RESPONSIBILITY OF STATES TO FIGHT IMPUNITY FOR CORE INTERNATIONAL CRIMES AS PART OF THE RESPONSIBILITY TO PROTECT

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ABSTRACT

In this paper I will focus on how States can exercise their responsibility to protect populations, in particular what are the appropriate and necessary means available at their disposal at the national level? Mass atrocities are criminal acts and we should therefore draw comparisons with the national crime prevention activities. There is a substantial discrepancy between prosecuting ordinary crimes in relation to prosecution of core international crimes. Why? Prosecution of core international crimes usually has transnational component and therefore requires judicial cooperation between several States. National judiciaries are usually not very favorable to starting such complex cases with the consequence being impunity. However, it should be stressed that genocide, crimes against humanity and war crimes are international crimes which breach values considered important by the whole international community.

Any State, regardless of any territorial or nationality link with the perpetrator or the victim, has a right but also an obligation to punish perpetrators of such crimes, as it was decided by the recent ICJ judgment in the case “Questions relating to the Obligation to Prosecute or Extradite (Belgium vs. Senegal).” If the States have an obligation to fight impunity than we must ask ourselves what should we do to improve effectiveness of prosecuting international

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crimes? A first step is to establish appropriate jurisdictional basis, including universal jurisdiction. We can see that the majority of States have adopted universal jurisdiction in their national legislations. However, there is only a small number of cases that were prosecuted on this basis because States usually lack adequate knowledge how to prosecute such cases, resources and determination or they seek to avoid potential political conflicts with other States.

The responsibility of States to punish perpetrators of mass atrocities is clearly an important element of the R2P concept. It has a deterrent effect on any future commitment of such crimes. States should do more to ensure their effective prosecution and it seems that more pressure should be put on States by scholars and the civil society to exercise their responsibility to fight impunity for international crimes. States should also enhance cooperation with each other in the detection, arrest, extradition and punishment of persons guilty of international crimes.

Key words: International crimes, state responsibility, prosecution, universal jurisdiction.

1. INTRODUCTION

In 2005, at the UN World Summit, 150 leaders of UN Member States recognized the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, with the following words:

"Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. [...] The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity." 

The responsibility to protect concept (R2P) was then further elaborated by Mr. Edward Luck, UN Secretary General’s Special Adviser on the R2P. He based the concept on three pillars: (1) The State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement; (2) The international community has a responsibility to encourage and assist States in fulfilling this responsibility; (3) The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.

The R2P concept importantly redefines sovereignty as responsibility and locates the responsibility in the first instance with the State, but if it fails in honoring its responsibility, then the residual responsibility to protect victims of atrocities shifts to the international community. The concept of sovereignty has a long history. This principle was already considered by the ancient ius gentium as the foundation for every action taken by those in government with regard to the governed. The International Commission on

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3 Ibid 26.
Intervention and State Sovereignty (ICISS), which followed Secretary-General Kofi Annan’s famous report on challenges to humanitarian intervention in September 1999, consolidated a number of disparate trends and registered a norm shift already underway with an acceptable language. In the change of the Westphalian order individuals became subjects of international law as bearers of duties and holders of rights under a growing corpus of human rights and international humanitarian law treaties. Thakur outlines that discussions and analyses of the protection of civilians and the prosecution of perpetrators have hitherto proceeded along separate lines, but in fact they are two sides of the same coin. The interrelated twin tasks of the States are then to protect the victims and punish the perpetrators. Both of these tasks require substantial derogations of sovereignty, the first with respect to the norm of non-intervention and the second with respect to sovereign impunity up to the level of heads of government and State.

Sancin states that several scholars ascribe greater effectiveness to the concept of individual criminal responsibility than to the concept of state responsibility, because there are several obstacles in holding states accountable for their wrongful acts. It seems that the principles of complementarity and subsidiarity, which allow international tribunals and courts of third states to exercise their jurisdiction if states in question fail to exercise their primary jurisdiction, make the concept of individual criminal responsibility much more efficient than addressing the wrongs through state responsibility.

