

UNIVERSITY OF PADOVA

European Master's Degree in Human Rights and Democratisation
A.Y. 2018/2019

Universal Jurisdiction and Populism

Is it possible to secure a genuine application of the principle of universal jurisdiction in the face of rising 21st century populism?

Author: Vanessa Ardabili
Supervisor: Paolo de Stefani

Abstract

In an increasingly populist world there are certain developments occurring which on one hand enhance the need for an extraterritorial principle like universal jurisdiction, on the other hand, however, render states less willing to make use of it – or at least less willing to use it for genuine reasons. The cause for such increased need in view of rising populism is primarily two-fold: more hate crimes against parts of populations are likely to occur, mandated by immune state officials pursuing their populist or nationalist agenda, and, at the same time, a larger number of persons are likely to be left without state protection, which they would be able to receive if another state, or body with judicial authority, stepped in through asserting universal jurisdiction. Causes for the decreased willingness, on the other hand, are ever-quoted concepts of state sovereignty, territorial integrity, and immunity from foreign judicial criminal proceedings – hence, nationalist attitudes one can observe infiltrating government policies more and more since the beginning of this century. In this time of political change, seemingly in contradiction to global notions of human rights and international criminal law, thus blurring the rationales behind universal jurisdiction assertions more than before, it seems to be forgotten that core human rights are at stake and people left without justice. This thesis picks up on that controversy in developments and identifies whether there are possibilities to secure a genuine, non-abusive, application of the principle of universal jurisdiction – thus, whether one can continue to count on universal jurisdiction as safeguard for human rights, and how this approach would need to look like more specifically adapted to the current world order and changed mind-sets of numerous state heads.

Outline

<u>Introduction</u>	p. 3
How populism increases controversies in the application of universal jurisdiction and its threat to human rights	

PART I – MAPPING THE FRAMEWORK OF ANALYSIS

<u>Chapter 1</u>	p.10
A search for the core objectives of universal jurisdiction	

- Dismantling the controversies around universal jurisdiction
- Development throughout time
- Shift in rationales for assertion

<u>Chapter 2</u>	p. 31
Identification of elements of genuine and non-genuine uses of the principle of universal jurisdiction	

<u>Chapter 2.1</u>	p. 33
Identification of elements of a genuine use of universal jurisdiction	

- Theoretical case scenarios in line with universal jurisdiction’s core objectives: the positive outcome approach
- Theoretical case scenarios in line with universal jurisdiction’s core objectives: the negative outcome approach

<u>Chapter 2.2</u>	p. 38
Loophole analysis to the as genuine identified use: Identification of elements in a non-genuine use and application of universal jurisdiction	

- Theoretical case scenarios running counter to universal jurisdiction's core objectives: universal jurisdiction's core objective: the positive outcome approach
- Theoretical case scenarios running contra universal jurisdiction's core objectives: universal jurisdiction's core objective: the negative outcome approach

PART II – REALITY CHECK

Chapter 3 p. 45

Populism and state attitudes

- The 21st century populist movement and its trend
- Populism's impact on national and international policies
- Identification of populism's effects on international criminal law

Chapter 4 p. 58

Impact of the effects of populism on universal jurisdiction

- On how the effects interfere with the as genuine identified elements
- On how the interference with genuine use might trigger an increase in non-genuine use

PART III – THE TASK OF MAINTAINING GENUINENESS

Chapter 5 p. 73

Overcoming the identified issues

- Assessment of universal jurisdiction's degree and extent of flexibility
- Specific proposals
- Specific proposal transcending checklist
- Feasibility assessment

Conclusion p. 79

Bibliography p. 80

Annex p. 88

Introduction

How populism increases controversies in the application of universal jurisdiction and its threat to human rights

The principle of universal jurisdiction has ever since been a debated topic. Prone to being abused as political tool to feed games of power¹, rationales for its use have been blurred by dubious interests and its application thus questioned as furthering national political interest², colonial senses of entitlement³, or forum shopping⁴ rather than serving as a means to justice.

And yet, it is possible to detect some genuine use, as this paper will pick up on, one that is in line with the principle's core objectives of combatting impunity, restoring justice, deterrence and prevention of gross international crimes, and victim reparation⁵. Already susceptible to abuse in a world order in which most Western states promote international cooperation, this paper will question, analyse and evaluate how challenged and obstructed its use is becoming when considering that, in the course of current 21st century populist movements, also those states that have previously been providing pushback⁶ against human rights violating state heads base their national political decisions and policies increasingly on national security, sovereignty, territorial integrity and non-interference⁷.

¹ See for example Stephen Macedo, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, (University of Pennsylvania Press, 2006), page 3

² See for example The Princeton Principles on Universal Jurisdiction (Princeton University, 2001), available at: https://lapa.princeton.edu/hosteddocs/unive_jur.pdf, pages 24-25

³ See for example AU-EU Expert report on the Principle of Universal Jurisdiction (16 April 2009), available at: <https://www.scribd.com/document/14984540/The-AU-EU-Expert-Report-on-the-Principle-of-Universal-Jurisdiction>, para. 37

⁴ The Executive Council, Thirteenth Ordinary Session, 24-28 June 2008, *Report of the Commission on the Use of the Principle of Universal Jurisdiction by Some Non-African States as Recommended by the Conference of Ministers of Justice/Attorney General*, available at: <http://archives.au.int/bitstream/handle/123456789/3264/EX%20CL%20411%20%28XIII%29%20 E.PD F?sequence=1&isAllowed=y>, at. 84

⁵ The Princeton Principles *supra* note 2, *Introduction to Principles*, pages 24-25, see also International Congress on Universal Jurisdiction, *Madrid-Buenos Aires Principles of Universal Jurisdiction*, (Madrid and Buenos Aires, 2014-2015) available at:

<http://www.hormantruth.org/ht/sites/default/files/files/universal%20jurisdiction/MADRID%20-%20BUENOS%20AIRES%20PRINCIPLES%20OF%20UNIVERSAL%20JURISDICTION%20%20%20%20-EN.pdf>; (Preamble); see also Africa Legal Aid, *The Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Violations*, (Arusha, 2002), available at: https://www.africalegalaid.com/download/policy_document/Policy_Document.pdf, Principle 17

⁶ Philip Alston, 'The Populist Challenge to Human Rights' (February 2, 2018). *Journal of Human Rights Practice*, Volume 9, Issue 1, 1 February 2017, Pages 1–15, (doi/10.1093/jhuman/hux007); NYU Law and Economics Research Paper No. 18-05, available at: <https://ssrn.com/abstract=3117093>, page 5: e.g. the US, as well as other leading Western and Latin American states.

⁷ e.g. the current US policy focus in *ibid.* page 3; see also statement of the Islamic Republic of Iran on Agenda item 85 at *UN General Assembly Sixth Committee 72nd Session* (Summary Record of the 13th meeting held at New York 11 October 2017, A/C.6/72/SR.13, (New York, 6 December 2017), available at: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/C.6/72/SR.13, page 2

It shall be noted, already at this early point of writing, that this paper considers universal jurisdiction a lawful instrument under international law, and is in favour of its use, that is, more specifically, in favour of an application as a tool of *last resort* – as the ultimate means to combat impunity that would otherwise occur as a consequence of non-action. Therefore, the fact that this paper will continuously point to the problematic risk of an abuse given the principle's nature is not the expression of an opinion against its use but rather a call for more attention during application, and for an implementation that takes above-mentioned risk for abuse into account, and seeks to prevent such misuse in a more effective way. According to the paper's claim, namely, it is feared that in view of recent developments of populism and nationalism, even more effective mechanisms than the ones already in place will indeed be necessary in order to secure the principle's genuine application.

The call for a responsible use of universal jurisdiction is not new. Soon after re-emergence of the principle in the late 1990s and increase in use after the *Pinochet* precedent, the scholarly world as well as international organisations saw the need to establish guidelines given the principle's perilous and abusive potential when unregulated⁸. It is not this paper's aim to make aware of the fact that universal jurisdiction is dangerous when abused. This was, as already mentioned, long ago acknowledged. What is aimed at with this paper is that such *responsible use* now needs to pay due regard to the emerging populist threat and related issues that are to come with it, and thus, from now on, should be redefined by beginning to include apt preventive measures. If a responsible use of universal jurisdiction as evolving tool⁹, namely, meant before that it has to be guided and limited in its application and scope¹⁰, then its evolving character must certainly also capture and imply the current *zeitgeist* of populism and find a middle ground on which also populist regimes will not deprive universal jurisdiction of its genuine purpose.

Core to such claim is a hypothesis putting the principle of universal jurisdiction and the effect of the recent populist movement in direct connection, thereby showing up a controversy. **If one assumes that some effects of populism are that 1) more people are**

⁸ Steven W. Becker, 'Universal jurisdiction. Global report', *Revue internationale de droit pénal*, vol. 79, no. 1, 2008, pp. 159-172, available at: <https://www.cairn.info/revue-internationale-de-droit-penal-2008-1-page-159.htm>, page 169; see also The Princeton Principles *supra* note 2, pages 25 and 26-27; or UNGA resolutions (2009-2017), A/Res/64/117, A/Res/65/33, A/Res/66/103, A/Res/67/98, A/Res/68/117, A/Res/69/124, A/Res/70/119, A/Res/71/149, A/Res/72/120

⁹ The Princeton Principles *supra* note 2, page 16

¹⁰ See Anne-Marie Slaughter, 'Defining the Limits: Universal Jurisdiction and National Courts'. Published in *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*, edited by Stephen Macedo, (University of Pennsylvania Press, Philadelphia 2004), page 168

in need of protection from the international community¹¹, but that at the same time 2) states are less willing to interfere with another state's sovereignty, and that 3) states do not accept when it is interfered with their own sovereignty which thus allows one to predict a decreased overall willingness concerning its use, **then one can say that** populism does on one hand render a concept like universal jurisdiction indeed even more important as a tool in the fight against impunity but, on the other hand, hinders its functioning at the same time. When one furthermore assumes that the effects of populism, bearing increased focus on national interest and security resulting in rejection of international norms and cooperation¹², instead might trigger a different consequence, namely that an instrument like universal jurisdiction would yet make a beneficial tool to demonstrate and further pursue populist-minded states' national agendas at an international level, then one can add to, and slightly amend, the assumption of states being less willing to make use of the principle despite an increased need, that they are less willing to make *genuine* use of it. Hence, in other words, it might not necessarily be the principle of universal jurisdiction altogether that the states here focussed on are less willing to make use of, but a *pure* form of application -ideally detached from any national interest by being expression of an act in the interest and on behalf of the entire international community¹³- that is not foreseen by the populist state actors in question anymore.

