rows.

After her arrest, Rwanda immediately lodged a formal diplomatic protest with the German government.[166] It insisted Ms. Kabuye is entitled to, and must benefit from immunities which she enjoys as an envoy of the country (she had been dispatched as part of the advance

[163] Tribunal de Grand Instance de Paris, Cabinet de Jean-Louis Bruguiere, Ordonnance de soit-communique' De' livrance de mandats d'arre' ts internationaux (November 17, 2006), at http://www.taylor report.com/Documents/BrugiereReportEnglish.pdf [hereinafter Bruguie' re Report].

[164] Idem

[165] Jean Paul Sartre, quoted in Michael J. Kelly, "*Can Sovereigns Be Brought to Justice? The Crime of Genocide's Evolution and the Meaning of Milosevic Trial*" 76 St. John's L. Rev. 257, 264 (2002).

[166] Minister's News, Government of Rwanda Ministry of Foreign A airs and Cooperation at http://www.mina et.gov.rw/ index.php? Cited in Jalloh, universal jurisdiction, universal prescription? a preliminary assessment of the african union perspective on universal jurisdiction, ibid.

party to prepare for President Kagame's visit to the country). Rwanda also argued that this was a political case based on unsubstantial evidence.[167]

The government of Rwanda reacted by ordering the expulsion of the German ambassador and recalled its own from Berlin. On 11 November 2008, he was asked to leave the country and the Rwandan Ambassador in Berlin was recalled for consultations. Thousands of people protested against France and Germany in the streets of Kigali on Wednesday as a diplomatic conflict caused by the arrest of a senior Rwandan official in Frankfurt escalated, a few thousand demonstrators, mainly women, marched from the French school and cultural centre to the German embassy[168] However, the two Embassies remained operational. On 19 January 2009, Rwanda and Germany announced that they would reappoint ambassadors in the respective countries.

Meanwhile, bitter exchanges erupted between France and Rwanda, marking an all-time low in the relationship between the two states. Rwanda had already broken diplomatic ties with France in November 2006 after French anti-terrorism judge Jean-Louis Bruguiere issued the warrants against Kabuye and eight other Kagame aides.[169] President Kagame condemned the arrest while in a telecommunications conference in Geneva "*You cannot have France or any other country thinking it has the right to exercise its judicial powers beyond its borders to cover other sovereign entities*" [170]

In his address to Facing Tomorrow's conference in May 2008, he had denounced the abuse of the universal jurisdiction by powerful state on weaker states:

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[167] Government of Rwanda Communiqué on Kabuye at http://www.mina et.gov.rw/content/view/148/176/ accessed on 02/02/2016.
[168] Rwanda expels German ambassador, BBC NEWS, November 11, 2008, at http://news.bbc.co.uk/2/hi/7722917.stm. accessed on 09/02/2016
[169] idem
[170] idem

"...some in the more powerful parts of the world have given themselves the right to extend their national jurisdiction to indict weaker nations. This is total disregard of international justice and order. Where does this right come from? Would the reverse apply such that a judgment from less powerful nations indicts those from the more powerful?[171]

Subsequent to the Bruguiere arrest warrants, Rwanda initiated proceedings against France at the ICJ.[172] It based its application on Article 35(5) of the ICJ Statute and requested the court to find, inter alia, that by issuing the arrest warrants, France had violated the international law of immunities accruing to the Rwandan officials and the sovereignty of their state. Rwanda also asked the Court to find that France 'has acted in breach of the obligation of each and every State to refrain from intervention in the affairs of other States' and that it 'is under a duty to respect the sovereignty' of Rwanda. The ICJ transmitted the application, to which was also attached an application for provisional measures.[173] Ultimately, the case could not proceed because France did not accept the Court's jurisdiction over the case. Without such consent, no further action could be taken on the complaint.[174]

It is important to note that other French anti-terrorist judges Marc Trévidic and Nathalie Poux, who replaced Bruguière on the plane crash file, have since dismissed Bruguière's thesis that the plane was downed by former soldiers of the Rwanda Patriotic Front (RPF-Inkotanyi). After conducting their research in Rwanda, unlike Bruguière who never set foot in the country during his investigation, Judges Trévidic and Poux concluded in a 2012 report that Kanombe

[171] Address at the 'Facing Tomorrow Conference', Presidents Discussing Tomorrow, Jerusalem, Israel, (13 May 2008), found in C. C. Jalloh, 'Universal Jurisdiction, Universal Prescription?: A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction', 21 Criminal Law Forum (2010) 1, 1, 1.
[172] Press Release, International Court of Justice, The Republic of Rwanda applies to the International Court of Justice in a dispute with France (April 18, 2007), at http://www.icj-cij.org/presscom/index.php?p1=6&p2=1
[173] Idem
[174] Idem

Barracks was the launch site of the missiles that brought down the former president's plane. Since the barracks was tightly guarded by ex-FAR (the national army during Habyarimana's government), under the authority of Colonel Théoneste Bagosora, a key mastermind of the Genocide committed against the Tutsi, the French judges concluded that the president's plane might have been shot by Hutu extremists who went on to commit the Genocide.

The African Union (AU), sub-regional organizations, and individual African states were united in their support for Rwanda, with some condemning the arrest as 'a blatant abuse of the Principles of Universal Jurisdiction on the part of both Germany and France'. Perhaps partly because of these controversies, but also the apparent lack of credible evidence, France released Kabuye 31 March 2009.[175]

While France indicting Rwanda officials, the extremist Hutus running the political wings of the anti-Kagame and anti-Tutsi Front de defence pour la Liberation du Rwanda (FDLR) and other groups live in Europe, alongside their Diaspora financers and supporters.[176] Among these are suspects in France and Germany, wanted by Rwandan courts on genocide charges.[177] In such circumstances, it should not surprise anyone that it is heresy for the Kagame Government that a French court would indict its o□cials, effectively handing a political weapon to its enemies.[178] This is particularly so considering the political tension regarding France's accusations of support for the interim government which planned and executed the genocide. At the least, such indictments feed the extremist pro-Hutu propaganda machine against the government in Kigali.

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[175] Rwanda; French Court Lifts Indictment of Kagame Aide, N.Y. TIMES, March 31, 2009.

[176] Final Report of the Group of Experts on the DRC, UN Doc. S/2009/603, 23 November 2009 at paras. 91, 101, 102–110, cited by Jalloh, op cit.

