

LEGAL OPINION

CONCERNING UNIVERSAL JURISDICTION UNDER CUSTOMARY INTERNATIONAL LAW

I. Introduction

A. *Subject of the opinion*

1. We are asked to advise on the customary international law position regarding “universal jurisdiction”. For our purposes, we use the term to refer to criminal jurisdiction over conduct which occurs outside the state’s territory and does not involve its nationals.

2. The specific questions we are asked to address are the following:

What is the position under customary international law regarding a state’s jurisdiction over genocide, crimes against humanity or other international crimes which are alleged to have been committed with no nexus to the state’s territory or nationals (that is, crimes which have allegedly occur entirely outside the state’s territory, and without any involvement of its nationals)?

Specifically, does customary international law permit the state to investigate such (alleged) crimes?

And if so, is that permission to investigate limited to situations where a suspect is present in the territory of the state?

3. We emphasize that our analysis will focus on customary international law. Since the matters we are addressing are also the subject of various international conventions, the legal positions of many states will also be affected by their specific treaty obligations.

B. *Types of jurisdiction*

4. Before seeking to answer these questions, it is useful to clarify some key concepts concerning jurisdiction over criminal matters.¹
5. At the outset, we clarify that when we refer to a state’s “jurisdiction”, this means its “competence under international law to regulate the conduct of natural and juridical persons”.²
6. In respect of criminal matters, international law distinguishes principally between two types of jurisdiction. A state’s competence to create laws is its *prescriptive jurisdiction*; while a state’s competence to enforce its laws, by investigating, arresting, prosecuting, sentencing, and punishing crimes is its *enforcement jurisdiction*.³ Writing on jurisdiction in international law often fails to differentiate between these categories, and this can create some confusion.⁴ It is also important to note that prescriptive and enforcement jurisdiction operate independently of each other: it is possible for a state’s conduct to demonstrate lawful exercise of prescriptive jurisdiction but an impermissible exercise of enforcement jurisdiction, or vice versa.⁵

¹ Frameworks concerning civil jurisdiction can be slightly different and are not addressed in this opinion.

² J. Crawford, *Brownlie’s Principles of Public International Law* (9th edn, OUP 2019) p. 440.

³ A separate concept of “adjudicative jurisdiction” is of relevance regarding civil matters, but not criminal matters: see generally, R. O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’ (2004) 2 *Journal of International Criminal Justice*, pp. 735-760. An overview on the distinction between the reach of a State’s prescriptive and enforcement jurisdiction is discussed in V. Lowe, *International Law* (OUP 2007) pp. 170-187.

⁴ We address this difficulty below at paragraph 48 *et seq.*

⁵ A helpful explanation is provided in R. O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’ (2004) 2 *Journal of International Criminal Justice*, p. 741.

7. The questions we are asked to address in this opinion touch on both types of jurisdiction:
 - (1) We are asked about a state's jurisdiction regarding non-territorial international crimes which do not involve its nationals. This is a question about which acts can be penalised under the state's criminal law. It concerns prescriptive jurisdiction.
 - (2) We are then asked whether the state's officials may take steps to investigate such crimes, including where the suspect is not present in the state. This is a question about enforcement jurisdiction.

We consider these questions in turn and finally address the additional question of how the principle of legality ("no crime without law") can sometimes arise in respect of proceedings founded on universal jurisdiction.

II. Questions concerning prescriptive jurisdiction

8. As indicated above, questions of prescriptive jurisdiction concern whether a state's domestic law may regulate or prohibit certain conduct.
9. The starting point for prescriptive jurisdiction is usually given as territoriality. International law undeniably allows a state to regulate acts which occur within its own territory.⁶ However, prescriptive jurisdiction under international law can also encompass extraterritorial conduct. It is generally considered that prescriptive jurisdiction can be exercised where *any one* "basis" of jurisdiction is recognized. The following is a (non-exhaustive) list of bases of jurisdiction which are (or might be) recognized under international law:
 - (1) Territoriality: where act(s) constituting the crime occur in the state's territory (or on its registered vessels);
 - (2) Nationality: where the person who commits those act(s) is a national of the state;
 - (3) Passive personality: where a victim of the crime is a national of the state;
 - (4) Protective principle: where the act(s) constituting the crime affect the vital interest of the state, such as its security;
 - (5) Effects doctrine: where the crime causes harm within the territory of the state;
 - (6) Universal jurisdiction (elaborated below).

Some of these bases remain controversial, either in their scope or their very existence. We will restrict our opinion to the existence and scope of universal jurisdiction. However, it is relevant to note that the first five heads of jurisdiction listed above all concern some form of nexus between the conduct and the state seeking to proscribe that conduct.

A. Customary international law and universal jurisdiction over international crimes

10. The term "universal jurisdiction" refers to a head of prescriptive jurisdiction which is not based on a nexus between the prohibited conduct and the state in question.⁷ Instead, it is based on the

⁶ R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (9th edn, Longman 1992) pp. 456-461; J. Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) p. 440; C. Stalker, 'Jurisdiction', in M. D. Evans (ed.), *International Law* (5th edn, OUP 2018) pp. 289-290; A. Cassese, *International Law* (2nd edn, OUP 2005) p. 219.

⁷ R. O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice*, pp. 745-746; R. O'Keefe, *International Criminal Law* (OUP 2015) p. 17; P. Alston and R. Goodman, *International Human Rights* (OUP 2012) p. 1122; D. Guilfoyle, *International Criminal Law* (OUP 2016) p. 37.

nature of the conduct/crime in question—that is, conduct which is of concern to humanity as a whole, usually because of its heinousness. This is elaborated below at paragraph 24. Universal jurisdiction can be created by treaty (in which case it arises for states which are party to the treaty, rather than for all states); or it can arise under customary international law (in which case it is relevant to all states).

11. We note that some writers refer to universal jurisdiction as “controversial”. This may be misleading. There is no question that some multilateral treaties establish universal jurisdiction.⁸ But moreover, in our view, there is also no controversy that universal jurisdiction exists under customary international law. Any controversy relates to its scope.
12. The latter point is most readily demonstrated by reference to piracy. Since at least the middle of the 18th century, piracy (on the high seas) has been regarded as a crime of universal jurisdiction, able to be prosecuted in any state.⁹ The explanation usually given is that pirates are a common enemy of all humankind.¹⁰
13. More recently, and especially in the era since World War II, there has been significant discussion about the expansion of universal jurisdiction beyond piracy to cover other crimes, and particularly the gravest international crimes such as genocide, crimes against humanity, war crimes and torture.¹¹ Before turning in detail to the question of *which* crimes would be covered by such a principle (which we do, in section II.B below), we first consider the extent to which there is international agreement that customary international law now recognizes universal jurisdiction beyond the crime of piracy.
14. We begin by acknowledging the absence of a single authoritative international judicial decision. In 2002, the International Court of Justice (‘ICJ’) issued its judgment in the *Arrest Warrant Case (DRC v Belgium)*. That case concerned Belgium’s issue of an arrest warrant for the (by then) former Foreign Minister of the DRC, in respect of charges of war crimes and crimes against humanity. The alleged crimes did not occur in Belgian territory, and neither the suspect nor the victims held Belgian nationality. The ICJ’s joint judgment did not address universal jurisdiction, instead assuming that Belgium had jurisdiction under international law.¹² However, several judges of the Court addressed this question in separate or dissenting opinions. Judges Higgins, Kooijmans and Buergenthal;¹³ Van den Wyngaert;¹⁴ and Koroma¹⁵ concluded that universal

⁸ This assumes the definition of “universal jurisdiction” used in paragraph 10 above. Some writers have defined the concept as jurisdiction inhering in *all* states, but this would exclude treaty-based jurisdiction except where a treaty has universal membership.

⁹ M. Chadwick, *Piracy, and the Origins of Universal Jurisdiction: On Stranger Tides?* (Brill Nijhoff 2018), especially at pp. 137-140, although regarding later acceptance (19th century) in the United States see p. 141 *et seq.*

¹⁰ See, for example, International Law Commission, [First report on prevention and repression of piracy and armed robbery at sea](#), 22 March 2023, para. 27 *et seq.*; *The Case of the S.S. “Lotus” (France v Turkey)*, [Dissenting Opinion by Mr Moore](#), 7 September 1927, p. 70.

¹¹ See, for example, *Eichmann v Attorney-General of the Government of Israel*, [Judgment \(Supreme Court\)](#), 29 May 1962, para. 12(a).

¹² The DRC originally challenged Belgium’s actions on two grounds, the first relating to the lawfulness of universal jurisdiction, and the second to the existence of a relevant immunity. However, before judgment, the DRC dropped its arguments concerning universal jurisdiction, and the Court therefore ruled only on the question of immunities. Since the Court was considering DRC’s immunity “from jurisdiction”, it assumed that Belgium had jurisdiction under international law, without deciding on that question: *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (‘Arrest Warrant Case’), [Judgment of 14 February 2002](#), paras 45-46.