Resulting from that hypothesis this paper asks *whether it is possible to secure a genuine application of the principle of universal jurisdiction in the face of rising 21st century populism*. There are hence three main elements to the paper's research question: the query into a **genuine application** of the principle of universal jurisdiction, the query into **21st century populism**, and the question whether one can **secure such genuine application**.

¹¹ such increased need for international protection can have various reasons: for example, a populist or nationalist state is likely **a**) to commit hate crimes against certain groups of people within their country, in which then, obviously, no action by the state itself will be taken since latter is the perpetrator itself (e.g. ethnic cleansing in the Kosovo region by the extreme nationalist Serbian government under Milošević in the late 1990s), or **b**) to be less reluctant to protect people that belong to an ethnic minority or are not their nationals (e.g. note the high degree of discrimination in Hungary against Roma, increasing together with elevated degree of nationalisation of the government), those people thus relying on external help.

¹² Vito Todeschini, Interview with Sam Zarifi, Secretary-General of the International Commission of Jurists, 'Human Rights in the Time of Populism', *Rights!*, (Dec 17, 2018), available at: <https://rightsblog.net/2018/12/17/human-rights-at-the-time-of-populism/>; see also Alston *supra* note 6, pages 4-5; or Rosa Balfour, 'The (Resistable) Rise of Populism in Europe and its Impact on European and International Cooperation', IEMed. Mediterranean Yearbook 2017, available at: https://www.iemed.org/observatori/arees-danalisi/arxius-adjunts/anuari/med.2017/IEMed_MedYearbook2017_rise_populism_europe_Balfour.pdf/, page 59.

¹³ The Princeton Principles, *supra* note 2, *Introduction to Principles*, page 23-24

Its overall aim is to build up a base of arguments that eventually lead to the presentation of a framework encompassing different crucial elements which, through monitoring universal jurisdiction assertions more closely and thoroughly, should be paid attention to in current and future years. Posing and answering the research question presented above implies looking more in depth into the theoretical foundations of the principle of universal jurisdiction, into how those are affected by the consequences of populism, and how the negative effects thereby created can be overcome through adapted mechanisms and laws.

The structure of this paper will follow the narrative of the research question, therefore resulting in three different parts, each covering one of the respective elements. The chapters are grouped among those parts according to the line of reasoning that links the three different elements of the research question. *PART I* will map the theoretical framework for the analysis, i.e. the framework for universal jurisdiction to occur in. It will contain the first two chapters, of which the first one determines universal jurisdiction's core objectives and features, while the second -further split in two sub-chapters that both apply the same approach of drafting theoretical scenarios that can be paired with real life cases- will depart from the previously established core features and identify, in sub-chapter 2.1, more in detail elements that can be traced back as running closest to being in harmony with universal jurisdiction's main objectives, and that can be determined as elements necessary for, as well as indicative of, such genuine use. Sub-chapter 2.2 then deals with an identification of the elements of a non-genuine use by conducting a loophole analysis that will show how the controversies around universal jurisdiction crystallise in practice and point out procedural symptoms indicative of such abusive applications of the principle. In *PART II*, a reality check is undertaken which will demonstrate that the concerns brought forward are based on reality and are thus *real* concerns. This second part will cover two chapters of which the first, chapter 3, will address the second part to the research question -21st century populism- and thereby, firstly, prove that populism is rising, secondly, show *that*, and *how*, it impacts state heads' attitudes, and thirdly explain what that could mean in view of international law as well as, more specifically, international criminal law. Its goal is to shed light on where the conflict addressed by the research question has its roots in, as well as to provide the fundament for the next chapter that turns to the main debate: chapter 4 will reify the hypothesis by showing that all parts to it are not only based on *theoretical* concerns but, by combining findings from chapters 1 and 2.2 with findings from chapter 3, have

moreover *practical* foundations, in order to then analyse whether the hypothesis can be maintained in view of *factual* happenings, providing possible explanations for reasons of contradictions like, *inter alia*, rise in implementation of universal jurisdiction laws. Said critique will open the door to *PART III* of this paper, which contains the answer to the research question and therefore implies a future perspective, as overcoming the identified problems requires legal amendments that will show effect, like the peaking populist movement will, in the years to come. Chapter 5 will thus include in addition to suggestions made as part of the answer to the research question a feasibility check.

The methodology used covers a wide range of sources: it was relied on scholarly articles and other literature relating to both determinant and outcome to this research – universal jurisdiction and populism. Those sources were of particular importance for *PART I* and chapter 3 in *PART II* where it is gone back to the essence of both concepts. More essential to this paper, however, was the reliance on information deduced from country reports and public government statements (as can be perceived from country statements at UN sixth committee meetings of recent years for example, and reports concerning their acts when faced with international crimes either happening within, or outside of, their respective territorial jurisdiction). Another substantial source of material used is case law, mainly universal jurisdiction-related, but also, for a demarcation and thus framing of the concept, cases linking to other principles of jurisdiction. Furthermore, consideration of domestic, international, as well as draft legislation concerning universal jurisdiction was essential, particularly for the purpose of the last chapter which proposes, *inter alia*, amendments to existing law. Regard to domestic implementing legislation was also important, especially for the assessment of states' attitudes concerning their willingness to use universal jurisdiction, which often crystallises in their respective way of implementation.

Overall, the method used is thus a documentary analysis, relying on what countries have expressed, or what is to be found as evidence in law and reports concerning the issues addressed by the research question. The approach taken to conduct such documentary analysis is primarily a comparative one: identifying the effects and symptoms of populism on universal jurisdiction creates the need for comparisons of populist to non-populist states as well as of genuine to non-genuine universal jurisdiction applications.

In recent years, in line with the rising amount of populist governments in place, scholarly contributions concerning the impact of populism have been growing in their number. Also

more specifically in terms of human rights, and the populist threat they face, scholars have addressed several issues that can already be seen or are expected to come. Most of what has been discussed thereto-related, however, are the threats populism poses to the individual within the state, and mostly so in regard to liberal democracy¹⁴. Those existing publications make important contributions to this research, as many of the aspects connected to populism previously remarked and discussed in the scholarly world relate to this paper's topic in one way or the other, and contain at times information that can be translated to the here targeted issue – universal jurisdiction. Explicitly, however, the topic of how populism shows impact on foreign relations, thus including the fields of international human rights law, and even more specifically the latter as part of international criminal law, seems to be mostly left untouched. This paper therefore enters a thus far largely unexplored territory – which is here, however, considered to be of utmost importance for the international human rights and criminal justice framework. By departing from the idea, namely, that while current political trends seem to be manifesting populist and nationalist views as integral part of many countries' political systems rather than countering or dissolving such beginning consolidation of populism, international criminal law is now ever more to be read from the lens of what populism could do to it, as it relies on some fundamentals populism is most likely to demolish¹⁵. Such an inclusion of current populist trends into debates around universal jurisdiction strikes as even more necessary when considering the fact that international criminal law as the world knows it nowadays -which means as a growing body of laws mainly emerging from codification in form of conventions and other treaties- is still a fairly young discipline, and thus ever more prone to yet being shaped by, and grow according to, trends reflected in societies and current politics.

This therefore means, as already indicated in the preceding paragraph, that this thesis, by looking at the survivability of genuine universal jurisdiction usage, addresses an aspect of populism not put too much into the centre of focus yet – which is the effects of populism on different elements of international cooperation, here international *legal* cooperation. Even when human rights, and their being endangered, are put into relation with populism it is often not gone too much into detail beyond populists' policies of

¹⁴ Rosa Balfour, *supra* note 12, page 56

¹⁵ *e.g.* international cooperation, mutual assistance, or R2P are, *inter alia*, amongst the concepts providing rationales for the existence of universal jurisdiction, and would -upon their consideration as general principles of international law- justify, and thus be in line with, universal jurisdiction.

exclusion¹⁶ or their threat to liberal democracy, or other fundamental notions of rights. What such analyses thus usually do not reach are the last stages to any given human right¹⁷, i.e. *guarantee* of its full exercise that includes, as very last aspect, accountability for its violation. This paper picks up on this gap in analysis, assesses how the international legal order is being shaped these years and consequently would result into a changed one in the future, and like that contributes to an initiation of filling said gap.