[177] Germany recently arrested the FDLR leader. See Ignace Murwanashyaka in Germany. BBC NEWS, November 19, 2009, Germany arrests top Rwanda rebels, BBC NEWS, November 17, 2009, at http://news.bbc.co.uk/2/hi/8364507.stm.

[178] Press Release, The Democratic Liberation Forces of Rwanda, Terrorists and war criminals to prosecute and to bring to justice are to be found in the RPF- Inkotanyi on power in Kigali and not in the leadership of the FDLR NR. 01/SE/ CD/NOVEMBER/2009, November 6, 2009

They give a whiff of legitimacy to the rebels who capitalize on them to recruit illiterate, disenfranchised and pliable youths to their rebel cause. These youth then further commit crimes in the name of 'liberation' even as they work to further undermine the stability of Rwanda.[179]

The destabilizing effects of indictments can also go beyond the country in issue and even imperil region-wide efforts to resolve other conflicts. Taking Sudan situation as example, Rwanda is one of the largest troop contributing nations to the joint AU-UN peacekeeping mission.[180] It threatened to withdraw all its forces from Darfur following the issuance of an indictment for General Karenzi Karake by Spanish Magistrate Merelles.[181] Human rights groups argued that the Rwandese deputy force commander's contract should not be renewed by the UN as he was involved in the commission of international crimes in Rwanda and Congo.[182] The contract was ultimately renewed. Two factors converged to this result. Firstly, the UN concluded that it had insuficiant evidence that General Karake committed crimes against humanity in the Congo. Secondly, the U.S. was not convinced that the allegations of direct responsibility against him for crimes committed in Rwanda in 1994 were credible.[183]

3.2.3.2.2 Spanish judge Indictment and the arrest of Gen Karenzi Karake

In February 2008, a Spanish Judge Fernando Andreu Merelles issued an indictment against 40 senior commanders from the former Rwanda Patriotic Army (RPA) which under the command of President Paul Kagame, stopped genocide in 1994. The Spanish indictment alleged that Kagame's troops committed genocide and other serious crimes against Hutu civilians during the ethnic slaughter from April to July 1994. It said Kagame's army continued to kill and torture

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[179] Jalloh, op cit

[180] UN Peacekeeping, UN Missions Summary of Military and Police, at http://www.un.org/Depts/dpko/dpko/contributors /2009/june 094.pdf.

[181] Colum Lynch, Rwanda Threatens Darfur Pull out if U.N. Removes General, WASH. POST, July 24, 2008

[182] Spanish Indictment of Rwandan O cials at http://www.hrw.org/en/news/2007/ 12/19/unau-investigate-karakes-past-conduct.

[183] U.S. Backed U.N. General Despite Evidence of Abuses, WASH. POST, September 21, 2008, at http://www.washingtonpost.com/wp-dyn/content/article/2008/09/20/ AR2008092001801_pf.html.

civilians in the aftermath, before invading neighbouring Congo and slaughtering Hutu refugees there.[184]

Acting on the European Arrest Warrant issued by the Spain Judge Mirelles, British police arrested General Karake at Heathrow airport on June 22 who was on an official visit in UK. The military intelligence chief was a commander in the Rwandan Patriotic Front (RPF), the rebel force that swept through Rwanda in 1994 to halt the slaughter of 800,000 minority Tutsis orchestrated by the Hutu government. The Spanish arrest warrant is in connection with allegations of reprisal killings in Rwanda and neighboring Democratic Republic of Congo in the years following the genocide. The charges against Karake stemmed from his tenure as head of military intelligence after the 1994 genocide. The Spanish court accused him of ordering large scale, organized massacres of Rwandan civilians throughout a number of Rwandan areas. The indictment alleged that Karake ordered the killing of three Spanish nationals working for the NGO Medicos del Mundo and was ultimately responsible for the murder of Canadian priest Guy Pinard in 1997.[185]

Gen Karake's arrest angered authorities in Kigali, who described it as an outrage, and prompted protests outside the British embassy in the Rwandan capital as well as outside Westminster Magistrates Court in London, where Karake appeared on 25 June 2015. President Kagame described the decision to detain Gen Karake as "contemptible", and said the general was a *"freedom fighter who has brought us where we are as a people."* He further commented *"...Absolute arrogance and contempt is the only basis for this arrest". "...They must have mistaken him for an illegal immigrant. The way they treat illegal immigrants is the way they*

[184] Broomhall, Bruce, "Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law", 2010, *New England Law Review* [Vol.35:2], pp. 399-420.

[185] Broomhall, Bruce, "Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law", 2010, *New England Law Review* [Vol.35:2], pp. 399-420.

treat all of us. Black people have become targets for shooting practice. We cannot accept that people treat us this way just because they can."[186]

The African Union expressed its deep concern about the arrest of Lt. Gen. Emmanuel Karenzi Karake on the basis of an arrest warrant issued by a Spanish Judge; Condemns the arrest as it violates the decision Assembly/AU/Dec.199 (XI) and the spirit of the agreement of April 2014 between the EU and Africa during the 4th EU-Africa summit held in Brussels, Belgium, on political dialogue between the EU and Africa to address the issue of the abuse of the principle of universal jurisdiction once and for all. The AU called for the "*immediate and unconditional release of Lt. Gen. Emmanuel Karenzi Karake, by the UK authorities; and considers it as not only an attack on a Rwandan national, but on Africa as a whole.*" The AU further condemned the blatant violation of the principle of universal jurisdiction by some non-African states against African government officials and its implications for peace and security on the continent, and stresses that this abuse threatens to reverse the hard won security and stability in Rwanda and in Africa as a whole. The AU stressed that *"the arrest is politically motivated and underscores the fact that arrest warrants issued by individual non-African Judges and other non-African legal systems are a clear violation of the sovereignty and territorial integrity of African states and constitute an attempt to subordinate African legal systems to those of non-African states."*[187]

Lt Gen Emmanuel Karenzi Karake, was finally released on 10 Aug 2015, after the Westminster magistrates' court dismissed the case and rejected his extradition to Spain. On his release, Rwanda's Foreign Minister Louise Mushikiwabo said in a tweet that she was delighted Gen Karake would be coming home. "This was an unnecessary and abusive process," she said.

