

Unraveling the Confused Relationship Between Treaty Obligations to Extradite or Prosecute and “Universal Jurisdiction” in the Light of the *Habré Case*

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Since the 1980s, the idea that treaty obligations to extradite or prosecute embody, or even mandate, a principle of universal jurisdiction has increasingly been supported by weighty scholarship. Although this view has not gone unchallenged, especially in the wake of the ICJ's judgment in the Habré Case, it is gaining ground among various actors in the field of international law. Indeed, this case is increasingly discussed to support the argument that the ICJ affirmed the existence of the principle of universal jurisdiction and provided meaningful guidance on its relationship with the obligation to extradite or prosecute.

Informed by a wide range of primary sources, including an original empirical analysis of state practice since the end of World War II to the present and actual prosecutions purporting to be based on universal jurisdiction, this Article brings new insight and much needed conceptual and legal clarification to the meaning of “universal jurisdiction” and its relationship with jurisdiction in treaty obligations. Its central argument is that treaty obligations to extradite or prosecute should not be conceptualized as, or used to infer the existence of, universal jurisdiction. Rather, the type of jurisdiction arising out of these obligations is more accurately termed “treaty-based jurisdiction,” which is antithetical to universal jurisdiction and at variance with its underlying rationale. Universal jurisdiction does not exist under customary international law and common examples of universal jurisdiction in state practice are actually different types of treaty-based jurisdiction.

The Article concludes that universal jurisdiction is a hollow concept without state practice and is in urgent need of both substantial revision and more accurate definition. Clarifying the basic concept could help avoid excessive—and unlawful—claims of jurisdiction that breach other rules of international law and cause further tension and disputes.

INTRODUCTION

The *Habré Case*, where Belgium sought the extradition or prosecution of former President and accused torturer Hissène Habré of Chad, marks the second contentious case in which the International Court of Justice (“ICJ”) has had the opportunity to clarify universal criminal jurisdiction in international law.¹ On the first occasion, in *Arrest Warrant*, the ICJ declined the

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1. Questions Relating to Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422 (July 20) [hereinafter *Habré Case*].

opportunity to discuss the legality of universal jurisdiction while deciding whether Belgium could issue an arrest warrant for the then-Minister of Foreign Affairs of the Democratic Republic of the Congo (“DRC”).² In the *Habré Case*, the ICJ, for the first time, decided on the obligation to extradite or prosecute and referred to the prescriptive jurisdiction arising out of this obligation in Article 5(2) of the 1984 U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) as “universal jurisdiction.”³

This Article uses a wide range of primary sources to bring new insight and much needed conceptual and legal clarification to the meaning of “universal jurisdiction” and its relationship to jurisdiction from treaty obligations to extradite or prosecute. In turn, it aims to inform the work on universal jurisdiction at the U.N. General Assembly and its Sixth Committee⁴ and to assist states and courts in the implementation of their treaty obligations to extradite or prosecute, thereby preventing disputes. Its central argument is that treaty obligations to extradite or prosecute should not be conceptualized as, or used to infer the existence of, universal jurisdiction.⁵ Rather, it is proposed that the type of jurisdiction arising out of these obligations is more accurately termed “treaty-based jurisdiction,” which is antithetical to universal jurisdiction and at variance with its underlying rationale.⁶

In making this argument, this Article provides three main sources of insight. First, it argues that the references to “universal jurisdiction” in the *Habré Case* amount to little more than obiter dictum and do not support universal jurisdiction’s existence in customary international law or its relationship, if any at all, to treaty obligations to extradite or prosecute. Second,

2. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3 (Feb. 14) [hereinafter *Arrest Warrant Case*]. The International Court of Justice (“ICJ”) determined this case by “assuming” that Belgium had jurisdiction under international law to issue and circulate an arrest warrant in respect of the then Minister of Foreign Affairs of the Democratic Republic of Congo (“DRC”), thereby deciding to focus solely on the question of immunities under international law. This was on the basis that the DRC in its final submissions had dropped its challenge to the legality of Belgium’s claim to exercise universal jurisdiction and relied exclusively on the alleged violation of diplomatic immunity. *Id.* ¶ 46. The ICJ’s decision in this regard was criticized in a joint separate opinion by Judges Higgins, Kooijmans, and Buergenthal, who were of the opinion that “it was not only desirable, but indeed necessary, that the Court should have stated its position on this issue of jurisdiction.” *Id.* at 63, ¶ 3 (joint separate opinion by Higgins et al., JJ.); see also *infra* notes 299–303 and accompanying text.

3. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 5(2), Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85 [hereinafter CAT]; *Habré Case*, 2012 I.C.J. at 422, ¶¶ 74–75, 84, 91, 118.

4. The Sixth Committee is the primary U.N. forum for the consideration of legal questions in the General Assembly.

5. This Article analyzes universal jurisdiction in the criminal context only. Additionally, its focus is not on proposing a definition of universal jurisdiction, but rather rebuts attempts to use treaty obligations to extradite or prosecute to infer that universal jurisdiction exists in places it does not.

6. The term “treaty-based jurisdiction” is borrowed from *Arrest Warrant Case*, 2002 I.C.J. at 63, ¶ 41 (joint separate opinion of Higgins et al., JJ.); see also *United States v. Yousef*, 327 F.3d 56, 94–96 (2d Cir. 2003); Sean D. Murphy (Special Rapporteur on Crimes Against Humanity), *Second Rep. on Crimes Against Humanity*, ¶ 113, U.N. Doc. A/CN.4/690 (Jan. 21, 2016).

it analyzes the text of Articles 5 and 7 of the CAT and their *travaux préparatoires*—both of which are bypassed by the ICJ in the *Habré Case*—to show that jurisdiction from treaty obligations to extradite or prosecute is incapable of giving rise to universal jurisdiction. Lastly, it presents the findings of an original empirical analysis of state practice since the end of World War II to the present, including actual prosecutions purporting to be based on universal jurisdiction, to show that universal jurisdiction does not exist under customary international law at present and that common examples of universal jurisdiction in state practice are actually different types of treaty-based jurisdiction.⁷

The argument advanced in this Article finds support in recent scholarship⁸ and has been adopted in a study on universal jurisdiction recently published by the European Parliament, following the submission of evidence by the present author.⁹ It also builds on the present author’s previously published research on universal jurisdiction’s alleged historical legal sources¹⁰ and is further supported by the present author’s current role as an independent expert legal advisor at the U.N. on counter-terrorism law, including treaty obligations to extradite or prosecute.

Clarification of the relationship between treaty obligations to extradite or prosecute and universal jurisdiction, especially in the light of the *Habré Case*, is timely and important for the following reasons. First, since the 1980s there has emerged an (unproven) prevailing narrative in scholarship, research institutes, nongovernmental organizations (“NGOs”), and the International Committee of the Red Cross (“ICRC”) that treaty obligations to extradite or

7. Although beyond the scope of this Article, the central argument has important implications for universal civil jurisdiction.

8. See Luc Reydam, *The Rise and Fall of Universal Jurisdiction* 14–26 (Leuven Ctr. for Glob. Governance Studies, Working Paper No. 37, 2010), http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp31-40/wp37.pdf; Sienho Yee, *Universal Jurisdiction: Concept, Logic, and Reality*, 10 CHINESE J. INT’L L. 503, 504 (2011). A similar argument was made over two decades ago by Rosalyn Higgins, *International Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public Interest Law*, 230 RECUEIL DES COURS 9, 98–99 (1991).

9. Luc Reydam, *The Application of Universal Jurisdiction in the Fight Against Impunity* 10–13, EP/EXPO/B/DROI/FWC/2013–08/LOT8/06 (Mar. 16, 2016). The study was requested by the Parliament of the European Union in order to “feed” into the debate on universal jurisdiction at the U.N. General Assembly. Although the Parliament removed the report from its database, Professor Reydam has made the report available online. See Luc Reydam, *The Application of Universal Jurisdiction in the Fight Against Impunity* (Mar. 14, 2016), <https://ssrn.com/abstract=2929013>. Despite the findings of Reydam’s report, the Parliament recently called on Member States “to apply the principle of universal jurisdiction in tackling impunity” in respect of war crimes, crimes against humanity and genocide. Resolution on Addressing Human Rights Violations in the Context of War Crimes, and Crimes Against Humanity, Including Genocide, ¶ 52, P8_TA-PROV(2017)0288 (July 4, 2017).

10. See Matthew Garrod, *The British Influence on the Development of the Laws of War and the Punishment of War Criminals: From the Grotius Society to the United Nations War Crimes Commission*, in BRITISH INFLUENCES ON INTERNATIONAL LAW, 1915–2015, at 317, 317–66 (Robert McCorquodale & Jean-Pierre Gauci eds., 2016) [hereinafter Garrod (2016)]; Matthew Garrod, *Piracy, the Protection of Vital State Interests and the False Foundations of Universal Jurisdiction in International Law*, 25 DIPL. & STATECRAFT 195, 195–213 (2014) [hereinafter Garrod (2014)]; Matthew Garrod, *The Protective Principle Jurisdiction over War Crimes and the Hollow Concept of Universality*, 12 INT’L CRIM. L. REV. 763, 763–826 (2012) [hereinafter Garrod (2012)].

prosecute impliedly embody and even mandate universal jurisdiction.¹¹ This argument is gaining ground following the *Habré Case*. For example, leading scholars increasingly discuss this case as if the ICJ were affirming the existence of universal jurisdiction and providing meaningful guidance on its relationship with the obligation to extradite or prosecute.¹² Perhaps more importantly, in 2014 the International Law Commission (“ILC”) adopted a “Final Report” on treaty obligations to extradite or prosecute stating, in reliance on the judgment in the *Habré Case*, that the “necessary jurisdiction,” in the implementation of such obligations, “would necessarily reflect an exercise of universal jurisdiction.”¹³

Second, the topic of universal jurisdiction was elevated to the U.N. General Assembly and its Sixth Committee in 2009, at the request of the African Union, following a conflict when the African Union accused certain European states of abusing universal jurisdiction by selectively targeting African leaders for politically motivated prosecutions.¹⁴ The conflict generated between Africa and Europe over universal jurisdiction is more widespread than regional differences and is ongoing. Work on this topic has made little progress during the past seven years and delegations are presently unable to agree on how to move the topic forward.¹⁵ The primary reason for this impasse is due to considerable confusion between universal jurisdiction and treaty obligations to extradite or prosecute. On one hand, several delegations evidence universal jurisdiction’s existence by referring to extradite or prosecute obligations.¹⁶ As extradite or prosecute obligations are contained in

11. For the starting point of this increasingly intensive scholarly debate on the matter, see Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 785–841 (1988); see also *infra* notes 47–55, 253–262 and accompanying text.

12. See, e.g., RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES JURISDICTION, § 217 cmt. c, note 2 (AM. LAW. INST., Tentative Draft No. 2, 2016) [hereinafter RESTATEMENT (FOURTH)]; Mads Andenas & Thomas Weatherall, *International Court of Justice: Questions Relating to the Obligation to Extradite or Prosecute (Belgium v Senegal) Judgment of 20 July 2012*, 62 INT’L & COMP. L.Q. 753, 753–769 (2013); Máximo Langer, *Universal Jurisdiction is Not Disappearing: The Shift from ‘Global Enforcer’ to ‘No Safe Haven’ Universal Jurisdiction*, 13 J. INT’L CRIM. JUST. 245, 251 (2015).

13. Int’l Law Comm’n, Rep. of the Work of Its Sixty-Sixth Session, U.N. Doc. A/69/10, at 149–50 (2014). The International Law Commission (“ILC”) was established by the U.N. General Assembly in 1947 to promote the progressive development of international law and its codification. See G.A. Res. 174 (II) (Nov. 21, 1947).

14. See Assembly of the African Union Dec. 199 (XI), A.U. Doc. Assembly/AU/14 (XI) (July 1, 2008); Permanent Rep. of Tanz. to the U.N., Letter dated 29 June 2009 from the Permanent Representative of the United Republic of Tanzania to the United Nations Addressed to the Secretary-General, U.N. Doc. A/63/237/Rev.1 (July 23, 2009); Permanent Rep. of Tanz. to the U.N., Letter dated 21 Jan. 2009 from the Permanent Representative of the United Republic of Tanzania to the United Nations Addressed to the Secretary-General, U.N. Doc. A/63/237 (Feb. 3, 2009).

15. See Press Release, General Assembly Sixth Committee, Speakers in Sixth Committee Agree on Need to Advance Discussion of Universal Jurisdiction, While Differing over Principle’s Application, Scope, U.N. Press Release GA/L/3525 (Oct. 13, 2016).

16. See, e.g., U.N. Secretary-General, *The Scope and Application of the Principle of Universal Jurisdiction*, ¶¶ 11, 16, 21–22, 31, 37, 64, 74–75, U.N. Doc. A/70/125 (July 1, 2015) [hereinafter Secretary-General Report (2015)]; U.N. Secretary-General, *The Scope and Application of the Principle of Universal Jurisdiction*, ¶¶ 14, 18, 22, 36, 38–39, U.N. Doc. A/67/116 (June 28, 2012) [hereinafter Secretary-General Report (2012)].

more than sixty treaties, including numerous treaties and legally binding U.N. Security Council resolutions relating to acts of “terrorism,”¹⁷ the *Habré Case* is leading to further positive statements about universal jurisdiction’s application over a potentially voluminous list of crimes.¹⁸ On the other hand, a considerable number of delegations caution that extradite or prosecute obligations, despite having the purpose of preventing impunity, is conceptually and legally distinct from universal jurisdiction proper.¹⁹ As a result, a Working Group, established by the Sixth Committee to undertake a “thorough discussion” of universal jurisdiction, has identified a non-exhaustive list of twelve crimes, not all of which are crimes under international law, in acknowledging support among some delegations for “treaty-based forms of universal jurisdiction.”²⁰

The Article concludes that universal jurisdiction is, at present, a hollow concept without state practice and is in urgent need of substantial revision and more accurate definition. This requires recognition that treaty obligations to extradite or prosecute do not provide a legal source of “universal jurisdiction” and that characterizing these obligations as such is conceptually confused and inconsistent with actual state practice. Unilateral assertions of universal jurisdiction should be avoided until the basic concept is clarified and its existence in custom is established by states. The risk is that excessive—and unlawful—claims of jurisdiction (including over nationals of non-state parties to the relevant treaties), breaching other rules of international law and causing further tension and disputes, could result.

17. There is currently no internationally agreed upon or comprehensive definition of “terrorism,” although the definition has been the subject of negotiations at the United Nations since 2000. See U.N. Office of Legal Affairs, Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996, <http://legal.un.org/committees/terrorism/> (last updated Sept. 22, 2017). Nonetheless, the extradite or prosecute obligation is contained in numerous international and regional counter-terrorism instruments and Security Council resolutions. *E.g.*, International Convention for the Suppression of Terrorist Bombings art. 6, Dec. 15, 1997, 2149 U.N.T.S 256 [hereinafter *Terrorist Bombings Convention*]; S.C. Res. 1373, ¶ 2(e) (Sept. 28, 2001).

18. See, *e.g.*, U.N. GAOR, 70th Sess., 12th mtg., ¶¶ 57, 78, U.N. Doc. A/C.6/70/SR.12 (Oct. 20, 2015); U.N. GAOR, 69th Sess., 12th mtg., ¶ 21, U.N. Doc. A/C.6/69/SR.12 (Oct. 15, 2014); see also Amnesty International, *Universal Jurisdiction: Strengthening this Essential Tool of International Justice* 25, IOR 53/020/2012 (Oct. 2012). For a contrary view of the *Habré Case*, see Permanent Mission of India to the U.N., On Agenda Item 83 “The Scope and Application of the Principle of Universal Jurisdiction” at the Sixth Committee of the 69th Session of the U.N. General Assembly (Oct. 15, 2014), <http://statements.unmeetings.org/media/4653143/india-en.pdf>.

19. See, *e.g.*, Secretary-General Report (2012), *supra* note 16, ¶ 41; U.N. Secretary-General, *The Scope and Application of the Principle of Universal Jurisdiction*, ¶ 15, U.N. Doc. A/65/181 (2010) [hereinafter *Secretary-General Report* (2010)].

20. These crimes are apartheid, corruption, crimes against humanity, crime of aggression, enforced disappearances, genocide, piracy, slavery, terrorism, torture, transnational organized crime and war crimes. See Chairman of the Working Group for the Scope and Application of the Principle of Universal Jurisdiction, *Informal Working Paper Prepared by the Chairperson for Discussion in the Working Group* (Nov. 7, 2014), <https://papersmart.unmeetings.org/media/2/4655216/roadmap-en.pdf> [hereinafter *Roadmap*]; Oral report by the Chair of the Working Group on the scope and application of the principle of universal jurisdiction, U.N. GAOR, 71st Sess., 31st mtg., ¶ 26 U.N. Doc. A/C.6/71/SR.31 (Dec. 2, 2016).

The structure of the Article is as follows. Part I describes the scholarly definitions of universal jurisdiction and extradite or prosecute obligations prior to the *Habré Case*, as well as the way in which scholars interpret the ICJ's judgment in this case as a broad call for universal jurisdiction. Part II presents an overview of the factual and procedural background of the *Habré Case* and analyzes the ICJ's judgment in this case, especially the way in which the ICJ approaches Article 5(2) of the CAT and cursorily refers to the jurisdiction arising out of this provision as "universal jurisdiction." Part III examines the impact of the *Habré Case* on actors in the field of international law, particularly scholars and the ILC, and the rationales advanced for interpreting extradite or prosecute obligations as impliedly permitting and even mandating universal jurisdiction. Part IV argues that the ICJ's reference to Article 5(2) as "universal jurisdiction" in the *Habré Case* amounts to little more than obiter dictum and does not constitute a meaningful pronouncement of universal jurisdiction's existence in customary international law or its relationship, if any at all, to treaty obligations to extradite or prosecute. In making this argument, this Part first analyzes the CAT's text and *travaux préparatoires* in order to show that universal jurisdiction is incapable of falling within the scope of the CAT and numerous other treaties that use extradite or prosecute obligations. Then, the Part uses original empirical findings of an in-depth analysis of actual state practice in respect of assertions of universal jurisdiction in order to show that universal jurisdiction is a hollow concept in customary international law and therefore it is false to read treaty obligations to extradite or prosecute as either permitting or mandating universal jurisdiction. Based on the empirical analysis in Part IV, Part V argues that only treaty-based jurisdiction exists in the CAT and other treaties creating extradite or prosecute obligations and analyzes key case studies in order to show that common examples of universal jurisdiction state practice are actually better explained as different types of treaty-based jurisdiction. Part VI concludes.

I. THE CONCEPT AND INTERPRETATION OF UNIVERSAL JURISDICTION PRE-HABRÉ

A. *Extraterritorial Criminal Jurisdiction and the Burden of Proof*

It is useful at the outset of the analysis to explain the meaning of universal jurisdiction, as it is commonly understood in scholarship and the work of research institutes and NGOs, in order to distinguish it from the obligation to extradite or prosecute. Generally, states are prohibited from legislating on criminal matters outside their territory unless international law provides for explicit permission.²¹ The burden of proof is of decisive importance.²² The

21. See, e.g., Judgment, 2002 I.C.J. 4, 35, ¶ 4 (Feb. 14) (separate opinion by Guillaume, Pres.); S.S. "Lotus" (Fra. v. Turk.), Judgment, 1927 P.C.I.J. (Ser. A) No. 10 (Sept. 7); RESTATEMENT (FOURTH),

state that asserts the applicability of its domestic law beyond its territory bears the burden of proving that it is permitted by one of the grounds of prescriptive jurisdiction accepted under customary international law.²³ There is presently no multilateral treaty codifying and defining these grounds of prescriptive jurisdiction, although since the early twentieth century they have been defined as *lex ferenda* in scholarship and the work of research institutes, such as the American Law Institute, to include principles of territoriality, nationality, and protective jurisdiction.²⁴ Such proof of a link with the prescribing state serves to prevent unlawful interference in the sovereignty and domestic affairs of other states.²⁵ This may be contrasted with the principle of universal jurisdiction, the most controversial ground of jurisdiction, which does not require the prescribing state to prove any link to its territory, nationals, or national interests when exercised.

B. *Definition of the Universal Jurisdiction Concept*

There is currently no agreed definition of universal jurisdiction among states. However, scholars, research institutes, and several states usually “define universal jurisdiction as the ‘absence’ of normal jurisdictional links” to the prescribing state.²⁶ For example, the Institute of International Law in its resolution on universal jurisdiction provides that:

Universal jurisdiction in criminal matters, as an additional ground of jurisdiction, means the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law.²⁷

supra note 12, § 211; *Arrest Warrant Case*; Int'l Law Comm'n, Rep. on the Work of Its Fifty-Eighth Session, annex E, ¶¶ 8–9, U.N. Doc. A/61/10 (2006).

22. The link relied on to ground prescriptive jurisdiction over given conduct must exist at the time at which the conduct is performed.

23. It is axiomatic that jurisdiction may also be established by treaty.

24. See Edwin D. Dickinson (Reporter), *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 437 (Supp. 1935); see also INT'L BAR ASS'N LEGAL PRACTICE DIV., REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 141–61 (Sept. 28, 2008), http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx; RESTATEMENT (FOURTH), *supra* note 12, §§ 212–17; Int'l Law Comm'n, *supra* note 21, annex E, ¶¶ 10–21; Frederick A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1 (1964).

25. See Christian Tomuschat (Rapporteur), *Universal Criminal Jurisdiction With Respect to the Crime of Genocide, Crimes Against Humanity and War Crimes*, 71(I) Y.B. INST. INT'L L. 213, 219–20 (2005).

26. Yee, *supra* note 8, ¶ 3; see also, e.g., Secretary-General Report (2010), *supra* note 19, at 5; AU-EU Technical Ad Hoc Expert Group, *Report on the Principle of Universal Jurisdiction*, ¶ 8, EC Doc. 8672/1/09 REV1 (2009); Steven W. Becker, *Commentary on the Princeton Principles*, in THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 43 (Stephen Macedo ed., 2001); Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT'L CRIM. JUST. 735, 740, 745 (2004).

27. Inst. of Int'l Law, *Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes*, ¶ 1 (2005), http://www.idi-iil.org/app/uploads/2017/06/2005_kra_03_en.pdf; see also RESTATEMENT (FOURTH), *supra* note 12, § 217.

The absence of proof of a prescriptive link is justified by universal jurisdiction's underlying rationale, which transcends the interests of states. First, the grave or heinous nature of certain crimes under international law, such as piracy and war crimes, is widely believed to be at universal jurisdiction's "core."²⁸ Second, because such crimes are so serious, preventing the impunity of them is a concern of every state. As such, states acting on the basis of universal jurisdiction do so as "agents of the international community" to exclusively protect international community values.²⁹ The types of values that may be protected by universal jurisdiction are usually left insufficiently explained or unsubstantiated by courts and in scholarship and need to be worked out and agreed upon by states. They are often proposed to include the prevention of impunity of heinous crimes and the protection of human rights. The Sixth Committee has so far been unable to reach agreement on both the definition of universal jurisdiction and its underlying rationale, including the international community values protected, during its work on universal jurisdiction.³⁰

C. Treaty-Based Jurisdiction

If the unique feature of universal jurisdiction is the absence of any link at all between the crime and the prescribing state, then jurisdiction arising out of treaty obligations to extradite or prosecute is its antithesis. Since 1929, the extradite or prosecute obligation has been included in more than sixty treaties with some complex and varying conditions of extradition or prosecution.³¹ Although treaty-based jurisdiction arises out of all treaties creating extradite or prosecute obligations, the main focus of this Article is on a particular kind of extradite or prosecute provision known as the "Hague formula" and the extradite or prosecute obligation formulation contained in

28. U.N. GAOR, 70th Sess. 12th mtg., *supra* note 18, ¶ 31; Roadmap, *supra* note 20. See also Becker, *supra* note 26, at 23, 28; Higgins, *supra* note 8, at 90; Randall, *supra* note 11, at 788; Tomuschat, *supra* note 25, at 225.

29. *Arrest Warrant Case*, 2002 I.C.J. at 137, ¶ 5 (Feb. 2014) (dissenting opinion of van den Wyngaert, J.); see also *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582–83 (6th Cir. 1985); *Att'y Gen. of Isr. v. Eichmann*, 36 I.L.R. 277, 300 (S. Ct. 1962) (Isr.); *Nat'l Comm'r of the S. African Police Serv. v. S. African Human Rights Litig. Ctr.*, 2014 (2) SA 42 (SCA), para. 39 (S. Afr.); *Arrest Warrant Case*, 2002 I.C.J. at 63, ¶¶ 51, 61, 73, 75 (joint separate opinion by Higgins et al., JJ.); Secretary-General Report (2010), *supra* note 19, ¶ 10. *But see Arrest Warrant Case*, 2002 I.C.J. at 35, ¶ 15 (separate opinion by Guillaume, Pres.).

30. Oral report, *supra* note 20, ¶ 26. In terms of the "role and purpose of universal jurisdiction," different delegations to the Sixth Committee have proposed that it include "[t]o combat impunity," "[t]o protect the rights of victims," "[a]chieving international justice/promoting justice," and "[t]o address the most serious crimes of concern to the international community as a whole." U.N. GAOR, 69th Sess., 28th mtg., ¶ 29, U.N. Doc. A/C.6/69/SR.28 (Nov. 7, 2014); U.N. GAOR, 70th Sess., 12th mtg., *supra* note 18, ¶ 32.

31. For a description of a proposed typology of provisions containing extradite or prosecute obligations in treaties, see Secretariat, *Survey of Multilateral Conventions Which May Be of Relevance for the Work of the ILC on the Topic "The Obligation to Extradite or Prosecute (aut dedere aut judicare)"*, ¶¶ 7–9, annex, U.N. Doc. A/CN.4/630 (June 18, 2010).

the grave breaches provisions of the 1949 Geneva Conventions.³² The basis for this focus is that the Hague formula was first included in the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft³³ and is “unanimously acknowledged” as having served as a model for most of the contemporary criminal law conventions.³⁴ As such, this provision has been used in numerous international and regional treaties aimed at the suppression of specific offenses, principally in the field of countering terrorism,³⁵ but also in many other diverse areas, including torture,³⁶ mercenaries,³⁷ safety of U.N. personnel,³⁸ transnational organized crime,³⁹ corruption,⁴⁰ and forced disappearances.⁴¹ The 1949 Geneva Conventions are considered by leading scholars to be the “first treaty-based embodiment” of mandatory universal jurisdiction and influenced the subsequent adoption of universal jurisdiction in criminal law conventions (including conventions containing the Hague formula) since the 1970s.⁴²

A treaty-based obligation to extradite or prosecute requires a state party (the “Custodial State”) to establish its jurisdiction over a relevant offense—for example, torture, in the case of the CAT—when an alleged offender is present in the state’s territory, and to either prosecute him or extradite him to a party with a link to the offense.⁴³ The common wording used in treaties that use the Hague formula, including in the text of the CAT, describes the treaty-based jurisdiction of a Custodial State in the following terms: each contracting state “shall . . . take such measures as may be necessary to establish its jurisdiction over such offenses in the case where the alleged offender is present in any territory under its jurisdiction and it does not extradite him . . . to any of the States mentioned in paragraph 1.”⁴⁴

The states “mentioned in Paragraph 1” (“Paragraph 1 States”) have important links with a relevant offense. These links are often specified in provi-

32. *See id.* ¶ 90.

33. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 [hereinafter Seizure of Aircraft Convention].

34. Secretariat, *supra* note 31, ¶¶ 90–91, 113. For a list of treaties containing the Hague formula, see *id.* ¶ 108.

35. *See, e.g.*, International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, T.I.A.S. No. 13075, 2178 U.N.T.S. 197 [hereinafter Financing Convention].

36. CAT, *supra* note 3.

37. International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, Dec. 4, 1989, 2163 U.N.T.S. 75.

38. Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, S. Treaty Doc. No. 107-1, 2051 U.N.T.S. 363.

39. Convention against Transnational Organized Crime, Nov. 15, 2000, T.I.A.S. No. 13127, 2225 U.N.T.S. 209.

40. United Nations Convention Against Corruption, Oct. 31, 2003, S. Treaty Doc. No. 109-6, 2349 U.N.T.S. 41.

41. International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, 2716 U.N.T.S. 3.

42. Roger O’Keefe, *The Grave Breaches Regime and Universal Jurisdiction*, 7 J. INT’L CRIM. JUST. 811, 811, 825–26 (2009).

43. CAT, *supra* note 3, art. 5(2).

44. *Id.*

sions used in parallel to extradite or prosecute obligations, in particular where a state party's nationals or national vital interests are implicated by an offense.⁴⁵ For example, the Terrorist Bombings Convention permits states parties to establish their jurisdiction over a relevant offense when committed against the state's nationals, the state's property abroad (including an embassy or other diplomatic or consular premises), aircraft operated by the government, or if an offense is committed in an attempt to compel the state to do or abstain from doing any act (thereby threatening the state's sovereignty, independence, and governmental functions).⁴⁶ Therefore, jurisdiction derived from treaty obligations to extradite or prosecute has a treaty basis in international law and accordingly creates important links with one or more of the parties to the relevant treaty regime.

D. *The Habré Case as Evidence for the Existence of Universal Jurisdiction*

Since the 1980s there has developed an (unproven) prevailing narrative in scholarship that universal jurisdiction has "long and honorable" historical roots under customary international law in respect of piracy and war crimes, which can be analogized with jurisdiction contained in modern treaty obligations to extradite or prosecute.⁴⁷ This Article is not the place to examine universal jurisdiction's historical origins, which has been examined in-depth by the present author elsewhere.⁴⁸ As will be discussed in Section IV.D, contrary to common belief there is no historical evidence to support the existence of a customary rule of universal jurisdiction over piracy and war crimes. Consequently, universal jurisdiction has no historical foundations in customary international law and is a hollow concept.

Although the prevailing narrative is not new, it has been reinvigorated in response to the *Habré Case*, with scholars and NGOs (including the ILC and several delegations at the Sixth Committee) interpreting the ICJ's judgment as representing a broad call for universal jurisdiction.⁴⁹ For example, Professor Koutroulis suggests that the ICJ confirms the obligation to establish universal jurisdiction for crimes under the CAT.⁵⁰ Professors Andenas and

45. The state's national vital interests include sovereignty, political independence, security, diplomatic personnel and premises, embassies, and government facilities abroad. See also *infra* notes 292–298 and accompanying text.

46. Terrorist Bombings Convention, *supra* note 17, art. 6(2).

47. David Stewart, *Some Perspectives on Universal Jurisdiction*, 102 PROC. ANN. MEETINGS (SOC'Y INT'L) 404, 404 (2008); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (AM. LAW INST. 1987); Becker, *supra* note 26, at 45–48; Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L., 1, 3 (2011); O'Keefe, *supra* note 26, at 755–56; Randall, *supra* note 11, at 788–89, 791–97, 801–10, 815–21; Michael P. Scharf, *Jurisdiction with Respect to Crime: Universal Jurisdiction and the Harvard Research*, in THE HARVARD RESEARCH IN INTERNATIONAL LAW: CONTEMPORARY ANALYSIS AND APPRAISAL 276–85 (John P. Grant & J. Craig Barker eds., 2007); Tomuschat, *supra* note 25, at 215–16.

48. Garrod (2014), *supra* note 10; Garrod (2012), *supra* note 10.

49. For the impact of the *Habré Case* on the ILC, see *infra* Part III.

50. Vaios Koutroulis, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, MAX PLANCK ENCYC. PUB. INT'L L. (2014).

Weatherall go much further, arguing that the judgment develops the law of jurisdiction, in particular by “clarifying the obligation to extradite or prosecute . . . [and] that the obligation is premised upon universal jurisdiction.”⁵¹ According to the authors, the ICJ’s judgment supports the notion that universal jurisdiction is necessary to fulfill treaty obligations to extradite or prosecute with respect to international crimes.⁵² In a similar vein, Professors Gilbert and Rüsç suggest that the ICJ in the *Habré Case* reveals the “overlap” between extradite or prosecute and universal jurisdiction and the necessity for states regarding core international crimes to establish universal jurisdiction.⁵³

Amnesty International also interprets the *Habré Case* as a “landmark” judgment with respect to the duty of states to investigate and prosecute crimes under international law based on universal jurisdiction.⁵⁴ Professor O’Keefe goes further still and expands the scope of universal jurisdiction beyond the narrow category of crimes under international law to encompass a broad range of crimes proscribed in extradite or prosecute regimes. Thus, the *Habré Case* is referenced in order to reinforce the argument that, starting with the 1949 Geneva Conventions, universal jurisdiction is “mandated by the great majority of the conventions in the field of international criminal law.”⁵⁵

Similar sentiments have been expressed by some delegations during the work on universal jurisdiction at the Sixth Committee, with the Belarusian delegation welcoming the ICJ’s judgment for “clarifying aspects of the scope and application of the principle of universal jurisdiction”⁵⁶ and the Polish delegation commenting that the judgment underlines “that the best way of giving effect to the principle of *aut dedere aut judicare* was to prescribe universal jurisdiction.”⁵⁷

II. ICJ’S JUDGMENT IN THE *HABRÉ CASE*

A. *Background*

After taking power on June 7, 1982 at the head of a rebellion, Hissène Habré was president of Chad for eight years, during which time his regime

51. Andenas & Weatherall, *supra* note 12, at 753, 768; see also Errol P. Mendes, GLOBAL GOVERNANCE, HUMAN RIGHTS AND INTERNATIONAL LAW: COMBATTING THE TRAGIC FLAW, ch. 1, (2014); Thomas Weatherall, *Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence*, 46 GEO. J. INT’L L. 1151, 1188 (2015).

52. See Andenas & Weatherall, *supra* note 12, at 768.

53. Geoff Gilbert & Anna M. Rüsç, *Jurisdictional Competence Through Protection: To What Extent Can States Prosecute the Prior Crimes of Those to Whom They Have Extended Refuge?*, 12 J. INT’L. CRIM. JUST. 1093, 1102 (2014).

54. Amnesty International, *supra* note 18, at 25.

55. ROGER O’KEEFE, INTERNATIONAL CRIMINAL LAW, 324, 371, 397 (2015).

56. U.N. GAOR, 69th Sess., 12th mtg., *supra* note 18, ¶ 21 (Belr.).

57. U.N. GAOR, 70th Sess., 12th mtg., *supra* note 18, ¶ 78 (Pol.); see also *id.* ¶ 57 (Switz.).

allegedly committed large-scale violations of human rights in Chad, “including arrests of actual or presumed political opponents, detentions without trial or under inhumane conditions, mistreatment, torture, extrajudicial executions and enforced disappearances.”⁵⁸ In 1990, Habré’s former defense and security adviser, Idriss Déby Itno, the current president of Chad, led the overthrow of the Habré regime and Habré fled to Senegal where he has lived ever since.⁵⁹ In 1993, Habré’s immunity was removed by the successive Chadian Government so that Habré could be prosecuted.⁶⁰

On November 30, 2000, a Belgian national of Chadian origin filed a civil-party application with a Belgian investigating judge against Habré for, “*inter alia*, serious violations of international humanitarian law, crimes of torture and the crime of genocide.”⁶¹ Between November 30, 2000 and December 11, 2001, a further twenty persons, comprising two individuals of dual Belgian-Chadian nationality and eighteen Chadians, filed before the same judge for similar complaints against Habré.⁶² Belgium transmitted an international arrest warrant to Senegal and requested the extradition of Habré on September 22, 2005 and, five days later, Interpol issued a “red notice” pursuant to Habré’s arrest.⁶³

The *Chambre d’accusation* of the Dakar Court of Appeal in Senegal rejected Belgium’s jurisdiction over Habré in a judgment of November 25, 2005, finding that Habré should be granted “jurisdictional immunity,” as a former Head of State, “for acts allegedly committed in the exercise of his functions.”⁶⁴ The following day, Senegal referred the matter to the African Union.⁶⁵ The African Union, in a decision of July 26, 2006, decided that the *Habré Case* fell within its competence and mandated Senegal to prosecute the *Habré Case* “on behalf of Africa.”⁶⁶ Between March 2011 and January 2012, Belgium made three further extradition requests, which were declared inadmissible by the *Chambre d’accusation* of the Dakar Court of Appeal in accordance with Senegalese extradition law.⁶⁷

In the wake of *Pinochet*, a case decided in the U.K. House of Lords that held that the immunity of a former Head of State does not exist in domestic law in respect to the alleged acts in violation of the CAT,⁶⁸ and following a

58. *Habré Case*, 2012 I.C.J. at 422, ¶ 1.

59. *See id.*; *Habré Case*, Verbatim Record, ¶¶ 2.20–2.23 (Mar. 19, 2012, 10 a.m.), <http://www.icj-cij.org/files/case-related/144/144-20120319-ORA-01-01-BI.pdf>.

60. *See Habré Case*, 2012 I.C.J. at 422, ¶ 20; *see also Chad Lifts Immunity of Ex-Dictator: Green Light to Prosecute Hissène Habré in Belgium*, HUMAN RIGHTS WATCH (Dec. 5, 2002), www.hrw.org/news/2002/12/05/chad-lifts-immunity-ex-dictator.

61. *Habré Case*, 2012 I.C.J. at 422, ¶ 19.

62. *Id.*

63. *Id.* ¶ 21.

64. *Id.* ¶ 22.

65. *Id.* ¶ 23.

66. *Id.*

67. *Id.* ¶¶ 38–40.

68. R v. Bow St. Metro. Stipendiary Magistrate *ex parte* Pinochet Ugarte (No. 3) [2000] 1 AC (HL) 147.

decade of campaigning by human rights NGOs,⁶⁹ Belgium instituted proceedings with the ICJ against Senegal on February 19, 2009 over a dispute concerning Senegal’s compliance with its obligations arising under the CAT, as well as other obligations under customary international law, to prosecute Habré, or to extradite him to Belgium for the purpose of prosecution.⁷⁰ Notwithstanding the 40,000 alleged murders and acts of torture committed by Habré’s regime,⁷¹ Belgium brought the action on behalf of several of Habré’s victims who had recently attained Belgian citizenship.⁷² For its part, Senegal announced that it would expel Habré to Chad—the state in whose territory the alleged crimes had occurred and the only other party to the CAT to express interest in Habré’s prosecution—“but on no account outside Africa.”⁷³ However, the expulsion decision was suspended following a finding made by the U.N. High Commissioner for Human Rights that Habré may be tortured and executed.⁷⁴

One of the most important aspects of the *Habré Case* is the ICJ’s examination of the admissibility of Belgium’s claim against Senegal. As Section II.B will show, this is because the way in which the ICJ approached admissibility influenced its subsequent interpretation of the CAT’s “object and purpose” and the “nature and meaning” of the obligation to extradite or prosecute in Article 7 of that instrument. It equally influenced the ICJ’s approach to jurisdiction in Article 5 of the CAT.

B. *Obligations Erga Omnes Partes as a Basis for the Proceedings*

Belgium defended the admissibility of its claim based on a “special interest” with the *Habré Case*, the existence of which distinguished “Belgium from the other parties to the Convention and gave it a specific entitlement in the case of Mr. Habré.”⁷⁵ Thus, Belgium was an “injured state” within the meaning of Article 42 of the Articles on State Responsibility and could invoke Senegal’s responsibility on this basis.⁷⁶ The “special interest” was

69. See Reydams, *supra* note 8, at 24–26.

70. *Habré Case*, 2012 I.C.J. at 422, ¶ 1.

71. See Comm’n of Inquiry, *Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories*, in 3 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRATICS RECKON WITH FORMER REGIMES 51, 81 (Neil J. Kritz ed., 1995).

72. See *Habré Case*, 2012 I.C.J. at 422, ¶¶ 19–21; *id.* at 605, ¶¶ 21–23 (dissenting opinion by Sur, J. ad hoc); see also *Habré Case*, Application Instituting Proceedings, ¶¶ 3, 11, 15 (Feb. 19, 2009), <http://www.icj-cij.org/files/case-related/144/15054.pdf>; *Habré Case*, Memorial of the Kingdom of Belgium, ¶ 1.19 (July 1, 2010), <http://www.icj-cij.org/files/case-related/144/16933.pdf> [hereinafter Memorial of Belgium]; *Habré Case*, Verbatim Record, ¶¶ 1.3–1.4, 1.12–1.13 (Mar. 12, 2012, 10:20 a.m.), <http://www.icj-cij.org/files/case-related/144/144-20120212-ORA-01-01-BI.pdf>.

73. *Id.* ¶ 1.40.

74. See *id.*; see also U.N. Official Urges Senegal to Review Reported Intention to Extradite Ex-Chadian Leader, UN NEWS CTR. (July 10, 2011), http://www.un.org/apps/news/story.asp?NewsID=38993&Cr=chad&Cr1=#.V2v0E_krLIU.

75. *Habré Case*, 2012 I.C.J. at 422, ¶ 66.

76. Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 54 (2001). Although the Draft Articles on State Responsibility have not been codified in a convention, they

that an investigation had been instigated in Belgium at the behest of a “Belgian national of Chadian origin,” a victim of the Habré regime, and Belgian courts were permitted “to exercise passive personal jurisdiction” by virtue of Article 5(1)(c) of the CAT.⁷⁷ Belgium had thus “availed itself of its right under Article 5 to exercise its jurisdiction and to request extradition.”⁷⁸ For its part, Senegal argued that Belgium was not entitled to invoke the international responsibility of Senegal for the alleged breach of its obligation under the CAT as “none of the alleged victims of the acts said to be attributable to Mr. Habré was of Belgian nationality at the time when the acts were committed.”⁷⁹ During the proceedings, however, Belgium subsequently defended admissibility on a secondary argument: “[u]nder the Convention, every state party, irrespective of the nationality of the victims, is entitled to claim performance of the obligation concerned, and, therefore, can invoke the responsibility resulting from the failure to perform.”⁸⁰

The ICJ’s judgment focused solely on Belgium’s second basis of admissibility and held that Belgium, as a party to the CAT, had standing to invoke the responsibility of Senegal for the alleged breaches of Senegal’s obligations under Articles 6 and 7 of the CAT.⁸¹ The ICJ reasoned that, in view of the CAT’s object and purpose, states parties have a “common interest” to ensure that the perpetrators of torture do not enjoy impunity.⁸² On the basis of this “common interest,” the ICJ asserted that:

[t]he obligations of a State party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offenses occurred. All the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention.⁸³

According to the ICJ, these obligations under the CAT may be defined as “obligations erga omnes partes,” within the meaning of Article 48 of the Articles on State Responsibility, “in the sense that each state party has a

have increasingly been relied upon and treated as a legal source by states, courts and tribunals, including the ICJ. See James R. Crawford, *State Responsibility*, MAX PLANCK ENCYC. PUB. INT’L L. ¶¶ 64–65 (2006).

77. *Habré Case*, 2012 I.C.J. at 422, ¶ 65.

78. *Id.*

79. *Id.* ¶ 64.

80. *Id.* ¶ 65.

81. *Id.* ¶ 70.

82. *Id.* ¶ 68.

83. *Id.*

legal interest in the compliance with them in any given case.”⁸⁴ The “common interest in compliance” with the relevant obligations under the CAT, in the ICJ’s opinion, “implies” that each state party is entitled to invoke the responsibility of another party for the failure to comply with its obligations *erga omnes partes* and to bring that failure to an end.⁸⁵ This finding meant that there was “no need” to pronounce on whether Belgium has a “special interest” with respect to Senegal’s compliance with the CAT under Article 5(1)(c) of the CAT.⁸⁶

The ICJ’s decision to focus solely on Belgium’s secondary argument means that there is no need for a state party to be specially affected by an alleged breach of the CAT before it may invoke the international responsibility of another party and will have standing before the ICJ to do so. This decision was heavily criticized by the opinions appended to the ICJ’s judgment for not reflecting the CAT’s text.⁸⁷

C. *Implications of Obligations Erga Omnes Partes for Extradite or Prosecute Obligations*

The ICJ’s reasoning with regard to obligations *erga omnes partes* gives rise to two implications for extradite or prosecute obligations.

1. *Protection of a Common Interest*

First, having established that Belgium had standing to bring its claim against Senegal, the ICJ’s judgment portrays Belgium as exclusively protecting a “common interest” in the *Habré Case*. In the words of the ICJ: “contracting States do not have any interests of their own; they merely have, one and all, a common interest.”⁸⁸ While Belgium requested that the ICJ declare that Senegal must, failing prosecution, extradite Habré “to Belgium without further ado,” the ICJ ultimately found more generally that Senegal must submit Habré’s case for prosecution, “if it does not extradite [him].”⁸⁹ Important questions unresolved by the ICJ remain as to whether Belgium has the right to request extradition and exercise jurisdiction over Habré under Article 5 of the CAT; to which state party Senegal must extradite Habré, failing prosecution; and which state party other than Belgium, if any, would have competence under the CAT to request his extradition and prosecution.

84. Int’l Law Comm’n, *supra* note 76, at 56; *see also Habré Case*, 2012 I.C.J. at 422, ¶ 68.

85. *Habré Case*, 2012 I.C.J. at 422, ¶ 69.

86. *See id.* ¶ 70.

87. *See id.* at 571, ¶ 12 (dissenting opinion by Xue, J.); *id.* at 471, ¶¶ 21, 31–32 (separate opinion by Abraham, J.); *id.* at 605, ¶ 28 (dissenting opinion by Sur, J. ad hoc).

88. *Id.* ¶ 68 (quoting *Reservations to the Convention on Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28)).

89. *Id.* ¶¶ 14, 118, 121.

The ICJ does not sufficiently explain why the Custodial State has obligations to establish its jurisdiction over crimes committed by the accused foreign national abroad and to initiate criminal proceedings in the absence of extradition, pursuant to Articles 5(2) and 7 of the CAT respectively. In that connection, the ICJ's judgment conflates two separate issues: state responsibility under the CAT and jurisdiction under the CAT. To say that states parties to the CAT seek to protect a "common interest," for the purpose of monitoring treaty implementation and one party bringing a claim before the ICJ "concerning the cessation of an alleged breach by another State party," is one thing.⁹⁰ However, it is quite another to suggest that parties have no "interest[s] of their own" in preventing impunity by requiring a Custodial State to establish jurisdiction and undertake a prosecution, failing extradition.⁹¹ And yet, both are seemingly treated by the ICJ as one and the same, according to the CAT's supposed object and purpose: to protect a "common interest" by preventing impunity of the perpetrators of torture on behalf of all other parties.⁹² In order to arrive at this conclusion, the ICJ had to overlook the text of Articles 5 and 7. As pointed out by Judge ad hoc Sur, the CAT's object and purpose, as determined by the ICJ, "superseded and removed all other considerations."⁹³

2. ICJ's Treatment of Article 5(2) CAT

Second, the ICJ's interpretation of the CAT's object and purpose as the protection of a "common interest" influenced its subsequent interpretation and the "nature and meaning" of the obligation to extradite or prosecute under Article 7, as well as the type of jurisdiction arising out of this obligation under Article 5(2) of the CAT. Having determined the admissibility of Belgium's claim, the ICJ, throughout its judgment, described jurisdiction in Article 5(2) of the CAT as "universal jurisdiction."⁹⁴ In particular, the ICJ noted that the "obligation to establish universal jurisdiction" under Article 5(2) is a "necessary condition" for fulfilling the obligations to undertake a preliminary inquiry under Article 6(2) and to submit the case to its authorities for prosecution under Article 7(1).⁹⁵ The purpose of these obligations, in the ICJ's opinion, is to "enable proceedings to be brought against the suspect, in the absence of his extradition" and to "achieve the object and purpose" of the CAT, which is "to make more effective the struggle against torture by avoiding impunity for the perpetrators."⁹⁶ In the words of the ICJ, "[t]he Convention against Torture thus brings together

90. *Id.* ¶ 69.

91. *Id.* ¶ 68.

92. *See id.* ¶¶ 68, 74–75.

93. *Id.* at 605, ¶ 35 (dissenting opinion by Sur, J. ad hoc).

94. *See, e.g., id.* at 422, ¶ 74.

95. *Id.*

96. *Id.* ¶ 74; *see also id.* ¶ 115.

150 states which have committed themselves to prosecuting suspects in particular on the basis of universal jurisdiction.”⁹⁷

Contrary to the ICJ, an analysis of the CAT’s text and *travaux préparatoires* in Part IV shows extradite or prosecute obligations do not give rise to universal jurisdiction. Paragraph 1 States have jurisdiction to prevent impunity because they have important links with an alleged offense.⁹⁸ Therefore, a Custodial State (Senegal in the *Habré Case*) has an obligation under Article 5(2) of the CAT to initiate criminal proceedings and assert a type of treaty-based jurisdiction failing extradition to one of the Paragraph 1 States referred to in Article 5. Before examining the CAT’s text and *travaux préparatoires*, the next Part examines the impact of the *Habré Case* on other actors in the field of international law.

III. APPLICATION OF *HABRÉ* ONTO UNIVERSAL JURISDICTION

A. ICJ’s Affirmation of Universal Jurisdiction’s Existence

The ICJ’s description of Article 5(2) as “universal jurisdiction” in the *Habré Case* is in passing, as if such an interpretation is beyond question. At first glance, it would appear that the Court is sanctioning the existence of universal jurisdiction in customary international law and its embodiment in the CAT. This is certainly the interpretation offered by the separate opinion of Judge Caçado Trindade when he asserts that the ICJ’s judgment “captures the rationale of the CAT, with the latter’s denationalization of protection, and assertion of the principle of universal jurisdiction.”⁹⁹ Informed by “*jus naturalist* thinking,” Judge Caçado Trindade’s reasoning for interpreting the extradite or prosecute obligation in the CAT as giving rise to universal jurisdiction is, in part, that the principle of universal jurisdiction itself has a “long” history in international law and is “set forth in the CAT” in Articles 5(2) and 7(1).¹⁰⁰ Therefore, the CAT, by establishing universal jurisdiction, “transcends the inter-State dimension, as it purports to safeguard not the interests of individual states, but rather the fundamental values shared by the international community as a whole.”¹⁰¹ One consequence of this interpretation of the CAT, which is not shared by the ICJ, is that all states are required to assert universal jurisdiction over alleged perpetrators of

97. *Id.* ¶ 75.

98. See Criminal Proceedings in France (Dem. Rep. Congo v. Fr.), Verbatim Record, 18 (Apr. 28), <http://www.icj-cij.org/files/case-related/129/129-20030428-ORA-01-01-BI.pdf>.

99. *Habré Case*, 2012 I.C.J. at 487, ¶ 123 (separate opinion by Caçado Trindade, J.).

100. *Id.* ¶ 177 (separate opinion by Caçado Trindade, J.) (citing M. HENZELIN, LE PRINCIPE DE L’UNIVERSALITÉ EN DROIT PÉNAL INTERNATIONAL—DROIT ET OBLIGATION POUR LES ETATS DE POURSUIVRE ET JUGER SELON DE PRINCIPE DE L’UNIVERSALITÉ [THE PRINCIPLE OF UNIVERSALITY IN INTERNATIONAL CRIMINAL LAW—THE RIGHT AND OBLIGATION OF STATES TO PROSECUTE AND TRY ACCORDING TO THE PRINCIPLE OF UNIVERSALITY] 81–119, 349–50, 450 (2000)).

101. *Id.*; cf. *Habré Case*, Provisional Measures, 2009 I.C.J. 139, 165 ¶¶ 63, 85, 105 (May 28) (dissenting opinion by Caçado Trindade, J.).

torture when found in their territory, “without limits in time (past or future) or in space” as to when the conduct occurred and regardless of when the CAT entered into force in the prosecuting state.¹⁰² If taken to its logical conclusion, however, this would suggest that states are permitted by customary international law to assert universal jurisdiction and initiate prosecutions independently of the CAT and its agreed text, and therefore have jurisdiction regardless of the suspect being present within the prescribing state’s territory and even if the prescribing state is not a party to this instrument at the relevant time when the conduct occurs. In the words of Judge Guillaume, this would “risk creating total judicial chaos.”¹⁰³

Of the numerous opinions appended to the ICJ’s judgment in the *Habré Case*, only Judge Cançado Trindade argues that the principle of universal jurisdiction properly so called is codified in the CAT. Nonetheless, this Article has shown that scholars and NGOs interpret the ICJ’s judgment as representing a broad call for universal jurisdiction.¹⁰⁴ The basis for this interpretation of the *Habré Case* in scholarship is explained on two different rationales.

1. *Jus Cogens Create Universal Jurisdiction*

The first basis is the ICJ’s passing reference that “torture is part of customary international law and it has become a peremptory norm (*jus cogens*).”¹⁰⁵ According to this view, all states have obligations *erga omnes* to punish individual violators of *jus cogens*.¹⁰⁶ In order to perform these obligations, one legal effect of *jus cogens* is to provide universal jurisdiction over international crimes.¹⁰⁷ The notion that universal jurisdiction arises from *jus cogens* and obliges all states to prosecute international crimes is itself derived from the judicial dicta of two cases. The first of these is the *Furundzija* case, in which the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) notes that “it would seem that one of the consequences of the *jus cogens* character” of torture is that every state is entitled to punish indi-

102. *Habré Case*, 2012 I.C.J. at 487, ¶ 177 (separate opinion by Cançado Trindade, J.).

103. *Arrest Warrant Case*, 2002 I.C.J. at 35 ¶ 15 (separate opinion by Guillaume, J.).

104. See *supra* notes 49–55 and accompanying text.

105. *Habré Case*, 2012 I.C.J. at 422, ¶ 99; see also Vienna Convention on the Law of Treaties art. 50, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (“[A] peremptory norm[] of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted . . .”).

106. Obligations *erga omnes* are owed to the international community as a whole by virtue “of the importance of the rights involved, [whereby] all States can be held to have a legal interest in their protection.” *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5). On the meaning of obligations *erga omnes*, see Int’l Law Comm’n, *supra* note 76, arts. 40–41, 48.