It has to be noted that in all the topic's broadness, combining legal as well as political concerns arising from the various challenges populism poses to the international legal order and human rights, this paper analyses *the specific impact* on universal jurisdiction *only*. Every argument, case, or other scenario brought forward serves the purpose of showing that the hypothesis lying at the heart of this paper is based on real concerns. The scope of this paper does therefore not exceed the frame of looking through a lens that exclusively focusses on aspects crucial to show populism's impact on the fields of law and political dynamics governing universal jurisdictional matters. What is certain is that behind the principle of universal jurisdiction there are other principles that will need to be paid attention to, as impact of populism on them is key to make statements concerning populism's effects on universal jurisdiction, especially when considering that the interconnectedness between both concepts has not been explored and respective links have thus to be created through also looking at other principles with comparable objectives and functions. It shall thus simply be acknowledged here that the limit of this paper's frame of analysis lies with aspects that are necessary for understanding and evaluating the impact on universal jurisdiction and do not go beyond such purpose. Hence, when examples are included that relate to judicial cooperation, the jurisdiction of international tribunals, or to extraterritorial principles of justice other than universal jurisdiction, for example, this will only be done so when the example is necessary to prove the hypothesis connected to universal jurisdiction and not in order to enhance the scope of debate.

Taking into account all of the above said, it is here considered that the specific impact on universal jurisdiction is an important and novel contribution to the populism debate.

¹⁶ Balfour *supra* note 12, pages 56, 60

¹⁷ *see* Alston *supra* note 6, page 17: the various stages to a given human right, which are all of equal importance for the right to be safeguarded, can be summarised as recognition through existence in form of a general principle in a state's domestic law; specific legislation defining and criminalising the commission of the prohibited act, establishment of mechanisms to prevent and monitor the crime, and lastly, guarantee for accountability.

Chapter 1: A search for the core objectives of universal jurisdiction

That the most basic characteristics of the principle of universal jurisdiction are controversial in nature is an undisputable fact: to almost all of its potentially justice-promoting features a “could” can be prefixed¹⁸, indicating sides to the principle that potentially work directly against justice – the powers that lie within its character thus being two-fold¹⁹. This controversial character has often been -here held wrongly- used to challenge its legitimacy altogether, thereby confusing causes for, and symptoms of, the principle’s inherent, or resulting, controversies. Especially among opponents one can observe this rather unobvious misrepresentation of universal jurisdiction’s intended functioning.²⁰ That again has led to confusions as to what features constitute its character and what constitutes a diversion from its character through irresponsible use. Thus, being controversial in nature cannot be seen as necessarily leading to illegitimacy, nor is it necessarily a negative attribute in regard to what the principle itself is purported to achieve – it first and foremost rather points to the need of a guided and responsible use, especially under consideration of the fact that while the justice-promoting side will be brought out through such responsible use, the potentially dangerous side will be thereby constrained. Therefore, it is important to draw a clear line between each feature’s two potential sides – and like that the principle’s core character and main objectives will crystallise.

¹⁸ Universal jurisdiction has been, *inter alia*, described as “a potent weapon” that **could** “cast all the world’s courts as a net to catch alleged perpetrators of serious crimes under international law.” (Stephen Macedo, *supra* note 1, page 3); or as a concept that **could** grant “the promise of greater justice” or that **could** be “a weapon against impunity” (The Princeton Principles, *supra* note 2, page 24). Or, contrarily, on the other side of each “could-provision”, as being *disparate, disjointed, and poorly understood* jurisprudence, or plagued “by incoherence, confusion, and (...) uneven justice.” (The Princeton Principles, *supra* note 2, page 24); or as causing “deprivation of individual human rights”, “unnecessary frictions between States” or “undue harassment of individuals” (AU-EU Report *supra* note 3, para. 13).

¹⁹ note also that it is commonly referred to universal jurisdiction as “weapon” (e.g. Macedo, *supra* note 1, page 3; The Princeton Principles, *supra* note 2, page 24; Henry Kissinger, *The Pitfalls of Universal Jurisdiction* (Global Policy Forum Foreign Affairs 2001), available at: <https://www.globalpolicy.org/component/content/article/163/28174.html>); or as “new beast” to “tame” (Slaughter, *supra* note 10, page 168), both of which are an adequate depiction of its two-fold character.

²⁰ Note how the difference in presenting critique becomes apparent when looking at who makes a statement concerning universal jurisdiction: opponents present the risk of potentially just features shifting to *unjust* ones as inherent character rather than as consequence of *inherently just* features: e.g. Kissinger (opponent), *supra* note 19, at. 5-6 *versus* The Princeton Principles *supra* note 2, page 25

It is this chapter's aim, by dismantling each one of those controversies that are here considered as most blurring its original meaning and main purposes, to lead back to its original, most basic and fundamental character and like that establish its core objectives. Such aim will be reached by juxta-positioning **moot points** (i.e. points of critique commonly mentioned as challenges to its potential justice-promoting side of character and legitimacy) with **what would speak against such challenge** if viewed not as cause but as symptom of controversy²¹, and like that 1) cast aside the confusions surrounding the principle, furthermore 2) break down the principle into its core features, and 3) extract its main purposes.

In the following, six here as crucial considered controversies are put forward.

Controversy 1: Legitimacy in law

(Juxta-positioning Practice until the Arrest Warrant Judgement versus Practice After the Arrest Warrant Judgement)

As mentioned above, several aspects of universal jurisdiction's controversy lead opponents to declare the principle illegitimate. However, as also mentioned, this is at times an erroneous deduction: illegitimacy is most of the time presented as a *cause*, but actually functions as *symptom* of other controversial aspects inherent to the principle.²² However, there is one argument which can indeed be seen as potentially rightfully relating to lack of legitimacy: namely, that there is no objective legitimacy anywhere to be found in law, not even in international customary law.²³ According to several scholars' opinions, international customary law does not at all legitimise universal jurisdiction in the form its use has crystallised over the past decades which implies its applicability to several international crimes amenable to its authority, but does so only for one crime, namely piracy²⁴. However, considering the fact that international customary law evolves over

²¹ Note that here only those are juxta-positioned whose combination constitutes such type of a controversy that a challenge to the exercise of universal jurisdiction is actually posed.

²² Those by opponents presented reasons for illegitimacy will therefore appear as part of subsequent controversies.

²³ Devika Hovell, 'The Authority of Universal Jurisdiction', LSE Law, Society and Economy Working Papers (Aug 2018), available at:

http://eprints.lse.ac.uk/87545/1/Hovell_Universal%20Jurisdiction_Author.pdf, pages 7-11

²⁴ often relying on arguments brought in *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice (ICJ), 14 February 2002, Separate Opinion President Guillaume, available at: <https://www.icj-cij.org/files/case-related/121/121-20020214-JUD-01-01-EN.pdf>, at 5 and 12

time through state practice, the argument that during the 17 years following the *Arrest Warrant* judgement, where the ICC was not yet able to detect state practice, until today, state practice has indicated an evolution of the exercise of universal jurisdiction also over other crimes, seems plausible.²⁵ Devika Hovell argues against this assumption of a legitimacy under international customary law through state practice by referring to numbers: from the Eichmann trial until 2018, there have been 52 cases that were brought to completion, however distributed over 16 different states only, out of which furthermore 15 (i.e. 93%) were Western European states²⁶, and sees behind those numbers proof of the argument that both *quantity* as well as *distribution* reasons deny the existence of state practice.²⁷ Both aspects, however, seem to forego the fact that those stem from universal jurisdiction's character itself: concerning *quantity*, one can counter-argue that it is precisely the objective of universal jurisdiction to be of rare use²⁸, and then the fact that there is a limited number of completed cases to look back to can likewise point, if it can point to anything in the first place, simply to the fact alone that use must have happened correctly.²⁹ Rarity in number makes it difficult to draw any reliable conclusion concerning whether state practice is actually on the come or, contrarily, on the go, as one case only can already show significant impact and change the entire narrative of occurrence. Hence, rather than focusing on litigation only, proof for state practice must be derived from more than the actual existence of cases, like for example rhetoric around the principle – especially in view of a state's willingness to make use of it. What one can, if relying on numbers of cases, to at least some extent say, however, is that those as they are today do not seem to point to a decrease, which is in line with Máximo Langer's contesting of the commonly brought rise-and-fall theory concerning universal jurisdiction's trajectory throughout time.³⁰

The *distribution* argument, on the other hand, can be seen as symptom of the fact that universal jurisdiction is a costly procedure and requires both sufficient financial as well

²⁵ note also that in the *Arrest Warrant* judgement it says: "(...) no general positive rule of law can **yet** be asserted" (*ibid.*), possibly indicating a beginning of *state practice* and *opinio juris* crystallising, then not yet sufficient to qualify as international customary law, but leaving open that, in the future, under continuation of such practice, universal jurisdiction might be legally justified also for other crimes than piracy

²⁶ Hovell, *supra* note 23, page 8

²⁷ *ibid.*

²⁸ e.g. in *ibid.*, page 10

²⁹ see more on this in controversy number 2 (*Radical Exceptional versus Rare Exceptional Use*), page 16

³⁰ Máximo Langer, 'Universal Jurisdiction is Not Disappearing' (2015), *Journal of International Criminal Justice*, pages 245-256, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567036;

as judicial capacity and resources.³¹ One can thus ask oneself whether -if non-western states have had the possibility- they would have asserted it, and whether thus the argument that state practice mostly happens in only one part of the world and thus not as sufficient representation to fully satisfy the requirements necessary to qualify as customary international law, can be refuted. If one can furthermore be certain of that, and not only assume so, the perspective on universal jurisdiction already having reached the necessary threshold for state practice changes. This assumption can thus become reality when looking at whether non-western states show intention and willingness to make use of the doctrine. One significant piece of evidence, pointing to this assumption finding occurrence in reality is the fact that African States³² have, for several years now, planned a mass withdrawal from the Rome Statute³³ due to being unsatisfied with the Court's functioning³⁴. Despite arising from discontent and rejection of the ICC and therewith fundamental ideas concerning a global criminal justice system, one can see that the principle of universality is *not* the reason for rejection of the ICC, but actually driving force³⁵. The AU as a whole speaks in favour of the principle of universal jurisdiction, which becomes apparent in observance of their UN 6th Committee submissions³⁶, their own model on universal jurisdiction³⁷, and their AU Constitutive Act³⁸ as well as the African Charter of Human and People's Rights³⁹. Hence, lack of universal jurisdiction cases to report has in the past by at least a significant amount of states not stemmed from

³¹ The Princeton Principles, *supra* note 2, page 27

³² here of relevance as African, thus referred to non-Western, states have in the past been mostly on the side asserted against.