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[186] Harriet Alexander, Rwanda's spy chief released by British court. http://www.telegraph.co.uk/news/worldnews/africa and Indian ocean/Rwanda/11795960 accessed on 17/02/2016

[187] AU's communique on the arrest of Lt. Gen. Karenzi KarakeTimes Reporter, Published: June 28, 2015

3.4 Conclusion

The chapter examined the conflict in Rwanda, how it evolved and culminated into genocide in which about one million people lost their lives. The post genocide period in Rwanda was characterized by uprooted judicial system; the country having lost most of its judicial personnel and detention facilities and other infrastructure destroyed by war. The new government's priority was to reconcile the society in order to build a new stable and peaceful country and this could only be possible through justice. and that was what both genocide survivors and presumed genocide perpetrators were expecting to see as soon as possible.

The study dwelled more on the importance of the ICTR and Foreign national court in trying fugitives that participated in genocide. It assessed both the achievements and limitations of the ICTR as ad hoc tribunal as well as the application of the universal jurisdiction by national courts in prosecuting heinous international crimes and challenges involved in relation to the principle of sovereignty.

The chapter clearly demonstrates how the universal jurisdiction principle was important in bringing to justice criminals who cannot be reached by their national states. It showed how willing states in Europe and America prosecuted fugitives who were on their territory basing on universal jurisdiction, or extradited them to Rwanda. However, it also came out Cleary that some states lack the will to apply the principle on suspects that are on their soil for political raisons.

Finally, the chapter illustrates using two Rwandan cases, how states can abuse the universal jurisdiction principal by indicting officials of another country without its consent, which is considered by the latter as interference in its internal affairs and this can seriously affect the diplomatic relations among states. States need to cooperate when applying the principle to avoid comprising international relations which are strongly tied to States sovereignty.

CHAPTER FOUR

EFFECT OF THE APPLICATION OF UNIVERSAL JURISDICTION ON RWANDA

As discussed in previous chapters, the principle Universal Jurisdiction enables a State to prosecute a person under its jurisdiction no matter where or against whom the crime, was committed, independent of the perpetrator's nationality. This helps to deal with impunity by closing the gap in law enforcement that has favoured perpetrators of serious crimes under international law. On the other side, Realists argue that universal jurisdiction can be politicized and consequently interfere with another country's sovereignty. This chapter will analyze the impact of the application of the principle on Rwanda.

4.1 Positive Effect of the application of the principle of universal jurisdiction

After the 1994 genocide against Tutsi in Rwanda, which took the life of about one million Tutsis, and moderate Hutus in a period of one hundred days, the biggest number of those who were involved in killings fled the country and seek asylum in different countries around the globe. The post genocide government of Rwanda appealed to the international community to assist in bringing those responsible for genocide to justice. In response to that, the Security Council on 8 November 1994 set up the International Criminal Tribunal for Rwanda (ICTR), based in Arusha. Other states basing on the principle of universal jurisdiction also tried suspects that were arrested on their territories.

The ICTR and foreign national courts that tried genocide basing on universal jurisdiction principle collaborated closely with Rwanda ministry of Justice to be able to collect evidences and access witnesses. The ICTR prosecution had an office in Kigali while foreign courts would send investigating teams to Rwanda and take witnesses to prosecuting states to give their testimonies.

4.1.1. Handled by the International Criminal Tribunal for Rwanda (ICTR)

The establishment of of ICTR was important because it made possible the track and prosecution of those who played a big role in planning and executing genocide against Tutsis in Rwanda in 1994. In addition, some cases tried by ICTR set precedence for the International Law. For example the case Prosecutor v. Akayesu, was the first case in which an international tribunal was called upon to interpret the definition of genocide.[188] This case also emphasized the fact that rape and sexual violence may constitute genocide. [189] Other cases include Prosecutor v. Kambanda, in which for the first time in history, an accused acknowledged his guilt for the crime of genocide before an international criminal tribunal, and a criminal tribunal convicted a head of government for the crime of genocide.[190] Another important case is Prosecutor v. Nahimana also called Media Case, which was the first judgment since the conviction of Julius Streicher at Nuremberg after World War II in which a court examined the role of the media in the context of international criminal justice.[191]

Other important cases handled by the ICTR included the "Military I case" involving five former high ranking officers of the Rwandan army who played a crucial role in the planning and execution of genocide. The five were the former army Chief of Staff General Augustin Bizimungu, former Ministry of Defence Chief of Staff, Colonel Colonel Théoneste Bagosora, Brigadier General Gratien Kabiligi, Major Aloys Ntabakuze and Lieutenant Colonel Anatole Nsengiyumva. The five accused were charged with conspiring together and with others to commit genocide in Rwanda. Prosecuting such high ranked generals and senior officers is a strong message both to military personnel who still have ill intentions of killing innocent

[188] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998).
[189] Ibid Para 113
[190] Prosecutor v. Kambanda, Case no. ICTR 97-23-S, Judgment and Sentence, Paras 39- 40 (Sept. 4, 1998).
[191] Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment and Sentence (Dec. 3, 2003).

civilians and to victims, they get consoled by seeing such high profile people who were considered as untouchable being arrested and prosecuted. Other prominent suspects tried by the ICTR include a Rwanda's most famous singers, Simon Bikindi, was sentenced to 15 years imprisonment for inciting violence during the genocide, and Emmanuel Rukundo, a priest and former army chaplain, who was given a 25-year jail sentence for committing genocide, sexual assault and kidnapping during the genocide.[192]

For Rwandans, on the sides of both the victim and the perpetrator, the justice and deterrence expected from the ICTR results not only from knowing that high profile genocide planners such as Akayesu, Kambanda and Bagosora - just to name a few - have been condemned. More importantly, it also results from witnessing the process through which they lost their positions of power, authority, and harm.[193]

However, most Rwandans believe that the ICTR would have been better achieved its objectives if the court was located in Rwanda so that cases could be heard where most victims, perpetrators, and affected families are located. Other limitations on Rwandan participation in the ICTR's proceedings include both its refusal to recognize the rights of victims to direct representation in the proceedings, and in its implementation of restitution. In proceedings before the ICTR and ICTY, victims do not play an autonomous role; they are only able to appear in court if called as witnesses. Under the Rwandan legal system, victims, or any other people affected by the criminal act, may participate as a party (partie civile) in a criminal case.[194] Denying victims such rights by the ICTR is considered not only as justice delayed, but also as

[192] BBC News/Africa 'Rwanda Priest Jailed for Genocide', Available at: <http://news.bbc. co.uk/go/pr/fr/-/2/hi/africa/7915388.stm>

[193] E. Alvarez, Crimes of States/Crimes of Hate: Lessons from Rwanda, 24 Yale J. INT'L L. 365, 404 (1999).