We have witnessed what amounts to revolutionary advances in the criminalization of domestic and international violence by armed groups and their individual leaders. The landscape of international criminal justice has changed dramatically in an astonishing short period of time. There are several mechanisms available for holding individuals accountable for their commitment of international crimes: national mechanisms, such as extradite or prosecute obligation (aut dedere aut judicare) and universal jurisdiction; mixed mechanism, such as mixed tribunals in Sierra Leone, Cambodia, East Timor, Bosnia and Kosovo; and international criminal tribunals (ICTY, ICTR and ICC). In the last decades we have also witnessed a sharp increase in the number of criminal cases prosecuted before international criminal tribunals and domestic courts for criminal acts committed outside these states’ territories.

An increasing number of States have extended their jurisdiction extraterritorially over the conduct of non-nationals on the basis of the "passive personality" principle and "universalality principle" where no connection between the crime and forum state exists. This latter principle provides every state with jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of the situs of the offense and the nationalities of the offender and the offended.

International criminal tribunals have made a considerable progress in the development of the international criminal jurisprudence, as well as, in the development of our common conscience and understanding that the most...
serious crimes cannot go unpunished. The preamble of the Rome Statute of the International Criminal Court states:

"[...], Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,[...]

This article will focus on the more contentious aspect of national mechanisms for the prosecution of international crimes, namely the question of extraterritoriality, as there is much more legal uncertainty in exercising these prosecutions than in the work of international criminal tribunals. However, this does not in any way mean that there are no open questions concerning international tribunals or that their work is less important. It means only that their legal basis is more clear that the exercise of the national jurisdiction extraterritorially.

Amnesty International's legal memorandum entitled "Universal Jurisdiction: the duty of states to enact and implement legislation" documents more than 125 states that introduced universal jurisdiction over at least one crime.16 In the past decade, courts in Austria (i.e. Kadyrov and Cvjetković), Belgium (i.e. Yerodia Ndombasi, Sabra and Shatila, Dutroux, Laurent-Désiré Kabila, Saddam Hussein, Ariel Sharon, George Bush, Gbagbo, and "Four Butare"), Canada (i.e. Pintia, Jacques Mungwaneze, and Désiré Munganeza), Denmark (i.e. Sætre), Finland (i.e. François Bazaramba), France (i.e. Mwinyihika, Javari, Paul Kagame, Rose Kabuye, Barbie, Touvier and Papin, and Elly Old Dahi), Germany (i.e. Sokolović, Djafari, Jorgić, Almatov, Falun Gong, and

16 121 countries are States Parties to the Rome Statute of the International Criminal Court as of 24 January 2013.

Rumsfeld), Israel (i.e. Eichmann), the Netherlands (i.e. Habibullah Jalilzoy, Franz Van Annau, Hashimuddin Hesam Sebastien, Nazari Julia, Alberto Poch, Joseph Mpamba, and Boutser), New Zealand (i.e. Moshe Yaalon), Norway (i.e. Charles Bandora), Senegal (i.e. Hissène Habré), Spain (i.e. Pinche, Seliger, Fidel Castro, Guatemala generals and Bush Administration officials), Switzerland (i.e. Fulgence Niyonzima), Sweden (i.e. Vojislav Seselj, Abd El Hassan Awale Qebyldid), and the United Kingdom (i.e. Farhad Sarwar Zardad, Robert Mugabe, Karuna Amman, Shaul Moaz, Doron Almog, Vincent Bajinya, Emmanuel Nteziyara, Cletist Ugashebuzi, Charles Manyanzewa, and Pinche) have instituted criminal proceedings for atrocities in Europe, Africa, and South America.18 However, some of the above listed cases cannot be considered as a full exercise of the universal jurisdiction since they were based also on the passive personality principle. Distinction should be also made between the exercise of the so-called "ordinary" universal jurisdiction and universal jurisdiction in absentia.