¹³ *Arrest Warrant Case*, [Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal](#), paras 59-65.

¹⁴ *Arrest Warrant Case*, [Dissenting Opinion of Judge Van den Wyngaert](#), paras 52-62.

¹⁵ *Arrest Warrant Case*, [Separate Opinion of Judge Koroma](#), para. 9.

(prescriptive) jurisdiction exists over international crimes. However, two judges expressed a contrary view.¹⁶ While providing considerable support for the existence of universal prescriptive jurisdiction for war crimes and crimes against humanity, the *Arrest Warrant Case* did not demonstrate a unified view from the ICJ as of 2002 on that question.

15. Despite this, significant support exists for the notion that universal jurisdiction now extends beyond piracy, particularly when developments since 2002 are considered. We highlight the following:
16. *Decisions of international courts*: The existence of universal jurisdiction under international law over core international crimes has been recognized by judges of the various international criminal tribunals, including the International Criminal Tribunal for the former Yugoslavia ('ICTY'),¹⁷ the International Criminal Court ('ICC'),¹⁸ and the Special Court for Sierra Leone.¹⁹ This position has also been recognized by the European Court of Human Rights.²⁰
17. *Practice of states*: The practice of states on this subject is well documented by scholars and organizations working in the field. They point to significant numbers of states which have enacted legislation establishing universal jurisdiction in some form.²¹ For instance, the International Committee of the Red Cross ('ICRC') reports that "at least 50 states have legislated at some point for universal jurisdiction to be established for war crimes committed during non-international armed conflicts."²² In 2012, Amnesty International reported that 147 states (out of 193 UN member states) had provided for universal jurisdiction over one or more of four core international crimes (war crimes, crimes against humanity, genocide, and torture).²³
18. Through international organizations, states have supported multiple resolutions endorsing universal jurisdiction.²⁴ State practice in this area can also be observed from the extensive discussions on universal jurisdiction within the UN General Assembly's Sixth Committee. Since a

¹⁶ *Arrest Warrant Case*, [Separate Opinion of President Guillaume](#), para. 16; [Separate Opinion of Judge Rezak](#), paras 6-10.

¹⁷ *Prosecutor v Tadić*, IT-94-1, [Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction](#), 2 October 1995, para. 62; *Prosecutor v Furundžija*, IT-95-17/1-T, [Judgement](#), 10 December 1998, para. 156.

¹⁸ *Prosecutor v Ruto and Sang*, [Decision on Defence Applications for Judgments of Acquittal](#), ICC-01/09-01/11-2027-Red-Corr, 5 April 2016, para. 458.

¹⁹ *Prosecutor v Gbao*, SCSL-2004-15- AR72I, [Decision on Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court](#), 25 May 2004, para. 8.

²⁰ *Jorgic v Germany*, App. No. 74613/01, [Judgment](#), 12 July 2007, para. 69; *Ould Dah v France*, App. No. 13113/03, [Judgment](#), 17 March 2009, pp. 16-17.

²¹ We recognize that this legislation often includes restrictions regarding the *enforcement* of these laws. That question is addressed below at paragraph 50.

²² ICRC, [ICRC Explainer: What does international law say about universal jurisdiction for war crimes committed in non-international armed conflicts?](#), 30 August 2022, pp. 2-3.

²³ Amnesty International, [Universal Jurisdiction: A Preliminary Survey of Legislation Around the World: 2012 Update](#), 9 October 2012, p. 2.

²⁴ See for example: UNGA Resolution 3074 (XXVIII) of 3 December 1973 on [Principles of International Co-Operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity](#), paras 1 and 5; UN ECOSOC Resolution 1989/65 of 24 May 1989: [Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions](#), Principle 18; UNGA Resolution 47/133 of 18 December 1992, [Declaration on the Protection of all Persons from Enforced Disappearance](#), art. 14; UNGA Resolution 60/147 of 16 December 2005 on [Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#). The UN Security Council has also called upon states to exercise universal jurisdiction over crimes of international concern, including piracy, a broad range of terrorist crimes, and core international crimes. See UNSC [Resolution 1918 \(2010\)](#) of 27 April 2010; UNSC [Resolution 1851 \(2008\)](#) of 16 December 2008; UNSC [Resolution 978 \(1995\)](#) of 27 February 1995.

2009 request by the Group of African States for an agenda item on universal jurisdiction, every year's proceedings have included consideration of "[t]he scope and application of the principle of universal jurisdiction."²⁵ It is noteworthy that the original request recognized that "[t]he principle of universal jurisdiction is well established in international law."²⁶ Indeed, topics for debate include the scope of universal jurisdiction, but not whether universal jurisdiction is recognized in international law.²⁷ Reports prepared by the Secretary-General concerning this agenda item show widespread legislative practice on universal jurisdiction, and also document instances of judicial practice.²⁸

19. Increasing numbers of prosecutions are taking place in reliance on legislation based on universal jurisdiction. A small number of such cases are widely known, most notably *Eichmann* (Israel),²⁹ *Demjanjuk* (USA, Israel, and Germany),³⁰ *Pinochet* (Spain and UK),³¹ and *Habré* (Senegal and Belgium).³² However, today significant numbers of cases are proceeding to trial on the basis of

²⁵ See an overview at UNGA Resolution 78/100, [Annotated preliminary list of items to be included in the provisional agenda of the seventy-eighth regular session of the General-Assembly](#), 15 June 2023, para. 86.

²⁶ UNGA, [Request for the inclusion of an additional item in the agenda of the sixty-third session](#), 23 July 2009, Annex 1: Explanatory Memorandum, para. 1.

²⁷ See for example: [The scope and application of the principle of universal jurisdiction: Informal Working Paper prepared by the Chairperson for discussion in the Working Group](#), 4 November 2016.

²⁸ See for example the most recent report: UNGA, [The scope and application of the principle of universal jurisdiction: Report of the Secretary-General](#), A/78/130, 6 July 2023, especially at paras 6-29, and pp. 16-20 (on legislation) and paras 31-39 (on judicial practice). But see also the equivalent sections in each of previous annual reports, available on the [Sixth Committee website](#) (last accessed 4 October 2023).

²⁹ Adolf Eichmann was abducted by Israeli agents in Argentina in 1960 and tried in Israel in 1961 for acts committed in Germany and its occupied territories between 1938 and 1945. He was charged under Israel's 1951 Nazi and Nazi Collaborators (Punishment) Law with crimes against the Jewish people, crimes against humanity, war crimes, and membership of hostile organizations. However, this law (and indeed Israel itself) did not exist at the time of the conduct in question and the Israeli Supreme Court ruled that jurisdiction derived from customary international law. See *Eichmann v Attorney-General of the Government of Israel*, [Judgment \(Supreme Court\)](#), 29 May 1962, para. 13(8)(a).

³⁰ John Demjanjuk was extradited from the USA to Israel in 1986, where he was tried and convicted in 1988 of crimes committed at Treblinka. In 1993 that verdict was overturned. In 2009 Demjanjuk was extradited from the USA to Germany on charges of crimes committed at Sobibór, and he was convicted as an accessory to murder in 2011 by the Munich Regional Court. In its 1985 decision, the US Circuit Court of Appeals held that universal jurisdiction enabled Israel to try Demjanjuk even though Israel had not existed at the time of the crimes. See *Demjanjuk v Petrovsky et al.*, United States Court of Appeals, Sixth Circuit, 31 October 1985, paras 582-583.

³¹ Augusto Pinochet was indicted in Spain in 1998 in relation to acts committed in Chile, and his extradition was requested from the UK (where he was visiting). Although Pinochet eventually avoided extradition on grounds of ill-health, both the Spanish and UK courts ruled that jurisdiction existed over the acts of torture he had committed outside their territories (although both relied heavily on treaties and domestic law). See *R v Bow Street Metropolitan Stipendiary Magistrate and others, Ex parte Pinochet Ugarte (No. 3)* ('*Pinochet* (No. 3)'), 24 March 1999, p. 240D; [Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena](#), 5 November 1998; and N. Roht-Arriaza, 'The Pinochet Precedent and Universal Jurisdiction' (2001) 35 *New England Law Review*, pp. 311-319.

