all their shortcomings, are likely to be the forerunner of similar future efforts that will emerge as an ICC with limited resources, encountering crimes that the Statute aims to suppress, will give indirect encouragement to its States Parties (conceivably through the United Nations) to support initiatives that will provide accountability without taxing the abilities of the Court itself. The consequences of complementarity should therefore be understood not solely in terms of proceedings undertaken by national governments acting in isolation, but rather as 'joint ventures' placed at varying degrees between the national and the international planes.

VI

Universal Jurisdiction

This Chapter outlines the present state of universal jurisdiction over the 'core crimes' of international criminal law and situates it within the overall development of that law. It argues that, if regular enforcement is (as it should be) a goal of the emerging system of international justice, then universal jurisdiction will be an essential part of that system. At the same time, applying universal jurisdiction is laden with difficulties, not least because of its reliance on national authorities to enforce international norms, given the historical reluctance of those authorities to play this role. As reticence to apply (or indeed to implement) this doctrine rests in important part on fear of its uncontrolled exercise, it is argued below that the necessary controls be imposed through criteria—insufficiently clarified so far—that are applied in a transparent manner. Universal jurisdiction will not become a reliable pillar of the international rule of law until these difficulties are squarely faced, although the current trend supports a guarded optimism.

1. INTRODUCTION

Universal jurisdiction is at a turning point. After fifty years of relative neglect, and with renewed impetus lent by the *Pinochet* hearings in the United Kingdom[1] and by the adoption of the Rome Statute of the International Criminal Court,[2] this doctrine stands poised to become an integral, albeit supplemental component of the emerging international justice system. At the same time, serious obstacles stand in the way of its realization as a consistently available tool of fair and impartial enforcement. These obstacles are in some measure 'technical', bearing on the need for implementing legislation and appropriate international agreements. They are also to some extent inherent in the nature of universal jurisdiction. Because universal jurisdiction relies on national authorities to enforce international prohibitions, pivotal decisions can be expected to reflect, to a greater or lesser extent, domestic decision-makers' calculations as to the interests of justice, the national interest, and other criteria; and given that universal jurisdiction cases can be expensive, difficult to conduct, a magnet for both domestic and international controversy, and of little immediate connection to the exercising State, it is little wonder that local authorities are reluctant to 'normalize' this doctrine.

[1] See Chapter VII, n. 16, below.
[2] See above, pp. 70–6.

see perpetrators brought to account, as these acts are often committed by those who act from or flee to a foreign jurisdiction, or by those who act under the protection of the State. As a result of these normative and pragmatic rationales, universal jurisdiction does not arise with respect to any and all crimes (as does jurisdiction under e.g. the territorial principle) but only with respect to particular offences.[11] The pragmatic consideration is especially apparent with piracy on the high seas (the first crime to be subject to universal jurisdiction), slavery[12] and terrorism,[13] where the potential to evade justice through absconding and safe havens is great. The normative impulse is more apparent with crimes against humanity and war crimes, the prosecution of which reinforces the declared interest of all States in upholding fundamental principles of humanity. Nonetheless, both pragmatism and normativity play a role with respect to all these crimes. Pirates were labelled enemies of mankind (*hostis humani generis*),[14] emphasizing the moral aspect of the condemnation, while war crimes and crimes against humanity are often committed by those whose political power renders their State a *de facto* safe haven, a driving consideration in the post-War development of international criminal law generally.[15]

The imperative to defend the fundamental interests of the international community through criminal process has frequently been said to endow national courts exercising universal jurisdiction with the *de facto* status of

[11] If one accepts the doctrine set down in *The Steamship Lotus* (*France* v. *Turkey*), (1927) P.C.I.J. Ser. A, No. 10, that States are entitled by their sovereignty to exercise jurisdiction within their territory over acts committed abroad, without the requirement of any permissive rule of international law, provided only that to do so is not prohibited by a positive rule of international law, then universal jurisdiction could in principle arise with respect to any crime. This approach appears to be reflected in the law of some jurisdictions, which allow their courts to prosecute any crime over a certain threshold of seriousness: see e.g. Sweden's Penal Code, ch. 2, s. 3(7) (jurisdiction of Swedish courts over crimes committed abroad, where Swedish law punishes the crime by over 4 years' imprisonment), and Norway's General Civil Penal Code, Pt. 1, ch. 1, s. 12(4) (applicability of Norwegian criminal law to felonies committed abroad by a foreigner now resident in Norway, where the act is also punishable in the country where committed). Nonetheless, the general reluctance of States to exercise jurisdiction beyond the grounds traditionally sanctioned by international law without its specific authorization has resulted in the development of positive norms permitting or mandating universal jurisdiction for certain crimes: International Law Association, Committee on International Human Rights Law and Practice, *The Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences: Final Report* (London: Report of the 69th Int'l Law Assoc'n Conference, 2000), at 11.