107. See ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 288–319, 340–357 (2006); Andenas & Weatherall, *supra* note 12, at 762–64; Weatherall, *supra* note 51, at 1154–55; see also *Habré Case*, 2012 I.C.J. at 487, ¶¶ 82–177 (separate opinion by Cançado Trindade, J.); Tomuschat, *supra* note 25, at 373.

viduals accused of torture based on universal jurisdiction.¹⁰⁸ Second, the *Pinochet* (No. 3) case, in which Lord Browne-Wilkinson, citing *Furundžija*, comments that “[t]he jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed.”¹⁰⁹ Although neither of these cases are examples of assertions of universal jurisdiction or concerned the examination of universal jurisdiction,¹¹⁰ *Pinochet* (No. 3) is, nonetheless, depicted in scholarship as the most important contemporary example of the exercise of universal jurisdiction and the rise of a new international legal order.¹¹¹ Under this proposed legal order, any state is permitted to exercise universal jurisdiction over certain crimes, regardless of the status of alleged perpetrators and the immunity to which they may be entitled under international law, for the protection of human rights.¹¹²

This interpretation of the relationship between universal jurisdiction and treaty obligations to extradite or prosecute, especially in light of the *Habré Case*, is problematical on at least two fronts. First, the opinions expressed in *Pinochet* (No. 3) and *Furundžija* are lone voices, which may be compared with considerable judicial opinion that, even when a crime amounts to a jus cogens prohibition, this does not have the legal effect of creating procedural rules, including universal jurisdiction.¹¹³ Even though the ICJ in the *Habré Case* declared the status of torture as a crime under customary international law, the ICJ was not prepared to recognize the existence of a customary rule of universal jurisdiction over this or any other crime.¹¹⁴ Nor does the ICJ

108. Prosecutor v. Furundžija, No. IT-95-17/1-T, Judgment, ¶ 156 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

109. R v. Bow St. Metro. Stipendiary Magistrate *ex parte* Pinochet Ugarte (No. 3) [2000] 1 AC (HL) 147, 198. Lord Millett was also of the opinion that “crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a jus cogens. Secondly, they must be so serious and on such a scale [and international character of the Holocaust] that they can justly be regarded as an attack on the international legal order.” *Id.* at 175–76.

110. The only authority in support of the propositions advanced in *Furundžija* and *Pinochet* are judicial dicta in *Att’y Gen. of Isr. v. Eichmann*, 36 I.R.L. 277 (S. Ct. 1962) (Isr.) and *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985). As explained in Parts IV and V, *infra*, neither of these latter cases are examples of universal jurisdiction either; and in both cases the relationship among universal jurisdiction, jus cogens, and treaty obligations to extradite or prosecute is not examined.

111. See, e.g., Becker, *supra* note 26, at 40–41; Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008*, 30 MICH. INT’L L.J. 928, 932, 940, 954 (2009); Langer, *supra* note 12, at 246–47; Langer, *supra* note 47, at 4, 18; Ved P. Nanda, *Universal Jurisdiction: It’s Back!*, 102 AM. SOC’Y INT’L PROC. 397, 398 (2008).

112. *But see* Ingrid Wuerth, *Pinochet’s Legacy Reassessed*, 106 AM. J. INT’L L. 731 (2012) (providing a critical appraisal of the narrative that Pinochet ushered in a new era of criminal accountability for egregious violations of human rights).

113. See, e.g., Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) [2006] UKHL 26, ¶¶ 24, 39, 103–05; R v. Bow St. Metro. Stipendiary Magistrate *ex parte* Pinochet Ugarte (No. 1) [1998] 1 AC (HL) 61, 79; *Pinochet* (No. 3), [2000] 1 AC (HL) at 252; Jurisdictional Immunities of State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99, ¶¶ 83, 96 (Feb. 3); see also Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT’L L. 815, 836 (2011); Yee, *supra* note 8, ¶¶ 4–7.

114. *Habré Case*, 2012 I.C.J. at 422, ¶ 99.

refer to *Pinochet* and *Furundzija* or express that universal jurisdiction has any relationship to international crimes or to jus cogens. This would suggest that, in the ICJ's opinion, international crimes do not automatically give rise to universal jurisdiction, irrespective of whether the crime in question has attained the status of jus cogens.¹¹⁵

Second, the ICJ has not recognized which international crimes, other than genocide and torture, belong to jus cogens.¹¹⁶ Universal jurisdiction is supposed to be confined to a limited category of crimes under international law, but most of the crimes contained in treaties creating obligations to extradite or prosecute are not heinous or do not have the status of being criminalized under international law, as are war crimes, genocide and crimes against humanity; furthermore, many states are not parties to these treaties.¹¹⁷ It is not clear how extradite or prosecute regimes give rise to universal jurisdiction for international crimes, yet the exact same regimes do not give rise to universal jurisdiction for treaty crimes. Nor is it clear how the categorization of a crime as a jus cogens prohibition has the ability to change the agreed jurisdictional provisions contained in treaty obligations to extradite or prosecute, especially when such treaties make no mention of jus cogens. In this regard, there is difficulty connecting the majority of extradite or prosecute treaty regimes to the protection of international community values, which is at the heart of the universal jurisdiction concept.¹¹⁸ Indeed, most treaties providing for extradite or prosecute obligations explicitly concern the protection of state interests.¹¹⁹

2. *Universal Jurisdiction Analogy*

The second basis for interpreting the ICJ's judgment in the *Habré Case* as support for universal jurisdiction is the existence of universal jurisdiction in customary international law independent of treaties. According to this view, universal jurisdiction has its origins in centuries-old custom and an excellent pedigree, while states typically use this type of jurisdiction in their national legislation in implementing treaty obligations to extradite or prosecute. And, as with universal jurisdiction, the prescriptive jurisdiction arising out of treaty obligations to extradite or prosecute and the national laws implementing them is—to quote the words of the U.N. Secretariat—“not condi-

115. See *Pinochet* (No. 1), [1998] 1 AC (HL) at 79; *Pinochet* (No. 3), [2000] 1 AC (HL) at 207.

116. See Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶¶ 147, 162 (Feb. 26); Armed Activities on Territory of Congo (Dem. Rep. Congo v. Rwanda), Jurisdiction of Court and Admissibility of Application, 2006 I.C.J. 6, ¶ 64 (Feb. 3).

117. Treaties creating extradite or prosecute obligations contain provisions by which the relevant acts are qualified as criminal offenses and states undertake to make them punishable under their domestic laws. Indeed, states have considerable discretion on how offenses and the elements of offenses are defined in their domestic laws.

118. See *supra* notes 28–29 and accompanying text.

119. See Claus Krefß, *Universal Jurisdiction over International Crimes and the Institut de Droit International*, 4 J. INT'L CRIM. JUST. 561, 566–67 (2006).

tioned by any jurisdictional considerations of States.”¹²⁰ Rather, such jurisdiction is based solely on the suspect’s “presence” in the prosecuting state’s territory and does not establish a “genuine link” to that state.¹²¹ Put in slightly different terms, a state is obliged to establish its jurisdiction over an offender found in its territory in the absence of any other lawful prescriptive jurisdictional link—that is, even if the offense occurs outside its territory and neither the offender nor the victims are of its nationality and its national interests are not threatened. Therefore, treaties containing extradite or prosecute obligations, by analogy, embody and even mandate the use of universal jurisdiction (regardless of actual treaty text or the status of the substantive crime at issue in international law or as *jus cogens*).¹²²

This reading of the jurisdiction arising out of the extradite or prosecute obligation in the CAT—by placing emphasis on universal jurisdiction in custom and state practice—is equally problematic because it is based on the prevailing narrative that universal jurisdiction is well established in customary international law and can be analogized with jurisdiction in treaty obligations to extradite or prosecute.¹²³ The assumption that universal jurisdiction exists in customary international law at present, regardless of its lack of historical foundations, is open to question in the light of empirical data on state practice.¹²⁴ Nonetheless, this reading of the CAT has been adopted by leading scholars,¹²⁵ the U.N. Committee against Torture;¹²⁶ some states and judicial opinions;¹²⁷ and the Institute of International

120. Secretariat, *supra* note 31, ¶ 44; *see also* RESTATEMENT (FOURTH), *supra* note 12, reporter notes 2–3.

121. Tomuschat, *supra* note 25, at 222; *id.* at 267 (response of Dinstein), 290–91 (response of Bernandez).

122. *See, e.g.*, O’Keefe, *supra* note 26, at 746–47, 754–55; O’Keefe, *supra* note 42, at 817, 826; Nanda, *supra* note 111.

123. *See supra* notes 47–55, *infra* notes 254–62, and accompanying text.

124. *See infra* notes 281–89 and accompanying text.

125. *See, e.g.*, MANFRED NOWAK & ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY 254 (2008); Andenas & Weatherall, *supra* note 12, at 768; Richard Dicker, *A Few Reflections on the Current Status and Future Direction of Universal Jurisdiction Practice*, 107 AM. SOC’Y INT’L L. PROC. 233, 235 (2013); Langer, *supra* note 47, at 4; Cedric Ryngaert, *Universal Criminal Jurisdiction over Torture: A State of Affairs After 20 Years U.N. Torture Convention*, 23 NETH. Q. HUM. RTS. 571 (2005); Liesbeth Zegveld, *The Bouterse Case*, 32 NETH. Y.B. INT’L L. 97 (2001) (Eng. trans.).

126. *Guengueng v. Senegal*, Communication No. 181/2001, U.N. Doc. CAT/C/36/D/181/2001, Decision, Comm. Against Torture, ¶¶ 6.4, 9.5 (May 17, 2006).

127. *See, e.g.*, Nat’l Comm’r v. S. African Human Rights Litig. Ctr., 2014 (2) SA 42 (S. Ct. App.) (S. Afr.); S. African Litig. Ctr. v. Nat’l Dir. of Pub. Prosecutions, 2012 (10) BCLR 1089 (North Gauteng High Court) para. 13 (S. Afr.); *Criminal Proceedings in France*, *supra* note 98, at 13–16; *Ely Ould Dah v. France*, 48 Eur. Ct. H.R. 884 (2009); *R v. Bow St. Metro. Stipendiary Magistrate ex parte Pinochet Ugarte* (No. 3) [2000] 1 AC (HL) 147, 196–201 (Lord Browne-Wilkinson); *id.* at 275–77 (Lord Millett); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, at 156 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); U.N. GAOR, 68th Sess., 13th mtg. ¶ 13, U.N. Doc. A/C.6/68/SR.13 (Jan. 6, 2014); Secretary-General Report (2010), *supra* note 19, ¶¶ 21–22; Permanent Mission of Spain to the U.N. Office of Legal Affairs, Scope and Principle of International Jurisdiction: Information Provided by the Kingdom of Spain, ¶ 14, U.N. Doc. 094 FP (Apr. 29, 2013) (on file with the United Nations Office of Legal Affairs); Permanent Mission of Sweden to the U.N. Office of Legal Affairs, Letter dated May 29, 2013 from the Permanent Mission of Sweden to the United Nations addressed to the Secretary-General

Law.¹²⁸ The same reading in numerous treaties other than the CAT has been made by several delegations during work on universal jurisdiction at the Sixth Committee;¹²⁹ AU-EU Technical Ad Hoc Expert Group;¹³⁰ ICRC;¹³¹ Institute of International Law;¹³² American Law Institute;¹³³ NGOs;¹³⁴ and the growing scholarship that has sought to clarify the universal jurisdiction concept.¹³⁵ Perhaps most importantly, in the light of the *Habré Case*, this reading has also been endorsed by the ILC during its work on the topic “obligation to extradite or prosecute.”

B. ILC's Final Report on Treaty Obligations to Extradite or Prosecute

After almost a decade of study, in 2014, the ILC at its sixty-sixth session decided to expedite the topic and adopt a Final Report on the obligation to extradite or prosecute.¹³⁶ The ICJ's judgment in the *Habré Case* was delivered before the ILC had opportunity to complete its work on this topic. In reliance on the *Habré Case*, the Final Report adopts the ICJ's reference to “universal jurisdiction”¹³⁷ and cites the *Habré Case* to support the proposition that it may be helpful for elucidating the meaning of numerous other conventions that have used the same Hague formula.¹³⁸ Consistent with the trend in the ILC's practice during the past fifteen years, the outcome of the ILC's work on the extradite or prosecute topic is packaged as a Final Report, rather than a set of draft articles (draft treaty) for the purpose of eventual

of the United Nations, para. 3 (May 29, 2013) (on file with the United Nations Office of Legal Affairs), <http://www.saflii.org/cgi-bin/LawCite?cit=%5b2013%5d%20ZASCA%20168>.

128. Tomuschat, *supra* note 25, at 336, 374–75, 387.

129. See, e.g., U.N. GAOR, 65th Sess., 10th mtg. ¶ 77, U.N. Doc. A/C.6/65/SR.10 (Oct. 13, 2010) (Bel.); U.N. GAOR, 65th Sess., 11th mtg. ¶¶ 37–38 U.N. Doc. A/C.6/65/SR.11 (Oct. 13, 2010) (U.S.); *id.* ¶ 40 (Bel.); *id.* ¶ 73 (Ger.); U.N. GAOR, 64th Sess., 13th mtg. ¶ 16, U.N. Doc. A/C.6/64/SR.13 (Oct. 21, 2009) (Russ.); *id.* ¶ 30 (Liech.); *id.* ¶ 37 (Malay.); *id.* ¶ 44 (It.); U.N. GAOR, 64th Sess., 12th mtg. ¶¶ 23–24, U.N. Doc. A/C.6/64/SR.12 (Oct. 20, 2008) (Switz.); *id.* ¶ 67 (Thai.); *id.* ¶ 77 (Fr.); *id.* ¶ 85 (Ger.); U.N. Secretary-General, *The Scope and Application of the Principle of Universal Jurisdiction*, ¶¶ 121–28, U.N. Doc. A/66/93 (2011); Secretary-General Report (2010), *supra* note 19, ¶¶ 21–22.

130. See AU-EU Technical Ad Hoc Expert Group, *supra* note 26, ¶¶ 9, 11, 16, 22–23.

131. See Int'l Comm. of the Red Cross to the U.N. Office of Legal Affairs, Information and Observations on the Scope and Application of Universal Jurisdiction (Apr. 30, 2013) (on file with the United Nations Office of Legal Affairs).

132. See Inst. of Int'l Law, *supra* note 27, ¶ 2.

133. See RESTATEMENT (THIRD) OF THE FOREIGN LAW OF THE UNITED STATES, *supra* note 47; see also RESTATEMENT (FOURTH), *supra* note 12.

134. See Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, IOR 53/003/2001 (Sept. 2001).

135. See, e.g., Jean d'Aspremont, *Multilateral versus Unilateral Exercises of Universal Criminal Jurisdiction*, 43 ISR. L. REV. 301, 307 (2010); Jamie Mayerfield, *Who Shall Be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights*, 25 HUM. RTS. Q. 93, 112 (2003); Nanda, *supra* note 111 at 397; O'Keefe, *supra* note 26, at 746–47, 755; O'Keefe, *supra* note 42, at 817, 826.

136. See Int'l Law Comm'n, Rep. of the Work of Its Sixty-Sixth Session, *supra* note 13.

137. See *id.* at 149–50.

138. See *id.* at 148.

codification by states.¹³⁹ Nonetheless, it was submitted to the U.N. General Assembly for dissemination and is “intended to assist States” in the implementation of their treaty obligations and advance understanding in this key area of international law.¹⁴⁰ As with other reports recently produced by the ILC, such as the report on the *Fragmentation of International Law*,¹⁴¹ the Final Report, by not comprising draft articles, has the potential to impact a wider audience of actors in the field of international law, “one made up not just of states, but also of attorneys, judges, policymakers, and academics.”¹⁴²

On closer analysis, however, the reports of the Special Rapporteur and the preparatory work of the ILC’s Working Group, on which the Final Report is based, reveals that what the ILC really means by the term “universal jurisdiction” is not really universal at all.

C. *Special Rapporteur Rules Out Universal Jurisdiction*

In his preliminary remarks on the obligation to extradite or prosecute topic, the ILC’s special rapporteur, having studied the inclusion of such obligations in various treaties since 1970, suggested that there had been created a “principle of universality of suppression.”¹⁴³ The special rapporteur proceeded to caution that:

[t]he principle of universality of suppression should not be identified, however, with the principle of universality of jurisdiction The universality of suppression in this context means that, as a result of application of the obligation to extradite or prosecute between States concerned, there is no place where an offender could avoid criminal responsibility and could find so-called “safe haven.”¹⁴⁴

He therefore made clear that the principle of universal jurisdiction “is not directly connected with the obligation to extradite or prosecute.”¹⁴⁵ The

139. On the ILC’s recent move in practice from the production of draft articles, which the ILC had typically produced as the outcome of its work for most of its history, to outcomes more likely than not to be described as something other than draft articles see Jacob K. Cogan, *The Changing Form of the International Law Commission’s Work*, AJIL UNBOUND (Mar. 27, 2014), <https://www.asil.org/blogs/changing-form-international-law-commission%E2%80%99s-work>; see also Sean D. Murphy, *Deconstructing Fragmentation: Koskeniemi’s 2006 ILC Project*, 27 TEMPLE INT’L. & COMP. L.J. 293, 306 (2013) (suggesting that the issuance of reports, rather than draft articles, may be necessary for the ILC to remain relevant).

140. See Int’l Law Comm’n, *supra* note 13, at 140.

141. See Int’l Law Comm’n, *supra* note 21, ¶ 233–51. On the impact of this report, see Murphy, *supra* note 139.

142. Cogan, *supra* note 139. The extent to which governments and other actors in the field of international law have actually consulted and relied upon the *Final Report* since 2014 is hard to gauge. As Murphy, *supra* note 139, at 299, rightly notes: “One would not necessarily expect a practitioner to cite to the ‘manual’ that comes with his or her toolbox; rather, he or she just uses the tools.”

143. Int’l Law Comm’n, Rep. on the Work of Its Fifty-Sixth Session, U.N. Doc. A/59/10, at 314 (2004).

144. *Id.*

145. *Id.* at 315.

same opinion was subsequently reiterated in the special rapporteur's reports submitted to the General Assembly.¹⁴⁶ However, some of the ILC's members regarded universal jurisdiction as "instrumental to the full operation of the obligation to extradite or prosecute"¹⁴⁷ and therefore one of the main problems in need of resolution is the question of "[w]hat kind of mutual relationship—if it is supposed that such a relationship exists—between the obligation *aut dedere aut judicare* and the concept of universal jurisdiction should be accepted"¹⁴⁸ In fact, at no point was the universal jurisdiction concept or its relationship with extradite or prosecute obligations, if any, examined by the special rapporteur or the ILC. But this relationship was given some initial consideration, perhaps hastily, by the ILC's Working Group in reaction to the ICJ's judgment in the *Habré Case*.

D. ILC's Working Group

Of the numerous legal questions identified by the Working Group, one of them was the relationship between the "obligation to extradite or prosecute and the principle of universal jurisdiction (does one necessarily imply the other?)."¹⁴⁹ The *Habré Case* prompted the Working Group to hold a "specially-convened" meeting and evaluate this question in 2012.¹⁵⁰ The following year, in 2013, the Working Group adopted a report citing with approval the ICJ's reference to "universal jurisdiction."¹⁵¹ In this report, at no point did the Working Group analyze the ICJ's judgment critically or in depth; rather, the judgment is viewed as "helpful in elucidating some aspects relevant to the implementation of the obligation to extradite or prosecute."¹⁵²

Controversially, on the "necessary jurisdiction" in order to implement treaty obligations to extradite or prosecute, the report, relying on the *Habré Case*, states that when the crime was allegedly committed abroad with no nexus to the forum State, the obligation to extradite or prosecute would

146. Zdzislaw Galicki (Special Rapporteur on the Obligation to Extradite or Prosecute), *Preliminary Rep. on the Obligation to Extradite or Prosecute* (aut dedere aut judicare), ¶ 18 U.N. Doc. A/CN.4/571 (June 7, 2006) [hereinafter Galicki (2006)]; see also Zdzislaw Galicki (Special Rapporteur on the Obligation to Extradite or Prosecute), *Second Rep. on the Obligation to Extradite or Prosecute* (aut dedere aut judicare), ¶¶ 16, 45, U.N. Doc. A/CN.4/585 (June 11, 2007) [hereinafter Galicki (2007)].

147. Galicki (2007), *supra* note 146, ¶ 34.

148. Zdzislaw Galicki (Special Rapporteur on the Obligation to Extradite or Prosecute), *Third Report on the Obligation to Extradite or Prosecute* (aut dedere aut judicare), ¶ 38, U.N. Doc. A/CN.4/603 (June 10, 2008).

149. Int'l Law Comm'n, Rep. on the Work of Its Sixty First Session, ¶ 204, U.N. Doc. A/64/10 (2009).

150. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Fourth Session, ¶¶ 208, 220, U.N. Doc. A/67/10 (2012).

151. Working Group on the Obligation to Extradite or Prosecute, *Rep. of the Working Group on the Obligation to Extradite or Prosecute* (aut dedere aut judicare), ¶ 24, U.N. Doc. A/CN.4/L.829 (2013) (citing Council Secretariat, *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, annex, ¶ 11 U.N. Doc. 8672/1/09/Rev.1 (Apr. 16, 2009)).

152. *Id.* ¶ 21.

necessarily reflect an exercise of universal jurisdiction, which is “the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events” where neither the victims nor alleged offenders are nationals of the forum state and no harm was allegedly caused to the forum state’s own national interests.¹⁵³ However, the obligation to extradite or prosecute can also reflect an exercise of jurisdiction under other bases. Thus, if a state can exercise jurisdiction on another basis, universal jurisdiction may not necessarily be invoked in the fulfilment of the obligation to extradite or prosecute.¹⁵⁴

The Working Group’s report proceeds to suggest that several treaties, such as the very widely ratified 1949 Geneva Conventions and the CAT, “require the exercise of universal jurisdiction over the offenses covered by these instruments.”¹⁵⁵ It also cites with approval the ICJ’s dictum referring to “universal jurisdiction” and seemingly treats it as reflecting existing *lex lata*.¹⁵⁶ And yet, the report does not examine universal jurisdiction or explain what the Working Group means by this term.

The above quoted passage raises two important issues. The first concerns the working methods and sources of evidence relied upon by the Working Group, while the second pertains to the meaning of “universal jurisdiction” and the Working Group offering a different interpretation of jurisdiction arising out of extradite or prosecute obligations to that of the ICJ.

1. *Working Methods and Sources of Evidence in Support of Universal Jurisdiction*

Turning to the first issue, the reference to “universal jurisdiction” is supported by only one tentative, secondary source. The scholarly work cited by the Working Group, authored by Professor Inazumi, places great emphasis of the accused’s “presence” in the Custodial State’s territory as the sole basis for interpreting jurisdiction as “universal.”¹⁵⁷

The Working Group had before it a working paper prepared by the special rapporteur.¹⁵⁸ In this paper, the special rapporteur states that the 1949 Geneva Conventions and numerous subsequent treaties using the Hague formula “envisage an obligation to exercise universal jurisdiction.”¹⁵⁹ The only source of evidence on which the special rapporteur relies to support the above proposition is a “survey of multilateral conventions,” prepared by the

153. *Id.* ¶ 24 (quoting *Arrest Warrant Case*, 2002 I.C.J. at 63 ¶ 42 (joint separate opinion by Higgins, et al., JJ.)).

154. *See id.* ¶ 24.

155. *Id.* ¶ 24; *see also id.* n.34.

156. *See id.* ¶ 24; *see also id.* n.43.

157. MITSUE INAZUMI, UNIVERSAL JURISDICTION IN MODERN INTERNATIONAL LAW: EXPANSION OF NATIONAL JURISDICTION FOR PROSECUTING SERIOUS CRIMES UNDER INTERNATIONAL LAW 122 (2005).

158. *See* Zdzislaw Galicki (Special Rapporteur), *Bases for Discussion in the Working Group on the Topic “The Obligation to Extradite or Prosecute (aut dedere aut judicare)”*, U.N. Doc. A/CN.4/L.774 (June 24, 2010).

159. *Id.* ¶ 14.

U.N. Secretariat.¹⁶⁰ However, the survey does not provide any evidence in support of this finding either.¹⁶¹ To its credit, the survey does have regard to the preparatory works of the Geneva Conventions, although such works are cited wholly out of their proper historical context.¹⁶² In particular, the survey quotes the “principle of universality” referred to during the Diplomatic Conference for the adoption of the 1949 Geneva Conventions. As will be explained, however, this term was a reference to the universal application of the extradite or prosecute obligation to all parties, including neutrals, and not universal jurisdiction proper.¹⁶³

The special rapporteur was also influenced by the adoption of a resolution on universal jurisdiction in 2005 by the Institute of International Law. In his opinion, the resolution showed a “mutual relationship and—to some extent—an interdependence between universal jurisdiction and the obligation *aut dedere aut judicare*.”¹⁶⁴ The resolution not only treated “universal jurisdiction” as an *existing* customary rule over international crimes, in particular genocide, crimes against humanity and war crimes.¹⁶⁵ It went one step further and declared that universal jurisdiction “can also be established” in treaty obligations to extradite or prosecute.¹⁶⁶ A closer analysis of the Institute’s preparatory work shows that neither of these propositions was based on existing state and treaty practice, not least the *Arrest Warrant* case and Belgium—the self-acclaimed pioneer of universal jurisdiction—abolishing the provision for such jurisdiction in its national law in 2003 “owing to the abuse of this legislation.”¹⁶⁷ Moreover, as the basis for its report, the Institute adopted the work of advocacy organizations (such as Amnesty International, International Law Association and Princeton Project) and a select group of scholars, all of which adopt the prevailing narrative, making exaggerated claims of the existence of universal jurisdiction in custom and confusing it with treaty obligations to extradite or prosecute.¹⁶⁸ Yet, in the opinion of the Institute’s rapporteur, such works “prove that universal jurisdiction is a principle already widely recognized under international instruments.”¹⁶⁹

160. Secretariat, *supra* note 31.

161. *See id.* ¶¶ 44, 90, 94, 144; *see also id.* n.251.

162. *See id.* ¶¶ 49–57.

163. *See infra* notes 358–80 and accompanying text.

164. Galicki, *supra* note 148, ¶ 47.

165. *Inst. of Int’l Law, supra* note 27, ¶¶ 1, 3.

166. *Id.* ¶ 2.

167. *See Int’l Law Comm’n, The Obligation to Extradite or Prosecute (aut dedere aut judicare): Comments and Information Received from Governments*, ¶ 15, U.N. Doc. A/CN.4/612 (Mar. 26, 2009); *see also* Permanent Mission of Belgium to the U.N., *Observations by Belgium on the Scope and Application of the Principle of Universal Jurisdiction*, ¶ 15, www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Belgium_E.pdf.

168. *See Tomuschat, supra* note 25, at 216–17, 222, 234.

169. *Id.* at 217.