³² Beginning from around 2000, efforts began to secure the trial of former Chadian president Hissènè Habré, who was residing in Senegal. Legal proceedings relating to the complaints occurred in Senegal and Belgium, and before the African Court for Human and Peoples' Rights, the Committee Against Torture, the ECOWAS Court of Justice, and the ICJ. Habré was eventually tried by a special court established within Senegal: the Extraordinary African Chambers. See generally, [Ministère Public c. Hisssein Habré](#), Judgment of 30 May 2016; [Le Procureur Général c. Hisssein Habré](#), Appeal Judgment of 27 April 2017.

universal jurisdiction, and considerably more are investigated.³³ The organization TRIAL International, which reports on universal jurisdiction, refers to 78 *convictions* between 2015 and 2022.³⁴ Many more investigations are opened but do not proceed to trial: Eurojust reports that within Europe alone more than 1,500 investigations were opened into genocide, crimes against humanity or war crimes, noting that while these may sometimes rely on nationality links, a growing number are based on universal jurisdiction.³⁵ These numbers can be expected to grow further given European states' interest in investigating crimes related to the Russo-Ukrainian conflict.³⁶ Notably, few objections are heard from other states, either in respect of legislation enacting universal jurisdiction, or consequent prosecutions.³⁷

20. *Non-binding instruments:* A number of non-binding instruments created by academic and/or professional experts endorse universal jurisdiction over core international crimes. These include the Princeton Principles on Universal Jurisdiction,³⁸ the Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences,³⁹ the Institute of International Law's Resolution on universal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes,⁴⁰ the *Association Internationale de Droit Pénal's* resolution on Universal Jurisdiction,⁴¹ and the Madrid-Buenos Aires Principles on Universal Jurisdiction.⁴²
21. *The work of legal scholars and experts:* Today there is an overwhelming consensus among international legal scholars that universal jurisdiction is recognized over core international crimes⁴³ (even if differences remain among them concerning the nature of the legal principle or

³³ For an overview of cases worldwide, see TRIAL International, [Universal Jurisdiction Database](#) (last accessed 4 October 2023); and TRIAL International's annual report on this subject, most recently: TRIAL International, [Universal Jurisdiction Annual Review 2023](#).

³⁴ TRIAL International, [Universal Jurisdiction Annual Review 2023](#), p. 12. We note that it is unclear whether this figure only covers cases based on universal jurisdiction or also includes cases based on active or passive personality, as TRIAL International also reports on these.

³⁵ Eurojust, [New investigations on core international crimes increase by 44% since 2016](#), 23 May 2022; Eurojust, [At a Glance: Universal Jurisdiction in EU Member States](#), 23 May 2023.

³⁶ See, for example, Y. M. Dutton, 'Prosecuting Atrocities Committed in Ukraine: A New Era for Universal Jurisdiction?' (2023) 55(1) *Case Western Reserve Journal of International Law*, pp. 391-393.

³⁷ See R. O'Keefe, *International Criminal Law* (OUP 2015) pp. 23-24, where various enactments and exercises of jurisdiction are referred to which did not generate objections.

³⁸ [Princeton Principles on Universal Jurisdiction](#), 2001.

³⁹ [Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective](#), October 2002.

⁴⁰ IIL, [Resolution on universal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes](#), 26 August 2005.

⁴¹ AIDP, Resolution on Universal Jurisdiction, 20-27 September 2009, in [Resolutions of the Congresses of the International Association of Penal Law \(1926-2014\)](#), pp. 434-436.

⁴² [Madrid-Buenos Aires Principles on Universal Jurisdiction](#), 2015.

⁴³ See for example: J. Crawford, *Brownlie's Principles of International Law* (9th edn, OUP 2019) p. 452; R. O'Keefe, *International Criminal Law* (OUP 2015) pp. 23-24; D. Guilfoyle, *International Criminal Law* (OUP 2016) pp. 37-38; P. Alston and R. Goodman, *International Human Rights* (OUP 2012) pp. 1123-1124; A. Cassese, *International Law* (2nd edn, OUP 2005) pp. 436-446; A. Aust, *Handbook of International Law* (Cambridge University Press 2005) pp. 45-46; C. Stalker, 'Jurisdiction', in M. D. Evans (ed.) *International Law* (5th edn, OUP 2018) pp. 302-303; V. Lowe, *International Law* (OUP 2007) pp. 177-178; A. Cassese and P. Gaeta (eds.), *Cassese's International Criminal Law* (3rd edn, OUP 2013) p. 278; I. Bantekas, *International Criminal Law* (4th edn, Hart Publishing 2010) pp. 344-346; G. Werle and F. Jessberger, *Principles of International Criminal Law* (3rd edn, OUP 2014) pp. 73-76.

its scope). That view has also been taken by the ICRC,⁴⁴ and is reflected in the International Law Commission's 1996 Draft Code of Crimes Against the Peace and Security of Mankind.⁴⁵

22. This brief survey of sources is not exhaustive. However, we believe it demonstrates the enormous weight of opinion which endorses the applicability of universal prescriptive jurisdiction beyond piracy, to core international crimes. Of course, there have been dissenting voices, including a small number of writers who reject the idea that customary law recognizes universal jurisdiction,⁴⁶ and states which have expressed resistance to the use of the principle.⁴⁷ However, we consider that they are eclipsed by the considerable weight of authority supporting the existence of universal prescriptive jurisdiction for the core category of the most serious international crimes.

B. Which crimes are covered by universal jurisdiction under customary international law?

23. As we alluded to above, one aspect of universal jurisdiction which remains in some ways "controversial", is its precise scope – in other words, which crimes it attaches to in customary international law. However, as we explain in this section, there is nonetheless extensive endorsement for the applicability of universal prescriptive jurisdiction to core international crimes.
24. From a purely theoretical perspective, different views exist concerning the basis for certain offences being considered as customary crimes of universal jurisdiction. Some assert that universal jurisdiction arises where a type of offence is especially heinous, making it a matter of concern to the international community as a whole.⁴⁸ Others refer to the peremptory (*jus cogens*) nature of international rules concerning certain crimes,⁴⁹ and/or link that peremptory status to

⁴⁴ UN General Assembly, [Statement by the ICRC during the General Debate on the Scope and Application of the Principle of Universal Jurisdiction](#) (76th Session, 22 October 2021).

⁴⁵ ILC, [Draft Code of Crimes against the Peace and Security of Mankind](#) (1996) art. 8.

⁴⁶ See, for example, G. P. Fletcher, 'Against Universal Jurisdiction' (2003) 1(3) *Journal of International Criminal Justice*, pp. 580-584; H. A. Kissinger, 'The Pitfalls of Universal Jurisdiction' (2001) 80(4) *Foreign Affairs*, pp. 86-96.

⁴⁷ Notably, concerns have been raised at times by some African states: see for example African Union, [Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction](#) (2008). However, as pointed out above (paragraph 18), when requesting universal jurisdiction to be debated in the UN General Assembly's Sixth Committee, the Group of African States did not reject the existence of universal jurisdiction under customary international law; but rather focused on a perceived targeting of African leaders. See: UNGA, [Request for the inclusion of an additional item in the agenda of the sixty-third session](#), 23 July 2009, Annex 1: Explanatory Memorandum, para. 5 ("While the African Union fully subscribes to and supports the principle of universal jurisdiction within the context of fighting impunity as well as the need to punish perpetrators of genocide, crimes against humanity and war crimes, it is, however, concerned about its ad hoc and arbitrary application, particularly towards African leaders").

⁴⁸ *Arrest Warrant Case*, [Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal](#), para. 46; *Pinochet (No. 3)*, p. 275E (Lord Millet); *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* ('Zimbabwe Torture Docket Case'), 30 October 2014, para. 40. For some examples in academic writing, see J. D. van der Vyver, 'Personal and Territorial Jurisdiction of the International Criminal Court' (2000) 14 *Emory International Law Review*, p. 41; L. N. Sadat, 'Redefining Universal Jurisdiction' (2001) 35 *New England Law Review*, p. 244. For a closer analysis of this theory, see C. Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015), pp. 126-127, and D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' in S. Besson and J. Tasioulas (eds.) *The Philosophy of International Law* (OUP 2010) p. 571.

