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Universal Jurisdiction: A Threat to State Sovereignty?

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1. INTRODUCTION

During the two World Wars of the twentieth century a series of atrocities were committed against humanity. Modern international law and its actors have condemned said acts, such as genocide and crimes against humanity, and promulgated the concept that their prevention and punishment are within the interest of the international community and that the global community cannot continue to witness similar massive violations of human rights in the future.[1]

In order to end impunity toward human rights violations, states must exercise their jurisdiction to prosecute[2] and punish individuals responsible for committing war crimes, crimes against humanity, genocide, and piracy. However, some states have failed to prevent and punish these crimes. For this reason, applying the principle of universal jurisdiction acts as a useful instrument within international law to bring criminal perpetrators before courts.[3]

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[1] Inazumi, Mitsue., *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law.* Intersentia, 2005, p. 1.

[2] In a general point of view, there is a different perspective among various states concerning on the interrelation of universal jurisdiction and the duty to extradite and prosecute. Some authors believe the notion to extradite and prosecute to be the same as universal jurisdiction. It is often considered that "the right to exercise universal jurisdiction is directly presuppose from existence of the duty to extradite or prosecute". However, although there is a considerable overlap between these two notions, in a strict sense they are distinct from each other.

Although, the obligation to extradite or prosecute and universal jurisdiction may share the same objective, ie., "combat impunity by depriving the persons accused of certain crimes, the obligation to extradite or prosecute would only arise after the state concerned had established its jurisdiction and, in any event, if the person was present on the territory, or was under control of that state". In addition, in case there is no extradition, the state will have the duty to transfer the case to its appropriate prosecuting authorities. Now, According to Mitsue Inazumi "this principle itself does not specify which basis of jurisdiction should be exercised. Therefore, it does not matter which jurisdiction basis is employed. As long as a suspect is prosecuted within a state where the person is present in the absence of extradition, the duty to extradite and prosecute is fulfilled".

Inazumi, 2005, p. 122; Arajärvi, Noora., 'Universal Jurisdiction: End of Impunity or Tyranny of Judges', LL.M Thesis, University of Helsinki, August 2006, p. 49; Report International Law Commission. Report on the work of its fifty-ninth session (7 May to 5 June and 9 July to 10 August 2007) http://untreaty.un.org/ilc/reports/2007/2007report.htm; http://untreaty.un.org/ilc/guide/7_6.htm Accessed 1 Junio 2010.

[3] Baker, Roozbeh., 'Universal Jurisdiction and the case of Belgium: A critical assessment', *ILSA Journal of International and Comparative Law*, <http://ssrn.com/abstract=1424212> accessed 5 January 2010.

The principle of universal jurisdiction has played an important role in the emerging regime of international accountability for serious crimes.[4] This principle refers to a form of jurisdiction in international law that allows courts of any state to conduct legal proceedings with respect to the aforementioned crimes, without regard to the location of the crime, the nationality of the offender or the nationality of the victim.[5] According to Kraytman another way to define universal jurisdiction is to say that "international law permits any state to apply its laws to certain offences even in the absence of territorial, nationality or other accepted contacts with the offender or the victim".[6]

Although exercising universal jurisdiction may be a useful tool to prevent the crimes that affect states and nations from going unpunished, there are some reasons to worry about exercising the universal principle. One such reason that the international community should be aware of is related to the principle of state sovereignty.

State sovereignty was determined by the agreements made by European states as part of the Peace of Westphalia in 1648. The sovereign authority of the state was constituted within a system of independence and equality for all states which have been empowered through international law to exercise total jurisdiction over all individuals living in their territories; each state possessing the right to have no other state interfere in matters within its own agreed-upon territory while having the right to immunity from the jurisdiction of foreign courts when concerning acts performed by the state in its sovereign capacity.[7]

The sovereignty of a state may be encroached upon when universal jurisdiction is not conducted by suitable standards and exercised wisely. For instance, it may be used to serve political purposes and to interfere with matters properly within the sphere of legitimate self-governance. In other words, the principle of universal jurisdiction

[4]Macedo, Sthephen., *Universal Jurisdiction: National Courts and the Prosecution of serious crimes under International Law*, Philadelphia, PA: University of Pennsylvania Press, 2006, p. 3.
[5] Baker, <http://ssrn.com/abstract=1424212> accessed 5 January 2010.
[6] Kraytman, Yana Shy., 'Universal Jurisdiction – Historical Roots and Modern Implication', *BSIS Journal of International Studies* Vol 2, 2005.
[7] Cassese, Antonio., *International Law*, Oxford University Press, New York, 2005, p. 49-52.

may be employed as a potential instrument of political mischief and interference in the domestic affairs of another state, thereby undermining its sovereignty.[8]

In this sense, the question which will provide guidance for the present text will be under what conditions state sovereignty is threatened by exercising universal jurisdiction and what implications there will be for either for the notion of sovereignty and universal jurisdiction. It is stated that universal principle that allows states to claim criminal jurisdiction over persons whose alleged crimes were committed outside the boundaries of the prosecuting state, regardless nationality, country of residence, or any other relation with the prosecuting country could be to some extent a breach of the principle of state sovereignty whereby no state is subject to the authority of any organization or principle. They are given the right to have autonomy in governing its internal affairs and given the right of non-interference. Moreover, sovereignty entails independence, the inherent legal equality of states, and sovereignty of territorial jurisdiction as being exclusive and absolute.

In order to expand upon and explain the important legal principle of sovereignty, this thesis presents a thorough study of the classical principles that resulted from the Peace of Westphalia. Subsequently, the main characteristics of the notion of jurisdiction as well as the meaning of universal jurisdiction will be examined in detail. To finalize, this author will outline the reasons that universal jurisdiction threatens sovereignty and the implications that accompany the acceptance of either the notion of sovereignty or that of universal jurisdiction.

[8] Macedo, 2006, p. 3.

2. THE INTERPLAY OF THE NOTIONS OF SOVEREIGNTY AND UNIVERSAL JURISDICTION

In the present Chapter one should study the theoretical precepts on the conception of sovereignty, jurisdiction and universal jurisdiction with the purpose of explaining the phenomenon connected to the action of any state to punish hideous crimes irrespective where the crime was committed and the nationality of the person committed a as threat to the scope of the state sovereignty and its components, such as independence, equality of states and territorial jurisdiction.

2.1 The Principle of State Sovereignty

The principle of sovereignty has been a fundamental principle in international law since early days of the nation-state system.[9] Traditionally, the concept of sovereignty started to dominate political thought after the agreements reached by European states as part of the Peace of Westphalia in 1648.[10] Historically, these agreements modified the balance of power between territorial authority and confessional groups in favour of the state, opening the way for building a successful state system of control and its supervision of populations. In other words, sovereignty was based on the occupation and possession of territory. That territorial integrity clearly defined the territorial boundaries that separate the domestic arena from the international one.[11] In this way, after the Thirty Years of War, the primacy of the authority of the state was set up within a system of independent and equal entities as a way of preserving peace and order in Europe.[12]

[9] Cronin, Bruce., 'The Tension between Sovereignty and Intervention in the Prevention of Genocide' *Human Rights Review*, July (2007), p. 293.

[10] "The initial breakdown of pre-Westphalia frame was to some extend a consequence of cleavages within Christianity, particularly the Protestant break with Rome, and in part a result of the military and economic benefits of more centralized political actors with larger capabilities to mobilize resources and establish order within territorial units". Falk, Richard., 'Revisiting Westphalia, Discovering Post-Westphalia', *The Journal of Ethis*,6 (2002), p. 313.