This article will first examine the concept of universal jurisdiction, followed by analyzing its application in practice and its obstacles. It will further consider the question whether an obligation of States to prosecute perpetrators of mass atrocities exists in international law and finally it will conclude with concrete proposals intended to assist states in prosecuting perpetrators of mass atrocities, including on the basis of universal jurisdiction.

2. UNIVERSAL JURISDICTION

The theory of universal jurisdiction transcends national sovereignty, which is the historical basis for national jurisdiction. It recognizes the existence of certain core values that are shared by the international community. These values are deemed important enough to justify overriding the usual territorial limitations on the exercise of jurisdiction.19 In the Eichmann case Attorney-
General of the Government of Israel spelt out: "The State of Israel therefore was entitled, pursuant to principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant [...]".

Since the early 1990s the judicial and legislative practice of states on universal criminal jurisdiction over the crimes in question has become a matter of considerable importance. At the same time, this practice has proven highly politically sensitive. It is not surprising that "much confusion and uncertainty reigns over universal criminal jurisdiction." We can find substantial terminological inconsistency among scholars while addressing universal jurisdiction, as well as no common definition of universal jurisdiction. Judge Van den Wyngaert in her Dissenting opinion in the ICJ Arrest Warrant Case stated that: "...There is no generally accepted definition of universal jurisdiction in conventional or customary international law. States that have incorporated the principle in their domestic legislation have done so in very different ways...", and "...Many views exist as to its legal meaning and its legal status under international law...", and "...uncertainties that may exist concerning the definition of universal jurisdiction...

However, one of the elements where it does not appear to be much disagreement is that the exercise of adjudicative universal jurisdiction should follow the principle of subsidiarity as a matter of good judicial policy. In 2005 a group of eminent scholars attempted to pinpoint the lex lata on universal criminal jurisdiction by adopting the Resolution on universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes.

The idea behind universal jurisdiction could be best described by the recent Separate Opinion of Judge Trindade in the ICJ case on Questions relating to the Obligation to Prosecute or Extradite where he speaks about the ideal of a universal justice, without limits in time (past or future) or in space:

"In this second decade of the XXIst century, after a far too long a history, - the principle of universal jurisdiction, as set forth in the CAT Convention (Articles 5(2) and 7(1)), appears nourished by the ideal of a universal justice, without limits in time (past or future) or in space (being transfrontier). Furthermore, it 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. There is nothing extraordinary in this, if we keep in mind that, in historical perspective, international law itself proceeds the inter-State dimension, and even the States themselves. What stands above all is the imperative of universal justice. This is in line with jurisprudential thinking. The contemporary understanding of the principle of universal jurisdiction discloses a new, wider horizon. In it, we can behold the universalist international law, the new universal jus gentium of our times, -remindful of the totus orbis of Francisco de Vitoria and the societas generis humani of Hugo Grotius. Jus cogens marks its presence therein, in the absolute prohibition of torture. It is imperative to prosecute and judge cases of international crimes - like torture - that shock the conscience of mankind. Torture is, after all, reckoned in our times as a grave breach of International Human Rights Law and International Humanitarian Law, prohibited by conventional and customary international law; when systematically practiced, it is a crime against humanity. This transcends..."
the old paradigm of State sovereignty: individual victims are kept in mind as belonging to humankind, this latter reacts, shocked by the perversity and inhumanity of torture."