⁴⁹ *Pinochet (No. 3)*, p. 198F (Lord Browne-Wilkinson), p. 247F (Lord Hope), p. 275E-F (Lord Millet). See also *Prosecutor v Furundžija*, IT-95-17/1-T, [Judgement](#), 10 December 1998, para. 156.

obligations owed to the international community as a whole (*erga omnes*),⁵⁰ and treat these factors as the source of universal jurisdiction. A related, but in principle distinct, approach focuses on certain crimes as existing under international law, rather than merely being recognized by multiple national legal systems: on this theory, where international law itself creates an offence, it is by definition a crime of interest to all states.⁵¹ In contrast, some other commentators suggest a purely positivist view, asserting that universal jurisdiction simply attaches to those crimes which states accept it for.⁵²

25. Ultimately, these conceptual debates are of limited relevance for our purposes. Even if theoretical underpinnings are not harmonious, there is solid agreement on the existence of universal jurisdiction under customary international law for the most important international crimes: genocide, crimes against humanity, war crimes and torture.
26. *Genocide*: Genocide is widely recognized as being subject to universal jurisdiction. Although the jurisdictional provision of the 1948 Genocide Convention (which has near universal membership) does not expressly provide for extraterritorial jurisdiction by states,⁵³ courts have ruled that it either requires, or at least allows, universal jurisdiction over genocide.⁵⁴ Commentators overwhelmingly support the view that genocide is a crime under international law over which any state may exercise universal jurisdiction.⁵⁵ Decisions in *Eichmann*⁵⁶ and *Demjanjuk*⁵⁷ recognized the customary law right of all states to prosecute genocide.⁵⁸
27. *Crimes against humanity*: Crimes against humanity are not yet the subject of their own international convention, but they are generally understood to be one of the core international crimes (alongside war crimes, genocide and possibly aggression), as reflected in various

⁵⁰ [Pinochet \(No. 3\)](#), p. 247F (Lord Hope); A. Addis, 'Imagining the International Community: The Constitutive Dimension of Universal Jurisdiction' (2009) 31(1) *Human Rights Quarterly*, p. 143; M. Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59(4) *Law and Contemporary Problems*, p. 65; J. Davidovic, 'Universal Jurisdiction and International Criminal Law', in C. Flanders and Z. Hoskins (eds.) *The New Philosophy of Criminal Law* (Rowman & Littlefield 2015) p. 124.

⁵¹ *Prosecutor v Tadić*, IT-94-1-T, [Decision on the Defence Motion on Jurisdiction](#), 10 August 1995, para. 42; [Zimbabwe Torture Docket Case](#), 30 October 2014, para. 37; [Pinochet \(No. 3\)](#), p. 198F (Lord Browne-Wilkinson); [Polyukhovich v Commonwealth of Australia](#), 10 August 1991, Justice Brennan at para. 39; Justice Toohey at paras 26, 33-35.

⁵² See e.g., D. Guilfoyle, *International Criminal Law* (OUP 2016) p. 38.

⁵³ [Convention on the Prevention and Punishment of the Crime of Genocide](#), 9 December 1948, art. IV.

⁵⁴ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v Serbia and Montenegro)*, Judgment of 26 February 2007, [Separate Opinion of Judge Lauterpacht](#), para. 110; *Jorgic v Germany*, App. No. 74613/01, [Judgment](#), 12 July 2007, paras 68-70; [Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena](#), 5 November 1998; [Ríos Montt et. al \('Guatemalan Genocide Case'\)](#), 26 September 2005.

⁵⁵ See, for example, A.R. Carnegie, 'Jurisdiction over Violations of the Laws and Customs of War' (1963) 39 *British Yearbook of International Law*, p. 424; D. Cassel, 'Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court' (2001) 35 *New England Law Review*, pp. 426-427; Y. Dinstein, 'International Criminal Law' (1985) 20 *Israel Law Review*, p. 214; [Restatement \(Third\) of the Foreign Relations Law of the United States](#), 1987, § 404; K. C. Randall, 'Universal Jurisdiction under International Law' (1988) 66 *Texas Law Review*, p. 788.

⁵⁶ *Eichmann v Attorney-General of the Government of Israel*, [Judgment \(Supreme Court\)](#), 29 May 1962, paras 10(2) and 13(8)(a).

⁵⁷ [Demjanjuk v Petrovsky et al.](#), United States Court of Appeals, Sixth Circuit, 31 October 1985, paras 582-583.

⁵⁸ While the *Guatemalan Genocide Case* in Spain principally concerned obligations under the Genocide Convention, the Constitutional Court also indicated its view that the key obligations reflected customary law: [Ríos Montt et. al \('Guatemalan Genocide Case'\)](#), 26 September 2005, paras 5-6.

international texts, including the Nuremberg Principles,⁵⁹ the Rome Statute,⁶⁰ and the statutes of other international criminal tribunals.⁶¹ Universal jurisdiction over crimes against humanity has also been widely accepted as recognized under customary international law. This was the view of Judges Higgins, Kooijmans and Buergenthal and Judge Van den Wyngaert in the *Arrest Warrant Case*,⁶² and the position is supported by decisions from international tribunals⁶³ and domestic courts,⁶⁴ as well as United Nations resolutions.⁶⁵

28. *War Crimes*: There is also no doubt that customary international law recognizes universal jurisdiction over (at least some) war crimes. The four Geneva Conventions of 1949 established universal jurisdiction over grave breaches committed in international armed conflicts,⁶⁶ and have been ratified or acceded to by all states. Notably, the ICRC, in its 2005 study of customary international humanitarian law, concluded that states have the right to exercise universal jurisdiction over war crimes.⁶⁷ That view has also been taken by other international bodies,⁶⁸

⁵⁹ International Law Commission, [Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal](#), 1950, Principle I(c).

⁶⁰ [Rome Statute of the International Criminal Court](#), 1 July 2002, art. 7.

⁶¹ See for example: [Statute of the International Criminal Tribunal for Former Yugoslavia](#), 25 May 1993, art. 5; [Statute of the International Criminal Tribunal for Rwanda](#), 8 November 1994, art. 3; [UNTAET Regulation No. 2000/15 on the Establishment with Panels with Exclusive Jurisdiction over Serious Criminal Offences](#), 6 June 2000, arts 1.3 and 5; [Statute of the Special Court for Sierra Leone](#), 14 August 2000, art. 2; [Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea](#), 10 August 2001 (amended 27 October 2004), art. 5.

⁶² *Arrest Warrant Case*, [Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal](#), para. 65; [Dissenting Opinion of Judge Van den Wyngaert](#), paras 51 and 67.

⁶³ *Prosecutor v Tadić*, IT-94-1-T, [Decision on the Defence Motion on Jurisdiction](#), 10 August 1995, para. 42; *Prosecutor v Ntuyahaga*, Case No. ICTR-90-40-T, [Transcript of 18 March 1999](#) (Bernard Ntuyahaga Motion Decision), where the Tribunal “[e]ncourage[d] all States, in application of the principle of universal jurisdiction, to prosecute and judge those responsible for serious crimes such as genocide, crimes against humanity and other grave violations of international humanitarian law.” See also *Prosecutor v Ruto and Sang*, [Decision on Defence Applications for Judgments of Acquittal](#), ICC-01/09-01/11-2027-Red-Corr, 5 April 2016, para. 458.

⁶⁴ *Eichmann v Attorney-General of the Government of Israel*, [Judgment \(Supreme Court\)](#), 29 May 1962, para. 11; *Polyukhovich v Commonwealth of Australia*, 10 August 1991, Justice Toohey at para. 28; [Sentencia Condentoria de la Audencia Nacional \(Caso Scilingo\)](#), 19 April 2005, pp. 107-110. On the decision, see Alicia Gil Gil, ‘The Flaws of the Scilingo Judgment’ (2005) 3 *Journal of International Criminal Law*, pp. 1082-1084 (provides a useful overview on how the Spanish *Audencia Nacional* asserted that state practice demonstrates the existence of an international customary rule granting national court’s jurisdiction over crimes against humanity, even in the absence of domestic provisions); [Sentencia del Tribunal Supremo \(Casa Adolfo Scilingo\)](#), 1 October 2007; *Case of Anwar Raslan*, [Higher Regional Court Koblenz](#), 13 January 2022.

⁶⁵ For example: [Principles of International Co-Operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity](#), adopted on 3 December 1973: “[W]ar crimes and crimes against humanity, wherever they are committed, shall be subject to investigation [,] and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.”

⁶⁶ [Geneva Convention \(I\) for the Amelioration of the Condition of the Wounded Sick in Armed Forces in the Field](#), 12 August 1949, art. 49; [Geneva Convention \(II\) of the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea](#), 12 August 1949, art. 50; [Geneva Convention \(III\) Relative to the Treatment of Prisoners of War](#), 12 August 1949, art. 129; [Geneva Convention \(IV\) Relative to the Protection of Civilian persons in Time of War](#), 12 August 1949, art. 146. See also [Protocol \(I\) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts](#), 8 June 1977, art. 85 (qualifies grave breaches as war crimes).

⁶⁷ ICRC, [Customary International Humanitarian Law](#), 2005, p. 46. Specifically, [Rule 157](#) of the study enounces that states have the right to vest universal jurisdiction in their national courts over war crimes.