[11] Axtman, Ronal., 'The State of the State: The model of the modern state and its contemporary transformation', *International Political Science Review.*Vol. 25, No 3, July (2004), p. 260.

[12] State Sovereignty. www.idrc.ca/en/ev-28492-201-1-DO_TOPIC.html accessed 22 January.

The central part of Westphalia sovereignty could be illustrated as the notion that "states exist in specific territories, within which domestic political authorities are the sole arbiters of legitimate behaviour".[13] Jean Bodin argued that "it is the distinguishing mark of the sovereign that he cannot in any way be subject to the commands of another, for it is he who makes law for the subject, abrogates law already made, and amends obsolete law".[14] In general, the rules of sovereignty that were agreed to in the Peace of Westphalia identified the prerogatives of sovereign states, smoothed the progress of diplomacy between them, and was undoubtedly partially in favour of state autonomy in matters that are considered to be domestic.[15]

The principle of state sovereignty embraced the idea that "states were not subject to the authority of any higher institutions or principle; therefore, state itself was the ultimate source of political authority within its territory".[16] Every state was given the right to have a high degree of autonomy in governing its internal affairs. This right of autonomy implied that states were entitled to control the relationships between their governments and the citizens and groups that constitute their respective societies. In the same way, the right of autonomy entailed freedoms from external interference in the domestic affairs of the state, especially if interference was coercive in nature.[17] In this way, it should be noted that the right of non-interference "provided a measure of stability, predictability, and order within the anarchic system of nation-states for several centuries".[18]

2.1.1 The Concept of Independence

According to Island of Palmas Case arbitration Thomas M. Frank stated that "sovereignty in the relation between states signifies independence; independence in

[13] Larry May & Zachary Hoskins, Ed., *International criminal law and philosophy,* ASIL Studies in International Legal Theory, Cambridge University Press, 2010, p. 45.
[14] Worth, John., 'Globalization and the Myth of Absolute National Sovereignty: Reconsidering the "Un-Signing" of the Rome Statute and the Legacy of Senator Bricker', *Indiana Law Journal.* Vol 79:245 (2004), p. 258. Cited in Jean Bodin, Six Books of the Commonwealth 28 (M.J. Tooley trans., Barnes & Noble 1967 (1576).
[15] Larry May & Zachary Hoskins, Ed. 2010, p. 45. ; Cronin, 2007, p 292.
[16] Cronin, 2007, p. 293.
[17] Cronin, 2007, p. 293.
[18] Cronin, 2007, p. 293.

regard to a portion of the globe that is the right to exercise therein, to the exclusion of any other state, the functions of a state".[19] Within every political society there must be an accepted sovereign authority whose supremacy is decisive and recognized as the sole lawful and legitimate basis of authority.[20]

The principle attribute of state sovereignty was the notion of independence, stated in the Draft Declaration on the Rights and Duties of States in 1949 "as the capacity of a state to provide for its own well-being and development free from the domination of other states".[21] To be clearer, any economic or political dependence that could be presented does not have an effect on the legal independence of the state, except if a state is officially required to give in to the demands of a 'superior' state, in which case its status as 'dependent' is concerned.[22] Nevertheless, freedom entitles states to exist within the international legal system, and it is therefore international law that defines the scope and magnitude of the independence of states and not the states themselves unilaterally.[23]

It should be noted that the notion of independence in international law involves some rights and duties, such as: "the right of a state to exercise jurisdiction over its territory and permanent population; the right to engage upon an act of self-defence in certain situations; and the duty not to intervene in the internal affairs of other sovereign states".[24] This duty dictates that states cannot intervene in matters within the domestic jurisdiction of any other state – a principle included in the Declaration of Principles of International Law of October 1970 concerning friendly relations and cooperation among states. It was declared that "no estate or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state".[25]

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[19] Franck, Thomas., 'Multiple tiers of Sovereinty: The future of International Governance', *SOC'Y Int'l L,* Proceedings 51(1994), p. 51.
[20] Held, David. 'Law of States, Law of Peoples' *Legal Theory*, 8 (2002), p. 3.
[21] Shaw, Malcolm., *International law*, 6th Edition, Cambridge University Press, 2008.p. 211.
[22] Shaw, Malcolm., 2008, p. 211.
[23] Shaw, Malcolm., 2008, p 211.
[24] Shaw, Malcolm., 2008, p. 212.
[25] Shaw, Malcolm., 2008, p. 213.

2.1.2 Notion of Legal Equality of States

Legal equality of states is another essential feature of state sovereignty. That is, states have the same juridical capacities and functions irrespective of size or power, and are entitled to one vote in the United Nations General Assembly. The principle of the legal equality of states is recognised in the Declaration on Principles of International Law. This provides that:[26]

> "all states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, in spite of differences of an economic, social, political or other nature. In particular, sovereign equality includes the following elements:
>
> - State are judicially equal;
> - Each state enjoys the rights inherent in full sovereignty;
> - Each state has the duty to respect the personality of other states;
> - The territorial integrity and political independence of the state are inviolable;
> - Each state has the right freely to choose and develop its political, social, economic and cultural systems;
> - Each state has the duty to comply fully and in good faith with its international obligations and to live in peace with other states".

It is important to highlight that the principal element of state sovereignty was codified in the Montevideo Convention on Rights and Duties of States in 1933.[27]

[26] Shaw, Malcolm., 2008, p. 214.

[27] Articles related to the principle of state sovereingty codifed on the Montevideo Convention on Rights and Duties of States (1933) are:

> Art. 1. The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; (d) capacity to enter into relations with other states.
> Art. 3. The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.
> The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.
> Art. 4. States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law.
> Art. 5. The fundamental rights of states are not susceptible of being affected in any manner whatsoever.

This principal element is related to three main requirements for exercising state sovereignty: a permanent population, a defined territory, and a functioning government. And of course, it has to be taken into account that the main component of sovereignty has been a sufficient display of the authority of states to act over its territorial jurisdiction.[28]

2.1.3 The Concept of Territorial Jurisdiction

Territorial jurisdiction is a fundamental feature of sovereignty.[29] Within a state the jurisdiction of the sovereign is exclusive and absolute. States have power and authority over every person, property and events that exist or take place within its territory. Any restriction upon a territory originating from an external source would constitute a breach of its sovereignty. Any exception to the complete power of a sovereign within its own territory must be made under the consent of the nation itself, although, it has to take into account that an "absolute and complete nature of territorial jurisdiction can be modified either by general principles of international law or by specific obligations freely undertaken by the territorial sovereign".[30]

The exercising of jurisdiction does not entail that any state can employ it without any respect for international law. It is assured that a state must respect the limits which

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> Art. 6. The recognition of a state merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable.
> Art. 7. The recognition of a state may be express or tacit. The latter results from any act which implies the intention of recognizing the new state.
> Art. 8. No state has the right to intervene in the internal or external affairs of another.
> Art. 9. The jurisdiction of states within the limits of national territory applies to all the inhabitants.
> Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals.
> Art. 11. The contracting states definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure. The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily.

Montevideo Convention on Rights and Duties of States signed in Montevideo, December 26, 1933. http://www.oas.org/juridico/english/sigs/a-40.html Accessed 10 December 2009.