[194] Organic Law No. 08/96 on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes against Humanity Committed since October 1, 1990, 1996, arts. 10, 29, (Rwanda) available at http://www.prevent genocide.org/fr/droit/codes/rwanda.htm#7.

justice denied.[195] Furthermore, although the ICTR's Rules of Procedure 105 and 106 provide victims' with rights to restitution and to claim compensation before competent national courts, the ICTR practices hinder the recourse to those options.[196]

4.1.2. Cases handled by Foreign National courts

After the defeat of the governmental forces and militias that were committing genocide by the Rwanda Patriotic Army, most suspects fled the country and took exile in neighbouring countries and other parts of the world. The new government had to cooperate with host countries to see those suspects prosecuted. Available options were either to extradite them back to Rwanda, send them to ICTR or to try them in their national courts.

The extradition was only possible for countries that had extradition treaty with Rwanda but also for political reasons some countries, for political reasons, refrained from extraditing invoking lack of free and fair justice in Rwanda. Only few cases would be accepted by ICTR because its mandate was to try those who played a big role in planning and executing genocide. For host states to try those suspects they needed to have the principle of universal jurisdiction in their legislation.

Countries that used their national courts to try suspects involved in genocide against Tutsi in Rwandan in 1994 basing on the principle of universal jurisdiction are from Europe and America and those include Belgium, Switzerland, Germany, Canada, USA, Finland, Norway, Sweden, the Netherlands, and France. However, a country like France took many years to start the prosecution those cases. Known to host a big number of known genocide suspects who fled after the genocide, it was not until February 2014 that the first Rwandan genocide suspect Pascal

[195] Jean-Marie Kamatali, The Challenge of Linking International Justice and National Reconciliation: The Case of the ICTR. 16 LEIDEN J. INT'L L., 115, 131-32 (2003).
[196] ICTR Rules of Procedure and Evidence, Rules 105-06 (2005), available at http://www.ictr.org/ENGLISH/rules/260503/270503e&fnew.pdf. accessed on 19/03/2016

Simbikangwa, a former intelligence chief under the Habyarimana government was tried. This was the first case brought to trial by a newly created war crimes unit in France. This delay can be explained by the fact that France backed the former government of Rwanda and supported and trained some of the forces which were involved in committing genocide in 1994. Belgium, the Rwanda colonial master, is the state that had tried the most Rwandans so far compared to others. This can be explained by the fact that five Belgian peacekeepers, who were guarding the then Rwandan premier minister Agathe Uwiringiyimana. were killed in Kigali during the genocide. Also like France, Belgium received many fugitives after the genocide because of the colonial ties it had with Rwanda. These cases tried but host countries are important milestones in the demonstration of international commitment to ensuring that perpetrators of the genocide are held accountable, wherever they are found.[197]

4.2. Negative Effect of the application of universal jurisdiction

The previous section demonstrates how universal jurisdiction can be a powerful instrument for the international system by protecting its interests, human rights and fighting against impunity. However, the exercise of universal jurisdiction may infringe, or at least detract from, the principle of sovereignty and sovereign equality and is easily subjected to political abuse including discrimination as manifested in selective prosecution, thus destabilizing international relations. Because of this, this form of jurisdiction has been described by Henry Kissinger as "dangerous".[198] This happens especially when universal jurisdiction is used as a tool for achieving other political ends. States may exercise universal jurisdiction as a means of gaining advantage over states with whom they are in conflict by prosecuting nationals of those

[197] Rwanda: Justice after genocide- 20 Years on March 28, 2014 at www.hrw.org/news/2014/03/28/rwanda-justice-after-genocide-20-years accessed on 24/03/2016
[198] Henry Kissinger 2001, The Pitfalls of Universal Jurisdiction, Foreign Affairs.

opponent states for conduct unrelated to the conflict between the two states. Furthermore, the political nature of universal jurisdiction is on full display when the attempt to exercise universal jurisdiction by States may indeed be tradable, as in the case of Belgium which decided in 2003 to scuttle its strong universal jurisdiction authorization when threatened by the US to move NATO Headquarters away from Brussels.

The negative side of universal jurisdiction has been witnessed by Rwanda in two cases in which senior Rwanda government officials were indicted by a French and a Spanish judges respectively. These two cases were politically motivated and the principle of sovereignty and sovereign equality of states were violated, which resulted in the destabilisation of international relations between Rwanda and other states as we are going to demonstrate in the analysis of each case.

4.2.1 French Judge Bruguire's Indictments

In November 2006, French investigative magistrate Jean-Louis Bruguiere issued nine arrest warrants against certain Rwandan o□cials.[199] Most of the persons that he accused of terrorism are former military o□cers associated with the current Rwandese government that stopped genocide after defeating the government forces that were involved in genocide supported by the French government.

Judge Bruguière began his investigation on 27th March 1998, following the complaint submitted on 31st August 1997 by the daughter of the co-pilot of President Habyarimana's aeroplane, Jean-Pierre Minaberry, who died in the crash. Subsequently, the families of the other members of the crew associated also in the court action with the public prosecutor in the case. Although the complaint was lodged in 1997, more than three years after the crash, Judge

[199] Vanessa Thalmann 2008, French Justice Endeavours to Substitute for the ICTR,6JICJ 995, 995.

Bruguière waited until March 1998 to commence a judicial investigation. The choice of this date is not entirely coincidental. In March 1998, a French journalist of Le Figaro, Patric de Saint-Exupéry, published a series of very compromising articles on the role of France in the genocide of the Tutsi. On the 3rd of the same month, a group of French intellectuals published in the daily newspaper Libération an appeal for setting up a commission of inquiry in France with a view to establishing the responsibilities.[200] On the same day, Paul Quilès, chairman of the Foreign Affairs Commission of the French National Assembly, announced the establishment of a fact-finding mission, but with very limited powers compared to a Commission of Inquiry. The coincidence of the establishment of a fact-finding mission, instead of a Commission of Inquiry which has more power, and the kick off of Bruguière's investigations make one think of the need for French government to conceal the truth since under the French law, judicial investigation takes precedence over a commission inquiries. This means as long as Bruguière was investigating the crash of the aeroplane of the President of Rwanda, the Parliamentarians of the Quilès Mission could not go further with their investigations on the case. This shows how the launch of investigations by the judge was politically motivated.