³³ AU Assembly, 28th Ordinary Session, *Decision On The International Criminal Court (ICC)Doc. EX.CL/1006(XXX)*, AU Assembly Doc. Dec.622(XVIII), (Jan.30–31, 2017), available at: https://www.au.int/web/sites/default/files/decisions/32520-sc19553_e_original_-_assembly_decisions_621-641_-_xxviii.pdf, para. 8

³⁴ *Note* that this thesis does by no means intend to challenge or evaluate allegations made by numerous African states of an alleged selectivity of the ICC. Whether it holds true or not is of no significance for this paper's aim: it is here merely picked up on the fact that it appears in the AU's rhetoric and reasoning to reject the ICC and related version of universality.

³⁵ AU Executive Council, 21st Ordinary Session, *Decision On The African Union Model National Law On Universal Jurisdiction Over International Crimes, Doc. EX.CL/731(XXI)*, (July 9-13 2012, Addis Ababa), available at: https://www.un.org/en/ga/sixth/71/universal_jurisdiction/african_union_e.pdf, para. 2

³⁶ *note especially* African Union, *Request for the inclusion of an additional item in the agenda of the sixty-third session, The scope and application of the principle of universal jurisdiction*, U.N. Doc. A/63/237/Rev.1, 23 July 2009; available at: <https://undocs.org/pdf?symbol=en/A/63/237/Rev.1>

³⁷ AU Executive Council, *supra* note 35

³⁸ AU, *The African Union Constitutive Act*, available at: https://au.int/sites/default/files/pages/34873-file-constitutivact_en.pdf, art. 3(e) and *especially* 3(h)

³⁹ OAU, *African (Banjul) Charter on Human and Peoples' Rights*, OAU Doc. CAB/LEG/67/3 (27 June 1981), rev. 5, 21 I.L.M. 58 (1982), available at:

http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf, art. 45 and 60

disregarding the doctrine, or rejecting its main ideas, but rather from considering the way it was being made use of as unfair. One can therefore see the development concerning the AU states' reaction rather as an attempt to counter the potential dangers of universal jurisdiction's two-sided character, and furthermore assume that they would use it, and would have already made more use of it, if it was less biased.

To sum up this first presented controversy, leaving out the thereto related confusions as to where its legitimacy stems from, one can say that the argument of illegitimacy being *cause* for controversy in character -i.e. lack of express (objective) authorisation in law- certainly gives its usage a controversial connotation, but also shows that the character of universal jurisdiction is yet to be shaped, is yet to await evolution, and, most importantly, thus naturally implies rarity in occurrence in cases – despite the need to be streamlined into domestic laws to even reach such rare applications. To reiterate, state practice is hard to detect for a principle that is supposed to be used rarely, which has to be taken into account when observing the silence from the ICC in previous judgements that can point to either a prohibition – or, contrarily, a silent authorisation, then assuming that potential to evolve is to be seen as a possible legitimisation.

Controversy number 2: Radical Use

(*Juxta-Positioning **Radical** Exceptional Use versus **Rare** Exceptional Use*)

As mentioned above, the fact that pure universal jurisdiction cases are rare cannot be used as an argument to refute the existence of state practice. However, such controversy of an existence of only few cases is taken as reason to not only refute and relate its rareness to lack of state practice but to moreover label the exercise of universal jurisdiction as what one could call *radical exceptional*.⁴⁰ To identify such aspect of rarity as part of one of its inherent controversies as a negative feature⁴¹, does not serve as a convincing argument – in the end, universal jurisdiction should, in its most pure and ideal form of exercise, happen rarely⁴². What is implied by *radical* is mostly that ordinary courts exceed their usual scope of jurisdiction thereby potentially resulting in a “*dramatic extension of*

⁴⁰ Langer *supra* note 30, page 253

⁴¹ *ibid.*

⁴² Slaughter, *supra* note 10, page 169; *see also* Hovell, *supra* note 23, page 10

*judicial power and corresponding threat to judicial legitimacy*⁴³. What the idea of universal jurisdiction being *radical exceptional* is here juxtapositioned with is the challenging of such allegation by instead seeing its use and nature being of *rare exceptional* use.

A first idea to justify such *rare exceptional* use is -instead of taking rarity of cases as a proof for radical character- to recognise that it has to be looked at *how streamlined* universal jurisdiction is in domestic legislation (implementation being the necessary act to allow the exercise in the respective state). And in fact, one can observe the number of countries around the world that have enshrined universal jurisdiction in their domestic laws in its pure form (i.e. not stemming from treaty authorisation but as a separate concept) as well as in form of a recognition of universality of certain crimes by making them amenable to universal jurisdiction in their domestic laws whenever the respective treaty provides for extraterritorial justice for the crime in question⁴⁴, has gone up.⁴⁵ Noteworthy, however, is the large number of states allowing universal jurisdiction over ordinary crimes⁴⁶, which is here by this paper considered to be against its inherent core objective, and would actually be a confusion caused by misinterpretation possibly leading to unfolding its dangerous potential – then actually being the above-mentioned “*dramatic extension*”. The character of universal jurisdiction crystallising behind this confusion is that the implied function of *ordinary* judges acting as *international* ones, should only happen when they prosecute *international* crimes.

The second idea to justify the *rare exceptional* use is then that the resulting rarity proved as inherent characteristic can indeed be viewed as a necessary consequence of the principle relying on being an exception⁴⁷, a loophole filler⁴⁸, and a default jurisdiction⁴⁹ that is gone back to when other mechanisms have not provided what also universal

⁴³ *ibid.*, page 168; *see also* Hovell *supra* note 23, page 10; *or* Kissinger *supra* note 19, para. 18

⁴⁴ *See* list of treaties that do so in **annex 1**

⁴⁵ Amnesty International, ‘Universal Jurisdiction – A Preliminary Survey of Legislation Around the World’, Amnesty International (Oct 2011 London) available at: https://www.amnesty.org/download/Documents/32000/ior530042011en_, especially pages 1-2, and 16-21; and Amnesty International, ‘Universal Jurisdiction – A Preliminary Survey of Legislation Around the World – 2012 Update’ Amnesty International Publications (Oct 2012 London) available at: <https://www.amnesty.org/download/Documents/24000/ior530192012en.pdf>, pages 1-2, and 16-21; *see also* Langer *supra* note 30, page 247

⁴⁶ *ibid.*

⁴⁷ Hovell *supra* note 23, page 10; *or* Slaughter, *supra* note 10, page 175

⁴⁸ The Princeton Principles, *supra* note 2, page 24

⁴⁹ Hovell, *supra* note 23 page 10; A Cassese, ‘Is the Bell tolling for Universality? A Plea for Sensible Notion of Universal Jurisdiction’ (2003), *Journal of International Criminal Justice* 589, available at: <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jicj1&div=46&id=&page=>, page 593

jurisdiction intends to grant, and is thus relied on as a very last mechanism to ascertain impunity is guaranteed fully. Here it is shown that solely relying on numbers does not only not explain a (non-)existence of state practice but furthermore would misrepresent its role: it is a safeguard and guarantee whose unfolding potential usually almost never gets to be shown, as often there is no need for prosecution under the universality principle because the other mechanisms of international criminal justice have done the work already. It therefore functions at the *last* stage of the guarantee of each respective right universal jurisdiction seeks to protect, where, again, it makes the *last* part in a chain of mechanisms ensuring accountability.

The first aspect to this idea is thus that its role is to be seen as being of *last resort*, as the ultimate means in a chain of safeguards as integral part to the international criminal justice system that seeks to prevent the impunity, and like that in the longer run, prevention and deterrence of heinous international crimes. In order to explain such position that universal jurisdiction takes in the above-mentioned chain it has to be started at its beginning: when the crime in question is considered one of the international core crimes⁵⁰ then it is often the case, if not highly likely, that territorial jurisdiction by the state concerned will not take place. Reasons for that can be multiple in their number: the most predominant ones relate to the perpetrators being state officials under the current regime, in the case of which then the ones hurt are often unable to file complaints⁵¹, or prosecuting authorities unwilling to investigate⁵². Especially when the crimes occur during a time of conflict, the acts are very likely to go unpunished. Additionally, also after a conflict, and in the case that the acts in question were committed during the war, possibilities to adjudicate on the base of territorial jurisdiction is often not likely to occur, or at least not in reasonable time: if the old government remains in office, not much will have changed in regard to the above-named reasons. If a new government is in place, it can be a proponent of the old one, and, even if not, the chances are high that main focus is on establishing peace and reconciliation through amnesties, often leaving out the justice sector as contributing

⁵⁰ commonly considered as international crimes being amenable to jurisdiction are genocide, torture, crimes against humanity, war crimes, piracy and slavery (*see for example* Becker, *supra* note 8); *note* that it is advocated amongst universal jurisdiction promoters to include, due to emergence of new crimes as well as increase in gravity of certain international crimes, additional crimes to be amenable to universal jurisdiction, but the above-mentioned ones are so far the ones which have crystallised through satisfying the requirements of state practice and *opinio juris*.