[28] State Sovereignty. www.idrc.ca/en/ev-28492-201-1-DO_TOPIC.html

[29] Dixon, Martin., *Textbook on International Law*, Oxford University Press, 2007, p. 143.

[30] Beale, Joseph., 'The Jurisdiction of a Sovereign State', *Harvard Law Review.* Vol 36, No 3, Jan. (1923), p. 245; Dixon, 2007, p. 144.

international law places on its jurisdiction and, within these limits, its right to assert jurisdiction rests in its sovereignty.[31] In addition, it has been acknowledge that states must have prudence concerning their jurisdiction under the principle of sovereignty, although it must be highlighted that sovereignty itself is a principle within the framework of international law.[32]

To complement what it has been said about sovereignty one must address the United Nations Charter to Art. 2 (7), which states that "nothing shall authorize a state to intervene in matters which are essentially within the domestic jurisdiction of any state". In brief, state sovereignty has been related to four principal points. First, a sovereign state is entitled to have the benefit of supreme political authority and a control over the legitimate use of force within its borders. In addition, it is also able to regulate movements across its territory while reserving the right to make decisions concerning foreign policy. Last, it must be accepted by other states as an independent entity entitled to govern without restrictions or external intervention.[33]

2.1.4 Pros & Cons: The Concept of Sovereignty

The institution of sovereignty provides some disadvantages for weak states and some advantages for stronger states. On the one hand, granting weak states sovereignty would be a political and legal limit to the imposition of values and policies by more dominant states in the international field. In the worst situation, it may be the only protection against territorial occupation by a stronger state. For instance, there are circumstances in which most political leaders have the same opinion: that particular practices are hideous (such as genocide) and that the governments of weaker states are particularly unlikely to allow for one state's intervention into the internal affairs of another. On the other hand, for stronger states, sovereignty grants a legal justification that permits them to delineate and pursue their unilateral interests

[31] Inazumi, 2005, p. 17; Cited in Permanent Court of International Justice France v. Turkey (Lotus Case), 7 September 1927, PCIJ Rep., Series A, No. 10, p. 48.
[32] Inazumi, 2005, p. 17.
[33] Larry May & Zachary Hoskins, Ed., 2010, p. 45-46. Cited in Richard Haas, 'existing rights, evolving responsabilities', remarks at the School of foreign serivece and the Mortara Center for International Studies, Gerogetown University 2003. Cited in John Jackson, ' sovereign-modern: a new approach to an outdated concept' 97 the American Journal of International Law (2003), 786.

without being subject to the will of the majority. In both cases the principle of sovereignty ensures that every society is able to develop its own domestic institutions based on its own political principles,[34] but that this development should remain within the framework of certain collective responsibilities. The fact that states have exclusive authority over its territories and are responsible for guaranteeing these conditions within their borders does not threaten international peace and security. When they step down from this responsibility, the broader community should be obligated to take action aimed at rectifying the situation.[35]

All in all, the principle of sovereignty emphasizes the development of an international order in which states are nominally free and equal. States are allowed the benefit of supreme authority over all matters within a given territory, shaping separate and discrete political orders in their own interest, without the need to recognize any authority superior to them or employ diplomatic initiatives.[36]

2.2 The Concept of Jurisdiction

First of all, it is important to take into account basic principles related to the issue of jurisdiction in order to understand the current jurisdictional system under international law. One can begin to examine the current system with the *Case of the S.S. "Lotus"*[37] which is still seen as the only international legal decision concerning the rights of a state to exercise criminal jurisdiction.[38] In short, the Lotus case started when a high-seas collision occurred between the French steamer, *Lotus*, and the Turkish steamer, *Boz-Kourt*. The vessel from Turkey sunk and eight crewmembers were killed. Turkey authorities commenced with proceedings against a French Lieutenant and Turkish commanders. The French government asserted that Turkey acted in a manner inconsistent with the principles of international law by declaring criminal jurisdiction over the French commander. The Permanent Court of

[34] Cronin, 2007, p. 294.
[35] Cronin, 2007, p. 294.
[36] Held, 2002, p. 4.
[37] PCIJ, Ser. A., No 10, 1927. http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/
[38] Reydams, Luc., *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford University Press, 2003, p. 11.

International Justice held that Turkey had not infringed the principles of international law by asserting proceeding against the French Lieutenant.[39] The Court stated that:

> International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of state cannot therefore be presumed.
>
> The first and foremost restriction imposed by international law upon a state is the failing the existences of a permissive rule to the contrary, it may not exercise its power in any form in the territory of another state. In this sense jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention.
>
> It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such view would only be tenable if international law contained a general prohibition to state to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed states to do so in certain specific cases.
>
> What international law leaves to the states is 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.
>
> In this circumstance, all that can be required of a state is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.[40]

In sum, the Lotus case settled the doctrine of permissive rule that corresponds with the idea that states could extend its criminal jurisdiction further than their territory so

[39] Reydams, 2003, p. 11; Arajärvi, Noora., 'Universal Jurisdiction: End of Impunity or Tyranny of Judges', LL.M Thesis, University of Helsinki, August 2006, p. 4.
[40] Reydams, 2003, p. 12-13; Cited in 1927 PCIJ Reports, ser. A, No 10, paras 18-19.

long as there is no rule of international law prohibiting that action.[41] In other words, as Williard Cowles stated independent states have autonomy in all matters that are not prohibited by principles of international law; moreover, states are in all probability free to act, and "the proponent of restriction must bear the burden of establishing the existence of a prohibitive rule of international law".[42]

2.2.1 Forms of Jurisdiction

There are specifics powers reserved to sovereign states. These powers are: to prescribe or make laws (Legislative), to decide legal disputes (Judicial), and to enforce legal decisions or verdicts (Executive).[43]

Cherif Bassiouni asserts that the terms used to enforce and prescribe law are not often of equal scope. That is, "that a sovereign state, or an entity exercising some of the attributes of sovereign state or legal entity that has some sovereign attributes can enforce the prescription of another state, or international law, even though the enforcing power may not have prescribed what it enforces"[44].

To be clearer, there are three primary categories of powers: *Executive* is considered to be the jurisdiction with the potential to interfere the most. The term 'Executive' can be defined as "the right to effect legal process coercively, such as to arrest someone, or undertake searches and seizures".[45] This jurisdiction is related to the ability of a government to take action inside the boundaries of another country and, in most cases, this is carried out by domestic law enforcement agencies.[46]

Nevertheless, one should take note that according to the principles of independence of states and territorial sovereignty, state officials should not execute their authority on foreign territory nor impose the will of their state upon other territory. One of the

[41] Arajärvi, 2006, p. 4.
[42] Cowles, Willard., 'Universality of Jurisdiction over War Crimes', *California Law Review*, Vol. 33, No. 2 (1945).
[43] Macedo, 2006, p.40.
[44] Macedo, 2006, p. 40.
[45] Cryer, Robert; Friman, Hakan; Darryl Robinson and Wilmshurst, Elizabeth., *An Introduction to International Criminal Law And Procedure*, Cambridge University Press, 2007, p. 38.
[46] Cryer; Friman; Darryl and Wilmshurst, 2007, p. 38.

most important examples in relation to this issue was the case of the Nazi criminal Adolf Eichmann, who was seized by Israeli agents in Argentina in 1960. Eichmann's capture on Argentine soil was a patent breach of Argentina's territorial sovereignty and an unlawful exercise of Israeli jurisdiction.[47] Nonetheless, taking someone into custody on foreign soil does not prevent states from exercising their jurisdiction. The act of detention in a foreign country would constitute a breach of both international law and the principle of non-intervention, thereby constituting a violation of the human rights of the person concerned.[48]

Legislative means of power represent the superiority of established organs of the state to make binding law within its territory. In the same way, it is known that in certain conditions these rules may be extended to include a foreign country.[49] Nevertheless, the enforcement of such legislation would be complex, not only in a practical way, but also when considering international law due to the principle of non-intervention.[50] The term *Judicial* means that domestic courts are competent and capable of passing judgement on matters brought before them. Furthermore, it concerns the power of the national courts of a specific state to judge cases in which a foreign issue is present. It should be noted that by passing judgment over offences committed by another country, it is possible that courts will actively intervene in the internal jurisdiction of a country in which the offences took place.