Another indicator of the political nature of the case is date chosen for the official publication of the indictment. Judge Bruguière's indictment was published on 23rd November 2006 at a time when at the ICTR, the trial of the alleged brain of the genocide of the Tutsi, Col. Bagosora, an ally of France, had reached a delicate phase and when French high ranking officers who had worked hand in hand with the ex-FAR were awaited to come and give evidence in his

[200] Jean-Damascène BIZIMANA, Critical analysis of the investigations by judges Bruguière and Merelles, https://friendsofevil.wordpress.com/2010/09/29/critical-analysis-of-the-investigations-by-judges-bruguiere-and-merelles/ accessed on 27/03/2016.

defence. A few days after judge Bruguière's indictment was out, Bagosora's lawyers wrote an application to ICTR asking that this order be submitted as a piece of evidence in his defence.[201]

4.2.1.2 Lack of impartiality in investigating the case

Under the French law, in the research of the objective truth, the investigating should conduct investigations both on incriminating and exonerating evidences.[202]In Bruguière's report, it is clear that he investigated the incriminating allegations with the intention of incriminating the Rwandan senior officials. In his report he never made any effort to interrogate the suspects nor witnesses discharging them. He never went to the scene of the crime to crosscheck the allegations he had so far collected against the suspects nor dispatch a rogatory commission to this end as criminal procedures dictate. His investigation was biased; he interviewed those who had the version that would lead to the outcome he wanted, which is considered as a serious defect in the conduct of a criminal procedure.

4.2.1.3 Lack of the secrecy and presumption of innocence by the judge

Judge Bruguière findings were published in the press, without any respect of the normal procedure of communicating discreetly the case file to the prosecution. This was contrary to article 11 of the French code of criminal procedure stipulates: (...) *"without prejudice to the rights of the defence, the procedure during the inquiry and investigation is secret"*[203]. The Judge published his findings implicating senior Rwandan government officials in a very authoritative French *Le Monde*, at the the tenth commemoration of the genocide. This means that judge Bruguière had communicated illegally the findings of his investigation to the press. One can

[201] Jean-Damascène BIZIMANA, Critical analysis of the investigations by judges Bruguière and Merelles, Ibid.
[202] Art. 81, French Code of Criminal Procedure
[2] Article 11, French Code of Criminal Procedure
[203] Article 11, French Code of Criminal Procedure, at https://www.legifrance.gouv.fr/affichCodeArticle.do? cid Texte accessed on 23/03/2016

deduce that the judge, politically motivated, wanted to disrupt the 10th commemoration by publishing a report that was implicating Rwanda authorities in the killing of president Habyarimana that sparked genocide and therefore dismissing the role of France. Prior to the publication of the investigation report, Le Monde had already published on 10th March 2004, an article entitled *"Revelations on the assassination attempt which sparked off the Rwandan genocide"*, by Stephen SMITH. In this article, it was stated that: *"the anti-terrorist judge Jean-Louis Bruguière has completed his investigation on the crash of the aeroplane of President Habyarimana on 6th April 1994"*. The author went ahead and wrote, *"Le Monde has read the final report which puts the responsibility on the Rwandese Patriotic Front (RPF) of General Kagame, the current ruling party in Kigali"*.[204] The leakage organized by Juge Bruguiere was meant to discredit the government of Rwanda and cover the role of France in the genocide, in breach of discretion and presumption of innocence principles. This was echoed by many other medias around the world, for example an article by Robin Philpot would read: *"As people around the world prepare to mark the 10th anniversary of the terrible Rwandan tragedy triggered by the shooting down of former Rwandan President Habyarimana's plane on April 6, 1994, the report by French anti-terrorist judge Jean-Louis Bruguière provides cause to reconsider some accepted ideas about those events. The report leaked to Le Monde places the entire blame for the missile attack on President Habyarimana's plane on current Rwandan President Paul Kagame."*[205]

4.2.1.4 Investigations based on non credible witnesses

In his investigations Judge Bruguière interviewed only opponents of the government of Rwanda in exile and genocide suspects who were detained and under trial by ICTR such as

[204] Jean Damascene Bizimana, Critical analysis of the investigations by judges Bruguière and Merelles, Ibid.
[205] Robin Philpot, the Assassination of former Rwandan President Habyarimana? Nobody Can Call It a Plane Crash Now. http://www.raceandhistory.com/historicalviews/2004/rwanda.html

Bagosora, Renzaho, Ntabakuze. Some witnesses such as Ruzibiza Abdul admitted to be criminals by affirming to have participated in the shooting down of Habyarimana's aeroplane. Others had fled Rwanda after being tried and convicted for various offences or escaped legal action brought against them. This was enough not to allow them to testify as per the French law which stipulates: *"Persons against whom there are serious and corroborating indications that they have participated in the facts brought before the investigating magistrate cannot be heard as witnesses".*[206]

On 9 November 2008, following that politically motivated indictment by judge Bruguire based on universal jurisdiction, Madame Rose Kabuye, Chief of Protocol of president of Rwanda was arrested by the Germany police in Frankfurt while on official mission. Kabuye was transferred to Paris shortly after and was brought before investigating magistrates, interrogated and released on conditional bail. After her arrest, Rwanda immediately lodged a formal diplomatic protest with the German government.[207] Upon her arrest, rwanda insisted Ms. Kabuye who had been dispatched as part of the advance party to prepare for President Kagame's visit to the country was entitled to, and must therefore benefit from immunities which she enjoys as an envoy of the country. Rwanda also argued that this was a political case based on unsubstantial evidence.[208]

After the French indictments, the outraged Rwandan Government condemned the indictments as 'judicial bullying'[209] within the AU,[210] the UN[211] and in any other forum

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[206] Article 105, French Code of Criminal Procedure, https://www.legifrance.gouv.fr/affichCodeArticle.do, accessed on 25/03/2016

[207] Minister's News, Government of Rwanda Ministry of Foreign A airs and Cooperation at http://www.mina et.gov.rw/index.php? cited in Jalloh, universal jurisdiction, universal prescription? a preliminary assessment of the african union perspective on universal jurisdiction, ibid.