We can note that states have recognized that the nature or exceptional gravity of certain crimes rendered their suppression a joint concern of the international community. Consequently, every State has the right to exercise its jurisdiction to prosecute the perpetrators of such crimes27 Randall28 noted that development of jus cogens and erga omnes doctrines evolved hierarchy of international norms. Such hierarchy recognizes certain norms as fundamental to the world community. The concept of jus cogens was developed in the Vienna Convention on the Law of Treaties (VCLT)29, although some authors had mentioned the existence of peremptory norms before, especially by natural law thinkers like Francisco de Vitoria, Francisco Suarez, Hugo Grotius and Emmerich de Vattel.30 The concept of obligations erga omnes first appeared in the Barcelona Traction Case31 before the ICJ. In famous obiter dictum the Court held that obligations towards the international community as a whole (obligations erga omnes) exist, in which all states have a legal interest in their protection in light of the importance of the rights involved.

The range of offences that fall under universal jurisdiction is however contested.32 The 2005 Resolution of the Institute de Droit international33 stated that universal jurisdiction may be exercised over international crimes identified by international law as falling within that jurisdiction in matters such as genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions for the protection of war victims or other serious violations of international humanitarian law committed in International or non-International armed conflict. The Article 53 of the VCLT on jus cogens does not provide for a list of crimes that would fall in this category. However, the International Law Commission in the Commentary to the Draft Articles on the Law of Treaties in the commentary to the Article 50 on jus cogens (Article 53 of the VCLT)34 suggested including the following crimes: "(a) a treaty contemplating an unlawful use of force contrary to the principles of the Charter, (b) a treaty contemplating the performance of any other act criminal under international law, and (c) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to cooperate. Other members expressed the view that, if examples were given, it would be undesirable to appear to limit the scope of the article to cases involving acts which constitute crimes under international law; treaties violating human rights, the equality of States or the principle of self-determination were mentioned as other possible examples."35 In the Joint Separate Opinion of Judges Higgins, Kooijmans and Burgenthal36 in the Arrest Warrant Case expressed support of universal

28 Randall, 631. See also T Mercon, 'On a hierarchy of International human rights' (1986) 80 The American Journal of International Law 1
32 Justitia et Pacis, Institute de Droit International, Krakow session – 2005, Seventeenth com-
jurisdiction over genocide, crimes against humanity and war crimes. It is today generally acceptable that states have a right to impose universal jurisdiction over international crimes\(^\text{a}\) such as genocide, crimes against humanity, war crimes and torture.\(^{19}\)

We can see that the R2P crimes are international crimes for which states have a right to establish universal jurisdiction. Admittedly though, there might still be some ambiguity with respect to the ethnic cleansing as it is not perceived as a legal norm \textit{stricto sensu}. The term ethnic cleansing was first used in media during the Bosnia conflict to describe systematic persecution of Muslim population. It was further elaborated by the UN Commission\(^a\) established by the UN Security Council Resolution 780 (1992) which stated that the act of ethnic cleansing constitutes other three crimes:\(^{10}\)

\(^{19}\) Cassese states that International crimes are breaches of international rules entailing the personal criminal liability of the individuals concerned and they result from the cumulative presence of the following elements: 1. violations of international customary rules; 2. rules are intended to protect values considered important by the whole international community; 3. there exists a universal interest in repressing these crimes; and 4. if the perpetrator has acted in an official capacity the State on whose behalf he has performed the prohibited act, is barred from claiming enjoyment of the immunity. A Cassese, \textit{International Criminal Law, Second Edition} (Oxford University Press 2008) 11-12.

\(^{20}\) "In the Court's opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (ius cogens)." (ICJ, Judgment on Questions relating to the Obligation to Prosecute or to Extradite (Belgium v. Senegal) of 20 July 2012, § 99.)


\(^{10}\) The expression 'ethnic cleansing' is relatively new. Considered in the context of the conflicts in the former Yugoslavia, 'ethnic cleansing' means rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area. 'Ethnic cleansing' is contrary to international law. Based on the many reports describing the policy and practices conducted in the former Yugoslavia, 'ethnic cleansing' has been carried out by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assaults, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property. Those practices constitute crimes against humanity and can be assimilated to specific war crimes. Furthermore, such acts could also fall within the meaning of the Genocide Convention.\(^{11}\) UN Security Council Resolution 780 (1992), § 2.