In short, there are a series of reasons that might influence national courts when making the decision to exercise this jurisdiction. Specifically, "in criminal matters these range from the territorial principle to the universality principle and in civil matters from the mere presence of the defendant in the country to the nationality and domicile principles".[51]

[47] Shaw, Malcolm., 2008, p. 651.
[48] Shaw, Malcolm., 2008, p 681.
[49] Shaw, Malcolm., 2008, p 649.
[50] Cryer; Friman; Darryl and Wilmshurst, 2007, p. 37-38.
[51] Shaw, Malcolm., 2008, p. 38.

2.2.2 Principles of Jurisdiction

The premise stated in the Lotus case related that all states are free to take on the principles that it considers as preeminent and most appropriate, indicating that there are different sets of recognized principles based on the exercising of criminal jurisdiction in compliance with international law.[52] These jurisdictional principles that states may invoke are four-fold. The first, *territorial jurisdiction*, suggests that a state has jurisdiction over every issue that takes place in its territory.[53] *National jurisdiction* is based on the principle of either active or passive personality. The former faces acts committed by nationals abroad and the later means that the state of the victim to the crime can assert jurisdiction for a crime committed in a foreign country by an alien.[54] *Protective jurisdiction* suggests that a state may claim its authority over subjects that produce a harmful effect on the state no matter where those acts take place or by whom they are committed.[55] *Universal jurisdiction* implies that there are certain crimes that are considered heinous when considering the international order and that any state may claim jurisdiction irrespective of where the act constituting the crime took place or the nationality of the person committing it.[56]

2.3 Universal Jurisdiction

The principle of universal jurisdiction allows national authorities to be entitled to conduct legal proceedings with respect to serious crimes (such as torture, genocide, slavery, war crimes, and crimes against humanity,) irrespective of the place of the crime, and the nationality of the person responsible for the offence or the victim.[57] Consequently, the doctrine of universal jurisdiction affirms that international law entitles every state to claim jurisdiction over crimes deemed to be horrific for the benefit of the international community, even if the state exercising jurisdiction has a

[52] Reydams, 2003, p. 21.
[53] Dixon, 2007, p. 146.
[54] Arajävi, 2006, p. 5.
[55] Dixon, 2007, p. 149.
[56] Dixon, 2007, p. 147.
[57] Inazumi, 2005, p. 25; Cited in International Law Association., 'Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences", Committed on International Human Rights Law and Practice, London conference, 2000, p. 2.

fragile or non-existent connection to the crime in comparison to other states .[58] Allowing states to join the right to jurisdiction in this way is meant to "function as a guarantee against impunity[59] and prevent the alleged person responsible for heinous crimes from finding a safe haven in third-party countries".[60]

States used to exercise the universal principle in a number of ways. In some countries national legislation, jurisprudence or practice could call for the exercise of jurisdiction only when the suspect is in the territory of the forum state. Second, some domestic law or practice allows the exercise in absentia of universal jurisdiction. Third, in some states it is required that suspects or victims should be a resident of the forum state at the time when criminal jurisdiction is pursued.[61]

2.3.1 Piracy

The expansion of the scope of universal jurisdiction became most apparent in state practice regarding the crime of piracy.[62] Piracy was recognized as the longest crime

[58] Bottini, Gabriel., 'Universal Jurisdiction after the Creation of the International Criminal Court', *International Law and Politics,*Vol. 36 (2004), p. 511. Cite by Bassiouni Cherif, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice, 42, Va. J. INT'L L. 81, 88 (2001).

[59] "Impunity means the failure by states to meet their obligation to investigate violations, to take appropriate measures in respect of the perpetrators by ensuring that they are prosecuted and punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take steps to prevent any return of such violations". Inazumi, 2005, p. 1. Cited in Annex to the Question of the Impunity of Perpetrtors of Human Rights Violations (civil and political), revised final report prepared by Mr Joinet, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1.

[60] Bottini, 2004, p. 511-512. Cited in Democratic Republic of Congo v. Belgium, Case Concerning Arrest Warrant of 11 April 2000, ICJ Judgment on 14 February 2002. 46 (dissenting opinion of Judge Van den Wyngaert).

[61] Council Secretariat., 'The AU-EU Expert Report on the Principle of Universal Jurisdiction', Council of the European Union, Brussels, 16 April 2009.

[62] "The draft for codification of international law concerning piracy, prepared by Bingham, made the lawful custody of a suspect a prerequisite". It proposed as follows:

Article 14

1. A state which has lawful custody of a person suspected of piracy may prosecute and punish that person.
2. Subject to the provisions of this convention, the law of the state which exercises such jurisdiction defines the crime, governs the procedure and prescribes the penalty.
3. The law of the state must, however, assure protection to accused aliens as follows:
   a) The accused person must be given humane treatment during his confinement pending trial.
   b) The accused person must be given a fair trial before an impartial tribunal without unreasonable delay.
   c) No cruel and unusual punishment may be inflicted.
   d) No discrimination may be made against the nationals of any state.

to be subject to universal jurisdiction and it was admitted without controversy, to be in compliance with international law.[63]

There were two fundamental characteristics explaining why universal jurisdiction was recognized for the crime of piracy under international law. The first characteristic was related to the gravity of the crime. This meant that states were motivated to acknowledge that the punishment for the crime of piracy provided the interests of a single state that represent the interest of international community as a whole.[64] The second characteristic was related to the lack of jurisdiction or the doubtfulness to which a state had jurisdiction over a case. This uncertainty arose because the high seas had to be considered a non-state. In turn, this meant that any state could exercise its jurisdiction to punish and prosecute acts committed on the high seas. As a result of this situation, it was admitted that any state that was able to capture and prosecute suspects could capitalize on that opportunity without missing the chance to battle the crime of piracy.[65]

However, it is worthy to mention what Eugene Kontorovich says much to clarify the importance of *locus delicti* in asserting universal jurisdiction over piracy. Taking into account that some believe that "because no state has jurisdiction over international waters, piracy occurs where traditional notions of jurisdiction do not apply...without universal jurisdiction, the argument is that, there would be no jurisdiction at all".[66] Kontorovich suggests that "piracy did not occur so much on the high seas as on ships sailing the high seas. But ships were considered within the territorial jurisdiction of the nation where they were registered; they were floating outposts of that nation's territory. Those ships that fell victim to pirates were almost always within the

4. A state may intercede diplomatically to assure this protection to one of its nationals who is accused in another state.

Inazumi, 2005, p. 50. Cinted by Joseph W. Bingham "research in international law IV: Piracy (Draft of Convention Prepared for the codification of international law)" supplement to American journal of international law Vol. 26, 1932.