⁵¹ *e.g.* the country finds itself in a period of war and the victims live in perilous situations, or belong to a minority group with suppressed access to legal institutions or limited economic means

⁵² *e.g.* due to being part of the government and in favour of the acts in question, or fearing for their safety upon initiation of investigations

part to such aims, thus letting many crimes go unpunished in face of the overwhelming task of rebuilding a nation, prioritising a speedy way to peace over more thorough investigations. If that is the case, international ad hoc tribunals could be there as support intended to ensure first of all the existence, but furthermore also the fairness of judicial proceedings. However, also through this special version of territoriality⁵³ at times not all, including even the most serious crimes, can be tried: what such a tribunal often faces is an overwhelming amount of cases combined with time pressure or limited resources.⁵⁴ When such stage of lack of justice is reached it would be time for states to assert jurisdiction extraterritorially. There might be countries with direct links (active personality, passive personality, or state interest) but if they do not claim their potential jurisdiction, usually only then the floor for universal jurisdiction would be opened. Hence, one can well see in this chain of different mechanisms, what the exact position and function of universal jurisdiction is and should be: a supplementary tool that would ensure **as a very last resort** that certain crimes do not go unpunished. The chain makes clear that the international justice apparatus would be faulty and impeded to effectively and fully function if it was to work without a concept like universal jurisdiction, catching a perpetrator of an international core crime as a very last net before impunity would be the case. It is thus not only supplementary to the jurisdiction of international courts but also to the jurisdictions of states that might have nexus. It shall be noted that therefore the exercise of universal jurisdiction should ideally happen when the other means available to achieve the same outcome (impunity) are exhausted. Also in the one and only case scenario in which it is not a state but an international body making use of the principle (the ICC upon UNSC authorisation when the perpetrator's national state is not member to the Rome Statute) universal jurisdiction shows its function as a last resort of supplementary character.⁵⁵

⁵³ note that even though usually trying perpetrators *outside* the territorial state of jurisdiction, ad hoc tribunals should be considered a territorial form of jurisdiction (*see* Becker, *supra* note 8, page 169) as they have jurisdiction over the crimes in the area of the conflict. Also the time-transcending component implied by universal jurisdiction is lacking as ad-hoc tribunals are non-permanent establishments with a time-specific period of jurisdiction.

⁵⁴ e.g. the ICTY, as well as the ICTR, were put under constant time pressure by the UN to complete their mandate and adjudicate more cases. *See* UNSC Res 1503 (28 August 2003) UN Doc S/RES/1503 (2003); para. 6-7; or UNSC Res 1534 (26 March 2004) UN Doc S/RES/1534 (2004), para. 6

⁵⁵ UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, available at: <https://www.icc-cpi.int/nr/rdonlyres/add16852-ae9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf>, art. 13(b) and art. 87 para. 5(b) where it further becomes apparent that also the referral to the UNSC, the only way in which the ICC relies on the universality principle is thought and drafted in a way that it is left for *rare* situations.

Taking into consideration the above presented chain that demonstrates how universal jurisdiction should, by virtue of its role within the international criminal justice system, not occur often, as well as it thus not only acts -logically- extreme in its *occurrence* and but furthermore logically extreme in its *measures*, since it responds to extreme, and not to ordinary, cases, the aspect that rarity should be taken as a positive result of its feature becomes apparent. It then means, namely, that use is made in line with its character. Occurrence of a high number of cases would then give rise to concern that universal jurisdiction's extreme measures are used for anything less extreme than the most extreme of the extreme cases. Hence, it is the opposite of a rare occurrence that could unlock universal jurisdiction's dangerous potential in this regard. Furthermore, in line with the by this paper adumbrated threat, which consists in the end in a combination of universal jurisdiction's dangerous side of the two-fold character with the populist movement, an increase in occurrence could signify that *rare* changes into *radical*.

Hence, disentangling the confusions of this second above-presented controversy leaves behind the certainty that both rarity and exceptionality shall not be seen as negative but as inherent to the principle's character, which is backed up by two arguments: **1)** rarity of cases is not a valid argument to refute universal jurisdiction, and is instead to be seen as a result of what phase of the accountability stage within the international criminal justice framework the principle functions in – as *last* resort, and *last* net of several, providing certainty that international crime perpetrators are caught; and **2)** rarity of cases is not what sheds light on how often the principle is, or would be, used and whether it is used for the right reasons, as its insurance to well and just functioning comes with being streamlined into domestic codes, where it exists as a default function available to be relied on in exceptional cases, rather than making constant use of it – which then would be more likely occurring in inappropriate ways.

Controversy number 3: Political Interest as Rationale for Use leading to Abuse of Power

(Juxta-Positioning political interest rationales for its existence versus those being result of abuse and thus rationales for use)

Amongst the critique on universal jurisdiction that picks up on its controversies it is often confused what is controversial about its genuine purpose and intention and the

controversy shown in *usage* by states. It has been claimed that universal jurisdiction is a playing out of some powerful countries' (political) interest through a judicial extension into the international sphere⁵⁶. However, considering the development the principle has gone through⁵⁷, which is captured by almost all recent documents laying down principles and new guidelines for universal jurisdiction's use through addressing its purpose as defending “*values common to the international community*”⁵⁸, this could be not further from the principle's genuine meaning. One can deduce that the exercise of universal jurisdiction is supposed to mean a move away, implying a disregard to national interest in its application⁵⁹.

Even if with that it is shown that national interest is nowadays not *supposed* to play any part in the ‘why’ behind a universal jurisdiction assertion, it does not signify that states *do act* without being influenced by the political atmosphere and their national stake in it. Complete disregard to national interest is rather a theory of how the *ideal* application should look like – and is therefore almost impossible to be reached.⁶⁰ Since national bias can lead in its most extreme forms to political abuse of the principle, draft guides -in order to come close to an objective assertion- give out warnings concerning national bias and call for prevention of abuse as well as, at times, include specific suggestions and safeguards⁶¹. The fact that it is acknowledged by proponents of the principle that abuse - due to national bias by either the state applying the principle, or by the state it is applied to- is possible to occur shows how the cause for such abuse lies not in the nature of the principle itself but in an exercise that disregards its main purpose of serving the interest of the international community. When considering that national interest does not always lead to abuse, but can have an outcome which does not necessarily hurt individuals or other actors in the process⁶², the difficulty of preventing all forms of national bias appears

⁵⁶ Slaughter, *supra* note 10, page 168

⁵⁷ Hovell *supra* note 23, page 12

⁵⁸ The Princeton Principles, *supra* note 2, pages 23-24

⁵⁹ Hovell, *supra* note 23, page 10; *see also* The Princeton Principles, *supra* note 2, *Introduction to Principles*, pages 23-24

⁶⁰ Langer, *supra* note 30, page 246; *see also* AU-EU Expert Report, *supra* note 3, at 13; *or* The Princeton Principles *supra* note 2, *Commentary*, by Steven W. Becker, page 43

⁶¹ The Princeton Principles, *supra* note 2, *Introduction to Principles*, pages 24-25, and 26; *see also* AU Executive Council, *supra* note 39, at 2

⁶² An example of national interest playing into the decision to assert universal jurisdiction could be the wish to not be internationally condemned for being a “safe haven” for international crime perpetrators, in the case of which justice is rightfully done and impunity avoided. If, however, a government wants to remove a foreign opponent and asserts under false, or insufficient, accusations (leading to infringement of the rights of the accused, potentially including the arbitrary deprivation of liberty, denial of a fair trial, or violation of the immunity of state heads) then national interest has indeed led to political abuse.

as more challenging, and at times even counter-productive in view of human rights protection.

Therefore, depriving this third controversy of its confusions shows that the fault does not lie with universal jurisdiction but with natural bias by states. The only fault that can be assigned to universal jurisdiction in regard to this controversy is that it relies on states' willingness and (rightful) application to unfold its justice-promoting potential – which leaves it, however, not different from most international legal principles and their related mechanisms. Instead, what the principle of universal jurisdiction has actually come down to after decades of evolution and redefining is that it seeks to work actively *contra* the risk it leaves and that crystallises as a *symptom*, at times, in abuse of power.

Controversy 4: Infringement of State Sovereignty

(Juxta-Positioning the infringement of international legal principles versus impunity)

This controversy has often expressed itself through the fact that an attempted exercise of universal jurisdiction by one state was faced with objection by the other through arguing that the asserting state was violating international law⁶³ – most commonly referring to an infringement of state sovereignty. From the perspective of an asserting state this seems almost ironic, as -if the case was filed for the prevention of the international crime in question and no other politically motivated reason- the defendant him or herself violated international law to the highest extent thinkable, and the defendant's national state then, if preventing the case to go to trial or challenging the assertion's legitimacy, equally acts in the violation of international norms, thereby however arguing that they have the legal base for their defence because the *asserting state* violates international law. This controversy, however, is nothing unusual but the obvious result of certain legal principles sometimes running counter to each other. Such a clash becomes ever more problematic when the protected values behind the clashing principles are granted a high level of protection – here the *foreign judicial interference* opposed to *sovereignty and non-interference*, latter being expression of the very basic fundament and rationale of international law. In the end, universal jurisdiction comes in as challenger of possibly

⁶³ e.g. *Arrest Warrant case*, *supra* note 24

dangerous side effects arising in the exaggeration of a more traditional concept of state relations.⁶⁴

The commonly posed question is to what extent universal jurisdiction may pose a limit to sovereignty: what kind of acts can qualify to need stronger protection than what state sovereignty protects? Universal jurisdiction assumes that violation of international core crimes **do** justify the violation of state sovereignty, which then -if seen as a justification- provides a lawful limit and exception to the more general rule.⁶⁵ This shows another pure characteristic crystallise behind this controversy: universal jurisdiction is an exception to the general rule and does thus not *refute* the right of state sovereignty, but *proves* it.