\(^{11}\) A Poels, 'Universal Jurisdiction in Absentia' 23 Netherlands Quarterly of Human Rights 65, 68.

\(^{12}\) Ibid 74.

\(^{13}\) Spain, Belgium (1993 Law and amended by 1999 Law), Israel, Senegal and New Zealand.

\(^{14}\) A Poels 76.

\(^{15}\) C Krée 579.

3. UNIVERSAL JURISDICTION IN ABSENTIA

Cases based on universal jurisdiction \textit{in absentia} raise further legal questions, not least concerning its admissibility and pragmatic feasibility. In some recent court cases, inter alia the Pinheiro cases in the United Kingdom and in Spain, in the Tadić Case in Germany and before the ICTY, and in the judgments by the Brussels Court of Appeals in the cases of Yerodia, Sharon and Changbo, both national and international courts have been confronted precisely with such questions and have been solicited to situate this legal concept within the current quest by the international community for a progressive judicial instrumentarium against criminal impunity for international crimes, the general demands of international crimes, the general demands of international law and pragmatic attainability for the courts.\(^{16}\) It should be stressed that most European States require the presence on their territory of the alleged perpetrator of international crimes before any prosecution can be initiated. This prerequisite was recently reiterated in the \textit{Ojuková Case in Austria}, in the \textit{Munyenyeya Case} and \textit{Javor Case} in France, in the \textit{Tadić} and Jorgić Case in Germany, the case of the \textit{Four Butare} in Belgium, and the \textit{Satric Case in Denmark}.

However, interesting is the \textit{Bouterse Case in the Netherlands} where the Dutch Supreme Court stated that the exercise of universal jurisdiction \textit{in absentia}, albeit contrary to domestic law, would be admissible under international law.\(^{17}\) Although some national legal systems\(^{18}\) allow asserting universal jurisdiction without the presence of the accused on their territory, an explicit legal basis for universal jurisdiction \textit{in absentia} in customary or conventional international law is still missing.\(^{19}\) Krée\(^{20}\) states that there is hardly sufficient state practice in direct support of a customary rule specifically prohibiting trials \textit{in absentia} based solely on universal jurisdiction. Yet, it is submitted a case can be made in support of the prohibitive rule if the jurisdictional question is placed into...
human rights context. Against the Judge Guillaume fear that the adjudicative exercise in absentia of universal jurisdiction would risk creating a total judicial chaos and wild exercise of extraterritorial judicial authority. Krepl states that these concerns are unwarranted in the case of investigative acts in absentia. It seems that this is a sound approach and is worth close attention.

4. AUT DEDERE AUT JUDICARE

States responsibility to fight impunity for international crimes is also imposed by the extradite or prosecute obligation (aut dedere aut judicare). The obligation raises several questions and it is currently under consideration by the International Law Commission. In the recent ICJ judgment on Questions relating to the Obligation to Prosecute or Extradite the Court considered that the obligation on a State to prosecute, provided for in the Torture Convention, is intended to allow the fulfillment of the Convention's object and purpose, which is "to make more effective the struggle against torture" (Preamble to the Convention) but limited the obligation under the Convention only to facts having occurred.

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4. **Article 6 of the European Convention on Human Rights (1950) and Article 7 of the International Covenant on Political and Civil Rights (1966).**

6. **Separate Opinion in the I.C.J. Arrest Warrant Case, p. 15.**

7. **According to the study prepared by the I.C.J. Secretariat more than 60 multilateral conventions which may be of relevance for the work of the International Law Commission on the topic "The obligation to extradite or prosecute (aut dedere aut judicare)," International Law Commission Annual Report 2009-2011, pp. 61-63, pp. 100-101.**

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5. **CUSTOMARY RIGHT OR OBLIGATION TO PROSECUTE**

The existence of a right or a duty to prosecute international crimes is undoubtedly one of the key questions that States face nowadays. The ICJ in its last judgment stated that "the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned" and rejected the existence of a customary rule of such an obligation. Judge Abraham in his Separate Opinion clearly rejected existence of an customary obligation to prosecute the perpetrators of international crimes on the basis of universal jurisdiction: "[...] the information thus provided [by Belgium] is quite insufficient to establish the existence of a customary obligation to prosecute the perpetrators of..."
such crimes on the basis of universal jurisdiction, even when limited to the case where the suspect is present in the territory of the State concerned.”