[63] Inazumi, 2005, p. 50.

[64] Inazumi, 2005, p. 50.

[65] Inazumi, 2005, p. 51.

[66] Kontorovich, Eugene., 'A Positive Theory of Universal Jurisdiction', *Bepress Legal Series* (2004), p.18

territorial jurisdiction of the nation whose flag they flew. Moreover, the victims of piracy came from somewhere, and thus were nationals of some state. Therefore, traditional jurisdictional concepts were adequate to deal with piracy without having to resort to universality".[67]

It is significant to highlight that the lack of disagreement with regard to territorial jurisdiction was the main factor in facilitating the progress of universal jurisdiction since a conflict with territorial jurisdiction was not a subject of concern when considering the crime of piracy when committed on high seas.[68]

Finally, according to the Draft Convention concerning Jurisdiction prepared by the Harvard School, "universal jurisdiction over piracy was justified on the ground that the punishable acts are committed upon the sea where all have an interest in the safety of commerce and where no state has territorial jurisdiction. Therefore, the formation of custom concerning universal jurisdiction over piracy did no alter the dominance of territorial jurisdiction under the classical jurisdictional regime".[69]

2.3.2 Universal Jurisdiction meaning in International Context

It is established that the Nuremberg Tribunal acknowledged in its judgment the fact of universal jurisdiction was a serious factor to be considered when dealing with war crimes, crimes against humanity and peace. It is stated: "In addition to the ground that parties to the London Agreement of 8 August 1945 could legislate for defeated Germany as occupying powers, in sitting up the Tribunal they had done together what any one of them may have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administrative law".[70] In this way, jurisdiction of the Nuremberg Tribunal was specified over crimes that had no geographic limitations in space. Moreover, this Tribunal was thought to establish and

[67] Kontorovich, 2004, p.18-19.
[68] Inazumi, 2005, p. 52.
[69] Inazumi, 2005, p. 52; Cited in Research in International Law, (under the Auspices of the Faculty of the Harvard Law School),'Drafts of Conventions Prepared for the Codification of International Law: Jurisdiction with respect to crime", *supplement to the American journal of international law*, Vol. 29, 1935, p. 566.
[70] Beigbeder, Yves., *International Justice against Impunity: Progress and New Challenges*, Martinus Nijhoff Publishers, 2005, p. 46.

enforce jurisdiction within territorial borders of states over persons who were neither citizens of any of the Four states (the United Kingdom, the United States, the Soviet Union, and France) who signed into force the international instruments which brought into existence the Nuremberg Tribunal. As a result, the jurisdiction of the Tribunal was justified based on the universal nature of the crimes committed.[71]

Although in the Statute of the International Criminal Court, the exercise of universal jurisdiction was not included as the agreement was designed to make the court more suitable to the United States, in the Preamble, however, a reference is made to the universal principle in paragraphs 4-6. It states as follows: "states parties affirm that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, determine to put an end to impunity for the perpetrators of such crimes, and recall the it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".[72]

There were two relevant trials related to war crimes and crimes against humanity perpetrated by Nazi officials during World War II that are seen as being backed by the universal principle. The first trial is that of the Demjanjuk case, in which the US Court of Appeals for the Sixth Circuit judged that "the universality principle is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore any nation which has custody of the perpetrators may punish them according to its law applicable to such offences."[73]

The second trial was that of Adolf Eichmann. In its final ruling, the District Court of Jerusalem recognized the nonexistence of an international criminal court for exercising universal jurisdiction over war crimes and crimes against humanity[74]:

[71] Beigbeder, 2005, p. 46.
[72] Beigbeder, 2005, p. 47.
[73] Beigbeder, 2005, p. 47; Cited in Demjanjuk v. Petrosky, 776 F.2d571, 582 (6th Cir. 1985, cert. Denied, 475 US 1016 (1986).
[74] Beigbeder, 2005, p.47.

> "The abhorrent crimes defined in this law are not crimes under Israel law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself. Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, 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".[75]

To summarize, Article 8 of the 1993 Draft Resolution on the Extraterritorial Jurisdiction of States by the Institute of International Law states that under the principle of universality, jurisdiction may be exercised in order to protect certain interests of the international community as a whole. In this way, jurisdiction may be extended to a person regardless of their nationality and the place where they may have committed their criminal acts. Universal jurisdiction may therefore refer to offences as defined under conventional and customary international law, such as piracy, crimes against humanity, war crimes, slavery, genocide. Lastly, universal jurisdiction may also thereby be exercised irrespective of the signature or ratification of any international convention by the state of the nationality of the accused.[76]

[75] Attorney General of Israel v. Eichmann, 36 Int'l L. Rep, 26 (Israel Dist. Ct. Jerusalem 1961). Aff'd 36 Int'l. Rep. 227 (Israel Sup. Ct. 1962)
[76] Reydams, 2003, p. 41. Cited in Ybk Institute Int'l L, II, 174, 65, 1993.

3. UNIVERSAL JURISDICTION: A THREAT TO STATE SOVEREIGNTY?

States are the principal entities of the international legal order; they represent their citizens while providing for their physical security within national borders. In general, states wish to guarantee that other states do not make use of criminal law to interfere with their sovereignty.[77] International law has sheltered states under the principle of absolute state sovereignty and the exclusiveness of territorial jurisdiction, while also leaving the principle of non-interference to the discretion of states.[78] But when universal jurisdiction comes into view it seems to be inconsistent with these basic principles and may act to interfere with the notion of the sovereignty of a state. Although these contradictions appear to be difficult to come to terms with, there are several arguments used to support that state sovereignty could be threaten to some extend by the exercise of universal jurisdiction.

3.1 The Western Notion of Universal Jurisdiction

It has been established that Western powers have conflicting perceptions with regard to universal jurisdiction, especially when attempting to specify "a code of offences against the peace and security of mankind fearing that they might thereby lose rights of diplomatic protection for their citizens or be forced to recognize criminal judgments of states whose legal systems they do not wish to respect as being of equivalent right".[79] In this way, Western powers are not interested in the judgments of foreign national courts when issues that are within its borders are at stake. Basically, Western countries generally support the principle of sovereignty, believing that non-recognition of foreign criminal judgments, immunity for individuals that act as state agents when crimes are committed, and the ability to deny to extradition of their own citizens are powers worth preserving.[80]

[77] Graefrath, Bernhard., 'Universal Criminal Jurisdiction and an International Criminal Court', EJIL, Vol. 67 (1990), p. 73.
[78] Inazumi, 2005, p. 19.
[79] Graefrath, 1990, p. 73.
[80] Graefrath, 1990, p. 73.