[208] Government of Rwanda Communiqué on Kabuye at http://www.mina et.gov.rw/content/view/148/176/

[209] Communique' , Government of Rwanda Ministry of Foreign A airs and Cooperation, on the arrest of Mrs. Rose Kabuye, (November 20, 2008), at http://www.mina et.gov.rw/content/view/148/176/lang,english [hereinafter Communique' on Kabuye].

possible.[212] The government of Rwanda reacted to the arrest by ordering the expulsion of the German ambassador and recalled its own from Berlin. On 11 November 2008, he was asked to leave the country and the Rwandan Ambassador in Berlin was recalled for consultations. Thousands of people protested against France and Germany in the streets of Kigali on Wednesday as a diplomatic conflict caused by the arrest of a senior Rwandan official in Frankfurt escalated, a few thousand demonstrators, mainly women, marched from the French school and cultural centre to the German embassy.[213] Rwanda argued that they were political indictments, targeting as they do, only former Rwandan Patriotic Front o cials. It suggested that they were also part of the broader phenomena of genocide revisionism.[214]

Based on ICJ jurisprudence, especially the arrest warrant case between Belgium and DRC, by merely issuing an arrest warrant against Ms. Kabuye, the French court breached Rwanda's sovereignty by failing to confer the applicable immunities. Subsequent to the Bruguiere arrest warrants, Rwanda took steps to initiate proceedings against France at the ICJ basing its application on Article 35(5) of the ICJ Statute[215]. It requested the court to find, that France had violated the international law of immunities accruing to the Rwandan o cials and the sovereignty of their state. With respect to the request that President Kagame be tried at the ICTR, Rwanda asked the Court to find that France 'has acted in breach of the obligation of each and every State to refrain from intervention in the a airs of other States' and that it 'is under a duty

[210] Commission of the AU Expresses Dismay at Arrest of Rwandan Chief of Protocol (The newsletter of the African Union Commission, Ethiopia), November 2008, at 4.
[211] Paul Kagame, President of Rwanda, Address to the UN General Assembly (October 5, 2009).
[212] Paul Kagame, President of Rwanda, Address at 60th Anniversary of the Establishment of State of Israel (May 16, 2008).
[213] Rwanda expels German ambassador, BBC NEWS, November 11, 2008, at http://news.bbc.co.uk/2/hi/7722917.stm. accessed on 09/02/2016
[214] Communique' on Kabuye, Ibid.
[215] International Court of Justice, The Republic of Rwanda applies to the International Court of Justice in a dispute with France (April 18, 2007)

to respect the sovereignty' of Rwanda.[216] Ultimately, the case could not proceed because France did not accept the Court's jurisdiction over the case. Without such consent, no further action could be taken on the complaint.[217]

4.2.2 Spanish judge Merelles' indictments

In February 2008, the Spanish investigative magistrate Fernando Andreu Merelles' issued indictment alleging that 40 current or former high-ranking Rwandans had committed serious crimes notably, genocide, crimes against humanity, war crimes and terrorism.[218] Judge Merelles' investigations in Spain were also at the behest of the families of nine Spanish citizens who were killed in Rwanda during the period of the indictment. The initial assertion of jurisdiction was therefore predicated on passive nationality links to the alleged crimes.[219] Admittedly, the inquiry in Spain subsequently used the universality principle to cover crimes allegedly committed later against 4 million Rwandans and even Congolese victims.

Judge Merelles began his investigation following a complaint lodged by an association called *Forum international pour la vérité et la justice dans la région des Grands Lacs.* This association comprises members of the families of the Spanish victims killed in Rwanda and in the Democratic Republic of Congo between 1994 and 2000, some political personalities and small groups of Rwandan opponents most of which represent a well known revisionist trend, such as the *Centre de lutte contre l'impunité et l'injustice au Rwanda,* established in Brussels and headed by Joseph Matata. The Spanish magistrate recognised personal immunities apply to President Kagame but for unstated reasons, he failed to consider the applicability of the

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[216] ICJ, Ibid
[217] Ibid
[218] Anonymous Commentator, The Spanish Indictment of High-Ranking Rwandan O cials,6JICJ 1003 (2008) [hereinafter Spanish Indictment of Rwandan O cials].
[219] Antonio Cassese, Introduction to International Criminal Law 277–291 (2003).

same or other types of immunities to the other o□cials. These include the Rwandan Ambassador to India, the Chief of Staff of the Rwandan Army and the Deputy Force commander of the UN-AU peacekeeping force in Darfur. All these o□cials were entitled to immunity at least while still in those offices.

4.2.2.2 Investigation carried out from without reaching the scene of crime

Visiting the scene of the crime is a requirement when carrying out criminal investigations because it enables the judge to have an exact vision of the places, to be aware of the physical facts and their sequence, to be able to test the authenticity of the accounts presented by the witnesses. In the absence of such precautions, there is a danger of error or manipulation of the investigating magistrate by evil-minded witnesses. No genuine investigation can be carried out in an office which, moreover, is hundreds of kilometres away from the scene.[220] Merelles should have learnt from ICTR investigators who, despite their experience gained over several years on the field, visited the country regularly to gather information and verify it, before deciding whether it is proper to draw up an indictment. Judge Merelles claims to have worked together with Bruguière, particularly by sending a rogatory commission to France[221]. Since the alleged crimes were committed in Rwanda not in France the rogatory commission would have been sent to Rwanda not to Judge Bruguire who did not go to the scene of crime himself.

4.2.2.3 Absence of judicial cooperation

In international criminal proceedings, inter-State cooperation is necessary in punishing crimes. This principle is set out in all the international conventions relating to the punishment of international crimes, and in the resolutions of the Security Council establishing international

[220] Jean Damascene Bizimana, Critical analysis of the investigations by judges Bruguière and Merelles, Ibid.
[221] Judge Merelles's bill of indictment, page 55

criminal jurisdictions. These resolutions are binding and compulsory for all the States.[222] This means that the Spanish investigating magistrate had in any case to carry out his investigation in a transparent manner, in collaboration with Rwanda. This was all the more necessary since the crimes were committed on Rwandan territory and the suspects were Rwandans. In addition, Rwandan courts were also competent to prosecute these individuals, and this implies a cooperation approach in order to solicit judgement before Rwandan courts before rushing into a one way investigation. far from the context of the perpetration of the crimes. For example the case of the murder of the Spanish Father Isidro Uzcundum in Mugina, Rwanda, he referred to in his indictment was being heard in Rwandan courts. If he was genuine he would have contacted the Rwandan prosecution to share some findings that would have assisted his investigations, or even request the transfer of the file from the Rwandan court to Spain. On the contrary, he preferred to rely on witnesses in exile and concluded blindly by incriminating senior officers of the Rwanda army.