On the other hand Judge Trindade argued against such narrow looking approach because in his view it does not correspond to the juridical revolution of the international law of human rights and corresponding State duties: “Last but not least, the emancipation of the individual from his own State is, in my understanding, the greatest legacy of the consolidation of the International Law of Human Rights - and indeed of international legal thinking - in the second half of the 20th century, amounting to a true and reassuring juridical revolution. Contemporary International Criminal Law takes that emancipation into account, focusing attention on the individuals (victimizers and their victims). Not only individual rights, but also the corresponding State duties (of protection, investigation, prosecution, sanction and reparation) emanate directly from international law. Of capital importance are the prima principia (the general principles of law), amongst which the principles of humanity, and of respect for the inherent dignity of the human person. This latter is recalled by the U.N. Convention against Torture. An ethical content is thus rescued and at last ascribed to the jus gentium of our times.”

The responsibility to punish perpetrators of international crimes is enshrined also in the statutes of international criminal tribunals. Statute of the International Tribunal for the Former Yugoslavia stipulates that a superior [commander] is subject to criminal responsibility in case of his failure to take the necessary and reasonable measures to prevent such [criminal] acts or to punish the perpetrators thereof.

Yet, there might be seen a strong argument in favour of a customary obligation for states to prosecute international crimes we should acknowledge that the lex lata does not recognize such an obligation and it is only subject to de lege ferenda obligation.

6. OBSTACLES TO EXERCISING EXTRATERRITORIAL JURISDICTION

It should be recognized that there are several potential obstacles, juridical and practical, in exercising extraterritorial prosecution of international crimes, such as gathering evidence from abroad and in controlling its reliability and authenticity, in questioning witnesses who do not understand the language used in the court proceedings, in battling legal and political opposition to prosecute incumbent heads of State or Ministers, or in dealing with public or foreign policy pressures. Such judicial process may create political tensions with other concerned states and hinder or encumber further State cooperation and economical relations. Furthermore, certain States might be prematurely dissuaded from initiating proceedings against the ground of universal jurisdiction due to the high costs associated with the gathering of evidence in regions and times of armed conflict or the denial of subsequent State visits of a number of distinguished government officials and heads of State who are suspected of having committed international crimes.

There were a number of skeptics on exercising universal jurisdiction. One of the most vocal ones was the former US State Secretary Kissinger who described it as “risking judicial tyranny”. He warned against the wide scope of arbitrariness due to the discretion left to national prosecutors to decide what crimes are subject to universal jurisdiction and whom to prosecute.

Jurisdictional immunities of state officials are often considered as obstacles in exercising universal jurisdiction. The issue, in particular, addressed...