Developed countries primarily invoke universal jurisdiction in instances involving developing countries and crimes committed by individuals from those countries. Asserting universal jurisdiction in this way, however, entails the danger of imposing Western values on the developing world.[81] In other words, "the enormous effort and potential expense in collecting evidence, gathering witnesses, and trying accused perpetrators of horrific crimes committed extraterritorially, the motivation for almost every such national proceeding likely would have some foundation in politics or arise from a sense of judicial, and most likely Western, superiority".[82]

In reaction to universal jurisdiction as a means of imposing Western values on weaker developing nations, it has been emphasized that the universal principle should be an option of last resort in situations where national or territorial states are not willing or able to prosecute. Such a situation could occur when exercising the universal principle is merely a temporary measure that will terminate as democracy and the rule of law spread, allowing democratic countries to interfere in the affairs of developing states rather than enduring a transitional period during which the mechanism necessary for domestic prosecution may not be adequately developed.[83] Nevertheless, it is still predicted that nations that dominate in military, economic, and political spheres will continue to hold their values as binding for smaller or weaker states. [84]

3.2 **Jurisdiction of State Sovereignty**

Universal principle deals with the classical notion of jurisdiction as being embedded in state sovereignty. It is explained that jurisdiction proceedings in legal cases do not interfere with the internal matters of other states since the assumed crimes are undeniably crimes under international law. Nonetheless, when jurisdiction is exercised by a state without it having a legal link with either the offence or the

[81] Bottini, 2004, p. 556.
[82] Bottini, 2004, p. 556; Cited by Sammons, Anthony. 'The under-theorization of universal jurisdiction: Implications for legitimacy on trials of war criminals by National Courts' *Berkeley J. INT'L L.* 2003, p. 138.
[83] Gluzman, Helena., 'On Universal Jurisdiction- Birth, Life and a Near- Death Experience?', Bocconi School of Law. Student – Edited – Papers. Paper No. 2009-08/EN. (2009), p.11.
[84] Gluzman, 2009, p. 12.

offender, it erodes the essential concept of jurisdiction. In fact, jurisdiction would be a contradiction to one of the fundamental principles of international law: "a rational distribution of competences among equal sovereigns".[85] Therefore, although not violating the non-interference principle, universal jurisdiction is a breach of the more fundamental principle of sovereign equality of states.[86]

3.3 Universal Jurisdiction: Used as a Political Means

The exercising of universal jurisdiction could be interpreted as a political means of achieving non-altruistic purposes by giving powerful nations the capacity to influence less powerful ones. Without a doubt, letting states assert universal jurisdiction might "encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined 'international community".[87]

When national courts abuse universal proceedings for their own political ends there is, of course, interference in the state's domestic affairs. In this way, exercising the universal principle becomes a significant tool in deconstructing state sovereignty by reducing the state's jurisdictional privilege and by using the jurisdictional claim to go against the state's decision not to prosecute or to protect the accused. The need to preserve interstate relations through non-interference rule and respecting in general the concept of sovereignty will therefore have a tendency to block universal jurisdictional assertions and proceedings. Consequently, the claim of jurisdiction over universal crimes could somehow appear uncertain or could be rejected by those who seek to take full advantage of state sovereignty at the expense of international justice.[88]

Kissinger stated the danger of a state based on its own ideological, religious, or political interests exercising universal jurisdiction. He acknowledge that "the danger

[85] Colangelo, Anthony., 'The New Universal Jurisdiction: In Absentia Signaling Over Clearly Defined Crimes', *Georgetown Journal Of International Law*, Tomo 36, Nº 2, Winter (2005).
[86] Colangelo, Anthony., 'The New Universal Jurisdiction: In Absentia Signaling Over Clearly Defined Crimes', *Georgetown Journal Of International Law*, Tomo 36, Nº 2, Winter (2005).
[87] Bottini, 2004, p. 556. Cited in Arrest Warrant Case, 15 (separate opinion of president Guillaume)
[88] Colangelo, Anthony., 'The New Universal Jurisdiction: In Absentia Signaling Over Clearly Defined Crimes', *Georgetown Journal Of International Law*, Tomo 36, Nº 2, Winter (2005).

lies in pushing the effort to extremes that risk substituting the tyranny of judges for that of governments; historically, the dictatorship of the virtuous has often led to inquisitions and even witch-hunts relying on states to exercise jurisdiction in a fair and impartial manner is indeed a tricky exercise".[89] In addition, it is believed that there is a chance that states which assert universal jurisdiction will be accused of jurisdictional imperialism because this universal principle is expected to be exercised by powerful states with regard to crimes committed in less powerful ones.[90]

In a situation where people of another state must be judged, it may signify that the state itself is judged as such. In other words, "putting individuals on trial may be equated with judging the act of another state".[91] For instance, the judgement of the act of a person, e.g. a head of state of a foreign state, may entail that his state has committed the offence, therefore condemning the state itself. This situation would result in hostile proceedings against a state and according to this, it should be noted that under the characteristic of state equality non-states could declare jurisdiction over a sovereign state. For this reason, "states are given jurisdictional immunity from the courts of other states. This immunity is deduced not only from the principle of equality but also from the principles of the independence and dignity of states".[92]

3.4 Universal Jurisdiction Undermines Foundations of Democratic Transition of a State

Mitsue Inazumi argues that states should avoid the universal principal for the reason that it could strike at the foundations of the democratic transition in a nation where the crime was committed. Consequently, third states may consent to territorial states to deal with the state of affairs. Kissinger highlights the example of post-Franco Spain in which criminal trials of human rights violations in the recent past were shied

[89] Mitsue Inazumi, p. 215, Kissinger, Henry., 'The Pitfalls of Universal Jurisdiction', *Foreign Affairs*, Vol. 80 - 4 (2001).
[90] Mitsue Inazumi, p. 215
[91] Bottini, 2004, p. 137.
[92] Bottini, 2004, p. 137.

away from or why the same effort by Chile to prioritize national reconciliation over criminal accountability should not be allowed in the Augusto Pinochet case.[93]

3.5 Universal Jurisdiction and Disagreements Among States

Inazumi has also suggested that exercising universal jurisdiction will lead to new disputes and disagreements between states. Such a situation may occur when the exercising of the universal principle could be reasoned to be an expression of doubt in the judicial system of a territorial state. More significantly, this act could generate a violent reaction from the territorial nation in which bilateral or even multilateral relationships may be aggravated. For instance, in the case of Augusto Pinochet, it was said that it could be preferable to try Pinochet in an international judicial body. Such a decision would avoid a trial in Spanish or British courts that might have acted to destabilize or threaten belief in Chile, damaging national pride in Chile as a sovereign and territorial state.[94]

In brief, the majority of cases where universal jurisdiction is put into effect would be in North American and European courts, while most of the people prosecuted are expected to come from developing nations. As a result, it is usually believed that "a weaker state exercising universal jurisdiction over crimes committed by nationals of a powerful state is highly unlikely to occur.[95] As the term 'jurisdictional imperialism' suggests, a former colonial power prosecuting a crime that had occurred in former colonies would be most vulnerable to such an accusation".[96]

[93] Inazumi, 2005, p. 198.
[94] Cited in Diana Woodhouse ed., the Pinochet case: a legal and constitutional analysis. (Hart Publishing, 2000) p. 127-129.
[95] A cynical remark made by Shadrack Gutto is the followings: 'What would happen if an African state like Djibouti would prosecute let us say a national of the United State for crimes against humanity? The prosecuting state would either be bombed or will not receive aid from the World Bank'. See, Evelyn Ankumah 'Introduction Seminar: Universal Jurisdiction for Crimes against Humanity. African Legal Aid Quarterly. January-march 2000, p. 5.
[96] Inazumi, 2005, p. 215-216.

3.6 The International Criminal Court

It should be clarified that the International Criminal Court will not substitute national prosecutions. In fact, the Rome Statute calls for states to ratify it and accept the responsibility to investigate and prosecute individuals suspected of crimes within the Court's jurisdiction in their national courts. In general, the International Criminal Court is considered to complement the acts of the national courts. Moreover, it will only investigate and prosecute individuals when national courts are not able to do so.[97]

As of March 2010, 111 countries are States parties to the Rome Statute of the International Criminal Court.[98] Participation in the International Criminal Court does not seem to be perceived as a threat to sovereignty. Instead, it seems that signatories of the Rome Statute are more willing to recognize a redefinition of the concept of sovereignty to enable the functioning of the Criminal Court. Nevertheless, as was noted above, the most powerful states (the United States, Russia, and China) have not yet acknowledged the jurisdiction of the International Court.