More specifically, such alleged violation of sovereignty on part of the objecting state (be it the territorial state where the commission of the crime took place⁶⁶, the defendant's national state, or even the victims' national state) can be expressed in various forms: either through obstructing and impeding the trial from happening⁶⁷, judicially challenging the trial, referring to non-validity of foreign judicial judgements, or even relating the undesired infringement of their sovereignty to the principle of immunity of state officials, which is here considered in line with the same reasoning as the sovereignty principle⁶⁸.

However, not only for the state whose national it is asserted against universal jurisdiction's challenging of state sovereignty, or immunity of state officials, can be the reason for failed attempts of a universal jurisdiction case. Reluctance to initiate an official investigation in the forum state where the case is brought forward due to a fear that the defendant's state of nationality could take the assertion as an infringement of their sovereignty, can likewise be detrimental to a successful exercise of universal jurisdiction and mean a case's end before it was even officially started. Such risk, based on prioritising friendly international relations with the defendant's national state over justice,

⁶⁴ Hovell, *supra* note 23, page 11

⁶⁵ *note* for example that the Court de Cassation in the *Gaddafi* judgement, by referring to acts of terrorism as not being amongst those crimes that provide reason for exemption from the more general rule of non-interference with foreign states, confirmed the idea of allowing universal jurisdiction for several other crimes. (See General Prosecutor at the Court of Appeal of Paris, Appeal judgement, Appeal No 00-87215, Decision No 64, (2001) 125 ILR 490, (2001) RGDIP 474, ILDC 774 (FR 2001), 13th March 2001, Criminal Division)

⁶⁶ *e.g.* the *Franco-Dictatorship* case (*Rodolfo Martín Villa and Others*, still under investigation), where the attempted initiation in Spain was prevented by the Spanish government, and when eventually continued in Argentina after non-success in Spain, the Spanish government continued impeding every single step both in the stage of investigation as well as hearings.

⁶⁷ *e.g.* Franco Dictatorship case

⁶⁸ In the notorious *Arrest Warrant* case (*supra* note 24), for example, Congo challenged the by Belgium issued arrest warrant and questioned both the legality of Belgium acting under the principle of universality as well as the legality of the limits to the Congolese state head's immunity thereby posed. See especially judgement para. 17, 21 or also para. 48.

is even more at risk to occur when the domestic law establishes the prosecutor as an initiator.⁶⁹

To conclude this controversy, it shall be pointed out that seeing this clash of two fundamental principles of international law and resulting critique brought forward as *cause* explaining why universal jurisdiction is controversial is somewhat erroneous as it is rather result, and thus *symptom* of the fact that the mere character of universal jurisdiction is not necessarily disregarding other international legal principles, but rather maintaining their virtues by preventing an exaggeration of their exercise otherwise leading to impunity for human rights abuses. Universal jurisdiction as challenger to state sovereignty thus signifies a prioritisation amongst, and balancing of, fundamental core values. Therewith, universal jurisdiction can be seen as the expression of a hierarchy by which the prevention of impunity for international core crimes takes the highest pedestal – which is a view often conveyed by judges dealing with such question of hierarchy in universal jurisdiction cases they are confronted with.⁷⁰

Controversy 5: Unclear or Open Content

(Juxta-Positioning uncertain content versus states' discomfort leading to blurred and mixed legislation)

The fact that the rules according to which universal jurisdiction is asserted are highly divergent from one country to another; that treaties sometimes seem to authorise and sometimes even to prescribe its application; that in many states universal jurisdiction can be applied for ordinary crimes, in others for international crimes, and in others again for international crimes when punishable domestically; as well as the fact that it is still unclear what those international crimes that are amenable to universal jurisdiction actually are (while some states have yet to recognise some, most, or all of them, others already include new ones thus widening the clash and difference in application of the

⁶⁹ FIDH, 'A Step-by-Step Approach to the Use of Universal (Criminal) Jurisdiction in Western European States', (FIDH, n°552a, April 2009), available at: <https://www.fidh.org/IMG/pdf/ComUniv522a2009.pdf>, page 18

⁷⁰ See for example, Lord Millet's opinion in *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet, Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* (On Appeal from a Divisional Court of the Queen's Bench Division), 24 March 1999, available at: <https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino7.htm>

principle), has as a result that universal jurisdiction, being a concept with international meaning but domestic in its specific regulation, is hard to grasp. The principle's pure form is extremely blurred, as most states do not make proper distinctions in their implementation laws between treaty obligation and the universality principle⁷¹. The resulting controversy is in the following split up in *subject-matter* related lack of clarity and *procedural* confusions.

Subject-matter

International law dealt with at the domestic level does not necessarily result in each state enshrining the same international provisions in their domestic codes. Both selection of what they consider international crimes as well as how they define the implemented crimes differ highly. When in addition to that, some states furthermore start mixing implemented international core crimes with national provisions (e.g. punishment according to their domestic standards, or statute of limitations even for international core crimes) a potential forum state could assert jurisdiction under the universality doctrine for what is not a crime in the territorial state of commission. While this seems to be the just, and impunity-preventing purpose of universal jurisdiction, it at the same time could open the floor to impose an asserting state's domestic interpretations of international criminal law, that is potentially not in line with international standards. Furthermore, if in a given case it is relied on judgements from previous cases, in which judges had not been able to refer to the existence of state practice yet, it is hard to tell with certainty that a new crime can be considered as amenable to the principle. However, the fact that there is much left open points to flexibility as an inherent feature of universal jurisdiction, which makes clarity and certainty, and especially consensus, even less detectable, but, when accepted as inherent characteristic, at the same time marks its idea of fairness by being adaptable to newly emerging threats and crimes in order to yet maintain protection of victims and justice.⁷²

Procedural

Two major procedural implication arising from lack of clarity can be observed: 1) the mixing with other traditional jurisdictional principles that have more links, and 2) the

⁷¹ Becker, *supra* note 8, page 161

⁷² note that in the *Gaddafi* judgement, *supra* note 65, for example, the choice of the words “*as it stands*” points to such argument.

assumption that treaty-authorized universal jurisdiction and a general notion of universal jurisdiction specifying the crimes amenable to it are the same.

Concerning the first, the controversy here is instead of clearly separating the universality principle in their domestic laws from other extraterritorial principles, states started to create mixed versions that blur meaning and scope of their notions of universal jurisdiction and even sometimes render its inclusion in their codes unnecessary⁷³. Reason for this rather vague implementation has been, *inter alia*, identified as a grown discomfort⁷⁴ with the broad and extreme implications a pure notion of universal jurisdiction can have, which has resulted in what is referred to as *Universality 'Plus'*⁷⁵ that implies the adding of aspects of more traditional, more globally justifiable, principles of jurisdiction.

This is, *inter alia*, furthermore also often a reason for the second above-mentioned phenomenon: sometimes it can be observed that *treaty-authorized* jurisdiction, referring to an obligation taken on the moment the treaty was ratified, is not distinguished from *universal* jurisdiction, which emphasises and further enhances the effects already created by mixing provisions for universal jurisdiction with other jurisdictional principles even more.⁷⁶

The inherent controversy behind those two confusions thus lies for the first, the subject-matter related, in the concept of international law itself where it is up to states what, and how much of what, they agree to, which particularly results in considerable differences in the sphere of international criminal law, as their national attempts and principles are

⁷³ e.g. art. 1 para. 2 of the United Kingdom War Crimes Act 1991 c.13. (**annex 2**)

⁷⁴ Slaughter, *supra* note 10, page 173

⁷⁵ *ibid.* pages 171-172

⁷⁶ e.g. legislation of *Iran*, *The Seychelles*, and *Japan*, are here considered particularly useful to compare, as the three show very different ways of implementing the universality principle. *Note* that **Iran** equals the universality principle and treaty-authorization (Iranian Penal Code, art. 8, *see annex 3*). **The Seychelles**, however, are an example of clearly distinguishing between the two different rationales for asserting jurisdiction. However, in their penal code, art. 65, they establish the principle as having authority over one crime only: piracy (here in this case obviously due to frequent occurrence and Seychelles taking a leading role in hearing piracy cases) but do not make other core crimes specifically amenable to the principle. In art. 65 para. 4 they furthermore clearly define the crime of piracy, hence make sure the principle of universal jurisdiction finds applicability. Since there is no general notion of universal jurisdiction, but only one in relation to piracy, the other crimes of international concern are, as per their laws, not covered by universal jurisdiction (*see annex 4*). **Japan**, then again, assigns universal jurisdiction to each crime that the code specifically subjects to the principle (*see penal code art. 3-2, annex 5*). However, instead of also including international crimes in art. 3-2, which would then mean universal jurisdiction over the by the principle targeted core crimes as well as their ordinary crimes, the code contains a separate article referring to treaties only (art. 4-2, **annex 5**), which thereby results in establishing universal jurisdiction over ordinary crimes and treaty-based jurisdiction over international crimes.

tremendously influenced by respective cultural aspects. For the second, the procedure-related confusion, the cause can be seen in a fear of opposition should a state adopt domestic procedures possibly considered too pure of universality, and thus has generated states to find rather vague middle paths.