⁶⁸ See the International Law Commission’s 1996 [Draft Code of Crimes against the Peace and Security of Mankind](#), art. 8.

international tribunals,⁶⁹ and domestic courts.⁷⁰ The ICRC documents an extensive list of national legislation and military manuals which recognize universal jurisdiction over war crimes.⁷¹

29. One area of slightly greater contention is *which* of the many war crimes have attained the status of crimes of universal jurisdiction. The relevant treaty law provisions are restricted to grave breaches, which are a subset of the war crimes occurring in international armed conflicts. However, some authority now exists for the proposition that war crimes committed in non-international armed conflicts are also the subject of universal jurisdiction under customary international law.⁷² That position has been taken by international courts,⁷³ national courts,⁷⁴ and also by the ICRC.⁷⁵ The ICRC points to legislative practice of more than 50 states; as well as at least 21 universal jurisdiction cases regarding internal armed conflicts which have been tried since 1997, none of which generated objections from the suspect's state of nationality.⁷⁶
30. *Torture*: A number of universal jurisdiction cases have now been based on the crime of torture. Formerly torture was treated as an international crime only where it was a war crime (when connected to an armed conflict), or a crime against humanity (when connected to a widespread or systematic attack against a civilian population).⁷⁷ More recently, some case law has begun to address torture as an international crime in its own right.⁷⁸ Other decisions have focused on the *jus cogens* nature of obligations to prevent or respond to torture as a basis for universal jurisdiction regarding torture (even in peace time).⁷⁹
31. Beyond these four categories of core international crimes, others have sometimes argued for universal jurisdiction attaching to other offences, including terrorism,⁸⁰ the slave trade and human trafficking,⁸¹ and grand corruption.⁸²

⁶⁹ *Prosecutor v Tadić*, IT-94-1-T, [Decision on the Defence Motion on Jurisdiction](#), 10 August 1995, para. 42.

⁷⁰ *Polyukhovich v Commonwealth of Australia*, 10 August 1991, Justice Brennan at paras 33, 36; Justice Toohey at para. 28; *Pinochet (No. 3)*, pp. 274F and 276E (Lord Millet); *Case of Hamid Noury*, [District Court of Sweden](#), 14 July 2022, pp. 35-38.

⁷¹ ICRC International Humanitarian Law Databases, [Practice relating to Rule 157: Jurisdiction over War Crimes](#) (last accessed 3 October 2023).

⁷² For a general source supporting this position see: International Commission of Jurists, [International Law and the Fight Against Impunity](#), 2015, p. 75.

⁷³ *Prosecutor v Gbao*, SCSL-2004-15-AR72(E), [Decision on Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court](#), 25 May 2004, para. 8.

⁷⁴ *Case of Hamid Noury*, [District Court of Sweden](#), 14 July 2022, pp. 35-38.

⁷⁵ ICRC, [ICRC Explainer: What does international law say about universal jurisdiction for war crimes committed in non-international armed conflicts?](#), 30 August 2022, pp. 2-3.

⁷⁶ *Ibid.*

⁷⁷ For example, see the treatment in: *Pinochet (No. 3)*, p. 246G-247C (Lord Hope).

⁷⁸ *Pinochet (No. 3)*, p. 197D-199D (Lord Browne-Wilkinson); *Zimbabwe Torture Docket Case*, 30 October 2014, para. 35.

⁷⁹ *Prosecutor v Furundžija*, IT-95-17/1-T, [Judgement](#), 10 December 1998, para. 156; *Ould Dah v France*, App. No. 13113/03, [Judgment](#), 17 March 2009, pp. 16-17. See also *Zimbabwe Torture Docket Case*, 30 October 2014, paras 35-37.

⁸⁰ See, for example, K. C. Randall, 'Universal Jurisdiction under International Law' (1988) 66 *Texas Law Review*, pp. 789-790, referring to *United States v Layton*, [Decision of the US District Court for the Northern District of California](#), 6 March 1981.

⁸¹ See, for example, R. O'Keefe, *International Criminal Law* (OUP 2015) pp. 21-22; M. Cohen, 'The Analogy Between Piracy and Human Trafficking: A Theoretical Framework for the Application of Universal Jurisdiction' (2010) 16 *Buffalo Human Rights Law Review*, p. 225.

⁸² See, for example, Transparency International, [Tackling Grand Corruption Impunity: Proposals for a definition and special measures](#), 17 May 2023, pp. 19-21.

32. In sum, there are a small number of core international crimes in respect of which universal jurisdiction is clearly recognized under customary international law. Universal jurisdiction may also exist for other offences, but this is less certain.

C. What do we mean by saying that international law permits the exercise of universal jurisdiction?

33. It is clear that customary international law does not *oblige* states to investigate or prosecute every crime which attracts universal jurisdiction.⁸³ That is the consensus view in academic writing and judicial decisions,⁸⁴ and it is supported by the very large percentage of international crimes which are *not* made subject to universal jurisdiction-based prosecutions. This also reflects the fact that universal jurisdiction is concerned with *prescriptive jurisdiction* (and therefore with the criminalising of certain conduct) rather than *enforcement jurisdiction* (involving the enforcement of criminal prohibitions).⁸⁵
34. A slightly different question is what customary international law says about whether a state may, should or must create national laws prohibiting those crimes which are subject to universal jurisdiction.
35. The classic starting point on this question is the 1927 decision of the Permanent Court of International Justice in the *Lotus Case*.⁸⁶ Regarding prescriptive jurisdiction, the Court explained that:

*Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.*⁸⁷

36. According to this approach, international law simply leaves states with a wide degree of freedom regarding prescriptive jurisdiction. Instead of certain bases of jurisdiction being actively permitted, states may act whenever there is not an identified prohibition on the exercise of prescriptive jurisdiction.
37. However, today it is unclear whether this approach is correct. Jurists question whether *Lotus* has been overtaken by a different approach to prescriptive jurisdiction, or indeed whether it was ever correct.⁸⁸ Only a few years after *Lotus*, the 1935 Harvard Draft Convention on Jurisdiction with Respect to Crime adopted a different approach, with prescriptive jurisdiction explicitly permitted on certain identified bases.⁸⁹ Indeed, that is the approach taken to prescriptive jurisdiction in most standard texts on public international law. They typically set out a series of permissive bases

⁸³ We note that the position may be different under some treaties.

⁸⁴ G. Werle and F. Jessberger, *Principles of International Law* (3rd edn, OUP 2014) pp. 81-83; D. Guilfoyle, *International Criminal Law* (OUP 2016) p. 39.

⁸⁵ See above at paragraphs 6-7 and below at paragraph 49.

⁸⁶ *The Case of the S.S. "Lotus" (France v Turkey)*, [Judgment No. 9](#), 7 September 1927.

⁸⁷ *Ibid.*, p. 19.

⁸⁸ Among others, Cecil Ryngaert cites Frederick Mann as considering (in 1964) that *Lotus* was "a most unfortunate and retrograde theory" which "cannot claim to be good law" while Rosalyn Higgins described it (in 1994) as "an unclear dictum of a court made long ago in the face of utterly different factual circumstances." See C. Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015) p. 35 and footnotes 20 and 21. See also D. Hovell, 'The Authority of Universal Jurisdiction' (2018) 29 *European Journal of International Law*, pp. 438-439.

⁸⁹ Harvard Law School Research in International Law, 'Jurisdiction with Respect to Crime' (1935) 29 *American Journal of International Law*, Supplement, pp. 439-442, especially art. 2.

of jurisdiction (rather than identifying specified prohibitions).⁹⁰ In the *Arrest Warrant Case*, Judges Higgins, Kooijmans and Buergenthal said that *Lotus* “represents the high water mark of laissez-faire in international relations, and an era that has been significantly overtaken by other tendencies.”⁹¹ Judge Van den Wyngaert also queried whether the *Lotus* approach is correct, and went on to analyse the customary international law position on universal jurisdiction for war crimes and crimes against humanity from both approaches.⁹² She concluded that international law does not merely *not prohibit* universal jurisdiction, but that it actively approves it:

*[I]nternational law permits and even encourages States to assert this form of jurisdiction in order to ensure that suspects of war crimes and crimes against humanity do not find safe havens.*⁹³

38. We also consider that this view sits more comfortably than *Lotus* does with the idea of universal jurisdiction as linked to the existence of a *jus cogens* rule of international law, or to the existence of a criminal prohibition at the international level.⁹⁴ On either theory, universal jurisdiction is linked to the existence of a positive rule at the international level, not to the absence of rules.
39. This could lead to the question of whether those international rules might not merely “permit” or “encourage” states to assert universal jurisdiction, but perhaps might even *oblige* them to proscribe certain conduct.⁹⁵ Minimal evidence of such an obligation exists to date. One example might arguably be found in the South African Constitutional Court’s 2014 decision in the *Zimbabwe Torture Docket Case*. Although South Africa was a party to the Torture Convention, the Court went beyond it and discussed the position under customary international law. Most relevantly:

Torture, even if not committed on the scale of crimes against humanity, is regarded as a crime which threatens “the good order not only of particular states but of the international community as a whole”. Coupled with treaty obligations, the ban on torture has the customary international law status of a peremptory norm from which no derogation is permitted.