[12] Rubin dissents on the availability of universal jurisdiction with respect to slavery: Alfred P. Rubin, *The Law of Piracy* (2d ed.) (Irvington-on-Hudson, NY: Transnational, 1997), at 11. For more on the crimes of piracy and slavery, see pp. 23–4 above.

[13] See n. 20 below.

[14] Sir Robert Jennings and Arthur Watts, eds., *Oppenheim's International Law* (9th ed.) (London: Longman, 1996), at 746; M. Cherif Bassiouni, 'The Sources and Content of International Criminal Law: A Theoretical Framework', in Bassiouni (1999b), at 224; for a comparison of the underlying rationales of piracy and the 'Nuremberg crimes', see Randall (1988), n. 2 above, at 803–4.

[15] See pp. 19–23 above.

agents of the international community, the declared values of which the proceedings vindicate.[16] To confer such a role on national authorities, however, raises complex practical difficulties that have only begun to be addressed (see pp. 118–27 below).

3. SCOPE OF UNIVERSAL JURISDICTION WITH RESPECT TO THE 'CORE CRIMES' OF ICL

Since the end of the Second World War, a considerable number of international conventions have established a duty to prosecute certain crimes. Such a duty does not always entail universal jurisdiction. For example, the 1948 Genocide Convention defines this crime, and states that '[p]ersons who commit genocide . . . shall be punished' (Article 4) and affirms that States Parties 'undertake to prevent and punish' it (Article 1). However, the Convention only refers to trial before the tribunals of the State within the territory of which the acts of genocide occur or before an international criminal court (Article 6), and does not provide for universal jurisdiction or the duty to extradite or prosecute (but see the discussion of customary law below).

Universal jurisdiction—in the form of the obligation to 'extradite or prosecute'—was recognized one year later in the four 1949 Geneva Conventions, which oblige all States Parties to prohibit 'grave breaches' of them.[17] Grave breaches are those violations of the Conventions that entail individual criminal responsibility.[18] States Parties are under a duty to search for persons alleged to have committed grave breaches, regardless of their nationality, and to bring them before their own courts, or alternatively to hand them over to another State Party for prosecution. The 'extradite or prosecute' obligation with respect to grave breaches under the Conventions was carried forward to the additional grave breaches of the first 1977 Additional Protocol.[19] The

[16] *Attorney-General of the Government of Israel* v. *Adolph Eichmann*, (12 Dec. 1961) 36 I.L.R. 18 (Isr. Dist. Ct., Jerusalem) *aff'd* (27 May 1962) 36 I.L.R. 277 (Isr. Sup. Ct.): 'international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is *universal*' (Dist. Ct., at 26); and referring to the State of Israel 'in the capacity of a guardian of international law and an agent for its enforcement' (Sup. Ct., at 304). As discussed with regard to the Rome Statute below, the need of international criminal law for the support of national courts exercising universal jurisdiction will not end with the establishment of the International Criminal Court.

[17] Geneva Convention I, Arts. 49, 50; Geneva Convention II, Arts. 50, 51; Geneva Convention III, Arts. 129, 130; and Geneva Convention IV, Arts. 146, 147.

[18] While States Parties to the Conventions are required to provide 'effective penal sanctions' with respect to grave breaches, they are only required to 'take measures necessary for the suppression' of violations other than grave breaches: Geneva Convention I, Art. 49; Convention II, Art. 50; Convention III, Art. 129; Convention IV, Art. 146.

[19] Additional Protocol I, Arts. 11, 85, 86, 88.

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

Nonetheless, efforts to put into operation a workable system for the suppression of international crimes must be mindful of international life as it presently operates. While the coherence and effectiveness of the normative order should always be borne in mind, it is important not to put conceptual neatness ahead of the difficulties that arise in determining international law and in putting doctrine into practice. As discussed below (pp. 118–27), this requires that the hard legal problems be clarified in order to better realize the aims of this law.

4. CURRENT DEVELOPMENT OF UNIVERSAL JURISDICTION

To date, and notwithstanding a spate of activity in Belgium and other countries, the exercise of universal jurisdiction over core crimes of international criminal law has been sporadic at best, responding to selected situations at particular times. With the movement towards the entry into force of the Rome Statute, however, a process of national law reform has begun which has the potential to develop into a trend that would entrench universal jurisdiction as a relatively widely available means of accountability. Before it can do so, however, serious challenges remain to be faced.