The pure character of universal jurisdiction, however, is not vague but straightforward, its nature being the opposite of what states have started to see as part of universal jurisdiction – and which is that it is the one principle that does **not** require a link, as it concerns humanity as a whole.⁷⁷

Controversy 6: Peace

(Juxta-Positioning Universal Jurisdiction Contributing to Peace and Reconciliation versus Preventing Peace and Reconciliation)

This controversy relates to diverging opinions on whether universal jurisdiction actually fulfils the aim of the context it is often used in⁷⁸: while some argue that it prevents peace and reconciliation in post-conflict zones, or causes diplomatic, as well as even armed, conflicts whenever the assertion occurs against a state prone to react with violence⁷⁹, others insist on its contribution to those aims relating to peace⁸⁰. The result is, on one side, reluctance to see it as a potential tool during transitional periods, while it is automatically implied, as a reaction on the other side, that it is an important supplement⁸¹ in transitional justice's dedication to criminal prosecutions, sometimes being the last and only possibility of obtaining justice⁸², especially when post-conflict states have to prioritise other aspects of national recovery over accountability.⁸³

⁷⁷ see The Madrid-Buenos Aires Principles, *supra* note 5, *Preamble*, page 1.

⁷⁸ Note that, given its nature, universal jurisdiction is majorly applied in conflict or post-conflict zones to war-related actors, and thus is also present as a potential tool in areas that find themselves in periods of political and legal transition. Out of the total number of 72 extraterritorial jurisdiction cases pending before domestic courts at the beginning of 2019, 57 emerged from conflict-related context, and the total of war crimes charges was 111.

⁷⁹ see for example Nicolas Browne-Wilkinson's opinion on the Princeton Principles as Participant to the Princeton Project 2001 (reprinted in Macedo, *supra* note 1, page 6)

⁸⁰ see for example, African Executive Council, *The African Union Model National Law On Universal Jurisdiction*, at. 11 (War crimes) para. b)iii. And e)iii

⁸¹ e.g. The Cairo-Arusha Principles, *supra* note 5, Principle 14, and especially Principle 16 concerning universal jurisdiction's role in bridging criminal prosecution aims and post-conflict zone needs

⁸² UN Office of the High Commissioner for Human Rights (OHCHR), *RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES*, Prosecution Initiatives, New York and Geneva 2006, HR/PUB/06/4, available at: <https://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>, pages 29-30

⁸³ The Princeton Principles, *supra* note 2, *Introduction to Principles*, page 27

In this section it is looked at two aspects to the relation between universal jurisdiction and peace: 1) universal jurisdiction relating to the *establishment* of peace (resolving conflicts), and 2) universal jurisdiction relating to the *disruption* of peace (causing conflicts).

Concerning the first aspect, the Princeton Principles bring the implied controversy well to the point by relating universal jurisdiction's dangerous potential to disrupt peace or reconciliation to being a consequence of "imprudent" or "untimely" use⁸⁴. Also under UN promotion, the principle has been named alongside broader (especially transitional justice) aims. The Sixth Committee of the UN has ever since its sixty-fourth session⁸⁵ (2009) included universal jurisdiction as an item on its agenda, as from 2010 furthermore establishing a working group to discuss the topic more thoroughly⁸⁶. In their respective yearly resolutions, reference is made in every single one to UN's broad goals of peace and harmony with the UN Charter.⁸⁷ However, also within the UN the controversy of universal jurisdiction potentially working against the establishment of peace is recognised, and the potentially damaging effects of the conduction of universal jurisdiction trials addressed.⁸⁸ That the sole conduction of criminal prosecutions alone would work contrary to peace, as transitional justice's potential success lies precisely in the combination with other mechanisms than prosecutions, is commonly acknowledged, and goes without saying if the idea of transitional justice as an inter-disciplinary approach prevails. However, the argument is yet at times made that, even as contribution, criminal prosecutions -especially including universal jurisdiction due to the distance to the state in which reconciliation is supposed to take place or lack of connectedness to the victims⁸⁹- counter the establishing of peace after conflict in a given place. Opening that debate, however, would exceed the paper's scope, but mentioning this controversy already suffices as it says about universal jurisdiction's objective that it was at least *intended* to contribute to peace in post-conflict zones, and thus, the rejection of the principle due to it being a tool by greater powers to interfere in, here reconciliation-related, domestic affairs, again an example of a confusion of *causes* with *symptoms*.

⁸⁴ *ibid.*, page 25

⁸⁵ UN General Assembly, *Resolution adopted by the General Assembly on 16 December 2009*, (A/64/452), available at: <https://undocs.org/pdf?symbol=en/A/RES/64/117>

⁸⁶ UNGA Res. A/65/474, para. 2

⁸⁷ UNGA Res. A/64/452 *supra* note 85, para. 1

⁸⁸ UN Office of the High Commissioner for Human Rights (OHCHR), *RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES*, Prosecution Initiatives, New York and Geneva 2006, HR/PUB/06/4, available at: <https://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>, page 29

⁸⁹ *ibid.*

The second aspect referring to the disruption of peace, implies the idea that universal jurisdiction might actively work against peace by generating diplomatic difficulties, in most extreme case scenarios potentially leading to armed conflict or some other form of violence.⁹⁰ Such fear stems from the argument that if the international prosecution is not conducted through an international court whose jurisdiction the defendant's national state has accepted, or authorised through an -by both ratified- treaty, but occurs by an unilateral decision of one state, then the latter will not be reacting in a peaceful way.⁹¹

Breaking down the in this section presented controversy it becomes apparent that, concerning the first aspect, universal jurisdiction's pure character is in that aspect to be seen in line with what types of crimes it criminalises – which are, from the very beginning, the Geneva Conventions and thus any aim to carry out attacks on peacekeeping or other humanitarian missions in place. Even if this does not relate to all transitional justice aims, it does yet remind of universal jurisdiction's core objectives, to be in line with mentioned international conventions – all of which work towards the non-violent, dignity-respecting, and long-lasting peace. Whenever a universal jurisdiction assertion seems to hinder such aim it can again be attributed to inadequate and even irresponsible use.

Concerning the second aspect, it likewise applies that a responsible and reflected use of the principle can prevent a bad outcome: in the -rather unlikely- occurrence that a national defendant's state reacts with violence against the asserting state, however, it has to be kept in mind that the fault lies with the attacking state – and not the principle *per se*. It holds true, though, that while working towards the greater goal of peace, rules around universal jurisdiction must do their best to counter possible irresponsible use.

Apart from detecting universal jurisdiction's core purposes and objectives through clarifying controversies around it and classify them according to causes and symptoms, there are of course many other indicators the observation of which allows to establish the principle's fundamentals. One here as useful considered approach is a follow-up of the principle's development: its trajectory over time gives various hints of 1) how perception has changed from earlier as compared to today and where a notion of universal jurisdiction nowadays has arrived at; 2) what, if any, its fundamentals that remain

⁹⁰ e.g. Nicolas Browne-Wilkinson's critique on the Princeton Principles as Participant to the Princeton Project 2001 (*see supra* note 79)

⁹¹ *ibid.*

unchangeable throughout time are; and 3) whether flexibility constitutes one of its main features and what the degree of such flexibility might be.

Concerning the first point made, one can remark that a shift seems to have been made from universal jurisdiction being a tool to serve **domestic** interest, over **state-community** interest, over serving the interest of **humanity**, to eventually being seen as serving the interest of **victims**.⁹² And indeed, when comparing rationales from its origins⁹³ to most recent notions, one can now see mention of the victim as fundamentally integral to the principle.⁹⁴ What this shift to an inclusion of victims means is a turning away from the idea of universal jurisdiction serving the benefit of states. Also nowadays it could be argued that an attack on certain groups has larger aims of actually attacking the state the direct victims are nationals of. In that regard the actual shift made is one of *individualising* victims, which is here thought to be the more accurate description of the new connotation to universal jurisdiction – at least when it comes to describe the change. Where such label is however more than accurate is concerning what individualising the people on the victim side behind the alleged committed international crimes in a case implies: victim protection safeguards⁹⁵, civil society empowerment in regard to their influence on bringing forward universal jurisdiction cases, and the development of a strong NGO network⁹⁶ whose respective parts act on behalf of victims and, independent from the government of their state, are often the ‘heart’ giving life and feasibility to the initiation of a universal jurisdiction case⁹⁷, are all expression of a factual development towards a victim-based purpose. In line with such implications of a victim-individualised and victim-focussed notion of universal jurisdiction are those arguments that have above been made to counter the idea of universal jurisdiction inherently being a political tool to solve state affairs through prosecutions⁹⁸.

⁹² Hovell, *supra* note 23, page 12

⁹³ M. Cherif Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’, 42 Va. J. Int’l L. 81 2001-2002, available at: <https://www.legal-tools.org/doc/052301/pdf/>, pages 109-110

⁹⁴ e.g. The 2002 Cairo-Arusha Principles, *supra* note 5, Principles 16 and 17; or even more recently, the 2015 Madrid-Buenos Aires Principles, *supra* note 5, Preamble

⁹⁵ The Princeton Principles, *supra* note 2, Principle 1 para. 4; The Cairo-Arusha Principles, *supra* note 5, Principle 7, 17; The Madrid-Buenos Aires Principles, *supra* note 5, Principle 11 paras. 2 and 3, Principle 13 para. 2, and especially Principle 20 and 22

⁹⁶ note that in at least 25-30 out of the above-mentioned total of 72, the involvement of NGOs was especially mention-worthy and crucial to advancement of the respective case, whereas in almost all cases NGOs were involved at some point during the proceeding.

⁹⁷ FIDH, *supra* note 69, pages 13-14

⁹⁸ This assumption is in line with what one can read from scholars analysing the meaning behind evolved notions of universal jurisdiction, e.g. Hovell *supra* note 23, page 18.