... Torture attracts universal condemnation and all nations have an interest in its prevention, regardless of the nationality of the perpetrator or of the place where it has occurred. ...

*Along with torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid require states, even in the absence of binding international treaty law, to suppress such conduct because “all states have an interest as they violate values that constitute the foundation of the world public order”.*⁹⁶

⁹⁰ See for example: R. O’Keefe, *International Criminal Law* (OUP 2015) pp. 9-25; J. Crawford, *Brownlie’s Principles of Public International Law* (9th edn, OUP 2019) pp. 441-448. D. Guilfoyle, *International Criminal Law* (OUP 2016) pp. 31-37; C. Stalker, ‘Jurisdiction’, in M. D. Evans (ed.), *International Law* (5th edn, OUP 2018) pp. 289-293; V. Lowe, *International Law* (OUP 2007) pp. 170-180.

⁹¹ *Arrest Warrant Case*, [Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal](#), para. 51.

⁹² *Arrest Warrant Case*, [Dissenting Opinion of Judge Van den Wyngaert](#), para. 51.

⁹³ *Ibid.*, para. 67. See a similar position set out by Justice Toohey in [Polyukhovich v Commonwealth of Australia](#), 10 August 1991, Justice Toohey at para. 27: “the proposition that universal jurisdiction is positively conferred by international law and is not merely the absence of prohibition is well founded.”

⁹⁴ See above at paragraph 24.

⁹⁵ Note that an obligation to prohibit international crimes in domestic law would not amount to an obligation to *enforce* those laws. As discussed above in paragraph 33, it is clear that there is no obligation to enforce, at least under customary international law.

⁹⁶ [Zimbabwe Torture Docket Case](#), 30 October 2014, para. 29.

Support for this view is, however, lacking to date, at least as concerns customary international law (although we note again that the position can be different under relevant conventions⁹⁷).

40. Accordingly, we consider the position under customary international law to be as follows: states are not yet *obliged* to create universal jurisdiction for international crimes under their national law. That being said, we consider that international law does go beyond merely not prohibiting universal jurisdiction, and instead positively enables universal jurisdiction for core international crimes.

III. Questions concerning enforcement jurisdiction

A. Customary international law concerning enforcement jurisdiction

41. The rules of customary international law regarding enforcement jurisdiction are both simpler and clearer. The general rule, albeit subject to limited exceptions, is that a state may not take enforcement action within the territory of another state.⁹⁸ According to the majority in the *Lotus Case*: “The first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State.”⁹⁹
42. What this means in practical terms is that acts taken to enforce a state’s law cannot be physically undertaken within the area of another state’s territory. These acts include steps such as arresting or detaining suspects, seizing property, or collecting evidence. In practice this means that State X cannot undertake such actions within the territory of State Y (unless a relevant exception applies). Importantly, this does not prevent State X from undertaking any or all of these steps within its own territory but in relation to crimes committed in State Y. However, State X may not enter State Y to further these actions¹⁰⁰ (unless a relevant exception applies).
43. Two key exceptions exist: First, a state may consent to another state undertaking enforcement action on its territory. This occasionally happens under treaties or under *ad hoc* arrangements where a state considers that it would benefit from policing assistance from another state.¹⁰¹ Secondly, international humanitarian law permits enforcement action to be taken in the context of an armed conflict or occupation, even on another state’s territory.¹⁰²
44. Outside of these exceptions, where a state wants enforcement steps to be taken in the territory of another state, it ordinarily does so by requesting assistance from the territorial state, usually through pre-established frameworks for extradition (for the transfer of a suspect) and/or mutual legal assistance (other measures for preserving or collecting evidence etc). Seeking extradition or mutual legal assistance from another state complies with the general rule set out in paragraph 41

⁹⁷ A different position can exist under treaties which may either explicitly or implicitly require states to adopt universal jurisdiction in their national law. See for example, regarding torture: *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, [Judgment of 20 July 2012](#), paras 74-75; *Guengueng et al. v Senegal*, [Decision](#), 17 May 2006, para. 1.

⁹⁸ For explanations of the rule see, for example: R. O’Keefe, *International Criminal Law* (OUP 2015) pp. 29 *et seq.*

⁹⁹ *The Case of the S.S. “Lotus” (France v Turkey)*, [Judgment No. 9](#), 7 September 1927, pp. 18-19.

¹⁰⁰ In this respect, a good example of an international unlawful act in exercise of enforcement jurisdiction can be seen in the *Eichmann* case, Eichmann having been arrested and detained by Israeli agents in Argentina (and without Argentina’s consent).

¹⁰¹ O’Keefe gives examples including the Schengen Convention’s inclusion of limited cross-border policing; Indonesia’s consent to foreign detectives operating on its territory to investigate bombings in Bali in 2002, and the powers given to military police where foreign military presence is agreed under a Status of Forces Agreement: see R. O’Keefe, *International Criminal Law* (OUP 2015) pp. 31-32.

¹⁰² R. O’Keefe, *International Criminal Law* (OUP 2015) pp. 32-33.

above because it is done from the requesting state's own territory, and the requested state can decide whether or not it wishes to comply with the request, subject only to any existing treaty obligations.¹⁰³ Judge Oda explained it this way in the *Arrest Warrant Case*:

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

*It bears stressing that the issuance of an arrest warrant by one State and the international circulation of the warrant through Interpol have no legal impact unless the arrest request is validated by the receiving State. The Congo appears to have failed to grasp that the mere issuance and international circulation of an arrest warrant have little significance.*¹⁰⁴

45. Judges Higgins, Kooijmans and Buergenthal made a similar point:

*The Belgian arrest warrant envisaged the arrest of Mr. Yerodia in Belgium, or the possibility of his arrest in third States at the discretion of the States concerned. This would in principle seem to violate no existing prohibiting rule of international law.*¹⁰⁵

46. These considerations lead us to respond to the second part of the question affirmatively. International law allows a state to take investigative action within its own territory, including in respect of an extraterritorial crime, whether on the basis of universal jurisdiction or any other extraterritorial head of jurisdiction.

B. What is the relevance (if any) of the presence of a suspect in the territory?

47. The preceding paragraphs may have already made clear the answer to this question. The international lawfulness of enforcement action depends on the location of the action. The location of the suspect is not relevant. Indeed, extradition frameworks exist precisely because states can and do investigate crimes when the suspect is not within their territory.
48. Suggestions that the presence of the suspect is relevant to an investigation or prosecution usually involve an argument which tries to link the location of the crime and the location of the suspect. It might, for example, be asserted that an investigation is permissible where the crime happened within the territory and the suspect is abroad, or when the crime happened extraterritorially but when the suspect is within the territory, but that it would be impermissible to prosecute a case where the crime was extraterritorial and the suspect is abroad. This appears to be the position of those judges in the *Arrest Warrant Case* who rejected "universal jurisdiction *in absentia*".¹⁰⁶ A

¹⁰³ See D. Guilfoyle, *International Criminal Law* (OUP 2016) p. 41: "seeking a person's extradition *cannot* amount to an impermissible exercise of enforcement jurisdiction in the State receiving an arrest warrant. It is at most a *request* that a person be arrested."

¹⁰⁴ *Arrest Warrant Case*, [Dissenting Opinion of Judge Oda](#), para. 13.

¹⁰⁵ *Arrest Warrant Case*, [Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal](#), para. 54.

¹⁰⁶ *Arrest Warrant Case*, [Separate Opinion of President Guillaume](#), para. 16; [Separate Opinion of Judge Rezek](#), paras 6-10 (although he did not use this terminology); [Declaration of Judge Ranjeva](#), paras 7-11; [Separate Opinion of Judge Bula-Bula](#), paras 75-81.

number of writers subsequently adopted this terminology (whether arguing for or against its permissibility in international law).¹⁰⁷

49. However, as prominent jurists have pointed out, that approach wrongly elides the two separate types of jurisdiction.¹⁰⁸ Judge Van den Wyngaert made this clear in her opinion: “[a] distinction must be made between *prescriptive jurisdiction* and *enforcement jurisdiction*.”¹⁰⁹ James Crawford, writing extrajudicially in 2019 (although himself a judge on the International Court of Justice at this time), explained it this way:

Although the notion of universal jurisdiction in absentia was not unknown in academic literature prior to the Arrest Warrant case, it is not compelling. Universal jurisdiction is a manifestation of a state’s jurisdiction to prescribe. The question whether jurisdiction is exercised in personam or in absentia is a manifestation of a state’s jurisdiction to enforce. In the context of Arrest Warrant, the Belgian law on war crimes and the issue of an arrest warrant in support of that law were separate acts. To speak of universal jurisdiction in absentia is to conflate prescriptive and enforcement jurisdiction.”¹¹⁰