2. *ILC Should Define Universal Jurisdiction*

The second important issue raised by the above quoted passage is the meaning of “universal jurisdiction.” The quotation refers to the applicability of “universal jurisdiction” over a crime committed abroad having “no nexus to the forum State.”¹⁷⁰ As has been explained, jurisdiction in treaty obligations to extradite or prosecute has important links to one or more of the parties to the relevant treaty regime.¹⁷¹ As jurisdiction is based on treaty, proof that “harm was allegedly caused to the forum state’s own national interests,” to quote the Working Group’s words, is not required.¹⁷² Therefore, the Custodial State, by failing to extradite a suspect and initiating criminal proceedings, either protected the vital national interests of Paragraph 1 States or its own interests. The quotation immediately proceeds to explain what the Working Group means by universal jurisdiction, which is nothing more than “the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events.”¹⁷³ The latter statement is a quotation of Judges Higgins et al. in the *Arrest Warrant* case.¹⁷⁴ And yet, the judges in this case emphasize that jurisdiction in treaty obligations to extradite or prosecute is not universal jurisdiction and that such “loose use of language” should be avoided.¹⁷⁵ This would suggest that whatever the Working Group may have meant by the term “universal jurisdiction” (which is not clear), it does not mean universal jurisdiction proper. In any event, the Working Group is not wholly convinced or unanimous that such jurisdiction is universal either. Thus, the above quotation contained in the Working Group’s report states that jurisdiction in the obligation to extradite or prosecute would “reflect an exercise of universal jurisdiction,” which is different from the finding that it *is* universal jurisdiction.¹⁷⁶ It further suggests that the obligation to extradite or prosecute “can also reflect an exercise of jurisdiction under other bases” and that “universal jurisdiction may not necessarily be invoked in the fulfillment of the obligation to extradite or prosecute.”¹⁷⁷ To suggest that jurisdiction in extradite or prosecute obligations is chameleon-like, with the ability to reflect territorial jurisdiction at one end of the continuum and universal jurisdiction at the other, makes little sense and does not sit neatly with the actual wording of the relevant treaty provisions.

In all likelihood, the Working Group’s cumbersome and convoluted description of jurisdiction implementing extradite or prosecute obligations

170. Working Group on the Obligation to Extradite or Prosecute, *supra* note 151, ¶ 24.

171. See *supra* notes 45–46 and accompanying text.

172. Working Group on the Obligation to Extradite or Prosecute, *supra* note 151, ¶ 24.

173. *Id.*

174. *Arrest Warrant Case*, 2002 I.C.J. at 63, ¶ 41 (joint separate opinion by Higgins et al., JJ.).

175. *Id.*; see also Murphy, *supra* note 6, ¶ 113.

176. Working Group on the Obligation to Extradite or Prosecute, *supra* note 151, ¶ 24 (emphasis added).

177. Int’l Law Comm’n, *supra* note 13, ¶ 18.

as “territorial,” “universal” and “other bases” of jurisdiction was aimed at garnering compromise among delegations at the Sixth Committee.¹⁷⁸ In this regard, the ILC’s Final Report does not provide authority for interpreting the jurisdiction arising out of extradite or prosecute obligations as universal jurisdiction proper.

In sum, the idea that the prescriptive jurisdiction arising out of treaty obligations to extradite or prosecute is not based on any recognized jurisdictional link and therefore can, by analogy, be read to impliedly embody and even mandate the use of universal jurisdiction is based on three fundamental premises: namely that the concept of universal jurisdiction is widely used in state practice and exists in customary international law at present; the actual text of relevant treaty provisions supports such a reading; and the ICJ in the *Habré Case* recognized the existence of universal jurisdiction in international law and its embodiment in the CAT.

IV. THE CASE AGAINST *HABRÉ* SUPPORTING UNIVERSAL JURISDICTION

This Part argues that the *Habré Case* does not support the existence of universal jurisdiction in international law and that jurisdiction from treaty obligations to extradite or prosecute is incapable of giving rise to universal jurisdiction. In so doing, it begins by showing that the ICJ’s references to “universal jurisdiction” in the *Habré Case* are little more than dicta and therefore caution according them weight. Thereafter, this Part analyzes the text of Articles 5 and 7 of the CAT and their *travaux préparatoires*, both of which are bypassed by the ICJ, in order to show that treaty obligations to extradite or prosecute do not give rise to universal jurisdiction. A reading that suggests otherwise disregards the actual text, which creates significant jurisdictional links with states parties to the CAT. Analysis in this Part focuses on the CAT, in the light of the *Habré Case*, but it applies equally to the numerous other treaties that create obligations to extradite or prosecute, most of which use the same Hague formula as the CAT. Lastly, this Part presents the findings of an empirical analysis of state practice in order to show that universal jurisdiction does not exist under customary international law at present and that common examples of universal jurisdiction in state practice are actually different types of treaty-based jurisdiction.

A. ICJ’s Reference to Universal Jurisdiction Reduced to *Obiter Dictum*

The ICJ’s characterization of jurisdiction in Article 5(2) of the CAT as “universal jurisdiction” in the *Habré Case* does not constitute a meaningful pronouncement of universal jurisdiction’s existence in customary interna-

178. See Int’l Law Comm’n, Rep. of the Work of Its Fifty-Seventh Session: Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During Its Sixtieth Session, Prepared by the Secretariat, ¶ 243, U.N. Doc. A/CN.4/560 (Jan. 13, 2006).

tional law or its relationship, if any at all, with treaty obligations to extradite or prosecute.¹⁷⁹ In this case, the ICJ rejects that it has jurisdiction to adjudicate Belgium’s complex and controversial claims relating to customary international law, including the existence of a customary rule of universal jurisdiction over war crimes, crimes against humanity and genocide.¹⁸⁰ The ICJ therefore refuses to rule on universal jurisdiction’s legality in customary international law and provides no supporting analysis of the existence of such a rule over the crime of torture.¹⁸¹ The ICJ finds that it has jurisdiction solely to adjudicate obligations under the CAT.¹⁸² However, it leaves unexplained what is meant by “universal jurisdiction” or the intended effect of the use of such nomenclature for the development of the international law of jurisdiction.¹⁸³ This is because the ICJ finds that, insofar as Article 5(2) of the CAT is concerned, it has “no jurisdiction in this case.”¹⁸⁴ The merits of the case, over which the ICJ has jurisdiction, are limited to the determination of what, in the ICJ’s opinion, is the nature and meaning of the obligations under Articles 6 and 7 of the CAT, and whether such obligations had been violated by Senegal.¹⁸⁵ As a result, the ICJ’s references to “universal jurisdiction,” which only appear in a limited number of paragraphs and absent, as they are, of any substantive reasoning, is reduced to mere *obiter dictum*.¹⁸⁶

In all likelihood, the ICJ’s references to “universal jurisdiction” impliedly follow the earlier decision of the U.N. Committee Against Torture in a case involving *Habré*.¹⁸⁷ Belgium relied on the same decision in the present case as evidence that Article 5(2) codified a customary rule of “universal jurisdiction.”¹⁸⁸ However, the Committee did not explain what it meant by “universal jurisdiction” either. It follows from the foregoing that one should probably refrain from reading too much into the ICJ’s references to “universal jurisdiction” in the *Habré Case*.

As the ICJ had no jurisdiction over the alleged violation of Article 5(2),¹⁸⁹ this raises the question whether the ICJ should have chosen to describe this

179. See, e.g., Sienho Yee, *A Call for a More Rigorous Assessment of Universal Jurisdiction*, 107 AM. SOC’Y INT’L L. PROC. 242, 245 (2013).

180. See *Habré Case*, 2012 I.C.J. at 422, ¶¶ 53–55; *Habré Case*, Verbatim Record, ¶¶ 28–30, 33 (Mar. 13, 2012), <http://www.icj-cij.org/files/case-related/144/144-20090406-ORA-01-00-BI.pdf>. But see Memorial of Belgium, *supra* note 72, ¶¶ 4.83–4.84 (arguing that Senegal had an obligation to exercise universal jurisdiction over war crimes, crimes against humanity, genocide and torture allegedly committed by *Habré*).

181. See *id.* at 471, ¶ 30 (separate opinion by Abraham, J.).

182. See *id.* ¶ 53–55.

183. See Yee, *supra* note 179, at 245.

184. *Habré Case*, 2012 I.C.J. at 422, ¶ 74.

185. CAT, *supra* note 3. Article 6 provides an obligation to conduct a preliminary enquiry, while Article 7 provides an obligation to extradite or prosecute.

186. See Yee, *supra* note 179.

187. See Comm. Against Torture, *supra* note 126.

188. See Memorial of Belgium, *supra* note 72, ¶¶ 2.02–2.04.

189. See *Habré Case*, 2012 I.C.J. at 422, ¶ 74.

Article as an “obligation to establish universal jurisdiction” at all, especially as this term is misleading in the absence of any explanation of its meaning and the potential of the court’s jurisprudence to impact other actors in the field of international law, not least states, national and regional courts, the ILC, and academics. This issue becomes of great importance when one considers that the Hague formula of the extradite or prosecute obligation is the same as that used in three-quarters of the criminal law conventions adopted since 1970.¹⁹⁰ Several states have made excessive claims of the applicability of universal jurisdiction over a wide range of treaty crimes, leading to interstate disputes and little progress during the work on the universal jurisdiction topic at the Sixth Committee due to incessant disagreement on the basic concept, definition, and scope of universal jurisdiction.¹⁹¹ The sections that follow will therefore aim to show that the ICJ erred in referring to Article 5(2) as “universal jurisdiction” (regardless of what was meant by the use of this term).

B. Article 5(2) CAT: Application of the Vienna Convention on the Law of Treaties

The starting point for discussion is that Article 5 of the CAT, as with other treaties providing for extradite or prosecute obligations, does not expressly provide for “universal jurisdiction.”¹⁹² As a general rule of treaty interpretation, the VCLT provides that a treaty shall be interpreted in accordance with “the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁹³ The meaning of “context” for the purpose of treaty interpretation includes, in addition to the text, the instrument’s preamble.¹⁹⁴ The ICJ in the *Habré Case* describes Article 5(2) as “universal jurisdiction” according to the supposed object and purpose of the CAT.¹⁹⁵ The phrase “object and purpose” is not defined by the VCLT and its meaning is vague and thus open to interpretation.¹⁹⁶ Nonetheless, in order to interpret the CAT’s object and purpose, one would reasonably expect the ICJ, which is at the heart of the international legal system, to have some regard to its “context.” The only extent to which the ICJ was prepared to consider context was to refer to a single and somewhat ambiguous preambular paragraph, which merely provides that states parties desire “to make more effective the struggle against torture.”¹⁹⁷ It is solely

190. See Secretariat, *supra* note 31, ¶ 90; see also Int’l Law Comm’n, *supra* note 13, ¶¶ 145, 147.

191. See U.N. GAOR, *supra* note 20.

192. See, e.g., *Arrest Warrant Case*, 2002 I.C.J. at 3, ¶ 4; *id.* at 63, ¶ 41 (joint separate opinion by Higgins et al., JJ.); *id.* at 35, ¶¶ 5–15 (separate opinion by Guillaume, Pres.); Yee, *supra* note 8, ¶ 21.

193. VCLT, *supra* note 105, art. 31(1).

194. *Id.* art. 31(2).

195. See *Habré Case*, 2012 I.C.J. at 422, ¶ 74; see also *id.* ¶¶ 68, 86, 115.

196. Isabelle Buffard & Karl Zemanek, *The “Object and Purpose” of a Treaty: An Enigma?*, 3 AUSTRIAN REV. INT’L & EUR. L. 311 (1998).

197. CAT, *supra* note 3, prml. para. 6.

from this preambular paragraph—and not by examining the instrument’s text—that the ICJ infers the CAT’s object and purpose. This would suggest that the ICJ does not, in fact, intend to interpret universal jurisdiction proper within the “ordinary meaning” of Article 5(2). To have done otherwise would perhaps place more weight on this preambular paragraph than it is capable of bearing.

The following sections provide a textual analysis of Articles 5 and 7 of the CAT and their *travaux préparatoires*, in accordance with the VCLT, in order to show that jurisdiction, even though it is capable of being interpreted broadly in Article 5(2), cannot be considered to include universal jurisdiction within its “ordinary meaning.” It further shows that the ICJ, by overlooking the text of Article 5, not only misinterprets the CAT’s “object and purpose,” but also the meaning of jurisdiction in Article 5(2) and the obligation to extradite or prosecute in Article 7, as the exclusive protection of a “common interest.”

1. *Article 5 CAT: Textual Analysis*

As with all treaties that use the Hague formula, the CAT, by virtue of Article 5(2), provides that “[e]ach State Party shall . . . take such measures as may be necessary to establish its jurisdiction over such offenses [referred to in Article 4] in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.”¹⁹⁸ As can be seen, the wording in Article 5(2) defines the scope of a party’s obligation to “establish its jurisdiction” over relevant offenses. This is limited by express terms to “cases where the alleged offender is present in any territory under its jurisdiction” and the failure, for whatever reason, to “extradite him . . . to any of the States mentioned” in Article 5(1). The “presence” of the accused in a state party’s territory is relevant for triggering the obligation to enforce jurisdiction and implement the extradite or prosecute obligation under Article 7 of the CAT. Therefore, a Custodial State must provide for prescriptive jurisdiction that is sufficiently broad to cover crimes committed by foreign nationals abroad that have a link with Paragraph 1 States and where the accused is not extradited to them, as envisaged by the text of Article 5(2) referred to above.

Notably, the ICJ in the *Habré Case* focuses exclusively on the “presence” of the accused and gives no consideration to the meaning of the words “does not extradite him . . . to one of the States referred to in paragraph I of the same article.”¹⁹⁹ Evidently, the meaning of Article 5(2) should not be read in isolation from the “States mentioned” in Article 5(1). Yet the ICJ provides no analysis of that paragraph. The only extent to which the ICJ has

198. *Id.* art. 5(2) (emphasis added).

199. *Habré Case*, 2012 I.C.J. at 422, ¶ 47; see also Comm. Against Torture, *supra* note 126, ¶ 9(5).

regard to Article 5(1) is in passing, towards the end of its judgment. The ICJ observes that the Custodial State “does indeed have the option of extraditing [the accused]” to a Paragraph 1 State, “*but on the condition that it is to a State which has jurisdiction in some capacity, pursuant to Article 5 of the Convention, to prosecute and try him.*”²⁰⁰ The above quoted passage raises two important issues. First, the “option” of extradition does not reflect the actual text of Article 5(2). It makes clear that extradition to a Paragraph 1 State is an obligation, and only if the Custodial State “does not extradite him” does it then have an obligation to undertake a prosecution. It follows that, unless a Paragraph 1 State has made out a *prima facie* case that it has jurisdiction by virtue of a link with the case in question, then a Custodial State is permitted, but certainly has no obligation, to extradite or prosecute. As will be explained in the discussion of Article 7 of the CAT, *infra*, this oversight led the ICJ to misinterpret the nature and meaning of the obligation to extradite or prosecute in finding that prosecution is an international obligation, while extradition is merely an “option.” Second, the condition that a Paragraph 1 State must have “jurisdiction in some capacity” before an alleged offender can be extradited would make little sense had the ICJ interpreted the CAT as providing for a principle of universal jurisdiction. In fact, Article 5(1) would be redundant.

2. Article 5(1) CAT: “Special Link” with Paragraph 1 States

Although the ICJ sidestepped discussion of Article 5(1), the importance of it justifies its quotation in full:

[e]ach State Party shall take such measures as may be necessary to establish its jurisdiction over the offenses referred to in article 4 in the following cases: (a) [w]hen the offenses are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) [w]hen the alleged offender is a national of that State; (c) [w]hen the victim is a national of that State if that State considers it appropriate.²⁰¹

Article 5(1) thus sets out the circumstances in which states parties are required, and permitted in the case of subsection (c), to establish jurisdiction and request extradition over relevant offenses, by virtue of the territoriality, active nationality and—so-called by Belgium in the *Habré Case*—“passive personality” principles of jurisdiction in customary international law.²⁰² The text of Article 5(1) would suggest that the CAT’s object and purpose is to prevent impunity when an offense has important jurisdictional links, or—in the words of the U.N. Secretariat, “a special link”²⁰³—with one or more

200. *Habré Case*, 2012 I.C.J. at 422, ¶ 120 (emphasis added).

201. CAT, *supra* note 3, art. 5(1).

202. See *Habré Case*, 2012 I.C.J. at 422, ¶ 65.

203. Secretariat, *supra* note 31, ¶ 112.

states parties, namely where an offense has been committed on a party's territory or by its nationals or against its nationals. Torture can, by definition, only be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”²⁰⁴ During the drafting of the CAT, some states were concerned with the protection of their own nationals from acts of torture committed by state officials abroad. The commission of such acts is injurious to the state itself, constituting an internationally wrongful act within the meaning of the rules of state responsibility and giving rise to a legal right of diplomatic protection.²⁰⁵ On the other hand, the requirement to establish jurisdiction over offenses committed against a state's nationals abroad raised concerns for a number of delegations during the *travaux préparatoires* of Article 5, as such jurisdiction could be abused and would be impractical. It was therefore made optional.²⁰⁶ Based on the foregoing, it is therefore reasonable to suppose that torture committed against one of its own nationals implicates certain of that state's national vital interests, including its sovereignty, political independence and governmental functions, and that impunity is prevented to protect such interests in addition to the human rights of their own nationals.

3. *Article 5(2) CAT: Prescriptive Link with Paragraph 1 States*

Article 5(2) is undoubtedly broad and requires no prescriptive link to be evidenced between a Custodial State's jurisdiction and an offense committed abroad. However, the text in Article 5(2), when read as a whole and in conjunction with Article 5(1), leads to the conclusion that the scope of a Custodial State's jurisdiction is limited to crimes within the treaty regime of the CAT that have a meaningful link with one of the Paragraph 1 States.²⁰⁷

204. CAT, *supra* note 3, art. 1.

205. A state responsible for injuring a foreign national is obliged to cease the wrongful conduct and to make full reparation for the injury caused by the internationally wrongful act. This reparation may take the form of restitution, compensation, or satisfaction, either singly or in combination. *See Draft Articles on Diplomatic Protection with Commentaries*, [2006] 2 Y.B. INT'L L. COMM'N pt. 2, at 22–28; Int'l Law Comm'n Rep., *supra* note 76, arts. 28, 30–31, 34–37.

206. *See* Comm'n on Human Rights, Rep. of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. E/CN.4/L.1576 (Mar. 6, 1981) [hereinafter Draft CAT (1981)]; Comm'n on Human Rights, Rep. on the Work of Its Thirty-Seventh Session, ¶¶ 21–22, U.N. Doc. E/CN.4/1475 (1981) [hereinafter Human Rights Rep. on Thirty-Seventh Session]; Comm'n on Human Rights, Rep. on the Work of Its Thirty-Sixth Session, ¶ 49, U.N. Doc. E/1980/13 (1980) [hereinafter Human Rights Rep. on Thirty-Sixth Session]; Comm'n on Human Rights, Rep. of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. E/CN.4/1367 (Mar. 5, 1980) [hereinafter Draft CAT (1980)]; Secretary-General of the Comm'n on Human Rights, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, In Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶¶ 15, 17, 22, 70, 73, U.N. Doc. E/CN.4/1314 (Dec. 19, 1978) [hereinafter Secretary-General on Human Rights]; J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 60 (1988).

207. *See also* Reidams, *supra* note 9, at 12–13.

The wording of Article 5(2) presupposes that Paragraph 1 States would be able to exercise their jurisdiction over a relevant offense had the accused been extradited.²⁰⁸ As will be explained, the purpose of Article 5(2) is thus to place an obligation on a Custodial State to establish its jurisdiction on behalf of Paragraph 1 States in cases of non-extradition.²⁰⁹ The jurisdiction in Article 5(2), when viewed in its proper context, cannot be interpreted as impliedly embodying a principle of universal jurisdiction within its “ordinary meaning.”²¹⁰ To suggest otherwise does not sit neatly with a textual analysis of Article 5(2) as a whole, or when read in conjunction with Article 5(1). It may even be said to misconstrue the textual situation, as parts of the text in Article 5(2), as well as the text in Article 5(1), are made redundant.²¹¹ It also places undue emphasis on the mere “presence” of the accused in a Custodial State’s territory, which is a precondition for the obligation to the exercise of jurisdiction in any given case.

The ICJ in the *Habré Case*, by focusing on the mere “presence” of the accused in the wording of Article 5(2), remarks somewhat misleadingly, that a Custodial State has an obligation to prosecute acts of torture and prevent impunity on behalf of all other parties for the exclusive protection of a “common interest.”²¹² This does not sit neatly with the textual analysis of Article 5, which shows that parties to the CAT—to quote the words of the ICJ—do have “interests of their own” in the prevention of impunity.²¹³ The reason why the ICJ considered only half of the text of Article 5(2) and did not examine jurisdiction in this article or its relationship with the jurisdictional provisions in Article 5(1) may be explained by the ICJ’s determination of the admissibility of Belgium’s claim (as a basis for bringing proceedings before the ICJ) based solely on its status as a party to the CAT.²¹⁴ The opinions appended to the ICJ’s judgment cast doubt on Belgium’s principal claim that it had the right to exercise jurisdiction under the Article 5(1)(c) of the CAT and its entitlement to request the extradition of Habré under Article 7 of the CAT, as the victims were not Belgian nationals at the time the alleged offences occurred in Chad.²¹⁵

Even if jurisdictional links to Paragraph 1 States were not explicit in Article 5(1) of the CAT, jurisdiction arising out of the extradite or prosecute

208. Article 5(2) of the CAT “does not require any State to exercise jurisdiction, merely to establish it.” Secretariat, *supra* note 31, n. 155.

209. See *infra* notes 326–342 and accompanying text.

210. This finding is further supported by CAT Article 7(1). CAT, *supra* note 3, art. 7(1); see also *Habré Case*, 2012 I.C.J. at 605, ¶ 36 (dissenting opinion by Sur, J. ad hoc); *id.* at 471, ¶¶ 30–39 (separate opinion by Abraham, J.); Reydams, *supra* note 8, at 20–21; Reydams, *supra* note 9, at 13.

211. The same point applies *mutatis mutandis* to Article 7(1) of the CAT.

212. *Habré Case*, 2012 I.C.J. at 422, ¶¶ 68, 74.

213. *Id.*

214. See *supra* notes 75–87 and accompanying text.

215. See *Habré Case*, 2012 I.C.J. at 571, ¶¶ 8, 12 (dissenting opinion by Xue, J.); *id.* at 471, ¶¶ 21, 31–32 (separate opinion by Abraham, J.). The tenuous link with Belgium at the time the crimes occurred may explain why Belgium invoked jurisdiction under both Article 5(1) and (2) of the CAT during the proceedings of the *Habré Case* and interpreted the case as “universal jurisdiction.”

obligation in Article 5(2) is still not universal jurisdiction properly so called, as treaty obligation to exercise jurisdiction and the presence of the suspect are required.²¹⁶ Only when a treaty gives the parties thereto jurisdiction over crimes having no link with any of the parties to the treaty would universal jurisdiction be established.²¹⁷ During the preparatory work of the Institute of International Law for a resolution on universal jurisdiction, the same point was acknowledged by several of the Institute’s eminent members and in the text of a draft resolution.²¹⁸ However, this was omitted from the resolution ultimately adopted in 2005.²¹⁹ That Article 5(2) does not establish a principle of universal jurisdiction is further corroborated by the *travaux préparatoires*.

4. Article 5(2) CAT: Travaux Préparatoires

The interpretation of Article 5(2) of the CAT as placing an obligation on a Custodial State to establish its jurisdiction on behalf of Paragraph 1 States in cases of non-extradition, rather than establishing universal jurisdiction, is further supported by analysis of the text and *travaux préparatoires* of the CAT. The VCLT provides for a supplementary means of interpretation, by having recourse to the preparatory work of the treaty, in order to confirm the meaning resulting from the textual analysis.²²⁰ The only extent to which the ICJ is prepared to observe the *travaux préparatoires* of the CAT in the *Habré Case* is to note, in passing, that Article 7(1) of the instrument is modelled on the Suppression of Unlawful Seizure of Aircraft Convention.²²¹ This statement explains nothing as to the nature and meaning of the extradite or prosecute obligation under Article 7(1) or whether Article 5(2) embodies a customary rule of jurisdiction, no less a principle of universal jurisdiction. As the ICJ does not undertake a textual analysis of Article 5 or examine the CAT’s *travaux préparatoires*, the result is that the ICJ’s reference to “universal jurisdiction” is, to quote the wording of Article 32 of the VCLT, left “ambiguous or obscure.”²²²

The CAT’s *travaux préparatoires* show that jurisdiction in Article 5(2) should not be interpreted as embodying a customary rule of universal jurisdiction.²²³ One of the most controversial issues debated during the CAT’s

216. See *Arrest Warrant Case*, 2002 I.C.J. at 35, ¶ 9 (separate opinion by Guillaume, Pres.); Yee, *supra* note 8, ¶¶ 23–25.

217. See Yee, *supra* note 8, ¶ 25.

218. See Tomuschat, *supra* note 25, at 335, 386; *id.* at 270–71, 277 (response of Vicuna); *id.* at 318–19 (response of Rozakis); *id.* at 321 (response of Cassese); *id.* at 328 (response of Lee); see also *id.* at 363, 367.

219. See Inst. of Int’l Law, *supra* note 27.

220. VCLT, *supra* note 105, art. 32.

221. *Habré Case*, 2012 I.C.J. at 422, ¶ 90.

222. VCLT *supra* note 105, art. 32.

223. For in-depth analysis of the *travaux préparatoires*, see BURGERS & DANIELIUS, *supra* note 206; see also ACHENE BOULESBAA, THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT (1999).

drafting was the question of so-called “universal jurisdiction.”²²⁴ A close reading of the debates within the Working Group, which was established by the Human Rights Commission for the purpose of drawing up a draft convention, reveals that the extradite or prosecute obligation had first been used in a draft convention proposed by Sweden.²²⁵ The Swedish Government, in submitting the draft to the Human Rights Commission, uses the term “principle of universality” as nothing more than a loose but convenient way to describe jurisdiction in the obligation to extradite or prosecute. The obligation is understood by the Swedish Government to correspond with provisions in a number of existing conventions against various acts of international terrorism.²²⁶ As pointed out by Professors Burgers and Danelius, the representatives of the Netherlands and Sweden to the Human Rights Commission and, respectively, the Working Group Chairman and the draftsmen of the first draft of the convention, Article 5(2) is, “with some simplification, called ‘universal jurisdiction.’”²²⁷ Nevertheless, the Working Group used the Swedish draft as the basis of its work. The comments made by delegations participating in the Working Group, as well as the comments submitted by governments on the draft to the U.N. Secretary-General, illustrate that the nomenclature “universal jurisdiction” continues to be used in order to describe the extradite or prosecute obligation throughout the drafting of the CAT.²²⁸ Thus, it should be of little surprise that, in 1984, the Working Group Chairman reports that “[t]he inclusion of universal jurisdiction in the draft convention was no longer opposed by any delegation.”²²⁹

To accept at face value the Working Group’s reference to “universal jurisdiction,” other than as a non-technical term used to describe the extradite or prosecute obligation, as have some (including Belgium in the *Habré Case*),²³⁰

224. Comm’n on Human Rights, Rep. of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶¶ 26–36, U.N. Doc. E/CN.4/1984/72 (Mar. 9 1984) [hereinafter Rep. on Draft of CAT (1984)]; Comm’n on Human Rights, Rep. of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. E/CN.4/1983/L.2 (Feb. 28, 1983) [hereinafter Rep. on Draft of CAT (1983)]; Comm’n on Human Rights, Rep. of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶¶ 22–36, U.N. Doc. E/CN.4/1982/L.40 (1982) (reprinted in U.N. Doc. E/1982/12/Add.1 (1982)) [hereinafter Rep. on Draft of CAT (1982)]; Draft CAT (1981), *supra* note 206; Human Rights Rep. on Thirty-Seventh Session, *supra* note 206; Human Rights Rep. on Thirty-Sixth Session, *supra* note 206, ¶¶ 50–53; Draft CAT (1980), *supra* note 206; Secretary-General on Human Rights, *supra* note 206.