Universal jurisdiction was explicitly recognized for the core crimes of international criminal law after the Second World War, although it seldom formed the exclusive basis of prosecutions that took place after the War.[29]

against humanity is Jennings and Watts (1994), n. 14 above, at 998. See also the *Restatement*, n. 9 above, para. 404.

[29] The Allies conducted over 1,000 trials in the tribunals of their national occupying forces following the end of WWII, and 'it is generally agreed that the establishment of these tribunals and their proceedings were based on universal jurisdiction': Randall (1988), n. 8 above, at 805,

Like other international justice initiatives, universal jurisdiction fell into neglect as post-War activity subsided into the stasis of the Cold War.[30] The *Eichmann* case brought the doctrine back to international attention in 1961.[31] The case did not lead to similar prosecutions in the short term, although it did inspire efforts to secure accountability for crimes committed against the Jewish people during the Second World War, and these efforts bore fruit in the legislative activity and related cases that arose in the 1980s and 1990s. During those years a number of countries passed legislation and undertook proceedings, generally without great success, against those alleged responsible for crimes during the Second World War.[32]

The establishment by the Security Council of *ad hoc* tribunals to try those responsible for crimes committed in the Former Yugoslavia and Rwanda led to a number of national prosecutions related to these situations.[33] The need

quoting *Demjanjuk* v. *Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); Amnesty International (1999), n. 27 above, at 17, quoting *In re List* (*Hostage* case), (1946–1949) 11 Trials of War Criminals 757 (U.S. Mil. Trib. Nuremberg, 1948), at 1242: a State may 'surrender the alleged criminal to the state where the offence was committed, or . . . retain the alleged criminal for trial under its own legal processes'. Nonetheless, the jurisdictional basis of these proceedings was often not made explicit, and passive personality jurisdiction was evidently a factor in a number of them: Randall (1988), n. 3 above, at 805–10; International Law Association (2000), n. 8 above, at 22. For example, while in the *Hostage* case the tribunal did state that '[a]n international crime . . . cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances', it also restricted its remarks to 'the courts of the belligerent into whose hands the alleged criminal has fallen'—something decidedly less than universal jurisdiction: ibid., at 1241.

[30] See Chapter II, n. 17 and Part II, n. 8 and related text above.

[31] See n. 16 above.

[32] Australia passed the War Crimes Amendment Act in 1988, giving its courts jurisdiction for international crimes committed in Europe during the Second World War; of several cases commenced, only one resulted in trial (and acquittal for the defendant, Polyukhovich) before abandonment of the prosecutorial policy by the Australian government: Graham T. Blewitt, 'The Australian Experience', in Bassiouni, n. 28 above, (vol. III) 301; Gillian Triggs, 'Australia's War Crimes Trials: All pity choked', in T.L.H. McCormack and G.J. Simpson, eds., *The Law of War Crimes: National and International Approaches* (The Hague: Kluwer, 1997), 123. The United Kingdom passed the War Crimes Act in 1991, like Australia restricting its scope temporally and geographically (to acts committed during the Second World War in Germany or German-occupied territory), sentencing Anthony Sawoniuk to life imprisonment in 1999: Jane L. Garwood-Cutler, 'The British Experience', in Bassiouni, n. 28 above, (vol. III) 325; International Law Association (2000), n. 8 above, at 29. Canada passed a statute without the geographical or temporal time limits of the UK and Australian acts, but turned away from a policy of prosecutions when the *Finta* case resulted in an acquittal: Christopher A. Amerasinghe, 'The Canadian Experience', in Bassiouni, n. 28 above, (vol. III) 243; Sharon A. Williams, 'Laudable Principles Lacking Application: The prosecution of war criminals in Canada', in McCormack and Simpson (1997), above in this n., 151. During the same period the United States developed its own unique history of allowing civil suits with respect to crimes under international law: Jane L. Garwood-Cutler, 'Enforcing ICL Violations with Civil Remedies: The U.S. Alien Tort Claims Act', in Bassiouni, n. 28 above, (vol. III) 343.

[33] See Chapter IV, n. 10 above. Austria acquitted a Bosnian Serb (Cvjetkovic) in May 1995; in 1996 Belgian courts authorized proceedings against a Rwandan national (Ntezimana); Denmark convicted a Bosnian Muslim (Saric) in 1994; France initiated proceedings against a Rwandan (Munyeshyaka) in 1995; Germany convicted 4 Bosnian Serbs (Djajic, Jorgic, Sokolovic, Kusljic)