50. It is certainly true that many states have introduced restrictions in their domestic laws to limit the exercise of enforcement jurisdiction. Commonly, these will mean that some enforcement actions will only be undertaken where the suspect is a national or resident of the state, is currently present in the state, or is likely to be present in the state.¹¹¹ However, judges and commentators alike have noted that such restrictions reflect practical and political considerations which make it desirable for states to limit the instances in which they will act on available jurisdiction, but that this does not imply that acting in a wider number of cases would be

¹⁰⁷ See for example: R. O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’ (2004) 2 *Journal of International Criminal Justice*, p. 750; A. J. Colangelo, ‘The New Universal Jurisdiction: *In Absentia* Signalling Over Clearly Defined Crimes’ (2005) 36(2) *Georgetown Journal of International Law*, pp. 537-603; A. Poels, ‘Universal Jurisdiction *In Absentia*’ (2005) 23(1) *Netherlands Quarterly of Human Rights*, pp. 65-84; F. Lafontaine, ‘Universal Jurisdiction – The Realistic Utopia’ (2012) 10 *Journal of International Criminal Justice*, pp. 1277-1302; F. M. Palombino, ‘Universal Jurisdiction *In Absentia* over Genocide: Some Critical Remarks in the Light of Recent Spanish Jurisprudence’ (2007) 9(2) *Journal of Genocide Research*, pp. 243-249; M. El Zeidy, ‘Universal Jurisdiction *In Absentia*: Is it a Legal Valid Option for Repressing Heinous Crimes?’ (2003) 37(3) *The International Lawyer*, pp. 835-861; R. Rabinovitch, ‘Universal Jurisdiction *In Absentia*’ (2005) 28(2) *Fordham International Law Journal*, pp. 500-530; T. Kluwen, ‘Universal Jurisdiction *In Absentia* before Domestic Courts Prosecuting International Crimes: A Suitable Weapon to Fight Impunity’ (2017) 8(1) *Georgetown Journal of International Law*, pp. 7-38; C. Kress, ‘Universal Jurisdiction over International Crimes and the *Institut de Droit International*’ (2006) 4 *Journal of International Criminal Justice*, pp. 561-579.

¹⁰⁸ R. O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’ (2004) 2 *Journal of International Criminal Justice*, pp. 736-744; R. O’Keefe, *International Criminal Law* (OUP 2015) p. 17; J. Crawford, *Brownlie’s Principles of Public International Law* (9th edn, OUP 2019) p. 453. See further D. Guilfoyle, *International Criminal Law* (OUP 2016) pp. 40-41. See also the South African Constitutional Court decision in [Zimbabwe Torture Docket Case](#), 30 October 2014, para. 29.

¹⁰⁹ *Arrest Warrant Case*, [Dissenting Opinion of Judge Van den Wyngaert](#), para. 49.

¹¹⁰ J. Crawford, *Brownlie’s Principles of Public International Law* (9th edn, OUP 2019) p. 453.

¹¹¹ To demonstrate through one example: In March 2014 Spain introduced restrictions to the application of universal jurisdiction by Spanish courts as governed by art. 23 of the Organic Law 6/1985 of 1 July 1985 of the Judicial Power. Pursuant to art. 23.4(a), the law now requires that, in order for the Spanish judiciary to act, the proceedings must be directed at a suspect who is a Spanish national, a foreigner who habitually resides in Spain or a foreigner who is present in Spain and whose extradition has been refused by Spain. [See Organic Law 1/2014 Modifying the Organic Law 6/1985 of the Judicial Power, BOE-A-2014-2709](#). For further examples, see the summaries of limitations under various AU and EU state laws (as at 2009) set out in the AU-EU Expert Report: [The AU-EU Expert Report on the Principle of Universal Jurisdiction](#), 16 April 2009, paras 18 and 24. For more recent examples, see ICRC International Humanitarian Law Databases, [Commentary to Geneva Convention III, article 129](#) (2020) footnote 110 (last accessed 4 October 2023).

impermissible.¹¹² A state's decision to refrain from prosecuting in some (or many) instances does not imply that prosecuting would be illegal: prosecutions may simply be thought undesirable, politically or otherwise. According to Judge Van den Wyngaert:

It may be politically inconvenient to have such a wide jurisdiction because it is not conducive to international relations and national public opinion may not approve of trials against foreigners for crimes committed abroad. This does not, however, make such trials illegal under international law.

*A practical consideration may be the difficulty in obtaining the evidence in trials of extraterritorial crimes. Another practical reason may be that States are afraid of overburdening their court system. ... The concern for a linkage with the national order thus seems to be more of a pragmatic than of a juridical nature.*¹¹³

51. In any event, it is also the case that some domestic legal systems incorporate universal jurisdiction without such limitations, thereby enabling investigations even without a suspect present in or linked to the investigating state.
52. For example, German law provides for extraterritorial jurisdiction over genocide, war crimes and crimes against humanity without a requirement for any nexus with Germany.¹¹⁴ Prosecutors have a discretion as to whether to proceed in cases where there is no nexus with Germany,¹¹⁵ but it is reported that in practice prosecutors will proceed with an investigation regardless of nexus unless there is a lack of evidence (including victims or witnesses) within Germany.¹¹⁶
53. In South Africa, the Constitutional Court examined the question of whether investigations based on universal jurisdiction required the presence of a suspect in South Africa. It noted that legislation concerning international crimes extended jurisdiction over acts of nationals and residents and persons who "after the commission of the crime, [are] present in the territory",¹¹⁷ but ruled that this limitation only restricted prosecutions; it did not limit the police's powers or duties to investigate.¹¹⁸ The Constitutional Court referred to international practice, which may require the presence of a suspect after a prosecution has started, but not for the opening of an investigation.¹¹⁹ It also noted that this is logical for compelling practical reasons:

Requiring presence for an investigation would render nugatory the object of combating crimes against humanity. If a suspect were to enter and remain briefly in the territory of a state party, without a certain level of prior investigation, it would not be practicable to initiate charges and prosecution. An anticipatory investigation does not violate fair trial rights of the suspect or accused person. A determination of presence or anticipated presence requires an investigation in the first instance. Ascertaining a current or anticipated location of a suspect could not occur otherwise. Furthermore, any possible next step that could arise as a result of an investigation, such as a prosecution or an extradition request, requires an assessment of information which can only be attained through an investigation. By way of example, it is only once a docket has been

¹¹² *Eichmann v Attorney-General of the Government of Israel*, [Judgment \(Supreme Court\)](#), 29 May 1962, para. 12(d); [Pinochet \(No. 3\)](#), p. 274C-F (Lord Millet); *Arrest Warrant Case*, [Dissenting Opinion of Judge Van den Wyngaert](#), paras 55-56; R. O'Keefe, *International Criminal Law* (OUP 2015) p. 23 (footnote 100) and p. 375; H. Ascensio, 'Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in Guatemalan Generals' (2003) 1 *Journal of International Criminal Justice*, p. 700.

¹¹³ *Arrest Warrant Case*, [Dissenting Opinion of Judge Van den Wyngaert](#), para. 56.

¹¹⁴ Article 1 of the [Code of Crimes Against International Law](#) of 26 June 2002 (as last amended 22 December 2016).

¹¹⁵ [Criminal Procedure Code](#), section 153(f).

¹¹⁶ OSJI and TRIAL International, [Universal Jurisdiction Law and Practice in Germany](#), March 2019, pp. 17-19.

¹¹⁷ [Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002](#), Section 4(3).

¹¹⁸ [Zimbabwe Torture Docket Case](#), 30 October 2014, paras 41-49.

¹¹⁹ *Ibid.*, para. 47.

completed and handed to a prosecutor that there can be an assessment as to whether or not to prosecute.¹²⁰

54. Several international instruments regarding universal jurisdiction take an approach which appears to reflect this. Where they do not support trials *in absentia*, they nonetheless permit investigations in universal jurisdiction cases where there is no suspect present (or expected to be present) in the territory. This is explicitly spelled out in the *Association Internationale de Droit Pénal's* resolution on Universal Jurisdiction¹²¹ and the Madrid-Buenos Aires Principles.¹²² It is also clearly implied in the Princeton Principles¹²³, the Institute of International Law's resolution on universal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes,¹²⁴ and the African Union Model National Law on Universal Jurisdiction over International Crimes,¹²⁵ all of which only require the suspect's presence for the purpose of trial, and also cover requests for extradition. Some other instruments make no mention of any requirement of a suspect's presence.¹²⁶
55. In practice, many investigations premised on universal jurisdiction have been undertaken without the presence of a suspect in the territory. That was the case in some of the best-known universal jurisdiction precedents which involved extradition requests, and where investigations preceding those requests were conducted "*in absentia*". It was the case for the investigations carried out in Israel and Germany in *Demjanjuk*; Spain in *Pinochet, Cavallo*,¹²⁷ and the *Guatemalan Genocide Case*,¹²⁸ and Belgium in *Habré* and the ICJ *Arrest Warrant Case*. Current high-profile investigations based on universal jurisdiction and in the absence of a suspect include the Argentinian investigations into crimes by the Myanmar government and military against Rohingya people,¹²⁹ and crimes by the Nicaraguan President, Vice-President, and other senior Nicaraguan officials.¹³⁰

¹²⁰ *Ibid.*, para. 48. The Spanish Constitutional Court made a similar point: [Ríos Montt et. al](#) ('*Guatemalan Genocide Case*'), 26 September 2005, para. 7.