225. See Permanent Mission of Sweden to the U.N., Letter dated Jan. 18, 1978 from the Permanent Mission of Sweden to U.N. Office, Division of Human Rights, at 3, U.N. Doc. E/CN.4/1285 (Jan. 23, 1978).

226. See BURGERS & DANELIUS, *supra* note 206, at 35.

227. *Id.* at 58.

228. See Secretary-General on Human Rights, *supra* note 206; see also BOULEBSBAA, *supra* note 223, at 177–235.

229. Rep. on Draft of CAT (1984), *supra* note 224, ¶ 26.

230. R v. Bow St. Metro. Stipendiary Magistrate *ex parte* Pinochet Ugarte (No. 3) [2000] 1 AC (HL) 147, 196, 201 (Lord Browne-Wilkinson); Memorial of Belgium, *supra* note 72, at 51; Christopher K. Hall, *The Duty of States Parties to the Convention Against Torture to Provide Procedures Permitting Victims to*

risks attributing to Article 5(2) legal consequences that were not debated or intended.²³¹ It would have made little sense for delegations during the CAT’s drafting to negotiate and set out in Article 5(1) three narrow grounds of jurisdiction, only for Article 5(2)—a subsidiary paragraph—to establish an all-encompassing, obligatory principle of universal jurisdiction.²³² Had the drafters been convinced of the applicability of a principle of universal jurisdiction, then surely they would not have stressed such alternative grounds of jurisdiction. This conclusion is supported for three further reasons. First, the existence and legality of universal jurisdiction in customary international law, as well as the implications raised by expanding such a rule to include crimes proscribed in treaties, was not examined by the Working Group. This is corroborated by an explanatory memorandum on the ratification of the CAT presented during the 1986–1987 Session of the Dutch Parliament. In this memorandum, the Ministers of Justice and of Foreign Affairs of the Netherlands declared that the “very severe offenses” proscribed in the CAT “could not in themselves justify the application of the principle of universal jurisdiction to such offenses. Repression of these violations should be left to the States that had a tie with the person or the place where the crime was committed.”²³³ This declaration is all the more significant in that the Netherlands’ representative had been Chairman of the Working Group and one of the instrument’s draftsmen. Second, it is unlikely that the Working Group intended to codify a principle of jurisdiction whose meaning and definition, then as now, are controversial and little understood. Lastly, a number of states that participated in the drafting of Article 5(2) have subsequently confirmed that it was not intended to codify a principle of universal jurisdiction.²³⁴

On closer analysis, the reason why jurisdiction in the extradite or prosecute obligation is described as “universal jurisdiction” during the CAT’s drafting is because of an over-simplistic analogy between the absence of an express jurisdictional link in Article 5(2) and the belief of the existence of a

Recover Reparations for Torture Committed Abroad, 18 EUR. J. INT’L L. 921, 934 (2007); Langer, *supra* note 12, at 252.

231. See Reydams, *supra* note 8, at 20.

232. See *Habré Case*, 2012 I.C.J. at 471, ¶ 29 (separate opinion by Abraham, J.); see also *Habré Case*, Verbatim Record, 8, ¶ 41 (Mar. 21, 2012, 10 a.m.), <http://www.icj-cij.org/files/case-related/144/144-20120321-ORA-01-00-BI.pdf>; BOULEBSBAA, *supra* note 223, at 176, 204–05; David W. Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, 53 BRIT. Y.B. INT’L L. 1, 13 (1983); Higgins, *supra* note 8, at 99.

233. Int’l Comm. of the Red Cross, *Netherlands: Practice Relating to Rule 157. Jurisdiction over War Crimes* (2016), http://www.icrc.org/customary-ihl/eng/docs/v2_cou_nl_rule157.

234. See, e.g., Permanent Mission of U.K. to the U.N. Office of Legal Affairs, Scope and Application of the Principle of Universal Jurisdiction, Note No. 57/11 (Apr. 15, 2011), http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/UK&Northern%20Ireland.pdf; Government of the People’s Republic of China, Information from and Observations by China on the Scope and Application of the Principle of Universal Jurisdiction, at 3–4, 8–10 U.N. Doc. 15/19/10 (2010), http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/China_E.pdf [hereinafter U.N. Note on China] (Eng. trans.).

historical customary rule of universal jurisdiction over piracy. The U.S. delegation goes so far as to expressly state that torture is “like” piracy in order to justify the description “of an obligation to prosecute or extradite” as “universal jurisdiction.”²³⁵ It is worth noting that, prior to the drafting of the CAT, extradite or prosecute obligations had come to be loosely referred to as “universal jurisdiction” during the negotiation of other treaties based on the same piracy analogy.²³⁶ This issue becomes of great importance when one considers that the same analogy has been repeated, once again, during the work on universal jurisdiction at the Sixth Committee.²³⁷

C. Textual Analysis of Article 7(1) CAT Supports Prosecution on Behalf of Paragraph 1 States

Article 7 of the CAT provides for the extradite or prosecute obligation. The *travaux préparatoires* make clear that Articles 5(2) and 7 have to be read together because of their complementary nature.²³⁸ Article 7(1) reaffirms the Custodial State’s duty to submit a case for prosecution “if it does not extradite him” to any of the states “contemplated in article 5.” This wording in Article 7(1) is not examined by the ICJ in the *Habré Case*. The same point applies *mutatis mutandis* to Article 6(4), which provides that the Custodial State “shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention.” It immediately proceeds to note that “[t]he State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.” This would suggest that Paragraph 1 States have the right, upon being notified, to request extradition of the alleged offender, after the Custodial State has undertaken a “preliminary inquiry” but has not yet “exercised jurisdiction.”²³⁹ If the Custodial State fails to extradite the accused to a Paragraph 1 State, for whatever reason, then the Custodial State has a duty to exercise its jurisdiction and prosecute on their behalf. In a similar vein, Article 7(2) seeks to further safeguard the interests of Paragraph 1 States in the event of non-extradition. It provides that, in cases where state parties are operating on the basis of Article 5(2),

235. Secretary-General on Human Rights, *supra* note 206, ¶¶ 15, 69.

236. See *Arrest Warrant Case*, 2002 I.C.J. at 63, ¶¶ 25–39 (joint separate opinion by Higgins et al., JJ.); see also *Documents of the Twenty-Fourth Session Including the Report of the Commission to the General Assembly*, [1972] 2 Y.B. INT’L L. COMM’N, at 316, U.N. Doc. A/CN.4/SER.A/1972/Add.1; *Summary Records of the Twenty-Fourth Session*, [1972] 1 Y.B. INT’L L. COMM’N, at 7, 11–12, 17, 190, 193, U.N. Doc. A/CN.4/SER.A/1972.

237. E.g., Secretary-General Report (2015), *supra* note 16, ¶¶ 55, 82; U.N. Secretary-General, *The Scope and Application of the Principle of Universal Jurisdiction*, ¶ 13, U.N. Doc. A/69/174 (July 23, 2014); Secretary-General Report (2010), *supra* note 19, ¶ 27.

238. Rep. on Draft of CAT (1982), *supra* note 224, at 5; BURGERS & DANIELIUS, *supra* note 206, at 63, 72.

239. As noted in *supra* note 208, Article 5(2) of the CAT requires states to merely “establish” their jurisdiction but not to “exercise” it.

the evidence required for prosecution “shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.” As indicated by the *travaux préparatoires*, Article 7(2) was included due to the official status of the alleged offenders and the risk of “trials on the basis of spurious accusations inspired by political motives.”²⁴⁰

One of the issues raised during the drafting of Article 5(2) was the circumstances in which a Custodial State would have an obligation under Article 7 to prosecute on behalf of a Paragraph 1 State. One delegation proposed to add the words “after receiving a request for extradition,” after the words “and it does not extradite him,” the purpose of which was to limit the Custodial State’s obligation to establish its jurisdiction after receiving an extradition request by a Paragraph 1 State.²⁴¹ Other delegations opposed the proposed amendment, as it could facilitate the creation of loopholes.²⁴²

Treaties which do not make the obligation to prosecute conditional upon refusal of a prior request for extradition, such as the CAT, imply that states are required to exercise universal jurisdiction over the offenses covered by these conventions.²⁴³ This view also seems to be shared by the ICJ in the *Habré Case* when it suggests, obiter dictum, that the “obligation to establish universal jurisdiction” under Article 5(2) is a “necessary condition” for fulfilling the obligation to submit the case to its authorities for prosecution under Article 7(1).²⁴⁴ As will be explained, *infra*, the establishment of jurisdiction in Article 5(2) is necessary for fulfilling the obligation to initiate criminal proceedings under Article 7, failing extradition to a Paragraph 1 State, but this does not automatically imply that it is “universal jurisdiction.” However, the ICJ goes one step further and interprets the “nature and meaning” of the extradite or prosecute obligation under Article 7(1) in the following way.

In the ICJ’s opinion the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the state by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the state.²⁴⁵

In coming to the above finding, the ICJ reasons that only if the Custodial State has “received a request for extradition in any of the cases envisaged in the provisions of the Convention [under Article 5(1)], it can relieve itself of

240. BURGERS & DANIELIUS, *supra* note 206, at 79.

241. Human Rights Rep. on Thirty-Seventh Session, *supra* note 206, at 57; Draft CAT (1981), *supra* note 206, at 25; Human Rights Rep. on Thirty-Sixth Session, *supra* note 206, at 59; Draft CAT (1980), *supra* note 206, at 8–9.

242. *Id.*

243. This interpretation of extradite or prosecute obligations is shared by Belgium. See Int’l Law Comm’n, *supra* note 178, ¶ 22; see also Comm. Against Torture, *supra* note 126, ¶ 9.7.

244. *Habré Case*, 2012 I.C.J. at 422, ¶ 74.

245. *Id.* ¶ 95.

its obligation to prosecute by acceding to that request.”²⁴⁶ In reaching this finding, the ICJ seems to impliedly follow the earlier decision of the Committee Against Torture in a case involving Habré.²⁴⁷

With respect, the ICJ is incorrect in its approach to interpreting the “nature and meaning” of the extradite or prosecute obligation, which gives the impression that the Custodial State has a positive and absolute obligation under the CAT to prosecute any act of torture, which exists *ipso facto* and arises as soon as the suspect is present in its territory, regardless of any request for extradition by a Paragraph 1 State. Conversely, only when such a request is made (if a request is made at all) does the Custodial State have discretion to choose the option of an alternative course, namely extradition of the alleged offender to a Paragraph 1 State. According to the ICJ, interpreting the obligation to prosecute in Article 7(1) in this way is “intended to allow the fulfillment of the Convention’s object and purpose.”²⁴⁸ The ICJ thus interprets the nature and meaning of Article 7(1) in the same way as jurisdiction in Article 5(2) of the CAT, namely the protection of a “common interest” and not the interests of particular states parties.²⁴⁹ It will be recalled in Part II, subsection C that the ICJ interpreted the CAT’s object and purpose in this way according to a single preambular paragraph and in order to preserve the admissibility of Belgium’s claim.

The absolute “obligation” to prosecute and “option” of extradition do not reflect the actual text of Articles 5(2) and 7(1). The *travaux préparatoires* indicate that the absence of an extradition request was a compromise intended to place the burden on the Custodial State to offer extradition, rather than on a Paragraph 1 State to request extradition, thus making more effective the ability of the latter to obtain the whereabouts and custody of an accused seeking refuge overseas. It is for this reason that Article 5(2) makes the Custodial State’s duty “to establish its jurisdiction” conditional upon the failure to extradite to a Paragraph 1 State. Only after a Custodial State has “immediately notified” a Paragraph 1 State of an alleged offender’s presence in its territory, in accordance with Article 6, and the Custodial State subsequently fails, for whatever reason, to extradite the suspect to a Paragraph 1 State, does an obligation arise to submit the case for prosecution under Article 7(1). It follows that unless one of the parties “contemplated in Article 5” and having a jurisdictional link with an offense makes an extradition request (upon being notified by a Custodial State of his presence and the charges against him), then there is no international obligation for a Cus-

246. *Id.*

247. See Comm. Against Torture, *supra* note 126, ¶ 9.7. In this case, Senegal argued that there would be an obligation to prosecute under Article 7 of the CAT only after an extradition request had been made and refused, which the Committee rejected. The U.N. Secretariat also suggests that, on the basis of this decision, treaties utilizing the Hague formula give rise to an obligation to prosecute *ipso facto*, independent from any request for extradition. See Secretariat, *supra* note 31, ¶¶ 127–31.

248. *Habré Case*, 2012 I.C.J. at 422, ¶ 115.

249. See *supra* notes 88–98 and accompanying text.

todial State to actually exercise its jurisdiction under Article 5(2) and prosecute an alleged offender under Article 7(1). The ICJ glosses over the actual wording of these provisions.

Only by viewing parts of the text of Article 5(2) selectively and in isolation, as well as overlooking the relationship between that text and Articles 5(1), 6(4), and 7, can the ICJ’s interpretation of the obligation to extradite or prosecute be maintained. A textual analysis of Articles 5 and 7 of the CAT leads to the following propositions. First, extradition and prosecution are both international obligations under the CAT and, contrary to the ICJ, the obligation to prosecute only arises when the obligation to extradite to a Paragraph 1 State is not fulfilled. Second, the nature and meaning of the obligation to extradite or prosecute is not exclusively to protect a “common interest.” Rather, it is to enable Paragraph 1 States to obtain the custody of the accused, or have such persons prosecuted on their behalf, failing extradition.

In sum, the analysis of the text and *travaux préparatoires* of Articles 5 and 7 of the CAT points to the conclusion that the principle of universal jurisdiction does not fall within the CAT’s scope. Of course, treaties are living instruments and they may, through subsequent state practice, change to include universal jurisdiction.²⁵⁰ However, for reasons spelled out in the following section, there is insufficiently general and widespread practice to suggest a different outcome. The conditions attached to jurisdiction in Article 5(2) of the CAT and numerous other treaties that use extradite or prosecute obligations would suggest that it should be called something else other than “universal jurisdiction.”²⁵¹ The ordinary meaning of jurisdiction in Article 5(2), based on the above textual analysis, is capable of an alternative interpretation, namely a form of “treaty-based jurisdiction.”²⁵² Before examining various types of treaty-based jurisdiction, the following section presents the empirical findings of an in-depth analysis of actual state practice in respect of assertions of universal jurisdiction. It shows that universal jurisdiction is a hollow concept in customary international law and therefore it is false to read treaty obligations to extradite or prosecute as either permitting or mandating universal jurisdiction.

D. Universal Jurisdiction’s False Historical Foundations and Hollow Concept

1. Unproven Prevailing Narrative

There is a further reason why jurisdiction in treaty obligations to extradite or prosecute should not be interpreted to imply or mandate universal jurisdiction: as a prerequisite, this interpretation is dependent upon the presumed existence of a customary rule of universal jurisdiction and its applica-

250. VCLT, *supra* note 105, art. 31(3)(b).

251. Reydams, *supra* note 9, at 7, 16.

252. See *infra* notes 292–328 and accompanying text.

bility over a broad range of crimes, which can be analogized with jurisdiction contained in modern treaty obligations to extradite or prosecute. The basis for this analogy is two separate, interrelated grounds. First, the prescriptive jurisdiction arising out of treaty obligations to extradite or prosecute is not based on any recognized jurisdictional link with an offense at issue.²⁵³ Therefore, treaties themselves, by analogy, impliedly embody and even mandate the use of universal jurisdiction.²⁵⁴ Second, universal jurisdiction has deep historical roots in customary international law with regard to piracy and war crimes, which developed over these types of crimes because they are “heinous.” Therefore, universal jurisdiction may be expanded unilaterally by states to other crimes of an equally heinous nature, including crimes contained in treaties and regardless of their actual text.²⁵⁵ The heinous nature of crimes thus becomes the sole criterion for deciding whether or not universal jurisdiction exists over a particular crime. The analogy was alluded to by Judges Higgins et al. in the *Arrest Warrant* case.²⁵⁶ The judges state that it is “necessary that universal criminal jurisdiction be exercised only over those crimes regarded as the most heinous by the international community. Piracy is the classical example.”²⁵⁷ The judges propose obiter dictum that treaties which contain extradite or prosecute obligations “opens the door to a jurisdiction based on the heinous nature of the crime,” which they referred to as “perhaps a treaty-based provision for universal jurisdiction.”²⁵⁸

And yet, it will be recalled that universal jurisdiction’s long and honorable past is based on an unproven prevailing narrative, which developed prior to the *Habré Case*, and amounts to a distortion of history.²⁵⁹ The prevailing narrative is increasingly subject to question, which appears to have developed out of “a persistent reliance upon tentative secondary sources or the use of primary sources wholly out of context.”²⁶⁰ On closer analysis, universal jurisdiction is based on false foundations in customary international law and has developed—out of scholarship rather than state practice—as a hollow

253. Tomuschat, *supra* note 25; see also *supra* notes 120–135 and accompanying text.

254. See *supra* notes 120–135 and accompanying text.

255. The result of this view is manifestly absurd because states could simply override carefully negotiated treaty texts that either provide for extradite or prosecute obligations or make no provision for extraterritorial jurisdiction at all, such as the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. Treaty Doc. No. 81-1, 78 U.N.T.S. 277. It is also based on a misreading of the obiter dictum in S.S. “*Lotus*” (Fra. v. Turk.), Judgment, 1927 P.C.I.J. (Ser. A) No. 10, at 19 (Sept. 7).

256. *Arrest Warrant Case*, 2002 I.C.J. at 63 ¶¶ 60–61 (joint separate opinion by Higgins et al., JJ.); see also Polyukhovich v Commonwealth (1991) 172 CLR 501, 537–39 (Austl.); Atty Gen. of Isr. v. Eichmann, 36 I.L.R. 277, 290–300 (S. Ct. 1962) (Isr.); Atty Gen. of Isr. v. Eichmann, 36 I.L.R. 18, 26 (Dist. Ct. 1962) (Isr.); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶¶ 147–56 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

257. *Arrest Warrant Case*, 2002 I.C.J. at 63, ¶¶ 60–61 (joint separate opinion by Higgins et al., JJ.).

258. *Id.* ¶¶ 46, 61.

259. See *supra* notes 47–48 and accompanying text.

260. Garrod (2014), *supra* note 10, at 208 (quoted in Reydams, *supra* note 9, at 8).

concept.²⁶¹ Recent scholarship and case law also shows that the heinous nature of piracy has nothing to do with universal jurisdiction and is therefore incapable of providing a rationale for it; and by extension, it does not provide a valid precedent for universal jurisdiction over crimes other than piracy.²⁶² This finding has important implications for the extent of the existence of universal jurisdiction in customary international law as it stands today. Indeed, the uncertain and controversial status of universal jurisdiction in customary international law would suggest that a cautious approach is needed when reading treaty obligations to extradite or prosecute as either permitting or mandating universal jurisdiction.

2. *Existing Studies Confuse Treaty-Based Jurisdiction as “Universal Jurisdiction”*

Regardless of alleged historical sources, scholars and NGOs (and some governments and courts) have cited examples of more recent state practice to “prove” that universal jurisdiction exists at present.²⁶³ For example, to date the most comprehensive survey of state practice, “aimed at covering all universal jurisdiction cases on the core international crimes (genocide, crimes against humanity, war crimes, and torture) brought since the trial of Adolf Eichmann in 1961” to 2011, has been undertaken by Professor Langer.²⁶⁴ Professor Langer argues that during this period, and especially since the *Pinochet* case in the 1990s, universal jurisdiction has been on the rise, with states passing universal jurisdiction statutes and asserting such jurisdiction, resulting in thirty-two defendants being brought to trial.²⁶⁵ Professor Langer does not explain the number of states that have enacted universal jurisdiction statutes or examine examples of state practice in any detail, or their significance for establishing customary international law over particular crimes. Moreover, Professor Langer acknowledges the weakness of the argument that treaty obligations to extradite or prosecute provide a basis for universal jurisdiction and that the Rome Statute of the ICC does not authorize universal jurisdiction either.²⁶⁶ Nevertheless, Professor Langer clearly adopts universal jurisdiction’s prevailing narrative²⁶⁷ and presupposes that

261. See *id.*

262. See *United States v. Hasan*, 747 F. Supp. 2d 599, 611 (E.D. Va. 2010); Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundations*, 45 HARV. INT’L L.J. 183, 184–86 (2004); Tamsin Paige, *Piracy and Universal Jurisdiction*, 12 MACQUARIE L.J. 131, 135 (2013).

263. See, e.g., Dicker, *supra* note 125, at 235; Kaleck, *supra* note 111, at 958; Wolfgang Kaleck, *Universal Jurisdiction: It’s Back*, 102 AM. SOC’Y INT’L L. PROC. 397, 402 (2008); Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104 AM. J. INT’L L. 436 (2010); Langer, *supra* note 47, at 7–9; Nanda, *supra* note 111, at 398–400; Beth Van Schaack & Zarco Perovic, *The Prevalence of “Present-In” Jurisdiction*, 107 AM. SOC’Y INT’L L. PROC. 237, 241 (2013); Peter Weiss, *Universal Jurisdiction: Past, Present And Future*, 102 AM. SOC’Y INT’L L. PROC. 406, 407–08 (2008).

264. Langer, *supra* note 47 at 2; see also Van Schaack & Perovic, *supra* note 263, at 240 (citing Langer, *supra* note 47).

265. See Langer, *supra* note 47, at 3–4, 7–9.

266. See *id.* n. 281.

267. See *id.* at 13–14, nn. 50–57.

universal jurisdiction's existence in customary international law is beyond question and that treaties creating extradite or prosecute obligations and the ICC Statute provide a legal source of authority to assert universal jurisdiction.²⁶⁸ Therefore, all national laws and trials pursuant to such treaties are counted as examples of universal jurisdiction, even though the states concerned may not share the same view.²⁶⁹ Based on these findings, this leads Professor Langer to suggest, in a subsequent study, that "universal jurisdiction has been expanding, not decreasing in recent years; there have been more universal jurisdiction statutes and trials."²⁷⁰

A similar claim has been made in a major survey of state practice by Amnesty International,²⁷¹ prepared for the purpose of informing Sixth Committee discussions on universal jurisdiction, on whose surveys of state practice Langer partly relies.²⁷² The Amnesty survey counts states as having automatically provided for universal jurisdiction legislation if the state has implemented treaty obligations to extradite or prosecute (which according to Amnesty provide for an "express" obligation to exercise universal jurisdiction), but also treaties that do not provide for such obligations, such as the Genocide Convention and the Rome Statute of the ICC (which provide for an "implied" obligation to exercise universal jurisdiction).²⁷³ This leads Amnesty to conclude that 147 out of 193 states "have provided for universal jurisdiction" over one or more international crimes, while a total of 91 states have provided for such jurisdiction "over ordinary crimes, even when the conduct does not involve conduct amounting to a crime under international law."²⁷⁴ Moreover, since World War II to today, prosecutions based on universal jurisdiction have been instituted in twenty states.²⁷⁵

Problematically, by confusing examples of treaty-based jurisdiction as universal jurisdiction such studies as those presented above risk creating an inaccurate empirical picture because the degree of state practice in support of universal jurisdiction (and its importance as a tool for preventing impunity) are overstated.²⁷⁶ It also leads to such claims that universal jurisdiction is exercised almost exclusively by European and Western nations in respect

268. See *id.* at 4.

269. E.g., Permanent Mission of U.K. to the U.N. Office of Legal Affairs, *supra* note 234; see also Langer, *supra* note 47, at 4, 15, 25.

270. See also Langer, *supra* note 12, at 247–49.

271. See Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World—2012 Update*, 1–2, 12–21 (Oct. 2012), IOR 53/019/2012.

272. See Langer, *supra* note 47, nn. 2, 21.

273. See Amnesty International, *supra* note 271, at 7, 9, n. 19.

274. *Id.* at 12. The Amnesty survey further finds that an additional sixteen states "can exercise universal jurisdiction over conduct amounting to a crime under international law, but only as an ordinary crime [as defined in the state's domestic law]." *Id.*

275. *Id.* at 10, n. 23.

276. See *id.* at 13–15; Ryan Goodman, *Counting Universal Jurisdiction States: What's Wrong with Amnesty International's Numbers*, JUST SEC. (Dec. 13, 2013, 9:12 AM), <https://www.justsecurity.org/4581/amnesty-international-universal-jurisdiction-preliminary-survey-legislation-world/>; Van Schaack & Perovic, *supra* note 263, at 238–39.

of international crimes;²⁷⁷ universal jurisdiction is “alive and well” in customary international law²⁷⁸ and no longer a theoretical concept, but “widely exercised in many countries;”²⁷⁹ and that over 100 states provide for universal jurisdiction in their legislation, including in the implementation of treaty obligations to extradite or prosecute, which proves that such treaties support universal jurisdiction’s existence.²⁸⁰ A detailed empirical analysis of state practice from the end of World War II to the present confirms that universal jurisdiction remains a concept without state practice.

3. *Domestic Prosecutions for International Crimes: Empirical Analysis*

This Article makes an original contribution to existing scholarship by providing an empirical analysis of actual state practice (legislation of 78 states and actual trials purported to involve universal jurisdiction in domestic courts with respect to international crimes).²⁸¹ This analysis reveals that universal jurisdiction remains a hollow concept without state practice to the present day. The survey was conducted in the period between the *Eichmann* trial in 1961—a trial widely cited by scholars as the most important historical example of universal jurisdiction—to 2016.²⁸² The findings of this survey reveal that none of the states in the sample provide for universal jurisdiction in their national laws. The states that have actually asserted extraterritorial jurisdiction and undertaken prosecutions are presented in Table 1.

277. Kaleck, *supra* note 111, at 932; Kontorovich, *supra* note 262, at 437, 453; *see also* Nanda, *supra* note 111, Van Schaack & Perovic, *supra* note 263, at 241.

278. Nanda, *supra* note 111, at 401 (introductory remarks of Nanda).

279. *Id.* at 402 (remarks of Kaleck); *see also* Kaleck, *supra* note 111, at 931.

280. Nanda, *supra* note 111, at 398 (introductory remarks of Nanda); *id.* at 401 (remarks of Hall); *see also* RESTATEMENT (FOURTH), *supra* note 12, at 56–57; Dicker, *supra* note 125, at 233.