4.2.2.4 Dismissing findings of Spanish experts

After the murder of three Spanish humanitarian employees of Médecins du Monde, the Spanish police dispatched a rogatory commission to Rwanda which carried out an investigation in Ruhengeri, Rwanda from 7th to 17th May 1997 on the request of the Spanish Ministry of Home Affairs. This commission was composed of two specialists, Mr Juan Lopez Palafox, who was Chief Inspector of National Police, a doctor in odontology and specialist in legal-medical anthropology, and Mr Cristobal Espinoza Martinez, 1st Sgt of Warden Service, with qualifications as judicial police. The Commission was accompanied by the Spanish Ambassador to Rwanda with residence in Tanzania. The Commission carried out its investigation

[222] Jean-Damascène BIZIMANA, Critical analysis of the investigations by judges Bruguière and Merelles, Ibid.

independently and indicated in its findings that it was not able to establish the exact identity of the perpetrators of the crime.[223] Merelles himself recognises this by saying *"They could not determine exactly the perpetrators of the crime as a result of the police investigation carried out"*[224].

The same Médecins du Monde which employed these Spanish carried out its own internal investigations and concluded that there was no incriminating evidence against Rwanda Patriotic Army (RPA). These two investigations which were carried out on the ground immediately after the events could not lead to the identification of the perpetrators of the murder and contradict Merelles' findings which were based on evidence obtained abroad several years later from opponents of the Government of Rwanda and RPF.[225] Merelles never gave reasons why he dismissed the above findings from the scene of crime and conducted by experts. He preferred to rely on biased stories gathered from Rwanda's dissidents in exile. This leads to the conclusion that investigation carried out by the Spanish magistrate Merelles was rather driven by political motives.

4.2.2.5 Breach of *Non bis in idem* Rule

Non bis in idem, which translates literally from Latin as "not twice in the same [thing]", is a legal doctrine to the effect that no legal action can be instituted twice for the same cause of action. It is a legal concept originating in Roman Civil Law, but it is essentially the equivalent of the double jeopardy doctrine found in common law jurisdictions.[226]Some acts in the Merelles' indictment can no longer be brought before a court, because they are covered by the authority of

[223] Jean-Damascène BIZIMANA, Critical analysis of the investigations by judges Bruguière and Merelles , ibid.
[224] Judge Merelles's bill of indictment, p 76
[225] Jean Damascene Bizimana, ibid
[226] GERARD CONWAY, Non bis in Idem in International Law International Criminal Law Review 3: 217–244, 2003. © 2003 Koninklijke Brill NV. Printed in the Netherlands at http://cj.md/uploads/ Non_Bis_in_Idem_in_International_Law.pdf accessed on 28/03/2016

the res judicata or non bis in idem rule. Res judicata or res iudicata , also known as claim preclusion, is the Latin term for "a matter [already] judged", and refers to either of two concepts: in both civil law and common law legal systems, a case in which there has been a final judgment and is no longer subject to appeal; and the legal doctrine meant to bar (or preclude) continued litigation of a case on same issues between the same parties. In this latter usage, the term is synonymous with "preclusion".[227] This rule was established by the International Covenant on Civil and Political Rights (Art. 14, §7) and by a customary practice recognised internationally. All the States of the world accept this principle. This means that the authority of the final res judicata in a State is binding on a criminal judge of any other State, be it in the case of acquittal or conviction of the concerned person. In Merelles indictment he requests legal proceedings against General Ibingira for the attack on Kibeho camp for the displaced in 1995, when General Ibingira has already been tried by the military tribunal in Rwanda on 30th December 1996 and sentenced to 18 months imprisonment. The case is closed and cannot be subject to proceedings, except if it can be proved that this trial was an enactment aimed at exempting the accused from justice. Merelles has not proved it and as such, he has no right to take legal proceedings against General Ibingira for an act which has been finally decided.

4.3 Implications of the application of universal jurisdiction on International Relations

Universal jurisdiction disrupts international relations and international justice. The abuse and misuse of indictments against African leaders have a destabilizing effect that may negatively impact on the political, diplomatic, security, social and economic development of States and their ability to conduct international relations.

[227] Legal Information Institute, Res judicata at https://www.law.cornell.edu/wex/res_judicata, accessed on 28/03/2016

As observed in the analysis of the indictments of the French judge Jean Louis Bruiguere and those of the Spanish judge Merelles. they were politicised and breached their national as well as international criminal procedures. The enforcement of those indictments by states affected diplomatic relations between Rwanda and other states such as France, Germany and United Kingdom. The abuse of universal jurisdiction in recent years particularly over African officials such as President Uhuru Kenyata of Kenya and his deputy, president Bashir of Sudan and Rwandan officials. caused African States to request the United Nations General Assembly in February 2009 to include it in the agenda of its 63rd session. Since then universal jurisdiction has been a subject of heated discussion in the UNGA.

4.4 Conclusion

Universal jurisdiction is a double edged sword which can be a powerful instrument for the international system by protecting its interests, human rights and fighting against impunity if genuinely used like. However, if the exercise of universal jurisdiction is abused for political ends it ends up infringing the principle of sovereignty and sovereign equality thus destabilizing international relations.

The chapter analysed the application of the principle of universal jurisdiction on Rwandan case and demonstrated how it was applied genuinely to prosecuted genocide suspected who had fled to foreign countries. This was done by courts of the host countries in collaboration with Rwanda prosecution without any diplomatic tension. On the other side the chapter also analyse two cases in which states used universal jurisdiction as a political tool to indict Rwanda senior officials with the aim to discredit the government and conceal the role of France in the genocide against Tutsis in 1994.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

Universal jurisdiction is a legal principle allowing or requiring a state to prosecute and try international crimes against humanity, genocide, torture, and war crimes without any territorial, personal, or national interest link to the crime in question when it was committed. Historically, universal jurisdiction can be traced back to the works of scholars such as Grotius. and to the prosecution and punishment of the crime of piracy. The concept of universal jurisdiction gained ground after the Second World War through the establishment of the International Military Tribunal and the adoption of new conventions containing explicit or implicit clauses on universal jurisdiction to deals with war crimes and other crimes against humanity committed during the war.