¹²¹ AIDP, Resolution on Universal Jurisdiction, 20-27 September 2009, in [Resolutions of the Congresses of the International Association of Penal Law \(1926-2014\)](#), pp. 434-436, paras 3 and 4.

¹²² [Madrid-Buenos Aires Principles on Universal Jurisdiction](#), 2015, Principle 11.

¹²³ [Princeton Principles on Universal Jurisdiction](#), 2001, Principle 1, paras (1)-(4).

¹²⁴ IIL, [Resolution on Universal Jurisdiction with regard to the Crime of Genocide, Crimes against Humanity and War Crimes](#), 26 August 2005, para. 3(b).

¹²⁵ [African Union Model National Law on Universal Jurisdiction over International Crimes](#), July 2012.

¹²⁶ See Inter-American Commission on Human Rights, [Resolution No. 1/03 on Trial for International Crimes](#), 24 October 2003; International Law Commission, [Draft Code of Crimes against the Peace and Security of Mankind](#), 1996, art. 8.

¹²⁷ Ricardo Cavallo was an officer in the Argentine military during the so-called "Dirty War". He later retired to Mexico. In 2000 he was indicted in Spain. Spain requested his extradition from Mexico and the Mexican Supreme Court allowed this. Subsequently his trial in Argentina became possible, and Spain gave the Argentine courts priority. Cavallo was extradited from Spain to Argentina and convicted there in 2011. See most relevantly: [Decision of Extradition 140/2002, Ricardo Miguel Cavallo](#), 10 June 2003; L. Benavides, 'Introductory Note to Supreme Court of Mexico: Decision on the Extradition of Ricardo Miguel Cavallo' (2003) 42(4) *International Legal Materials*, pp. 884-887.

¹²⁸ Charges of genocide were brought in Spain against eight former Guatemalan officials, concerning conduct during the 1970s and 1980s. The Spanish Constitutional Court ruled that the case could proceed, holding that no nexus or tie to Spain was needed to initiate a case. This ultimately led to formal extradition requests against the primary defendants: [Ríos Montt et. al](#) ('*Guatemalan Genocide Case*'), 26 September 2005. See further, N. Roht-Arriaza, 'Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Conflict Guatemala' (2008) 9(1) *Chicago Journal of International Law*, pp. 89-106.

¹²⁹ TRIAL International, [Universal Jurisdiction Annual Review 2022](#), p. 19.

¹³⁰ TRIAL International, [Universal Jurisdiction Annual Review 2023](#), pp. 17-18.

56. For these reasons, we conclude that there is no rule of international law which prohibits an investigation from taking place on the basis of universal jurisdiction, including where the suspect is not present in the territory of the investigating state.

IV. Questions concerning legality (*nullum crimen sine lege*)

57. We turn to briefly address a final matter. So far, we have concerned ourselves with the position under international law concerning jurisdiction. However, there is another basis on which it might be asked whether it is internationally lawful for a state to investigate and prosecute a person for international crimes. That question concerns the principle of legality: an act may only be criminalised (and punished) if it was prohibited by law at the time of its commission ("*nullum crimen sine lege*": no crime without law). This principle is recognized as part of the human right to a fair trial under treaties and other international instruments¹³¹ as well as customary international law.¹³²
58. This issue has frequently been raised in cases involving international crimes, including universal jurisdiction cases. Often suspects have been tried before international or national courts under statutes which did not exist at the time of the crime. This was especially the case regarding World War II era crimes, but it could also be said of the *ad hoc* and hybrid criminal tribunals, the statutes of which were written after the events in question.¹³³
59. However, objections based on the principle of legality have rarely succeeded. Usually it is considered that the principle has not been violated because, even in the absence of a contemporaneous statute, customary international law had already prohibited the acts in a sufficient way at the time of their commission.¹³⁴ This caveat to the principle of legality is reflected in international instruments,¹³⁵ and it has been applied in universal jurisdiction proceedings such

¹³¹ [Universal Declaration of Human Rights](#), 10 December 1948, art. 11(2); [European Convention on Human Rights](#), came into force on 3 September 1953, art. 7(2); [International Covenant on Civil and Political Rights](#), 19 December 1966, art. 15(2); [American Convention on Human Rights](#), 22 November 1969, art. 9; [African Charter on Human and Peoples' Rights](#), 27 June 1981, article 7(2); [ASEAN Human Rights Declaration](#), 18 November 2012, art. 20(2).

¹³² [Polyukhovich v Commonwealth of Australia](#), 10 August 1991, Justice Brennan at para. 47 and also at para. 75.

¹³³ This was the case, for example, for: the [Statute of the International Criminal Tribunal for the Former Yugoslavia](#) (adopted in 1993 and covering events from 1991 onwards); the [Statute of International Criminal Tribunal for Rwanda](#) (adopted in November 1994 and covering events from 1 January 1994); [UNTAET Regulation No. 2000/15 on the Establishment with Panels with Exclusive Jurisdiction over Serious Criminal Offences](#) (adopted in June 2000 and explicitly given jurisdiction over events between 1 January and 25 October 1999); the [Statute of the Special Court for Sierra Leone](#) (adopted in August 2000 and covering events from 30 November 1996); and the [Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea](#) (adopted in 2001 and covering events between 17 April 1975 and 6 January 1979).

¹³⁴ For example, this was the premise upon which the ICTY was established: [Report of the Secretary Pursuant to Paragraph 2 of Security Council Resolution 808](#), 3 May 1993, para. 34.

¹³⁵ [Universal Declaration of Human Rights](#), 10 December 1948, article 11(2); [International Covenant on Civil and Political Rights](#), 19 December 1966, art. 15(2); International Law Commission, [Draft Code of Crimes against the Peace and Security of Mankind](#), 1996, art 13(2); [ASEAN Human Rights Declaration](#), adopted on 18 November 2012, art. 20(2).

as *Demjanjuk*,¹³⁶ *Polyukhovich*,¹³⁷ and *Scilingo*,¹³⁸ which were held not to violate the principle of legality.¹³⁹

60. Additionally, some legal systems may enable international crimes (and their extraterritorial jurisdiction) to be directly imported from customary international law. Where this is the case, the offence will be a part of national law even without (or prior to) a national statute. This approach can be seen in the *Zimbabwe Torture Docket Case*,¹⁴⁰ and was also endorsed by Lord Millet in *Pinochet* (although not by the other Lords).¹⁴¹ Whether international law may be incorporated in this way will be a question of domestic law.
61. In any event, so long as the crime in question was clearly part of customary international law at the time of its commission, international law will not consider that the principle of legality is offended by an investigation or prosecution. In our view there is today no doubt that the core international crimes—genocide, crimes against humanity, war crimes and torture—are crimes under customary international law.

V. Conclusions

62. We conclude that customary international law grants states prescriptive jurisdiction over core international crimes (at least genocide, crimes against humanity, war crimes and torture) without any requirement for a nexus between the state and the crime.
63. We also conclude that customary international law permits a state to investigate allegations of these specific crimes, and to do so even where a suspect is not present in its territory, and even if its national legislation did not expressly prohibit the conduct at the time of its commission.

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25 October 2023

¹³⁶ [Demjanjuk v Petrovsky et al.](#), United States Court of Appeals, Sixth Circuit, 31 October 1985, paras 579-583.

¹³⁷ [Polyukhovich v Commonwealth of Australia](#), 10 August 1991, Justice Brennan at paras 45-50 (applying the principle, although he went on to hold that the domestic law did not conform to the international crime as it existed at the time of the conduct); Justice Toohey at paras 101-117.

¹³⁸ [Sentencia Condentoria de la Audencia Nacional \(Caso Scilingo\)](#), 19 April 2005, pp. 88-107; [Sentencia del Tribunal Supremo \(Casa Adolfo Scilingo\)](#), 1 October 2007.

¹³⁹ The same approach has been taken by the European Court of Human Rights: *Ould Dah v France*, App. No. 13113/03, [Judgment](#), 17 March 2009.

¹⁴⁰ [Zimbabwe Torture Docket Case](#), 30 October 2014, paras 41-60.

¹⁴¹ [Pinochet \(No. 3\)](#), p. 276A-E.