281. These states are as follows: Algeria, Argentina, Australia, Austria, Bahamas, Bahrain, Bangladesh, Belarus, Belgium, Brazil, Bulgaria, Canada, China, Costa Rica, Cuba, Cyprus, Czech Republic, Denmark, Republic of the Congo, Egypt, El Salvador, Finland, France, Germany, Ghana, Greece, Guatemala, India, Indonesia, Iran, Ireland, Israel, Italy, Jamaica, Japan, Kenya, Kazakhstan, Kuwait, Lebanon, Libya, Liechtenstein, Malawi, Malaysia, Mauritius, Mexico, Morocco, New Zealand, Nigeria, Norway, Peru, Poland, Qatar, Republic of Korea, Russia, Slovakia, Senegal, Seychelles, Singapore, Spain, Slovenia, Swaziland, Saudi Arabia, South Africa, Sri Lanka, Sudan, Sweden, Switzerland, Tanzania, Thailand, The Netherlands, Tunisia, Turkey, United Arab Emirates, Ukraine, Uganda, United Kingdom, United States, Vietnam, and Zambia.

282. The survey was undertaken by the present author by examining a range of sources, including: U.N. General Assembly and its Sixth Committee documents evaluating universal jurisdiction; LEXIS-NEXIS and Westlaw; specialized journals; websites, such as Legislationline and The Hague Justice Portal; NGO reports, such as Amnesty International, Human Rights Watch, Redress and Trial Watch; newspaper articles and other media documents; and the Google search engine. The survey was compiled as of May 2016.

TABLE 1. INTERNATIONAL CRIMES PROSECUTIONS

| Prosecuting state | Number of trials | Nationality (number of suspects) |
|--------------------------|------------------|---|
| Austria | 1 | Former Yugoslav (1) |
| Belgium | 4 | Rwandan (8) |
| Canada | 2 | Former Nazi (1) Rwandan (1) |
| Denmark | 1 | Former Yugoslav (1) |
| France | 5 | Former Nazi (1) Mauritanian (1) Tunisian (1) Rwandan (3) |
| Germany | 6 | Former Nazi (1) Former Yugoslav (4) Rwandan (2) |
| Israel | 1 | Former Nazi (1) |
| The Netherlands | 6 | Afghans (3) Congolese (1) Rwandan (2) Surinamese (1) |
| Norway | 1 | Former Yugoslav (1) |
| Spain | 1 | Argentinian (1) |
| Switzerland | 2 | Former Yugoslav (1) Rwandan (1) |
| Senegal | 1 | Chadian (1) |
| U.K. | 3 | Former Nazi (1) Afghan (1) Nepalese (1) |
| Total (13 states) | 34 trials | 41 suspects |

The results of this empirical research, as Table 1 shows, is a total of thirty-four trials in thirteen states.²⁸³ On the basis of Table 1, it is possible to identify a typology of three situations in which states undertake extraterritorial jurisdiction prosecutions: (i) World War II (five trials); (ii) treaty obligations to extradite or prosecute (ten trials); and (iii) internal armed conflicts in the territories of the Former Yugoslavia and Rwanda (nineteen trials). All of these situations actually involve the implementation of different types of treaty-based jurisdiction, in which there are sufficiently close connections to the prosecuting state or to one of its treaty partners, and are

283. The term "former Nazi" is used to denote the fact that suspects were prosecuted for alleged crimes committed in the context of World War II on behalf of the Nazi regime.

not examples of universal jurisdiction.²⁸⁴ In a similar vein, national laws, enacted to give effect to these treaty regimes, provide for treaty-based rather than universal jurisdiction.²⁸⁵ These findings are reflective of the work on universal jurisdiction at the Sixth Committee, which reveals that most states accept the existence of a customary rule of universal jurisdiction in their *opinio juris* and verbal practice. However, with the exception of piracy on the high seas, much of this is far from uniform and, on closer analysis, is really support for treaty-based types of jurisdiction.²⁸⁶ Evidence of actual state practice in support of universal jurisdiction proper in customary international law is nonexistent.²⁸⁷ Therefore, the idea that extradite or prosecute obligations can be read as impliedly embodying or mandating the use of universal jurisdiction because it is well established in customary international law, regardless of the actual treaty text, is premised on false analogies.²⁸⁸

The findings of existing studies on universal jurisdiction, identified above in subsection 1, include the cases in Table 1 to prove that universal jurisdiction exists. However, this is incorrect because in each of the cases identified in Table 1, a “clear and objective link existed with the forum state” and none of them provide proper examples of universal jurisdiction.²⁸⁹ That is to say, despite the *opinio juris* and verbal practice of all 13 states in Table 1 being in favor of universal jurisdiction, the prosecution of international crimes on the basis of universal jurisdiction *stricto sensu* has turned out to be non-existent. Put differently, the actual practice of these states shows that at no time has a state been willing to act as an “agent of the international community” and prosecute any crime committed anywhere in the world, whoever their authors and victims, for the exclusive protection of international community values. On the contrary, the data reveals that states (including those states invoking “universal jurisdiction”) only undertake prosecutions when jurisdiction has a treaty basis and they have a sufficiently

284. See *infra* Part V. For case studies illustrating these different types of treaty-based jurisdiction, see *infra* notes 343–422 and accompanying text.

285. This includes national laws implementing the Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter “Rome Statute”], which establishes a mandatory treaty regime of extradition if there is a failure to prosecute an alleged offender present in a state party’s territory, pursuant to the principle of complementarity.

286. See *infra* Part V; see also *infra* notes 343–424 and accompanying text.

287. Notably, during proceedings in the *Habré Case*, in response to a question put by Judge Greenwood, Belgium endeavored to show that a customary rule of universal jurisdiction exists over war crimes, crimes against humanity, and genocide. This is of great importance because states rarely attempt to explain themselves by evidencing the existence of customary rules. To quote the words of Judge Abraham, Belgium “fell far short of doing so.” See *Habré Case*, 2012 I.C.J. at 471, ¶ 33 (separate opinion by Abraham, J.); Reply of the Kingdom of Belgium to the Question Put by Judge Greenwood, *Habré Case* (Mar. 28, 2012), <http://www.icj-cij.org/files/case-related/144/17644.pdf>.

288. Reydamas, *supra* note 9, at 7–8.

289. See Reydamas, *supra* note 9, at 14–16; see also U.N. GAOR, 70th Sess., 12th mtg., *supra* note 18, ¶ 109 (China); Van Schaack & Perovic, *supra* note 263, at 240; Yee, *supra* note 8, ¶¶ 30–31, 42.

close link with the crime in question. It is the meaning of treaty-based jurisdiction to which this Article will now turn.

V. TREATY JURISDICTION IS THE ACTUAL BASIS OF JURISDICTION

This Part argues that only treaty-based jurisdiction exists in the CAT and other treaties creating extradite or prosecute obligations and analyzes key case studies, based on the empirical findings in Table 1, in order to show that common examples of universal jurisdiction state practice are actually better explained as different types of treaty-based jurisdiction. The case studies illustrating these different types of treaty-based jurisdiction are: prosecutions relating to World War II, prosecutions with a treaty's support, prosecution of a resident who cannot be extradited, and prosecution under a general treaty. Before examining these case studies, this Part begins by proposing a definition of treaty-based jurisdiction and explaining its underlying rationale, in order to show the difference between this type of jurisdiction and universal jurisdiction.

A. *Only Treaty-Based Jurisdiction Exists in Extradite or Prosecute Obligations*

The jurisdiction implementing the extradite or prosecute obligation in Article 5(2) of the CAT, as with all other treaties providing for such regimes, does not expressly require proof of a link between a Custodial State and an offense committed by a foreign national abroad (other than the presence of the accused and treaty obligation to exercise jurisdiction). This lack of required proof is not because it establishes a principle of universal jurisdiction but because the CAT does not, in fact, contain a principle of jurisdiction in customary international law at all. The territoriality and nationality principles have long been regarded as primary grounds of jurisdiction in international law.²⁹⁰ The pre-eminence of territoriality and nationality jurisdiction is reflected in the CAT's provisions and numerous other treaties that use the Hague formula, both of which are mandatory, and are used in parallel to extradite or prosecute provisions.²⁹¹

In the CAT, the furthest some states were prepared to accept jurisdiction over a relevant offense committed by a foreign national abroad is, by virtue of Article 5(1)(c), when the victim is a state's national.²⁹² This jurisdiction is voluntary and not obligatory. In other treaties, many adopted in response to international terrorism, states have been prepared to provide the same type of jurisdiction, on a voluntary basis, over particular serious offenses committed by foreign nationals abroad where it is necessary to protect their own

290. See S.S. "Lotus" (Fra. v. Turk.), Judgment, 1927 P.C.I.J. (Ser. A) No. 10, at 18–19 (Sep. 7); *Arrest Warrant Case*, 2002 I.C.J. at 35, ¶¶ 2–4 (separate opinion by Guillaume, Pres.).

291. CAT, *supra* note 3, art. 5(1)(a), (b). For a list of treaties providing for mandatory territoriality and nationality jurisdiction, see Secretariat, *supra* note 31, ¶ 112.

292. See *supra* notes 203–205 and accompanying text.

vital national interests.²⁹³ Offenses committed against or implicating the state’s sovereignty, political independence, national security and governmental functions,²⁹⁴ against diplomatic personnel and any other person who enjoys status as an internationally protected person and exercises functions on behalf of that state,²⁹⁵ against embassies, diplomatic and consular premises and government facilities,²⁹⁶ against nationals,²⁹⁷ and against registered and government operated flag vessels and aircraft could fall in this category.²⁹⁸

Based on the foregoing and the textual analysis in Part IV, the jurisdiction arising out of extradite or prosecute obligations may be better understood as a type of treaty-based jurisdiction. The interpretation offered here has received some judicial sanction by Judges Higgins et al. in the *Arrest Warrant*.²⁹⁹ The judges in that case study the provisions of certain important treaties (including the CAT), the adoption of which, they observe, is asserted in existing scholarship to “evidence universality as a ground for the exercise of jurisdiction recognized in international law.” They conclude that such treaties do not, in fact, provide for universal jurisdiction.³⁰⁰ The judges explain that the parties to these treaties agree to grounds of jurisdiction providing important links with the prescribing state. In addition to these grounds of jurisdiction, there are “parallel provisions whereby a State party in whose jurisdiction the alleged perpetrator of such offenses is found shall prosecute him or extradite him.”³⁰¹

The “parallel provisions” referred to in the passage quoted above is jurisdiction arising out of treaty obligations to extradite or prosecute. According to the judges, “[b]y the loose use of language the latter has come to be

293. For a list of treaties providing for extraterritorial jurisdiction on a voluntary basis, see Secretariat, *supra* note 31, ¶ 112.

294. See, e.g., International Convention for the Suppression of Acts of Nuclear Terrorism art. 9(2)(d), Apr. 13, 2005, S. Treaty Doc. No. 110–4, 2445 U.N.T.S. 89 [hereinafter Nuclear Convention]; Financing Convention, *supra* note 35, art. 7(2)(a) & (c); Terrorist Bombings Convention, *supra* note 17, art. 6(2)(d); International Convention Against the Taking of Hostages art. 5(1)(c), Dec. 17, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S. 205 [hereinafter Hostages Convention].

295. See, e.g., Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Areas art. 3(1)(c), Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

296. See, e.g., Nuclear Convention, *supra* note 294, art. 9(2)(b); Financing Convention, *supra* note 35, art. 7(2)(b); Terrorist Bombings Convention, *supra* note 17, art. 6(2)(b).

297. See, e.g., Nuclear Convention, *supra* note 294, art. 9(2)(a); Financing Convention, *supra* note 35, art. 7(2)(a); Terrorist Bombings Convention, *supra* note 17, art. 6(2)(a); Hostages Convention, *supra* note 294, art. 5(1)(d).

298. See, e.g., Nuclear Convention, *supra* note 294, art. 9(2)(e); Financing Convention, *supra* note 35, art. 7(2)(e); Seizure of Aircraft Convention, *supra* note 33, art. 4(1)(a).

299. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 4, 63, ¶¶ 21–45 (Feb. 14) (joint separate opinion by Higgins et al., JJ.); see also Yousef, *supra* note 6, ¶¶ 94–96.

300. *Arrest Warrant Case*, 2002 I.C.J. at 63, ¶¶ 25–26, 41 (joint separate opinion by Higgins et al., JJ.). The same conclusion is reached by Judge Guillaume, see *id.* at 35 ¶¶ 7–15 (separate opinion by Guillaume, Pres.).

301. *Id.* at 63, ¶ 41 (joint separate opinion by Higgins et al., JJ.).

referred to as ‘universal jurisdiction’, though this is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.”³⁰² While the judges were right to suggest that such jurisdiction has been “inaccurately termed” as a principle of “universal jurisdiction,” they referred to this treaty-based jurisdiction as “obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.”³⁰³ It is somewhat misleading to conceptualize this jurisdiction as “territorial jurisdiction.”³⁰⁴ It is not possible to found this extraterritorial prescriptive jurisdiction on the principle of territoriality simply because the alleged offender subsequently enters the territory of the prescribing state.³⁰⁵ As discussed above, the presence of the accused triggers the Custodial State’s obligation to enforce its jurisdiction and to extradite or prosecute. The enforcement of jurisdiction, which is strictly territorial, is distinct from jurisdiction to prescribe, which is extraterritorial.³⁰⁶ Only by the use of legal fiction would the “obligatory territorial jurisdiction” described by the judges perhaps make sense.

The above interpretation of treaty-based jurisdiction has also found some support in scholarship.³⁰⁷ Professor Yee highlights the difficulty of evaluating jurisdiction in treaties containing extradite or prosecute obligations due to “[o]ver-exaggerated statements expressing support for universal jurisdiction” in existing scholarship and “the controversy surrounding what constitutes universal jurisdiction, properly so called.”³⁰⁸ Having undertaken a careful examination of treaty practice, Professor Yee argues that there is no support for the claim that such treaties embody the existence of universal jurisdiction.³⁰⁹ This is because treaties either require that crimes have links to some parties to a particular treaty regime (as in the case of treaties that use the Hague formula, such as the CAT) or else a treaty permission or obligation to exercise jurisdiction and the presence of the suspect are required (such as the 1949 Geneva Conventions).³¹⁰ For Professor Yee, neither of these situations arising out of treaty practice can be properly called “universal jurisdiction.”³¹¹ The latter is based solely on the “universal concern” over the crime, such that “every state in the world has an interest in prosecuting the perpetrator,” and the absence of any jurisdictional link between the prosecuting state and the crime at issue.³¹²

302. *Id.*

303. *Id.* ¶¶ 41–42, 44; *see also* Yee, *supra* note 8, ¶ 8.

304. O’Keefe, *supra* note 26, at 742, 755.

305. *Id.*

306. *See* Int’l Law Comm’n, *supra* note 21, ¶ 9.

307. *See* Higgins, *supra* note 8, at 99; Murphy, *supra* note 6, ¶¶ 109–16; *see also* Reydams, *supra* note 8, at 14–21.

308. Yee, *supra* note 8, ¶¶ 14–15.

309. *See id.* ¶ 17.

310. *See id.* ¶¶ 15–28.

311. *See id.* ¶¶ 8, 28.

312. *Id.* ¶ 4; *see also id.* ¶¶ 7–8.

This leaves open the question the type of jurisdiction used to implement extradite or prosecute obligations. According to Professor Yee, extradite or prosecute is a “means of exercising jurisdiction; it is not jurisdiction itself.”³¹³ For Professor Yee, the obligation to extradite or prosecute does not necessarily lead to the finding of a particular ground of jurisdiction itself and may lead to the utilization of “all the possible kinds.”³¹⁴ Therefore, the “pivotal point” is to identify which type of jurisdiction (existing in customary international law and stipulated by the relevant treaty regime) the obligation is used to implement, such as territoriality, nationality or protection of vital national interests.³¹⁵ The present Article departs from Professor Yee and, as will be explained, concludes that the treaty-based jurisdiction arising out of extradite or prosecute obligations exists independently and may be distinguished in important ways from principles of jurisdiction in customary international law.

B. *Treaty-Based Jurisdiction: Defining the Basic Concept*

Treaty-based jurisdiction, it is proposed, may be defined as the permission under international law to establish jurisdiction over a relevant treaty-offense committed abroad, including by the nationals of another party to the treaty regime, in the absence of any other lawfully accepted jurisdictional link to the prescribing state at the time of the relevant conduct. As treaty-based jurisdiction implements extradite or prosecute obligations, many treaties, including treaties utilizing the Hague formula, do not require proof of a special jurisdictional link between the relevant offense and the prescribing state. Accordingly, national legislation, enacted to give effect to these treaties, usually makes no mention of the necessity of such links either. Conversely, treaty-based jurisdiction has two requirements insofar as jurisdiction to prescribe is concerned, both of which serve to limit the scope and application of this type of jurisdiction. First, this jurisdiction envisages and expressly requires the presence of the alleged offender in the territory of the prescribing state.³¹⁶ For example, it will be recalled from the textual analysis of Article 5(2) of the CAT that the common wording used in the Hague formula provides that a party shall “establish its jurisdiction over such offenses in the case where the alleged offender is present in any territory under its jurisdiction”³¹⁷ Second, the alleged offender must not be extradited. In the words commonly used in the Hague formula, the prescribing state’s jurisdiction applies “if it does not extradite him.”³¹⁸ Equally, national legis-

313. *Id.* ¶ 17.

314. *Id.*

315. *Id.* ¶ 18; *see also id.* ¶ 17.

316. *See Arrest Warrant Case*, 2002 I.C.J. at 35, ¶¶ 9, 15 (separate opinion by Guillaume, Pres.); *id.* at 63, ¶ 57 (joint separate opinion by Higgins et al., JJ.).

317. *See* Section I.C; Section IV.B.

318. CAT, *supra* note 3, art. 5(2).

lation giving effect to these treaties often make mention of the necessity of the subsequent presence of the accused in the prescribing state's territory and of the suspect not being extradited.

The establishment of treaty-based jurisdiction (and its enforcement) is mandatory in situations where there is an obligation to prosecute alleged offenders who are present in the prescribing state's territory and, for whatever reason, are not extradited to another relevant jurisdiction with a link to the offense, either in the form of a state party or, for example, an ad hoc international³¹⁹ or regional³²⁰ criminal tribunal or a permanent international criminal tribunal in the case of the ICC.³²¹

There are various forms of treaty-based jurisdiction and it is not confined to treaties creating extradite or prosecute obligations. For example, such jurisdiction may arise from an agreement between states, such as the agreement between allied powers at the end of World War II to prosecute international crimes committed by persons belonging to a "common enemy."³²² Treaty-based jurisdiction may also arise out of binding U.N. Security Council resolutions in response to specific situations, with the U.N. Charter as the ultimate source of legal authority,³²³ as well as out of the Rome Statute of the ICC under the principle of complementarity.³²⁴

C. *Treaty-Based Jurisdiction Distinguished from Grounds of Jurisdiction in Custom*

Contrary to the opinion of Professor Yee, treaty-based jurisdiction differs from principles of jurisdiction in customary international law in at least two important respects. First, the treaty itself provides a sufficient basis in international law for asserting extraterritorial jurisdiction and *ipso facto* creates important links between the Custodial State and a relevant treaty offense occurring abroad. As such jurisdiction is based on treaty and limited to the treaty context, unlike with principles of jurisdiction under general international law, no further evidence of a special link between the prescribing state and the crime in issue is needed.³²⁵ In fact, a party would be unable to fulfil its contractual obligations if treaty-based jurisdiction required specific links with a Custodial State to be proven. Although further proof of such a link may be irrelevant, this is not "universal jurisdiction;" that is, treaty-based

319. See *infra* notes 397–402 and accompanying text.

320. In the wake of the *Habré Case*, Senegal concluded an agreement with the African Union to prosecute Habré in a newly established "Extraordinary African Chambers" in order to implement the extradite or prosecute obligation in the CAT. See Agreement Between the Government of the Republic of Senegal and the African Union on the Establishment of Extraordinary African Chambers Within the Senegalese Judicial System, Sen.-AU., Aug. 22, 2012.

321. See Rome Statute, *supra* note 285, art. 17.

322. *Infra* note 345.

323. See *infra* note 397.

324. See Rome Statute, *supra* note 285, art. 17.

325. See U.N. Note on China, *supra* note 234, ¶ 6.

jurisdiction is not the competence of *any* state to prosecute crimes, based on the gravity of the crime alone and for the protection of international community values, in the absence of *any* link at all with the state. States parties to a treaty regime agree to the use of treaty-based jurisdiction but not to universal jurisdiction. Second, treaty-based jurisdiction is obligatory (and not merely permissive), the exercise of which is triggered by the presence of the accused and the failure to extradite to another party to the treaty regime. Thus, treaty-based jurisdiction applies *inter partes* in order to enable a Custodial State to perform its contractual obligations *vis-a-vis* Paragraph 1 States (and to protect the latter’s national vital interests implicated by an alleged offense).³²⁶ The enforcement of this treaty-based jurisdiction by states parties on each other’s behalf, where extradition is not forthcoming, is precisely the reason why extradite or prosecute obligations are triggered only upon the accused’s presence in the territory of a state party.

For example, during the proceedings of the *Habré Case*, Eric David, one of the Counsel and Advocates of Belgium, asserted in response to Senegal’s refusal to extradite Habré to Belgium that, “[f]or Senegal, it is not so much a question of exercising universal jurisdiction as one of performing its obligations to prosecute or, failing that, to extradite” to Belgium.³²⁷ David continued: “[t]herefore, it matters little how we characterize the jurisdiction that Belgium is asking Senegal to exercise: what matters is that it exercises that jurisdiction.”³²⁸

D. *Rationale of Treaty-Based Jurisdiction*

The purpose of treaty-based jurisdiction is to implement extradite or prosecute obligations. Although extradite or prosecute obligations have been included in numerous treaties with diverse variations,³²⁹ a common feature in the relevant provisions is the concept’s *raison d’être*; that is, to prevent impunity by enabling states parties to a particular treaty regime that have a link with an alleged offense to apprehend and prosecute the accused, or else have a prosecution undertaken on their behalf by the Custodial State in whose territory the accused has taken refuge. Contrary to the ICJ’s opinion in the *Habré Case*, the reason why states prevent impunity is not for the exclusive protection of a “common interest.”³³⁰ It is because treaty crimes implicate and may even be injurious to certain of their own national vital

326. See *Arrest Warrant Case*, 2002 I.C.J. at 63, ¶¶ 21–22 (separate opinion by Higgins, et al., JJ.); *id.* at 35, ¶¶ 7–15 (separate opinion by Guillaume, Pres.); *id.* ¶ 7 (declaration by Ranjeva, J.); Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), Provisional Measures, 1992 I.C.J. 3, ¶¶ 1–3 (Apr. 14) (declaration by Evensen, J.) [hereinafter *Lockerbie*]; Secretary-General Report (2010), *supra* note 19, ¶ 20; Yee, *supra* note 8, at 512–19.

327. *Habré Case*, Verbatim Record, *supra* note 180, ¶ 28.

328. *Id.* ¶ 30.

329. See Secretariat Survey, *supra* note 31.

330. See *Habré Case*, 2012 I.C.J. at 422, ¶¶ 68, 74.

interests, as exemplified by the relevant treaty provisions.³³¹ The underlying rationale of treaty-based jurisdiction therefore seems to be the reciprocal protection of national vital interests. The pragmatic and mutually beneficial nature of the obligation, by enabling an “injured” state to have offenders surrendered for prosecution, or punished on its behalf by the Custodial State failing extradition, is precisely the reason why Grotius first referred to the obligation in the early seventeenth century.³³²

The CAT’s *travaux préparatoires* indicate that the rationale for including the extradite or prosecute obligation is to make the instrument more effective by enabling Paragraph 1 States, primarily under the principles of territoriality and nationality jurisdiction, to obtain custody of the accused by placing a duty on the Custodial State to extradite. It was understood that the use of the obligation would mean that in “the frequent situations where a regime under which torture was practiced is overthrown, and the new regime in the country is anxious to bring the torturers to justice, it would be more difficult for the perpetrators to escape the consequences of their acts by fleeing to another country.”³³³ To that end, there was support among the Working Group that “an alleged offender should normally be tried by the State in whose territory the offense is committed.”³³⁴ There was an assumption that a Paragraph 1 State, particularly the state in whose territory the crime had occurred or whose national had committed the crime abroad, would normally exercise its jurisdiction over an alleged offense and remove the immunity of their own officials (as opposed to any other state party). This may explain the reason why delegations during the negotiation of Article 5(2) gave no consideration, failing extradition by a Custodial State, to the issues raised by the removal of the immunity of state officials from the criminal jurisdiction of foreign states. It may equally explain the inherent conflict in the CAT between such immunity and the requirement that alleged offenders act in an official capacity. The latter dilemma did not come to the fore before a national court until more than a decade after the CAT had come into force in *Pinochet*.³³⁵

On the other hand, during the drafting of the CAT, delegates recognized that extradition, as a sovereign act, is not an absolute obligation.³³⁶ Accordingly, the Custodial State, by failing to extradite the accused to a Paragraph 1 State, has an obligation to establish its jurisdiction on their behalf, in order to prevent the latter from becoming an “injured State” within the

331. See *supra* notes 294–298.

332. Garrod (2012), *supra* note 10, at 812; see also Int’l Law Comm’n, *supra* note 143, annex, ¶ 2; Galicki (2006), *supra* note 146, ¶¶ 5, 8; Reydamas, *supra* note 8, at 10–14.

333. BURGERS & DANIELIUS, *supra* note 206, at 58, 131; see also *Human Rights of All Persons*, *supra* note 206, ¶ 15.

334. Comm’n on Human Rights, Rep. on the Work of Its Thirty-Seventh Session, U.N. Doc. E/1981/25, at 58 (1981); see also Draft CAT (1981), *supra* note 206, at 8; Human Rights Rep. on Thirty-Seventh Session, *supra* note 206, at 8.