Countries that have rejected the International Court have primarily done so based on grounds of sovereignty. That is, a permanent criminal tribunal would limit their actions in fields where they have largely been free of any restriction. The principal issue here is that criminal jurisdiction over crimes committed within a specific territory, where the victim is a citizen or national interests are at risk, "will be at the mercy of an international system of criminal justice controlled by others".[99] This position is a sign of that the scope of Westphalia is structurally insufficient to encompass a permanent criminal tribunal that would have jurisdiction over the majority of states.[100] In this way, states could use the sovereignty principle to excuse themselves and do not allow the competence of an international criminal court within

[97] Amnesty International., 'Universal Jurisdiction: Questions and Answers', http://asiapacific.amnesty.org/library/Index/ENGIOR530202001?open&of=ENG-325 Accessed 1 June 2010.
[98] International Criminal Court. The State Parties to Rome Statue. http://www.icc-cpi.int/Menus/ASP/states+parties/
[99] Graefrath, 1990, p. 74.
[100] Partan, Daniel & Predrag, Rogic. 'Sovereignty and International Criminal Justice' International Law. Revista Colombiana de Derecho International', 2003, p. 56-57.

their territories. Following the example of Nuremburg, Western powers generally supported the creation of ad hoc courts whose competence should be based on the existence of national criminal jurisdictions. This point is contrary to the creation of an international criminal court that would have the competence to act in the same place of a national criminal jurisdiction.[101]

3.7 Considerations on the principle of Universal Jurisdiction

It should be noted that one has to consider other aspects in which universal jurisdiction should be exercised without regard to its effects on the principle of sovereignty.

First, one must take into account that exercising universal jurisdiction does not represent an act of sovereignty within the territory of another state. "Jurisdiction is claimed by the national court of the exercising state situates within the territory of this state, not in the territory of the state where the crime occurred".[102]Therefore, the end result of the trial may have an effect on the territorial state politically and socially, but the proceedings of the trial are not carried out in the territorial state. Consequently, universal jurisdiction should not be considered in contravention to the principle of prohibiting the exercising of sovereign power within the territory of a third state. In the end, one should refer to universal jurisdiction as the jurisdiction to institute territorial jurisdiction over individuals for extraterritorial actions, as universal jurisdiction is usually used by countries that have the presence of the suspect in their territory.[103]

Second, related to the principle of non-interference, it should be considered that when there is a prosecution of a significant crime it should be defined whether that

[101] Graefrath, 1990, p. 74.
[102] Inazumi, 2005, p. 135.
[103]Inazumi, 2005, p. 135. "Joint separate opinion of judges Higgins, Kooijmans and buergenthal, Case Concerning the Arrest Warrant of 11 April 2000, supra note (1), para. 42. These judges envisage universal jurisdiction not limited by the requirement of the presence of a suspect within the territory of the exercising states. Therefore, they refer to the obligation of states under many treaties to prosecute individuals in their territory as 'the inaccurately termed "universal jurisdiction principle"'. See Ibib, paras. 44, 57.

issue is to be a matter of domestic or international concern. It may be due to the fact that the principle of non-interference "should be interpreted in the light of the well established and generally accepted principle that serious violations of human rights are of concern to the international community and may give rise to prosecution under the principle of universal jurisdiction".[104] In this way, the principle of sovereignty cannot or must not be a pretext to take action against serious crimes. On this issue the International Criminal Tribunal for the former Yugoslavia stated that "the sovereign rights of states cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world".[105] In general, it should be observed that violations of human rights are recognised not only in the domestic field of a state but also as a matter of concern for the international community.[106]

[104] Inazumi, 2005, p. 136. Africa Legal Aid (AFLA), 'Preliminary draft of the Cairo Guiding Principles on Universal Jurisdiction in Respect of Gross Human Rights Offenses: An African Perspective', adopted in Cairo on July 2001, Principle 3.
[105] Tadic, Trail Chamber, para, 42.
[106] Inazumi, 2005, p. 136.

4. IMPLICATIONS EITHER FOR THE NOTION OF SOVEREIGNTY AND UNIVERSAL JURISDICTION

It seems that the principles of sovereignty and universal jurisdiction cannot be exercised and defended at the same time in the international arena. On the one hand, restricting the use of universal jurisdiction based on the sovereignty principle would have negative implications with regard to halting human rights violations committed in the world. On the other hand, the notion of sovereignty should be displaced as the international community becomes increasingly aware of the need to bring perpetrators who have committed heinous crimes before courts. However, to date, one should consider whether the state sovereignty principle has been displaced as much as necessary to open the way to implement universal jurisdiction.

4.1 Implications for the Sovereignty Principle

It has been suggested that to have a better understanding of the actual international system, one must reconsider the notion of state sovereignty as it is traditionally understood. That is, an evaluation should be made concerning the implicit rules of national sovereignty while also determining whether those rules are suitable in understanding the contemporary state system. It cannot be denied that the traditional notion of sovereignty has been a helpful tool in understanding and governing international law. Nonetheless, the international system has changed since the end of World War II and has begun giving priority to exercise the principle of universality, and with it, an increase in accountability for committed crimes against humanity.[107]

Should the concept of state sovereignty be given precedence over human rights when there is a need for justice? In Tadic case, it was stated that "borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity".[108] The crimes which the international tribunal had identified were not crimes of a merely domestic nature but,

[107] Larry May & Zachary Hoskins, Ed., 2010, p. 45-47.
[108] Mohammed El Zeidi., 'Universal Jurisdicition in Absentia. It is a legal valid option for represing henious crimes?', *37 Int'l L*, (2003), p. 884.

on the contrary, they were crimes which were universal in nature, well known in international law as a serious breaches of international humanitarian law, and go beyond the importance and significant of any state. The Trial Chamber indicated that in these circumstances "sovereign rights of states cannot and should not take precedence over the right of international community to act appropriately as they affect the whole of making and shock the conscience of all nations".[109]

As was stated in Chapter I, the principal rule of state sovereignty is that every state could overrule others from exercising jurisdictions due to acts carried out on its territory (principally those acts that are connected to its own nationals). It is more than clear that when citizens' rights to security are violated and state sovereignty is undermined, international prosecutions are not automatically warranted. However, as May argues "the remaining obstacle to such justification is defined by this international harm principle: only when there are serious harms to the international community, should international prosecutions against individuals' perpetrators be conducted".[110] In addition to this, May argues that from the time when states were created in order to seek at the social order and to preserve agreements among the citizens of the state, an important moral presumption was assumed of states: as long as they are conforming to this normative aim to protect its national, they should not be interfered with by other states.[111]

4.2 Implications for universal principle

Although one could think that sovereignty should be considered and made more flexible in combating impunity, this principle is still strong enough to limit or slow the exercising of universal jurisdiction, which would constitute a setback for supporters of the universal principle. For instance, it is important to highlight that two significant countries - Spain and Belgium - in which universal jurisdiction has been highly recognized had to step back and limit its use due to situations related to sovereignty principle.