44 Separate opinion of Judge Ronny Abraham in the I.C.J. Judgment on Questions relating to the Obligation to Prosecute or extradite (Belgium v. Senegal) of 20 July 2012, 11, § 33.
45 Separate opinion of Judge Conrado Trindade in the I.C.J. Judgment on Questions relating to the Obligation to Prosecute or extradite (Belgium v. Senegal) of 20 July 2012, 32, § 184.
46 Statute of the International Tribunal for the Former Yugoslavia, Article 7(3).
Judges Higgins, Kooijmans and Burgenthal in the Joint Separate Opinion in the Arrest Warrant Case, where they have stated that "immunity" and "jurisdiction" are inextricably linked. Whether there is "immunity" in any given instance will depend not only upon the status of [a suspect] but also upon what type of jurisdiction, and on what basis, the [state] authorities are seeking to assert it. While the notion of "immunity" depends, conceptually, upon a preexisting jurisdiction, there is a distinct corpus of law that applies to each and continued that "the law of privileges and immunities, however, retains its importance since immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system." Similarly, according to Talmor there is no conflict between substantive and procedural rules: the two sets of rules address different matters. A procedural rule may hinder the application or enforcement of the jus cogens rule, but it does not derogate from its content. The application of procedural rules, in general, also does not amount to recognizing as lawful a situation created by the breach of substantive rule of jus cogens, or rendering aid and assistance in maintaining the situation. On the other hand Institute de Droit International at its Naples session Resolution on Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes stated that: "Pursuant to treaties and customary international law, States have an obligation to prevent and suppress international crimes. Immunities should not constitute an obstacle to the appropriate reparation to which victims of crimes addressed by this Resolution are entitled. No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes." 

We can then probably agree with Judge Trindade in his Dissenting opinion in the ICJ case on jurisdictional immunities of the State (Germany v. Italy: Greece Intervening) where he concludes that contemporary international legal doctrine, including the work of learned institutions in international law, gradually resolves the tension between State immunity and the right of access to justice rightly in favour of the latter, particularly in cases of international crimes. 

7. PROPOSALS

It cannot be denied that the inevitable risk of a politically motivated selectivity in the exercise of true universal jurisdiction is reinforced where the national organ charged with opening of an investigation lacks sufficient independence. There have been some suggestions to provide for institutional safeguards against abuses, such as the one suggested by Susane Walther, to establish an international system of accreditation allowing for a preventive screening of any state willing to exercise true universal jurisdiction with a view to fulfilling the necessary prerequisites. At the same time, an international judicial organ, rather than the state concerned, should be entrusted with the power to make the decision as to whether another state was or is unwilling or unable to conduct the criminal proceedings in a given case.

It is noted that States are successfully exercising national criminal procedures on the basis of extraterritorial jurisdiction against lower and mid-level foreign officials, but attempts to try the highest level foreign officials have failed so far. This is understandable as processes against top level officials are highly politicized and have strong influence on the international relations.

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81 Ibid § 3-4.
82 Ibid § 75.
85 Ibid Article 3.
87 C Kreß, 584-585.
88 Ferdinandusse, 73.
With a view to address practical challenges to the exercise of extraterritorial jurisdiction it seems that there is a need to strengthen States cooperation in this respect.

The international community started the discussion on this issue in 1977 and made a first step by adopting UNGA Resolution 3074 on Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. Further progress was achieved on regional level. For example, within the EU pursuant to Council Decision 2002/494/JHA, a network of contact points for strengthened cooperation between national authorities in cases of persons responsible for genocide, crimes against humanity and war crimes was created. The aim of adopting this document was to enable law enforcement authorities in the EU Member States to cooperate as effectively as possible in the field of investigating and prosecuting persons accused of committing or taking part in genocide, crimes against humanity or war crimes, as defined in the Rome Statute.

It is somehow a paradox that extensive provisions on mutual legal assistance exist in the United Nations Convention against Transnational Organized Crime (2000), the United Nations Convention against Corruption (2003), and the International Convention for the Protection of All Persons from Enforced Disappearance (2006), but not for the international crimes (i.e. genocide, crimes against humanity, and war crimes). With a view to facilitate prosecution of international crimes before domestic courts it would be recommended to adopt a set of mutual legal assistance provisions for these crimes similar to those in the above noted treaties, thereby closing what appears to be a legal gap. Currently mutual legal assistance is based on bilateral treaties which are, however, limited in their number and scope. A binding global legal document for cooperation in criminal matters concerning core international crimes would substantially assist states in exercising prosecution of international crimes. On 24 September 2012 at the UN High-level meeting on the rule of law at the national and international levels the Governments of the Netherlands, Belgium and Slovenia jointly pledged to support effective investigation and prosecution at the national level of the most serious crimes of concern to the international community, in particular war crimes, crimes against humanity and crime of genocide, by improving the international framework on mutual legal assistance and extradition through the negotiation and adoption of a new comprehensive international instrument.