335. See Nanda, *supra* note 111.

336. See Rep. on Draft of CAT (1984), *supra* note 224, at 6.

meaning of Article 42 of the Articles on State Responsibility.³³⁷ The ever-present possibility that extradition may not be forthcoming is precisely the reason for the mandatory treaty-based jurisdiction arising out of the extradite or prosecute obligation and its inclusion in Article 5(2) of the CAT.³³⁸ The above interpretation was envisaged by De Visscher in 1926, long before the obligation to extradite or prosecute was included in modern treaties, during the effort of the League of Nations to codify extraterritorial criminal jurisdiction and extradition.³³⁹

There is nothing in the CAT or any other treaty providing for extradite or prosecute obligations that creates a hierarchy of jurisdiction. Therefore, a Custodial State, in addition to being required to protect the national vital interests of other states parties in cases of non-extradition, is able to assert treaty-based jurisdiction in cases where crimes threaten or implicate its own national vital interests. In such a situation, the Custodial State has the ability to assert broad extraterritorial jurisdiction without the burden of having to rely on one of the narrower grounds of jurisdiction specified in the relevant treaty regime, which would otherwise require evidence of a link with the alleged offense or offender. All that has to be proven by the Custodial State is the accused’s presence and the failure to extradite to another party. The wording of Article 5(2) of the CAT does not limit such an interpretation of treaty-based jurisdiction; and, indeed, it reflects the way in which the CAT and other treaties have been implemented in state practice.³⁴⁰

There is little doubt that universal jurisdiction and the treaty-based jurisdiction contained in extradite or prosecute obligations both have the purpose of preventing impunity. However, the latter’s rationale is to prevent the impunity of crimes that have important links with one or more states parties to the particular treaty regime. In that regard, the Custodial State prosecutes the offense on behalf of a state that has such a link, and not solely as an agent of the international community. There is no evidence to suggest, either by virtue of the operative provisions of such treaties or based on the way in which they have been implemented *in concreto*, that they are concerned with the exclusive protection of international community values.³⁴¹ Of

337. See Yee, *supra* note 8, ¶ 21.

338. See *United States v. Yousef*, 327 F.3d 56, at 94–96, 108–11 (2d Cir. 2003).

339. See James L. Brierly & Charles de Visscher, *Report of the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law*, 20 AM. J. INT’L L. 253, ¶ 2 (Supp. 1926).

340. See, e.g., *Yousef*, 327 F.3d at 94–96 (2d Cir. 2003); *Ould Dah v. France*, 48 Eur. Ct. H.R. 884 (2009); see also *United States v. Bout*, 731 F.3d 233 (2d Cir. 2013); *United States v. Ahmed*, No. 10 CR. 131 (PKC), 2011 U.S. Dist. LEXIS 123182, at *4–5 (S.D.N.Y. Oct. 21, 2011); *United States v. Yousef*, No. S3 08 Cr. 1213 (JFK), 2010 WL 3377499 (S.D.N.Y. Aug. 23, 2010); *United States v. Shi*, 396 F. Supp. 2d 1132 (D. Haw. 2005), *aff’d* 525 F.3d 709 (9th Cir. 2008); *United States v. Yunis*, 924 F.2d 1086, 1092 (D.C. Cir. 1991); *S v. Okab* (SS94/2011) [2013] ZAGPJHC 6 (S. Afr.); *R v. Zardad* (High Court, Jul. 19, 2005) (Eng.) (no written judgment available); *Lockerbie*, 1992 I.C.J. 3 (Apr. 14); John De Pue, *Extraterritorial Jurisdiction and the Federal Material Support Statutes*, 62 U.S. ATT’YS’ BULL. 16, 16–17 (2014); Murphy, *supra* note 6, ¶¶ 110–11.

341. See sources cited *supra* note 29.

course, treaties that contain crimes under international law and protect human rights in time of peace or armed conflict (such as the 1949 Geneva Conventions and CAT) mean that states, in implementing extradite or prosecute obligations, may also protect, either indirectly or incidentally, some of the same international community values as the principle of universal jurisdiction. As a prerequisite, the types of international community values falling within universal jurisdiction's scope require agreement among states. The extent to which extradite or prosecute obligations protect the same values as universal jurisdiction, which is far from clear, does not warrant treating the two concepts as one and the same.³⁴²

The interpretation of treaty-based jurisdiction arising out of extradite or prosecute obligations and its underlying rationale is not only consistent with the facts of the *Habré Case* but is supported by the few examples of the way in which treaty obligations have been implemented and state practice with regard to international crimes generally.

E. *Typology of Treaty-Based Jurisdiction: Case Studies*

Informed by the empirical findings in table 1, this final section analyzes key case studies which show that common examples of universal jurisdiction state practice are actually better explained as different types of treaty-based jurisdiction. The types of treaty-based jurisdiction considered are prosecutions relating to World War II, prosecutions with a treaty's support, prosecution of a resident who cannot be extradited, and prosecution under a general treaty.

1. *Historical Prosecutions Relating to World War II*

The first typology concerns crimes committed during the period of World War II, all of which are context specific and were tried *ex-post facto*. All of these trials stem from landmark treaties concluded by allied powers at the end of the war, which determine the types of conduct deemed to be criminalized under international law, including "war crimes," and limit jurisdiction to such crimes to the period of the war in which they were engaged, by persons belonging to a "common enemy," that were injurious to allied states and their nationals.³⁴³ These trials have been almost unanimously claimed by scholars as evidence of universal jurisdiction, with *Eichmann* being cited more than any other.³⁴⁴ And yet, it has been overlooked

342. The latter point is further illustrated by the Rome Statute, *supra* note 285, pmb. arts. 13, 17. *But see* Nat'l Comm'r of the S. Afr. Police Serv. v. S. African Human Rights Litig. Ctr., 2014 (2) SA 42 (SCA), ¶¶ 39–56 (holding that under customary international law, universal jurisdiction has developed, including in respect to torture, to protect "values that constitute the foundation of the world public order").

343. See Garrod (2012), *supra* note 10, at 773–95. See table 1 for five trials falling within this typology.

344. *E.g.*, Langer, *supra* note 47, at 3–4, 7–9, 15; O'Keefe, *supra* note 26, at 756–57; Randall, *supra* note 11, at 810–15; Scharf, *supra* note 46 at 278; Tomuschat, *supra* note 25, at 231–32; *see also* Prosecu-

time and again that Israel’s domestic law, titled “The Law for Meting out Justice to Nazis and their Collaborators,” did not provide for universal jurisdiction.³⁴⁵ It was limited temporally to crimes committed during the period of World War II and by persons belonging to a common enemy (the Nazi regime) or in an enemy country. It was also concerned with “crimes against the Jewish people.” The domestic law of Israel was thus subject to the same jurisdictional limitations as that of the other Allies at the end of the war.³⁴⁶ As Eichmann was charged with crimes against Jews, the District Court in that case found that the extraterritorial application of Israel’s domestic law was based on the protective principle of jurisdiction, a decision with which the Supreme Court was in full agreement.³⁴⁷ The statement by the District and Supreme Courts that jurisdiction could also be justified on the basis of universal jurisdiction was little more than dictum.³⁴⁸ In all likelihood, the fact that the District and Supreme Courts invoked universal jurisdiction and proclaimed to prosecute Eichmann “merely as the organ and agent of the international community”³⁴⁹ was because Israeli agents had abducted Eichmann from Argentina without first seeking the approval of the Argentinian authorities. In reaction to the covert operation, Argentina complained before the U.N. Security Council that its sovereignty had been violated.³⁵⁰ In any event, neither the District nor the Supreme Court provided any evidence of state practice to support the existence of universal jurisdiction or its applicability over war crimes or any of the other crimes with which Eichmann was charged. The *dictum* of a domestic court does not create a customary rule, and “caution is due when assessing the evidentiary value of precedents such as *Eichmann*.”³⁵¹ In the Sixth Committee debate on universal jurisdiction, the Israeli delegation does not recognize *Eichmann* as an example of universal jurisdiction, no less a historical precedent, or the inclusion of this jurisdiction in its domestic law over any crime.³⁵² Moreover, a conceptual distinction is made between jurisdiction arising out of treaty obligations to extradite or prosecute, for which provision is made in the domestic law of

tor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 156 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

345. Nazi and Nazi Collaborators (Punishment) Law, 5710-1950, SH NO. No. 64, 140. The same legislation in Eichmann was relied on in *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985).

346. See Garrod (2012), *supra* note 10, at 809.

347. Att’y Gen. of Isr. v. Eichmann, 36 I.L.R. 277, 304 (S. Ct. 1962) (Isr.); Att’y Gen. of Isr. v. Eichmann, 36 I.L.R. 18, 49–57 (Dist. Ct. 1962) (Isr.).

348. See *Eichmann*, 36 I.L.R. at 38–39 (Dist. Ct.); see also *Eichmann*, 36 I.L.R. at 303–04 (S. Ct.).

349. *Eichmann*, 36 I.L.R. at 300 (S. Ct.); *Eichmann*, 36 I.L.R. at 15 (Dist. Ct.).

350. See Rep. of Arg. to the U.N., Letter dated June 15, 1960 from the Representative of Argentina Addressed to the President of the Security Council, U.N. Doc. S/4336 (June 15, 1960); see also S.C. Res. 138 (June 23, 1960).

351. See Tom Ruys, *The Meaning of “Force” and the Boundaries of the Jus Ad Bellum: Are “Minimal” Uses of Force Excluded from U.N. Charter Article 2(4)?*, 108 AM. J. INT’L L. 159, 168 (2014).

352. See Permanent Mission of Israel to the U.N., Note dated May 30, 2010 from the Permanent Mission of Israel to the United Nations to the Executive Office of the Secretary General, Office of Legal Affairs (May 3, 2010), http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Israel.pdf.

Israel—“even if the person committing the offense is not an Israeli citizen or resident and irrespective of where the offense was committed”—and universal jurisdiction.³⁵³ The Israeli delegation does not question the existence of a customary rule of universal jurisdiction, perhaps unsurprising in light of the judicial dicta in *Eichmann*, and, instead, emphasizes that there are too many “uncertainties” regarding the legal status, definition and scope of universal jurisdiction that are essential for states to agree on before it is applied in practice.³⁵⁴ In addition to the practice of Israel, in the late 1980s and early 1990s, the interest of a small number of states in the prosecution of war crimes was revived after it became apparent that numerous Nazi war criminals from World War II had subsequently acquired citizenship in these respective countries, which included France, Canada, Australia, and Britain. This is not helped by the fact that several of these states claimed that they were justified in enacting legislation for the prosecution of war crimes on the basis of universal jurisdiction. For example, two of the seven judges of the High Court of Australia in *Polyukhovich* referred in their dicta to the existence of universal jurisdiction over war crimes and crimes under international law.³⁵⁵ It seems to have been forgotten by these states that they had not actually used universal jurisdiction at the end of World War II. In any event, the legislation enacted by these states is limited to crimes by persons belonging to a common enemy during the period of the Second World War, in which these states had been engaged, and who are subsequently residing in the territory of the prosecuting state. Thus, the legislative provisions, and the few trials brought under them, are not based on universal jurisdiction.³⁵⁶ Rather, they are an extension of the practice of the same Allies at the end of the World War II (with the additional qualification that suspects are subsequently resident in the prosecuting state).³⁵⁷ In addition to jurisdiction developing out of the practice of allied powers at the end of World War II, treaty-based jurisdiction was subsequently incorporated into the 1949 Geneva Conventions, which became the foundation of modern international humanitarian law.

One extradite or prosecute regime that is different from the Hague formula is that contained in the “grave breaches” of the 1949 Geneva Conventions and Article 85(1) of the First Additional Protocol to the 1949 Geneva Conventions.³⁵⁸ Unlike treaties that use the Hague formula, the grave

353. See *id.* at 2.

354. See U.N. GAOR, 71st Sess., 14th mtg., ¶¶ 7–10, U.N. Doc. A/C.6/71/SR.14 (Oct. 31, 2016) (Isr.).

355. *Polyukhovich v Commonwealth* (1991) 172 CLR 501, ¶ 32 (Austl.) (opinion of Brennan, J.); *id.* at 658–63 (opinion of Toohey, J.).

356. See, e.g., *R v. Finta*, [1994] 1 S.C.R. 701 (Can.); *R v. Sawoniuk*, [2000] EWCA (Crim) 9 (Eng.); *Federation Nationale des Deportés et Internes Résistants et Patriotes v. Barbie*, 78 I.L.R. 124 (Cass. Crim 1988) (Spain).

357. See Garrod (2012), *supra* note 10, at 813; see also Reydams, *supra* note 9, at 15.

358. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 art. 85; Conven-

breaches require states parties to prosecute alleged offenders present in their custody, failing extradition to another party, whose disputed acts have no express jurisdictional link to that or any other state party. As the jurisdiction of the prosecuting state party appears, at least at first sight, to be based solely on the mere presence of the accused, this has led some states, the ICRC and numerous scholars to read these latter provisions as the first treaty-based embodiment of universal jurisdiction.³⁵⁹

Even where a particular treaty does not use the Hague formula and therefore does not expressly require that a crime has a jurisdictional link to one or more of the parties, this should not automatically be interpreted as establishing a principle of universal jurisdiction.³⁶⁰ In their joint separate opinion in the *Arrest Warrant* case, Judges Higgins et al. commented on the grave breaches and suggested that “[n]o territorial or nationality linkage is envisaged, suggesting a true universality principle.”³⁶¹ On the other hand, the judges suggested that no case has touched upon the “jurisdictional possibilities” of the Geneva Conventions and remains to be judicially tested.³⁶² It is submitted that treaties such as the Geneva Conventions are more persuasively interpreted as a form of treaty-based jurisdiction as opposed to universal jurisdiction. This is indicated for two reasons.

First, the drafters of the Geneva Conventions never contemplated universal jurisdiction. Britain had a profound influence on the development of the laws of war and opposed the codification of war crimes and criminal sanctions for violations of the laws of war (including extraterritorial jurisdiction over such crimes) in existing customary international law generally.³⁶³ Consequently, the compromise among delegations was that these conventions are much more limited in scope and instead prohibit certain conduct as “grave breaches” and provide only for an obligation to extradite or prosecute alleged offenders.³⁶⁴ It follows that the grave breaches do not codify principles of jurisdiction in existing customary international law.³⁶⁵ This is reaffirmed by the fact that the Geneva Conventions were adopted less than a

tion [1] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 art. 49; Convention [2] for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 art. 50; Convention [3] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 art. 129; Convention [4] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 art. 146.

359. See *Prosecutor v. Tadić*, Case No. IT-94-1 A, Appeal on Jurisdiction, ¶¶ 79–80 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); see also INT’L COMM. OF THE RED CROSS [ICRC], CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 604 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005); Higgins, *supra* note 8, at 92; Inst. of Int’l Law, *supra* note 27, art. 3(a); Langer, *supra* note 46, at 4; O’Keefe, *supra* note 42, at 819, 828; Tomuschat, *supra* note 25, at 248, 250, 336, 334, 336, 350–51, 370.

360. See Reydams, *supra* note 8, at 16–18; see also Yee, *supra* note 8, ¶¶ 23, 25.

361. *Arrest Warrant Case*, 2002 I.C.J. at 63, ¶ 31 (joint separate opinion by Higgins et al., JJ.).

362. See *id.* ¶ 32.

363. See Garrod (2016), *supra* note 10.

364. *Id.*

365. See *id.*

year after the Genocide Convention. The drafters of the Genocide Convention rejected the inclusion of universal jurisdiction as it would go “against the traditional principles of international law and . . . might therefore create dangerous international tensions.”³⁶⁶

Second, the grave breaches are an early formulation of the obligation to extradite or prosecute, using imprecise and broadly worded language, which was repeated with greater clarity in subsequent treaties that use the Hague formula.³⁶⁷ As has already been shown elsewhere, the grave breaches have to be read in their proper historical context and in the light of state practice and the records of the United Nations War Crimes Commission at the end of World War II.³⁶⁸ The grave breaches were adopted in order to counter (in future armed conflicts) a number of serious inter-related problems experienced by the Allies at the end of the war. On the one hand, the jurisdiction of Allies injured by violations of the laws of war was limited *ratione temporis* to the period of the war and *rationae personae* to persons belonging to a “common enemy.”³⁶⁹ On the other, the Allies were either unwilling and/or unable due to inadequate domestic laws to prosecute their own or each other’s nationals for such violations committed against the enemy.³⁷⁰ At the same time, many alleged offenders had taken refuge abroad, particularly in neutral countries.³⁷¹ The latter did not have domestic laws criminalizing violations of the laws of war.³⁷² Moreover, the Allied and neutral states in whose territories alleged offenders had taken refuge were often unwilling to cooperate and extradite them to the states injured by such violations and they had no legal obligation to do so.³⁷³

A careful reading of the actual text of the grave breaches and various other primary sources, most notably archival records and records of the Diplomatic Conference leading to the adoption of the Geneva Conventions and the authoritative article-by-article commentary of Pictet, reveals the “novel character”³⁷⁴ of the grave breaches. First, they place an obligation on all states parties (including neutrals) to criminalize certain conduct as “grave breaches,” whether committed by a national, an ally or an enemy; second, require them to search for “any person” on their territory accused of a grave breach; and, third, require them to prosecute alleged offenders found on

366. Garrod (2012), *supra* note 10, at 810 (quoting The Charter and Judgment of the Nuremberg Tribunal: History and Analysis, Memorandum Submitted by the Secretary-General at 33, U.N. Doc. A/CN.4/5 (1949)); *see also* Reydams, *supra* note 8, at 15–17; Reydams, *supra* note 9, at 11–12.

367. *See Arrest Warrant Case*, 2002 I.C.J. at 63, ¶ 30 (joint separate opinion by Higgins et al., JJ.).

368. *See* Garrod (2012), *supra* note 10, at 810–12; *see also* Reydams, *supra* note 8, at 17–18; Reydams, *supra* note 9, at 11–12.

369. Garrod (2012), *supra* note 10, at 779–83.

370. *See id.*

371. *See id.*

372. *See id.*

373. *See id.*

374. JEAN S. PICTET, COMMENTARY I, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 351 (Int’l Comm. of the Red Cross, 1952).

their territory if there is a failure to hand over alleged offenders “to another High Contracting Party concerned.”³⁷⁵ During the Diplomatic Conference, a proposal to limit the obligation to search for and bring to trial alleged offenders, failing extradition to a “Party concerned,” to the parties to an armed conflict was withdrawn after it was explained that the “principle of universality applied.”³⁷⁶ This reference to “universality” in the preparatory work does not mean the principle of universal jurisdiction proper, as is often assumed.³⁷⁷ It means that the above obligation to extradite or prosecute applies to all parties, regardless of whether they are belligerents or neutrals, and that such an obligation does not violate a state’s neutrality. The broadly worded language used by the grave breaches, “regardless of their nationality,” means that parties are not permitted to limit the scope of their extradite or prosecute obligation to persons found on their territory who are regarded as belonging to the enemy. The obligation includes their own nationals, as well as the nationals of their Allies and neutrals.³⁷⁸ It is in this sense, especially the obligation laid on all states parties to, for the first time, enact special legislation criminalizing grave breaches and implementing the obligation to extradite or prosecute that Pictet refers to the “universality of jurisdiction.”³⁷⁹

It is a non-sequitur to read a Custodial State’s jurisdiction in the grave breaches as being based on the mere presence of the accused. Rather, jurisdiction has its basis in treaty, which must be enforced when an alleged offender is found on its territory and is not extradited to a “Party concerned” (that is, if a meaningful link exists between the offense and the state requesting extradition).³⁸⁰ Therefore, in situations of non-extradition, a Custodial State is required to initiate criminal proceedings against alleged offenders on behalf of a “Party concerned.” The reason why the grave breaches do not expressly require a jurisdictional link to some of the parties to the Geneva Conventions is because such breaches were *ipso facto* regarded as injurious to one or more of the parties to an armed conflict. Hence, the grave breaches used the broad language “Party concerned.”

375. Final Record of the Diplomatic Conference of Geneva of 1949, vol. II, sec. B, 39, at 116–17 (1949), at www.loc.gov/rr/frd/Military_Law/RC-Fin-Rec_Dipl-Conf-1949.html; see also PICTET, *supra* note 374, at 351–70. The Geneva Conventions recognize that the “[t]he obligation to extradite is limited by the national laws of the country in which the accused is.” *Id.* at 366. Moreover, extradition is subject to two limitations: the Contracting Party who requests the extradition of a suspect must make out a *prima facie* case and most states refuse to extradite accused persons who are their own nationals. In the latter instance, the grave breaches provisions “demand” that the state holding such persons “should bring them before its own courts.” *Id.*

376. Final Record of the Diplomatic Conference of Geneva of 1949, *supra* note 375, at 116.

377. See, e.g., *Att’y Gen. of Isr. v. Eichmann*, 36 I.L.R. 18, 38 (Dist. Ct. 1962) (Isr.); HR 11 november 1997, NJ 1997, 3717 m.nt. Besch (Prosecutor/Knesević) (Neth.), in 1 Y.B. INT’L HUMAN. L. 535 (1998) 600, 605 (Eng. trans.); Secretariat, *supra* note 31, ¶¶ 49–57; O’Keefe, *supra* note 42, at 815.

378. PICTET, *supra* note 374, at 365–66.

379. *Id.* at 359.

380. Reydams, *supra* note 9, at 13.

2. Prosecutions Pursuant to Treaty Obligations to Extradite or Prosecute

The second typology concerns crimes in violation of treaties providing for extradite or prosecute obligations. As discussed above, these obligations give rise to treaty-based jurisdiction, which has important links with one or more parties to the relevant treaty-regime and the crime at issue. States have asserted jurisdiction and undertaken prosecutions pursuant to these obligations in one of two situations. First, where the offense in question implicates or affects a state party's nationals (or residents) and/or national vital interests. This is precisely what has occurred, for example, in the practice of Spain—one of the so-called pioneers of universal jurisdiction.

3. Spanish Practice

The Spanish delegation has stated that *Pinochet* “became a model for the exercise of universal jurisdiction in Spain.”³⁸¹ However, *Pinochet* had nothing to do with the principle of universal jurisdiction proper. Spain requested Pinochet's extradition from the Custodial State—the United Kingdom—and claimed that it had “universal jurisdiction.” Yet, Spain was essentially a Paragraph 1 State under the CAT on the ground that more than fifty Spanish nationals had been among the victims of alleged torture committed in Chile, which was held by Spain's National Court Criminal Division to give Spain a “legitimate interest in the exercise of such jurisdiction.”³⁸² Why, then, did Spain claim “universal jurisdiction”?

The national law of Spain, as it then existed, provided that “Spanish jurisdiction is competent to try acts committed by Spaniards or foreigners outside the national territory” for crimes “under Spanish law,” including crimes that “under international treaties and agreements, must be prosecuted in Spain.”³⁸³ Thus, Spain regarded ratified treaties (including treaties containing extradite or prosecute obligations) as either permitting or requiring Spain to exercise “universal jurisdiction” (even in situations where a crime is linked to a Spanish national interest or victim). The interpretation of jurisdiction in treaty obligations to extradite or prosecute as “universal jurisdiction” may have been because, until 2009, jurisdiction over crimes committed abroad based on the nationality of the victim was unknown in Spain's domestic law.³⁸⁴ This would suggest that Spain had previously justi-

381. Permanent Rep. of Spain to the U.N., *The Scope and Application of the Principle of Universal Jurisdiction: Information Provided by Spain*, ¶ 4, Sixth Committee, (Nov. 12, 2010), [www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Spain%20\(S%20to%20E\).pdf](http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Spain%20(S%20to%20E).pdf).

382. *R v. Bow St. Metro. Stipendiary Magistrate ex parte Pinochet Ugarte* (No. 1) [1998] 4 All E.R. 897, 903 (Lord Slynn); *see also* Comm. Against Torture, Communication No. 176/2000, U.N. Doc. CAT/C/28/D/176/2000, ¶¶ 2.3, 6.7 (June 12, 2002).

383. L.O.P.J., art. 23, July 1, 1985 (Law on the Judiciary) (Spain), *translated in* Christen Broecker, *The Clash of Obligations: Exercising Extraterritorial Jurisdiction in Conformance with Transitional Justice*, 31 *LOY. L.A. INT'L & COMP. L. REV.* 405, 432 (2009).

384. *See* Rep. of Spain to the U.N., *supra* note 381, at 2, 8–9; Antoni Pigrau, *Commentary, Guatemala Genocide Case, Correspondents' Reports*, 8 *Y.B. INT'L HUMAN. L.* 507, 507–11 (2005).

fied the extraterritorial application of its domestic law based on “universal jurisdiction” (to the extent that such jurisdiction was deemed to exist conceptually and legally in Spain’s domestic legal and constitutional system) as comporting with international law. It did so by interpreting treaties as a legal source of authority for universal jurisdiction.³⁸⁵ Spain also appears to have relied on its own domestic law in order to identify the existence of universal jurisdiction in customary international law. This methodology puts the cart before the horse, as it passes over the underlying question whether the state is *permitted* by international law to exercise universal jurisdiction and, if so, over what crimes.

In the *Guatemalan Genocide* case, involving an attack on a Spanish embassy and its employees and a Spanish ambassador, as well as crimes committed against Spanish nationals in Guatemala, the Constitutional Court held that Spain’s domestic law “establishes a principle of absolute universal jurisdiction” and that it is “highly debatable” whether international law requires a connection with Spanish national interests in order for Spain to exercise such jurisdiction.³⁸⁶ While the Constitutional Court may have been correct in pointing out that Spain’s domestic law did not envisage proof of such a link, nonetheless, the court was not able to show, beyond asserting that there are “numerous precedents in international law,” that the legislation in question conformed with international law or indeed that the same “principle of absolute universal jurisdiction” existed in international law.³⁸⁷ It is clear that the Constitutional Court treated universal jurisdiction proper (to the extent that it was deemed to exist in custom) and treaty-based jurisdiction arising out of extradite or prosecute obligations as one and the same.

In any event, Spain has only been willing to exercise “universal jurisdiction” in cases where Spanish nationals and/or national vital interests have been implicated by an offense. This includes the *Scilingo* case—the only “universal jurisdiction” case in Spain to go to trial—involving more than six hundred victims of Spanish nationality, during Argentina’s military dictatorship between 1976 and 1983.³⁸⁸ In the light of Spanish practice, in its submission to the sixty-eighth session of the Sixth Committee, the Spanish delegation conceded that, with regard to the “significant number of cases based on the principle of universal jurisdiction” in Spanish practice since the mid-1990s, “[i]n a number of those cases, the victims of the crimes reported were Spanish citizens.”³⁸⁹ Spain amended its domestic law in 2009 so that its extraterritorial application requires the existence of “a relevant link with

385. See Permanent Rep. of Spain to the U.N., *supra* note 381, at 1–2, 5, 8–11.

386. Pigrau, *supra* note 384, at 508, 511.

387. See *id.* at 510.

388. The *Scilingo* case is included in Table 1. See Antoni Pigrau, Commentary, *Scilingo case*, 8 Y.B. INT’L HUMAN. L. 498, 504–05 (2005); Antoni Pigrau, Commentary, *Scilingo case*, 7 Y.B. INT’L HUMAN. L. 594 (2004); see also Commentary, *The Spanish Indictment of High-Ranking Rwandan Officials*, 6 J. INT’L CRIM. JUST. 1003 (2008).

389. Rep. of Spain to the U.N., *supra* note 127, ¶ 15.

Spain.”³⁹⁰ As pointed out by Spain during the Sixth Committee, “it is no longer possible to speak” of universal jurisdiction in Spain.³⁹¹

4. *Prosecution of Residents of Prosecuting State*

The second situation in which states have prosecuted crimes pursuant to treaty obligations to extradite or prosecute is where suspects have been present in the prosecuting state’s territory and could not be extradited to another party due to the relevant treaty regime related to the crime at issue. In this latter situation, the Custodial State has an obligation to initiate criminal proceedings, failing extradition, on behalf of a party that has such a link. In most of these trials, the suspects were residents of the prosecuting state and their own state of nationality was supportive of prosecution (as suspects were former state officials or officials of a former regime that had been overthrown) but was unwilling to request extradition, or extradition was not legally or practically possible. This is illustrated, for example, by the practice of the Netherlands.