[109] Mohammed El Zeidi., 2003, p. 884.
[110] Larry May & Zachary Hoskins, Ed., 2010, p. 41.
[111] Larry May & Zachary Hoskins, Ed., 2010, p. 40.

Spanish judges, in the last decade, have used universal jurisdiction as a tool to pursue cases against suspected human rights violators, most notoriously former General Augusto Pinochet of Chile. To date, Spanish courts follow a series of international investigations into alleged cases on genocide, torture and crimes against humanity, in places as far as Rwanda and Tibet. Some cases have little or no connection at all with Spain.[112] Calls to contain the scope of universal jurisdiction had to rise at its maximum point when Spanish magistrates announced investigations involving military and government officials from Israel and six former Bush administration officials suspected of providing legal protection for acts of torture committed at the US Detention Center in Guantanamo Bay, Cuba. Moreover, these proceedings have formed an uncomfortable diplomatic situation between Spain and China, as China has warned Spain that bilateral relations could be damaged if it were to take action in the case involving Tibet.[113]

The Congress of Deputies limited the exercise of universal jurisdiction. These limitations were established to maintain a balance between impunity and non-interference in domestic affairs of foreign countries.[114] The Congress of Deputies, on June 25 voted by a vast 341-2 majority to control the future scope of universal jurisdiction to cases in which victims must be Spanish, the alleged perpetrators must be in Spain, or if another link to Spain can be demonstrated.[115]

In the case of Belgium, it had a statute providing for jurisdiction over international crimes, whether there was any connection to Belgium or not. One result was that its national courts became a safe place for politically motivated claims against national

[112] Kern, Soeren. Spain step back from universal jurisdiction. *World Politics Review* on July 2 (2009). http://www.worldpoliticsreview.com/articles/4018/spain-steps-back-from-universal-jurisdiction accessed 1 May 2010.
[113] Kern, Soeren. Spain step back from universal jurisdiction. *World Politics Review* on July 2 (2009). http://www.worldpoliticsreview.com/articles/4018/spain-steps-back-from-universal-jurisdiction accessed 1 May 2010.

[114] El Congreso Limita la Jurisdicción Universal de la Justicia Española. EL PAIS.com – Madrid - 25/06/2009.http://www.elpais.com/articulo/espana/Congreso/limita/jurisdiccion/universal/justicia/espanola/elpepuesp/20090625elpepunac_14/Tes, Accessed 28 April 2010.
[115] Kern, Soeren., 2009. http://www.worldpoliticsreview.com/articles/4018/spain-steps-back-from-universal-jurisdiction accessed 1 May 2010.

leaders that had little possibility of occurring in the country where the events took place. Complainants sought to prosecute Ariel Sharon for abuses in Lebanon, and former president George Bush for a bombing in Baghdad during the first Gulf War. As a result, these proceedings made US Defense Secretary Donald Rumsfeld threaten to withdraw NATO headquarters from Brussels unless the law was revised and modified.[116] In the same way, the International Court of Justice judgment in Democratic Republic of Congo v. Belgium about immunities had a negative impact on Belgian law. As a result of these inconveniences, Belgium was forced to modify and revoke its progressive law of universal jurisdiction.

According to the new law, the exercising of universal jurisdiction by Belgium courts was subjected to a required link with Belgium in terms of the nationality or residence of the plaintiff accused; immunity from prosecution recognized foreign governmental officials while in office, and immunity from arrest applied to all persons in official visits; and the role of the public prosecutor increased where only the victim is Belgian.[117]

As it was pointed out, the assertion of the universal principle by national courts has given rise to perceptions of abuse on political or other grounds conduct, and with this it has led to the risk of deteriorated inter-state tensions. African states, for instance, have the perception that they have been targeted in the indictment and arrest of their officials; along with the use of jurisdiction by European states as being politically selective against them. Concern regarding this situation is heightened by numerous charges being brought against officials of African states in different European jurisdictions. The African perception is that most of the time inductees are sitting officials of African states; consequently indictments against these officials have serious repercussion for relations between African and European states.[118]

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[116] Chevigny, Paul., 'The limitations of universal jurisdiction', *Global Policy Forum*, March (2006).

[117] Belgium to curb war crimes law. BBC. June 23, 2003. http://news.bbc.co.uk/2/hi/europe/3012106.stm. Accessed 28 April 2010.

[118] Assembly of the African Union., 'Progress Report of the Commission on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction', Africa Union, Twelfth Ordinary Session, February 2009.

When there is an accusation issued by European states against officials of African states it has the effect of subjugating the latter to European jurisdiction, opposing to the sovereign equality and independence of states. For African states, indeed, this brings to mind memories of colonialism.[119] Moreover, it is stated that indictments addressed against foreign state officials "exercising functions on behalf of their states by low-level judges, often sitting alone without the benefit of collective knowledge and decision-making in judicial terms, tend to undermine the dignity of the state officials concerned and put at risk friendly relations between sovereign states".[120]

In conclusion, with these few illustrations one could wonder whether continue moving forward universal jurisdiction is meaningful and if it could be seen as a potential instrument to bring justice for the international community. The backstepping of Belgium and Spain, as well as permanent complaints from, for example, African states reflect the importance and influence of the sovereignty principle in the international sphere.

[119] Assembly of the African Union., 'Progress Report of the Commission on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction', Africa Union, Twelfth Ordinary Session, February 2009.
[120] Assembly of the African Union., 'Progress Report of the Commission on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction', Africa Union, Twelfth Ordinary Session, February 2009.

5. CONCLUSION

Universal principle that allows states to assert criminal jurisdiction over persons whose suspected crimes were committed outside the borders of the prosecuting state, regardless nationality, country of dwelling, or any other relation with the prosecuting country is to some extend a breach of the state sovereignty principle whereby all states are not under any authority of any organization or rule. All states are given the right to have autonomy in governing its internal affairs and given the right to non-interference. Moreover, sovereignty means independence, legal equality of states and exclusive jurisdiction over its territory.

There are some suggestions in scholarly fields concerning the necessity of reconsidering the sovereignty principle and making it more flexible to combat impunity over atrocious crimes. However, according to the various principles explained in Chapter II of this paper, the sovereignty principle is still sensible of the effect resulting for the exercise of the universal principle.

State sovereignty is affected when universal jurisdiction is exercised by developed countries that may entail the danger of imposing of Western values on developing countries in which most serious international crimes are committed. It is still predicted that countries that dominate in the military, economic, and political arena will continue to hold their values as binding on smaller or weaker states. Permitting powerful states to exercise universal jurisdiction could therefore allow it to be used as a political means of arbitrarily influencing weak countries. The principle of equality of states may be breached when the people on trial and their actions are equated to the acts of the state of the alleged criminal. More importantly, these acts could instigate a violent reaction from the territorial nation in which bilateral or even multilateral diplomatic relations would be damaged.

To sum up, the principle of state sovereignty is significant in the international system. "Not by accident, they are central concepts of international law".[121] Therefore, thanks to the importance of this principle in the international sphere, sovereignty remains strong enough to limit and impede the use of universal jurisdiction as a consequence of its negative effects, marking a step backwards for advocates of the universal principle. Taking this into account, the rights of states remain more important than combating impunity against human rights violations, thus it is unlikely that universal jurisdiction will overcome the sovereignty principle in the short time.

[121] Goldsmith, Jack., 'Sovereignty, International Relations Theory, and International Law' *Stanford Review.* Vol, 52, No 4, April (2000), p. 962.

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