The principle of universal jurisdiction enables each State to assert jurisdiction over certain crimes on behalf of the international community in a manner equivalent to the Roman concept of *actio popularis*, which gave every member of the public the right to take legal action in defense of public interest, whether or not one was affected. International law, both customary and conventional, regulates a State's assertion of universal jurisdiction. The universal jurisdiction principle is considered a powerful instrument when it comes to vindicate the fundamental values of the international community, advancing its legal agendas, protecting human rights and fighting against impunity.

Universal jurisdiction can deny safe havens to perpetrators of heinous offenses by bringing justice to victims, deterring state or quasi state officials from committing international

crimes, and establishing a minimum international rule of law by substantially closing the impunity gap for international crimes.

The positive effect of the principle of universal jurisdiction was seen after the genocide against Tutsi where most suspects fled the country and took exile in neighbouring countries and other parts of the world. The new government had to cooperate with host countries to see those suspects extradited or prosecuted. The extradition was only possible for countries that had extradition treaty with Rwanda but other countries that were willing to prosecute those suspects used their national courts to prosecute and try them basing on the principle of universal jurisdiction. Those countries include Belgium, Switzerland, Germany, Canada, USA, Finland, Norway, Sweden, the Netherlands, and France.

However, the exercise of universal jurisdiction by one State may infringe the sovereignty and sovereign equality of another state and therefore strain relations among states. The indictment of Rwandan senior officials by the French judge Bruguere strained diplomatic relations between Rwanda and France which ended in the breaking of diplomatic relations between the two counties for three years. The same indictment made the government of Rwanda asking the German Ambassador to Kigali to leave the country and recalling its Ambassador to Berlin for consultations.

France used the principle of universal jurisdiction as a political tool to conceal the truth on its role in the 1994 genocide against Tutsi in Rwanda by influencing the kick off judge Bruguière's investigations on Rwandan senior officials when a French journalist of Le Figaro, Patrick de Saint-Exupéry, published a series of very compromising articles on the role of France in the genocide of the Tutsi. It was also after a group of French intellectuals published in the daily newspaper Libération an appeal for setting up a commission of inquiry in France with a

view to establishing the responsibilities in the genocide against Tutsi. Another sign of the political aspect of the case was the publication of an article in a renown French newspaper *Le Monde*, revealing that judge Bruguière's investigations named the President of the Republic of Rwanda, Paul Kagame, as the culprit number one of the assassination of the former president of Rwanda Juvenal Habyarimana. This article was published before the judge's report was out to sabotage the tenth commemoration of the genocide of the Tutsi which the International Community was about to mark in a special way.

The abuse in recent years of the principle of universal jurisdiction, particularly over African officials, caused the Group of African States to request in February 2009 the inclusion of an additional item on the abuse of the principle of universal jurisdiction in the agenda of the 63 session of the United Nations General Assembly. The request was accepted and since then universal jurisdiction has been a hot subject of discussion in the the United Nations General Assembly.

The principle of Universal jurisdiction has been applied selectively to weak states such as Rwanda and other African states, but when it was tried to powerful countries such as Israel, the United States, and China they used their powers to stop its use against their people. That was the case when Belgian court indicted Ariel Sharon, Israel recalled its ambassador. The same when a group of Iraqis used the law to file a complaint against the first President Bush, Vice President Dick Cheney, Secretary of State Colin Powell and General Norman Scwartzkopf, for war crimes during the 1991 Persian Golf War, USA threatened to remove NATO headquarter from Brussels. Following those diplomatic pressures, Belgium amended their legislation on universal jurisdiction to allow the judiciary reject complaints in which there are no Belgians as victims and cases in which the plaintiffs have not lived in Belgium for at least three years. This shows the

double standard in the application of universal jurisdiction and how diplomatic pressures and potential reprisals by foreign states of the defendant's nationality, in order to protect their nationals, can compel the prosecuting state not to apply the principle. The compliance by the prosecuting state will of course depend on of the degree of leverage the national defendant's state has over the prosecuting state. This is in line with realism theory which believes in state as the most important Actor in International Relations and therefore state sovereignty should prime over international justice.

The use of universal jurisdiction as a political tool can threaten the world order and strain relations among states. Furthermore, there is the danger that universal jurisdiction may be perceived as hegemonistic jurisdiction exercised mainly by some Western powers against persons from weak nations. Given such dangers, states need to struck a balance between the goals of ending impunity and denying safe havens on one hand and respecting state sovereignty and maintaining friendly relations on the other.

5.2 Recommendations

After examining the application of the principle of universal jurisdiction and its application especially in the Rwandan case study, the study recommends the following:
The application of exercise Universal jurisdiction should be limited to the most heinous crimes such as, in addition to piracy, slavery, genocide, crimes against humanity and serious war crimes.

Triggering the exercise of universal jurisdiction should be subjected to a decision of the highest State authority because allowing private parties to initiate prosecutions may risk a greater number of politically motivated cases and an over-burdening of court systems with cases that are

political and therefore difficult to handle. However, private parties should be allowed to file complaints with the competent authorities, who would determine if proceedings are appropriate.

To avoid arbitrary decisions, the authority determining the prosecution on the basis of the universality principle should be required to consider a number of factors, including the presence of the accused; availability of evidence; severity of the crime and especially whether the national state is willing and able to prosecute. Universal jurisdiction should be understood as a last resort mechanism activated only if no primary jurisdiction is willing and able genuinely to prosecute the crime.

Universal jurisdiction should be considered as a subsidiary jurisdiction and for it to operate successfully it should be willing and able to cooperate closely with the domestic state. When states receive information regarding alleged serious international crimes, they should investigate the claim and share information with more closely connected states so that they may act. When a state obtains sufficient evidence to support the prosecution and where the more closely connected state proves unwilling or unable to act, then the state should proceed based on universal jurisdiction.

Inter-state cooperation remains invaluable to ending impunity and denying safe havens for persons suspected of committing serious international crimes and to maintain good diplomatic relations among states.

The application of the principle should respect immunities of officials of States and the presence of the suspect should be required to avoid diplomatic tensions between states.

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