5. *The Netherlands’ Practice*

Nzapali concerned the trial for torture of a national of the Democratic Republic of the Congo (“DRC”) who was serving as colonel of the Garde Civile of the DRC.³⁹² *Nzapali* fled to the Netherlands and resided there for several years after the existing regime to which he belonged was overthrown. Since *Nzapali* could not be extradited to the DRC due to a real risk of being subject to torture by the successor government, the Netherlands had an obligation, pursuant to the CAT, to initiate criminal proceedings against him. The Netherlands essentially tried *Nzapali* on behalf of a Paragraph 1 State, the DRC, which assisted in the gathering of evidence for his trial. Moreover, *Nzapali* had already been convicted in his home country, *in absentia*, for abuse of authority and other relevant crimes. In a similar vein, the prosecution of three Afghans concerned suspects residing in the Netherlands and involved allegations of torture and war crimes, which, in the opinion of Dutch courts, the Netherlands had an international legal obligation to investigate, failing extradition, pursuant to relevant treaties.³⁹³

390. See U.N. Secretary-General, *The Scope and Application of the Principle of Universal Jurisdiction*, ¶ 25, U.N. Doc. A/68/113 (June 26, 2013).

391. Rep. of Spain to the U.N., *supra* note 127, ¶ 16.

392. The *Nzapali* case is included in table 1. See Ward Ferdinandusse, *International Decision: Prosecutor v. N*, 99 AM. J. INT’L L. 686 (2005); Menno T. Kamminga, *First Conviction Under the Universal Jurisdiction Provision of the U.N. Convention Against Torture*, 51 NETH. INT’L L. REV. 439, 444–49 (2004) (including an English translation of the judgment of the Rotterdam District Court).

393. These cases are included in table 1. See HR 8 juli 2008, Case No. 07/10063, m.nt. SPB (Public Prosecutor/Heshamuddin Hesam), <http://www.asser.nl/upload/documents/20120601T050105-Supreme%20Court%20%208%20July%202008%20English.pdf>; HR 8 juli 2008, Case No. 07/10064, m.nt. SPB (Public Prosecutor/Habibullah Jalalzoy), <http://www.asser.nl/upload/documents/20120601T051337-Supreme%20Court%20%208%20July%202008%20English.pdf>; Rechtbank’s Gravenhage 14 oktober 2005, ECLI:NL:RBSGR:2005:AU373 m.nt. Dingley en Van de Vrede (Public

In *In re Bouterse*, the Dutch Supreme Court had to decide whether Dutch courts could assert jurisdiction, pursuant to the Torture Convention Implementation Act, over Desiré Bouterse—the leader of a military regime in Suriname—for alleged torture committed against military opponents during a coup d’état, led by Bouterse, in 1980.³⁹⁴ The Supreme Court held that the CAT establishes “universal jurisdiction” but dismissed the complaint against Bouterse on the grounds that such jurisdiction could be asserted only in cases with a link to the Netherlands, such as the presence of the suspect (as is required by Article 5(2) of the CAT), and, in any event, the acts were not criminalized as such in the Netherlands at the time they were allegedly committed.³⁹⁵ The Dutch legislature subsequently followed this approach with the adoption of the 2003 International Crimes Act, which implements the Rome Statute of the ICC and criminalizes war crimes, genocide, and crimes against humanity, although assertions of jurisdiction over these crimes is dependent upon the presence of the accused in the Netherlands. This legislation is an example of treaty-based jurisdiction, implementing treaty obligations to prosecute alleged offenders present in the Netherlands, failing extradition to the ICC or another state party to a relevant treaty regime, and not an example of universal jurisdiction proper. In light of the Supreme Court’s judgment in *Bouterse*, however, the Dutch delegation to the Sixth Committee has stated that the trials in table 1 “were premised on universal criminal jurisdiction.”³⁹⁶

6. *Prosecutions Under General Treaty: Former Yugoslavs and Rwandans*

The final typology concerns prosecutions of former Yugoslavs and Rwandans under a general treaty, in this case the U.N. Charter, in the implementation of legally binding U.N. Security Council resolutions.³⁹⁷ These resolutions establish ad hoc international criminal tribunals with a mandate to prosecute crimes arising out of armed conflicts in the Former Yugoslavia and Rwanda. The tribunals have limited territorial, personal, and temporal jurisdiction.³⁹⁸ Therefore, universal jurisdiction is not envisaged. The tribu-

Prosecutor/Hesam & Jalalzooy) (Neth.), <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBSGR:2005:AU4373>; Pub. Prosecutor v. Abdullah Faqirzada, INTERNATIONAL CRIMES DATABASE, <http://www.internationalcrimesdatabase.org/Case/1000/Faqirzada/> (summarizing the judgment of the Supreme Court of the Netherlands).

394. See Zegveld, *supra* note 125, at 97.

395. See *id.* at 105–13.

396. Permanent Mission of the Kingdom of the Netherlands to the U.N., Letter dated July 1, 2010 from the Permanent Mission of the Kingdom of the Netherlands to the Secretary-General of the United Nations, U.N. Doc. NYV/2010/1628 (2010), http://www.un.org/en/ga/sixth/65/ScopeAppUnijuri_StatesComments/Netherlands.pdf.

397. See S.C. Res. 955 (Nov. 8, 1994); S.C. Res. 827 (May 25, 1993). See table 1 for nineteen trials falling within this typology.

398. Int’l Crim. Trib. for Rwanda, Statute of the International Criminal Tribunal for Rwanda, arts. 1–7 (Jan. 2010), http://unictr.unmict.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf [hereinafter ICTR Statute]; Int’l Crim. Trib. for the Former Yugoslavia, Updated Statute of the Interna-

nals are given “primacy” over domestic courts,³⁹⁹ while “all” other states have an obligation to cooperate with them, including by taking “measures necessary under their domestic law” to criminalize and provide for jurisdiction over relevant crimes falling under the mandate of the tribunals.⁴⁰⁰ States are further required to search for suspects present on their territory and defer to the tribunals by transferring suspects to them for prosecution.⁴⁰¹ Alternatively, the tribunals may refer cases to states for trial instead of having them transferred.⁴⁰² In the absence of the transfer of suspects to the tribunals or to the states in whose territory the crimes had occurred, a Custodial State has an obligation to prosecute. This explains why former Yugoslavs and Rwandans represent the highest proportion of trials in table 1. Council resolutions essentially establish an obligatory extradite or prosecute regime; therefore, the jurisdiction used by states may be conceptualized as a type of treaty-based jurisdiction.

The prosecution of former Yugoslavs and Rwandans is interpreted by scholars and the European Court of Human Rights as evidence of universal jurisdiction state practice.⁴⁰³ In support of this interpretation, scholars cite Professor Reydams.⁴⁰⁴ Professor Reydams’s reasoning is that relevant Council resolutions require states to search for and try suspects present in their territory for relevant crimes falling under the mandate of relevant tribunals, including grave breaches of the 1949 Geneva Conventions, and that the grave breaches provisions implement universal jurisdiction.⁴⁰⁵ However, since at least 2010, Professor Reydams has reversed his position and argued

tional Criminal Tribunal for the Former Yugoslavia, arts. 1–8 (Sept. 2009), <http://www.icty.org/sid/135> [hereinafter ICTY Statute].

399. See ICTR Statute, *supra* note 398, art. 8; ICTY Statute, *supra* note 398, art. 9.

400. S.C. Res. 955, *supra* note 397, ¶ 2; S.C. Res. 827, *supra* note 397, ¶ 4.

401. See, e.g., Prosecutor v. Tadić, Case No. IT-94-1 A, Appeal on Jurisdiction (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); see also Press Release, Int’l Crim. Trib. for Rwanda, Ngirabatware Transferred to Arusha (Oct. 8, 2008), <http://unictr.unmict.org/en/news/ngirabatware-transferred-arusha>; Press Release, Int’l Crim. Trib. for Rwanda, Lieutenant Colonel Muvunyi transferred to ICTR Arusha (Oct. 30, 2000), <http://unictr.unmict.org/en/news/lieutenant-colonel-muvunyi-transferred-ictr-arusha>; Press Release, Int’l Crim. Trib. for Rwanda, Alfred Musema transferred to Arusha (May 21, 1997), <http://unictr.unmict.org/en/news/alfred-musema-transferred-arusha>.

402. E.g., Jorgić, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 12, 2000, 135 I.L.R. 152, 153–54 (including an English translation of the judgment of the German Federal Constitutional Court); Prosecutor v. Bucyibaruta, ICTR-2005-85-I, Decision on Request for Referral to France (Nov. 20, 2007); Prosecutor v. Munyeshyaka, ICTR-2005-87-I, Decision on Request for Referral to France (Nov. 20, 2007); Press Release, *Mpambara Will Not Be Tried in the Netherlands*, HAGUE JUSTICE PORTAL (Oct. 21, 2008), www.haguejusticeportal.net/eCache/DEF/9/915.html. For relevant practice in the Netherlands, see *Rwanda*, OPENBAAR MINISTERIE, <https://www.om.nl/onderwerpen/international-crimes-0/what-cases-have-been/rwanda/> (last visited Aug. 25, 2017).

403. See, e.g., Jorgić v. Germany, 2007-III Eur. Ct. H.R. 263, ¶ 68 (2007); Kaleck, *supra* note 111, at 932–58; O’Keefe, *supra* note 42, at 814; Luc Reydams, *Nyontezé v. Public Prosecutor*, 96 AM. J. INT’L L. 231, 231–36 (2002); Scharf, *supra* note 47, at 281.

404. See, e.g., Langer, *supra* note 47, at 4, 13, 28.

405. See Reydams, *supra* note 403.

that the grave breaches provisions and the prosecutions pursuant to them are not examples of universal jurisdiction.⁴⁰⁶

In all of the trials in table 1, the suspects were residents in the prosecuting states and extradition to the states where the crimes had been committed was legally, if not practically, impossible.⁴⁰⁷ The latter states often acquiesced or supported prosecution, so long as they were officials of overthrown regimes and not incumbent officials.⁴⁰⁸ For example, the four trials undertaken by Belgium all involve Rwandan suspects and the implementation of binding Council resolutions. Belgium has an additional link because the crimes had occurred in Rwanda—a former Belgian colony—and the suspects had acquired residence in Belgium and could not be transferred to the ICTR, while the successive Rwandan Government supported the prosecutions.⁴⁰⁹ Belgian nationals had also been killed during the genocide. Therefore, Belgium’s exercise of jurisdiction is far from universal. It is perhaps of no surprise that, out of a handful of states that have prosecuted crimes committed in Rwanda, Belgium has undertaken the most prosecutions.

The prosecutions of former Yugoslavs and Rwandans in the other states in table 1 are not any different from the practice of Belgium; all of them involve close links between the crime in issue and the prosecuting state.⁴¹⁰ For example, in *Jorgiæ*, the defendant—a former Yugoslav—had been legal resident in Germany for a long time, including at the time when crimes in Bosnia were committed, and the German Constitutional Court held that universal jurisdiction “required some sensible nexus with Germany.”⁴¹¹ The trial of a former Yugoslav by Denmark was based on a provision of the

406. Reydams, *supra* note 8, at 17 n. 35, 24; Reydams, *supra* note 9, at 14.

407. Various factors leading to a bar in extradition include the absence of an extradition agreement, fair trial concerns, real risk of human rights violations, and, until it was abolished in 2007, the death penalty for certain categories of *génocidaires* in the domestic law of Rwanda. Organic Law No. 31/2007, art. 6.

408. See, e.g., Knezević, *supra* note 377; Reydams, *supra* note 403; Prosecutor v. Refik Saric, INT’L CRIMES DATABASE, www.internationalcrimesdatabase.org/Case/743/Saric/ (summarizing the judgment of the 3rd Chamber of the Eastern Division of the Danish High Court); *Misrad Repak Case*, INT’L COMM. OF THE RED CROSS, www.icrc.org/ihl-nat/0/45061A413067E31CC125755C004A5773 (summarizing the judgment of the District Court of Oslo); Public Prosecutor v. Sadi Bugingo, INT’L CRIMES DATABASE, www.internationalcrimesdatabase.org/Case/919/Bugingo/ (summarizing the judgment of the District Court of Oslo); Dicker, *supra* note 125, at 234.

409. These four trials are *Nkezabera* (Cour d’assises, Bruxelles, Dec. 1, 2009); *Ntuyabaga* (Cour d’assises, Bruxelles, June 29, 2007); *Nzabonimana et al.* (Cour d’assises, Bruxelles, June 29, 2005); and *Ntezimana et al.* (Butare Four) (Cour d’assises, Bruxelles, June 8, 2001). For an English translated summary of *Ntezimana et al.* and *Ntuyabaga*, see Luc Reydams, *Belgium’s First Application of Universal Jurisdiction: the Butare Four Case*, 1 J. INT’L CRIM. JUST. 428 (2003) and *Belgian Court Sentences Rwandan Army Major*, HAGUE JUSTICE PORTAL (July 5, 2007), <http://www.haguejusticeportal.net/index.php?id=7886>. These trials are included in Table 1. See also Permanent Mission of Belgium to the U.N., *supra* note 167, ¶

410. In respect of the Netherlands, see HR 26 november 2013, m.nt. SCR (Joseph M.) (Neth.), <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3AHR%3A2013%3A1420>; Rb. Gravenhage 01 maart 2013, m.nt. Haijer en Bouda (Yvonne N.) (Neth.), <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3ARBDDHA%3A2013%3A8710> (unofficial Eng. trans.).

411. This trial is included in Table 1. See Jorgić,

Criminal Code implementing legally binding obligations, pursuant to multilateral criminal law treaties and Council resolutions, in which “Denmark is obliged to have criminal jurisdiction” when a suspect is present in Denmark.⁴¹² This trial and the legislation on which it is based are not recognized by the Danish delegation to the Sixth Committee as examples of universal jurisdiction.⁴¹³ As with Denmark, the legislation of Norway does not provide for universal jurisdiction. Rather, it provides for extraterritorial jurisdiction over certain crimes committed abroad, by foreign nationals, where they are subsequently residents of Norway or if Norway has an obligation to provide for such jurisdiction in the implementation of international legal obligations.⁴¹⁴ Thus, the single trial of a former Yugoslav is not recognized by the Norwegian delegation to the Sixth Committee as an example of universal jurisdiction either. The Canadian delegation to the Sixth Committee, despite approving the existence of universal jurisdiction in custom in respect of genocide, crimes against humanity and war crimes, has not recognized provision for such jurisdiction in its domestic law, or Canada’s trial of a Rwandan as an example of universal jurisdiction.⁴¹⁵ The national law of Canada, the “Crimes Against Humanity and War Crimes Act,” provides that a person may be prosecuted in Canada for specified crimes committed abroad: (a) if at the time of the offense the person was a Canadian citizen or a citizen of a state engaged in armed conflict against Canada, or the victim was a Canadian citizen or a citizen of a state allied with Canada in an armed conflict; or (b) if, after the time of the offense was committed, the person is present in Canada.⁴¹⁶ The wording of sub-paragraph (b) is intended to implement international legal obligations binding on Canada, such as treaty obligations to extradite or prosecute and council resolutions. Thus, in *Munyaneza*, the first case to be tried under this legislation,⁴¹⁷ the suspect resided in Canada and there was an obligation for Canada to act in concert with council obligations. The Superior Court in this case did not acknowledge the applicability of universal jurisdiction.⁴¹⁸

On the other hand, the Swiss delegation to the Sixth Committee has interpreted its domestic law as providing for universal jurisdiction and the single trial of a Rwandan for war crimes as an example of so-called “condi-

412. See Note from the Ministry of Foreign Affairs of Denmark to the Executive Office of the Secretary General, Office of Legal Affairs, http://www.un.org/en/ga/sixth/65/ScopeAppUnijuri_StatesComments/Denmark.pdf. This trial is included in table 1.

413. *Id.*

414. Permanent Mission of Norway to the U.N., Note from the Permanent Mission of Norway to the U.N. to the Executive Office of the Secretary General, Office of Legal Affairs, 1–4 (May 7, 2010), http://www.un.org/en/ga/sixth/65/ScopeAppUnijuri_StatesComments/Norway.pdf.

415. Statement by the Legal Advisor of the Permanent Mission of Canada to the U.N. to the Sixth Comm. of the Sixty-Eighth Session of the U.N.G.A. (Oct. 17, 2013), <https://papersmart.unmeetings.org/media2/433370/canada-can-z-e-86.pdf>.

416. Crimes Against Humanity and War Crimes Act, S.C. 2000, c 24, sec 8. (Can.).

417. See *R v. Munyaneza* [2009] Q.C.C.S. 2201. (Can.). This trial is included in Table 1.

418. See *id.*

tional” or “limited” universal jurisdiction.⁴¹⁹ However, national law requires the existence of a “close link” with Switzerland.⁴²⁰ On closer analysis, “universal jurisdiction” appears to be treaty-based jurisdiction by a different name. For example, the Swiss delegation suggests that the obligation to extradite or prosecute in treaties “is inextricably linked to the principle of universal jurisdiction” and that the assertion of universal jurisdiction can be an “obligation” as a result of international legal obligations.⁴²¹ Moreover, such jurisdiction is subject to the twin conditions that the suspect is present in Swiss territory and has not been extradited to another jurisdiction.⁴²²

The national laws of states implementing council resolutions and the trials brought under them are not examples of proper universal jurisdiction because there is an objective link and a mandate from a legitimate international authority. In effect, these states are undertaking prosecutions in concert with and on behalf of the tribunals in the completion of their mandates and the states in whose territories the crimes had been committed.

VI. CONCLUDING REMARKS

The assertions that treaty obligations to extradite or prosecute imply, embody, or permit a principle of “universal jurisdiction” are not new, but these assertions are now gaining ground, particularly in the light of the *Habré Case*. The present contribution, having critically examined the evidence upon which supporters of universal jurisdiction have relied, shows that such obligations are incapable of permitting or mandating universal jurisdiction. This finding is further corroborated by empirical evidence and the way in which these obligations have been implemented *in concreto* since the end of World War II to the present. This contribution proposes that jurisdiction arising out of extradite or prosecute obligations is better conceptualized as “treaty-based jurisdiction.” On the basis of the above assessment, a number of conclusions are merited.

First, the ICJ’s passing reference to Article 5(2) of the CAT as “universal jurisdiction,” regardless of what was actually meant by the term, is potentially misleading and should be followed, if at all, with caution in the future. Contrary to the ICJ’s opinion, extradition and prosecution are equal international obligations under the CAT. The Custodial State’s obligation to prosecute only arises when the obligation to extradite to a Paragraph 1 State (that is, a state that has made out a *prima facie* link with the crime at issue) is not fulfilled. The purpose of extradite or prosecute obligations is to enable

419. See Permanent Mission of Switzerland to the U.N., Note from the Permanent Mission of Switzerland to the U.N. to the Executive Office of the Secretary General, Office of Legal Affairs (Apr. 26, 2010), http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Switzerland_E.pdf. This trial is included in Table 1.

420. *Id.*

421. *Id.*

422. See *id.*

Paragraph 1 States to obtain the custody of the accused, or have such persons prosecuted on their behalf, failing extradition. Thus, in the *Habré Case*, Chad removed Habré's immunity to allow criminal proceedings to be initiated in Belgium and cooperated closely with Belgium by allowing the latter's public authorities to gather evidence on its territory. The same point applies, for example, to Afghanistan in relation to the prosecution of *Zardad* in the United Kingdom⁴²³ and to the DRC in connection with the prosecution of *Nzapali* in the Netherlands.⁴²⁴

Second, national laws implementing treaty obligations to extradite or prosecute and the few trials conducted on the basis of them should not be referred to as "universal jurisdiction" or used as evidence to infer the existence of universal jurisdiction. This is so for three key reasons. First, it gives a misleading and inaccurate empirical picture of state practice and the status of universal jurisdiction in customary international law. Second, the characterization of treaty obligations to extradite or prosecute as universal jurisdiction is fraught with conceptual difficulties and does not correspond with the actual text of treaties or state practice. Third, it leads to inter-state tensions over what constitutes universal jurisdiction and how its scope and application should be defined. In this connection, there is a risk that interpreting treaties as support for universal jurisdiction could result in excessive—and unlawful—claims of jurisdiction (including over nationals of non-state parties to the relevant treaties), breaching other rules of international law and causing further conflict. This risk is a reality, as can be seen, for example, by the African Union urging its member states to fully take advantage of the "Model National Law on Universal Jurisdiction over International Crimes,"⁴²⁵ which includes a wide range of crimes, and "to use the principle of reciprocity to defend themselves" by indicting non-African state officials;⁴²⁶ and the arrest of Lieutenant General Emmanuel Karenzi Karake during an official visit in the United Kingdom in 2015, which is condemned by the African Union as a "blatant" abuse of universal jurisdiction and an "attack" on "Africa as a whole."⁴²⁷

Third, the lack of universal jurisdiction in state practice raises two important questions. First, is it possible to identify the existence of a customary

423. See Sandra Laville, *UK Court Convicts Afghan Warlord* (Jul. 19, 2005), <https://www.theguardian.com/uk/2005/jul/19/afghanistan.world> (reporting on the verdict in *R v. Zardad* (High Court, July 19, 2005) (Eng.)).

424. See Ferdinandusse, *supra* note 392, at 687–88.

425. A.U. Exec. Council, Report, *The Legal Instruments and Recommendations of the Ministers of Justice/Attorneys General*, A.U. Doc. EX.CL/731(XXI)c ¶ 26R2 (2012).

426. See, e.g., U.N. GAOR, 70th Sess., 12th mtg., *supra* note 18, ¶ 28 (Rwanda); U.N. GAOR, 69th Sess., 11th mtg. ¶ 2, U.N. Doc. A/C.6/69/SR.11 (Oct. 15, 2014) (Iran on behalf of NAM); U.N. GAOR, 68th Sess., 12th mtg. ¶ 74, U.N. Doc. A/C.6/68/SR.12 (Oct. 17, 2013) (Egypt on behalf of African Group).

427. Peace and Security Council, Communiqué, 519th mtg., ¶¶ 4–5, A.U. Doc. PSC/PR/COMM.(DXIX), (June 26, 2015), <http://www.peaceau.org/uploads/psc-519-rwanda-comm-26-5-2015.pdf>.

rule of universal jurisdiction? Second, to what extent is the support for the concept in the Sixth Committee really political, due to its laudable rationalization of fighting impunity, rather than evidencing *opinio juris*?⁴²⁸ Verbal claims in support of universal jurisdiction do not necessarily reflect states’ underlying legal convictions and are, in any event, far from uniform. Broad verbal claims appear inconsistent with actual state practice. As emphasized by the African Group and reiterated by other delegations to the Sixth Committee, a careful analysis of state practice and *opinio juris* is needed in order to identify the existence of a customary rule of universal jurisdiction over a particular crime.⁴²⁹ The lack of state practice raises a broader issue. The importance and practical utility of universal jurisdiction may be overstated. How can something so rarely applied be called an essential tool in fighting impunity? Based on state practice, treaty obligations to extradite or prosecute are of much greater importance for preventing impunity. The lack of states practicing universal jurisdiction would suggest that the concept itself does not work and is in urgent need of revision, especially if support for interpreting treaty obligations to extradite or prosecute, which protect vital national interests of states, continues to grow.

Fourth, after seven years of work at the Sixth Committee, the universal jurisdiction topic has come no closer to conclusion. Delegations have taken as their starting point that a customary rule of universal jurisdiction has historical foundations from piracy on the high seas, which has been falsely analogized with numerous other so-called “heinous” crimes, and jurisdiction in treaty obligations to extradite or prosecute. However, there is no agreement over which crimes universal jurisdiction applies other than piracy;⁴³⁰ and no delegation has been able to identify the existence of universal jurisdiction. Second, broad and inaccurate language continues to prevail, with a number of delegations referring to extradite or prosecute obligations as “universal jurisdiction.” This would suggest that the debate has been wrongly postulated and misguided from the beginning because it is premised on historical misconceptions and false analogies.

As a result, significant disagreement on a number of other fundamental issues has arisen. These include which of the sixty or so treaties containing extradite or prosecute obligations, if any, establish “universal jurisdiction” and, if so, why; the sources of international law to support the applicability of universal jurisdiction over crimes contained in treaties; the definition of

428. See Yee, *supra* note 8, ¶ 39.

429. See, e.g., U.N. GAOR, 70th Sess., 12th mtg., *supra* note 18, ¶¶ 7–9 (S. Afr. on behalf of African Group); *id.* ¶ 10 (Trin. & Tobago on behalf of CARICOM); *id.* ¶ 23 (Sing.); *id.* ¶ 90 (U.K.).

430. Several powerful states have doubted universal jurisdiction’s existence in customary international law. See, e.g., U.N. GAOR, 71st Sess., 14th mtg., *supra* note 354, ¶ 19 (Saudi Arabia); *id.* ¶ 27 (India); U.N. Note on China, *supra* note 234, ¶¶ 3–5; U.N. GAOR, 69th Sess., 11th mtg., *supra* note 426, ¶ 19 (Russ.); Permanent Rep. of Korea to the U.N., Universal Jurisdiction in the Republic of Korea, Office of Legal Affairs, ¶ 2, http://www.un.org/en/ga/sixth/65/ScopeAppUnijuri_StatesComments/RepublicofKorea.pdf.

universal jurisdiction; the crimes, out of a potentially voluminous list, that fall under the scope of universal jurisdiction and why; and whether the exercise of universal jurisdiction is mandatory or permissive. As pointed out by the Chair of the Sixth Committee's Working Group, "[n]o delegation had rejected the concept of universal jurisdiction, but the approaches to its meaning, scope and application had been many and varied."⁴³¹

In an effort to "provide a middle ground between the positions of delegations," the Sixth Committee Working Group has recently proposed two different types of universal jurisdiction: universal jurisdiction in custom and "treaty-based forms of universal jurisdiction."⁴³² However, the latter type of jurisdiction is not really universal jurisdiction at all, as acknowledged in the Working Group's previous reports.⁴³³ As long as some states continue to confuse the relationship between universal jurisdiction and treaty-based jurisdiction, then the inability of the Sixth Committee to agree on how to move the debate forward will persist.⁴³⁴

431. U.N. GAOR, 66th Sess., 17th mtg., ¶ 18, U.N. Doc. A/C.6/66/SR.17 (Oct. 21, 2011).

432. U.N. GAOR 71st Sess., 31st mtg., *supra* note 20, ¶ 26.

433. See, e.g., U.N. GAOR, 67th Sess., 24th mtg., ¶ 14, U.N. Doc. A/C.6/67/SR.24 (Nov. 9, 2012); U.N. GAOR, 68th Sess., 23rd mtg., ¶ 99, U.N. Doc. A/C.6/68/SR.23 (Nov. 4, 2013); U.N. GAOR, 69th Sess., 28th mtg., *supra* note 30, ¶ 39.

434. See Press Release, *supra* note 15.