Salvador Declaration on Comprehensive Strategies for Global Challenges recommended to take more effective concerted action, in a spirit of cooperation, to prevent, prosecute and punish crime and seek justice and recognized that gaps may exist in relation to international cooperation in criminal matters. It has invited the Commission on Crime Prevention and Criminal Justice to consider reviewing this issue and explore the need for various means of addressing gaps that are identified. It has also stressed the need to strengthen international, regional and subregional cooperation to effectively prevent, prosecute and punish crime, in particular by enhancing the national capacity of States through the provision of technical assistance.

8. CONCLUSION - A GROWNING SENSE FOR RESPONSIBILITY

Joint appeal of the Foreign Ministers of Austria, Denmark, Ireland and Slovenia upon the UN Security Council to refer the situation in Syria to the International Criminal Court as soon as possible and similar letter of

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18 Ibid § 21.
the Swiss Ambassador to the UN on behalf of 58 States clearly shows the determination of States to hold perpetrators of mass atrocities accountable.

We can clearly see that there is a tendency to hold perpetrators of international crimes accountable for their atrocities. There is a growing awareness that states bear their share of responsibility to fight impunity for international crimes also beyond their borders. It is well established that states have a right to exercise extraterritorial jurisdiction over serious crimes of international concern. We can also see a trend of several scholars arguing for an obligation of states to prosecute perpetrators of such crimes on the basis of extraterritorial jurisdiction, including universal. Last ICJ judgments have confirmed that such an obligation cannot be considered as **lex lata**. However, the progressive development of international human rights law and its protection might lead to the development of such norm in the future.

The concept of R2P without any doubt contributes to the growing awareness of international community of states responsibilities. States have agreed to the principle of "responsible sovereignty" and to assist each other in performing these obligations. International community has also obliged itself to intervene when a state manifestly fails to protect its populations from mass atrocities. Halting perpetrators accountable for their crimes is undoubtedly an act of population protection. Drawing comparison to the national penal system, we can note that even the most retributively focused systems of criminal law could hardly disregard the prevention of the wrongs. A. Ashworth and Zedner assume that the state has a responsibility "to seek to reduce the incidence of the kinds of conduct that are properly criminalized, since it is a proper part of the state's duty to seek to protect its citizens from suffering such wrongs."

If we assume the existent obligation of States to protect populations from criminal acts on their territories than similar obligation to protect, at least for the most serious crimes, should exist also at international level - beyond their borders. Criminal and penal systems play a crucial role at national levels in the prevention and deterrence of potential criminal acts. Establishment of an effective global criminal and penal system would seem the best option to diminish and eventually eradicate most serious international crimes.

It should be clear that several obstacles on the way in achieving such a system exist, as was already elaborated above. The establishment of such a global system would for sure not happen overnight and many difficult questions will be raised. However, we can see a trend towards its establishment. The creation of the first ever permanent international criminal court, ICC, to which almost two thirds of the World states have submitted their jurisdiction, is a huge step towards such a global criminal system. Strengthened national criminal systems and extended extraterritorial criminal jurisdiction of States is yet another step in this direction. It seems that two sets of questions still remain to be resolved: (1) excluding potential interferences of states in international relations when exercising their extraterritorial criminal jurisdiction (immunities and arbitrariness of proceedings) and (2) exercising just and fair proceedings (evidence gathering, rights of accused and related costs). These two sets of questions are undoubtedly extremely difficult to resolve, however, not impossible. Having committed to the R2P concept, States are at least obliged to rigorously endeavor to find viable solutions for such a global judicial system that will eventually eradicate impunity for perpetrators of mass atrocities.

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27 Ibid 543.