Just alone the fact that such a significant development of changing focus is possible to find resonance in scholarship or draft legislation, and furthermore also in the sphere of application, shows not only that the tool of universal jurisdiction is of flexible character, but also that this flexibility has strong potential to be the force behind any further attempt to improve the principle.

Extracting universal jurisdiction's main objectives through observing the development can take various different shapes. One vantage point here mention-worthy is the approach to analyse recent shifts in universal jurisdiction's rationales for assertion. In his work, Langer counters the commonly brought theory of "*rise and fall*"⁹⁹ by instead explaining changes in usage through a shift from the "*global enforcer*" rationale¹⁰⁰, being based strongly on the idea that universal jurisdiction functions to fight impunity *wherever* it occurs, to the "*no safe haven*" rationale¹⁰¹, rather based on the assumption of universal jurisdiction as an obligation to exercise that is triggered when otherwise the state would become a refuge for war criminals.

Hence, by disentangling the controversies, myths, erroneous assumptions and false interpretations around universal jurisdiction, its function stands out clear: it is an exceptional tool of last resort forming part of the accountability stage in the protection of a granted rights, which is rare in occurrence, as it is not only the ultimate means of a larger mechanism but furthermore the exceptional response reacting to, and to be left for, exceptional cases. Its main objectives can thus be deduced as deterrence and a more likely prevention of certain particularly grave crimes whose prohibition has found consensus in international law, which will be reached through fighting impunity by ensuring accountability. A wide range of characteristics result from its identified area of functioning and main objectives: descriptors would be *rare* and *extreme*, often *vague* but yet *flexible* due to its constant purpose of seeking justice in a given time and place, *victim-oriented* but not attached to *national interest* that is other than ensuring accountability and promotion of justice, *place and time transcending* whenever an exaggeration of protecting state sovereignty would cause damage to victims, peace and justice.

⁹⁹ Langer *supra* note 30, page 246

¹⁰⁰ *ibid.* page 247

¹⁰¹ *ibid.*

How much those attributes run strikingly counter to what populism suggests will be addressed further in depth in chapter 4. In the following chapter it shall now first be looked at how in line with those identified objectives and main features a genuine use can crystallise – or how the lack of such regard can lead to abuse, and how this furthermore looks in practice.

Chapter 2: Identification of elements of genuine and non-genuine uses of universal jurisdiction

It is here held that the considerations of chapter 1 establishing genuine objectives, purposes and characteristics, and especially the identified risks and challenges to those genuine elements of the principle's *character*, make it possible to deduce theoretical scenarios by means of which now, in this chapter elements of a genuine *use* can be determined, as well as elements of its counter-part, the non-genuine use.

First, however, it shall be said that the assessment of what exactly constitutes such *genuine use*, is a multi-layered analysis, as any notion of *genuine use*, namely, exceeds the mere meaning of *non-abusive*¹⁰². Therefore, several fields are crucial for an overall evaluation of factors that play into a genuine use. Here of relevance are considered the four following phases:

The Implementation Phase makes the first important stage, as implementation and according laws indicate a state's approach towards -or away from- the identified main objectives (e.g. how limited the notion is, which crimes are covered, as well as the state's willingness to use the principle that might be diminished, or up to non-existent, even if, formally, legislation establishing the principle and implementation of international crimes (including their definition) seem to be in harmony with the main objectives¹⁰³).

The assertion phase is the stage at which national interest is most likely to interfere, both for the potential forum state as well as for the defendant's national state, or any other state objecting an expressed claim to jurisdiction by the asserting state. A state's willingness to open an official investigation, or to deny it, is highly indicative of its attitude towards international law. Due regard to the sensitivity of this phase has proved very helpful to find and follow strategies that make it less "easy" for the potential forum state to reject a complaint, like handing in a strong case file¹⁰⁴ when filing the complaint, providing

¹⁰² 'abusive' here standing for, as described in the previous chapter, a divergence from core objectives pursuing any other than those identified.

¹⁰³ Note the specific examples of Afghanistan and Iran that both officially seem to take a monist approach in view of the implementation of international law: when considering that a ratified treaty furthermore needs to be checked against Sharia law, and thus even after official ratification there is yet no guarantee that the treaty is applied, it becomes apparent that significant obstacles to the domestic application of international law are posed, and their indicators of lack of willingness hidden behind the domestic provisions already visible prior to any situation in which universal jurisdiction could be made use of. (*see annex 8*)

¹⁰⁴ e.g. FIDH, *supra* note 69, pages 10-12, *see especially* page 12

objective and convincible material. When the *potential* forum state becomes *actual* forum state by indeed opening an official investigation further aspects become of relevance, for example whether the forum state actually acted in the role of a *last resort*. Also the behaviour of the state whose national is asserted against, provides various indicators as to how genuine the use by the asserting state is in the given case, as well as the former's own approach. In this regard, for example, it has to be clearly distinguished between *justified reasons* for the defendant's national state to object the universal jurisdiction assertion, and *subjective reactions*, which often is an expression of above-mentioned hypocrisy¹⁰⁵ reflected in various states' reactions to universal jurisdiction cases.

The next phase in this classification is here considered as *the application phase*, including the actual trial, where the above-mentioned behavioural aspects on the side of the defendant's national state can become especially visible¹⁰⁶. But also the submission of the asserting state is indicative of the actual reasons why it saw itself in the position to make use of universal jurisdiction.

Even though with the completion of the trial the principle has been used and one could assume that an analysis of what the elements of a genuine use are is completed, *the post-application phase* is here nevertheless considered of particular relevance. Not only does every single case of universal jurisdiction become a very likely future precedent (note the in chapter 1 mentioned feature of rarity resulting in wide cognisance and relevance of each case, often ever more exposed due to the high degree of public attention), its transmitted image therefore being of matter, but also behaviour on both sides to the case and presented rationales for assertion are crucial, that could, depending on the outcome of the case, be taken on by other states.

It shall be noted that a positive outcome does not equal a genuine application of the principle, and nor does a negative outcome equal a non-genuine application. It is well possible that the principle is applied genuinely but that the greater goal of accountability and justice not reached due to being impeded by other external factors. Or, vice versa, that the principle is not applied genuinely but justice and accountability nevertheless the effects of the trial. Both possible outcomes are thus analysed for both sub-chapters,

¹⁰⁵ *note* the previously identified behavioural pattern of some states to shift from acceptance to rejection concerning universal jurisdiction assertions depending on whether the state in question is considering itself to be a victim to the case or on the defendant's side.

¹⁰⁶ *note* for example how often after the trial at First Instance, apart from potential appeals, a series of other "spin-off" cases starts (e.g. *Arrest Warrant* case, *supra* note 24)

thereby classifying each brought case scenario according to the phase in which the genuineness of the approach, or its loophole, *mostly* shows. It shall also be remarked that scenarios for the implementation phase are not provided in this chapter, as latter focusses more on the practical phases and relevant examples have furthermore already been given further above.

Chapter 2.1: Identification of elements of a genuine use and application of universal jurisdiction

The Positive Outcome Perspective

In the following rather classical scenario, leading to a **positive outcome**, one can see the evident genuine use crystallising especially during the assertion phase: *(I) State A has established universal jurisdiction over certain grave international crimes in its penal code. State A is aware of the fact that there is a former state official X in State B (still governed by the same suppressive regime that was in place when X was in office) who has committed several of the crimes amenable to universal jurisdiction and who no court has prosecuted yet. State A and state B share a common official language and are culturally close. Former state official X is indicted by state A. He avoids State A but when travelling to State C, State A sends an extradition request to state C. X is extradited upon extradition request by state A. The trial takes place without major difficulties: both State C and B are keen on collaborating with State A, which is considered to have a well-functioning criminal legal system with high standards of protection. No language problems or cultural difference arise as obstacles to the procedure.*¹⁰⁷ Hence, State A sees its responsibility to prosecute reaffirmed by the fact that if they did not assert, X would go unpunished, hence, the function of universal jurisdiction as last resort is upheld. Furthermore, State A has recognised its potential as convenient forum for the trial, especially in view of victims and witnesses who are granted protection and who can relate to the court system of State A, as it is culturally similar to their home country. Also State B and C saw the potential in State A as a forum and expressed their recognition through collaboration.

¹⁰⁷ the assertion reminds of the *Pinochet* case, in which the UK authorised the extradition requested by Spain, so that the former dictator Augusto Pinochet could be tried there.

Departing from the same scenario **(1)** but with slightly amended ending (*State C does not want to extradite as there is some obstacle that would endanger the health or life of X (e.g. X is in a weak state and not able to travel)*). *State C decides to prosecute by asserting universal jurisdiction itself*), which shall be called scenario **(1.A)**, one can see an equally genuine assertion of the principle, and a use of the international criminal justice system in good faith. Here, the relation between *aut dedere aut judicare* and universal jurisdiction becomes apparent. Since A's goal was solely based on fighting impunity for global justice, they support C in all ways possible, amongst other, by handing over case files and information. If the case had continued differently by state A's laws allowing prosecution *in absentia* for example, and state C did not find themselves a suitable potential forum state for this case, also then it can still be spoken of a genuine assertion of the principle. Still departing from the circumstances of scenario **(1)**, another feature and genuine use is to be pointed out here as having its roots in the assertion phase: **(1.B)** *The complaint was filed by NGO Y that independently had started investigations upon request by several victims. On behalf of those, Y submitted its case file to the authorities of state A. Also later, Y continued playing an important role, as it had already established links to victims and other witnesses, many of them living outside state A. The result is friendly ties to the prosecution of state A that keeps NGO Y informed about any advancement. Victims are thus constantly informed, also during the trial.*¹⁰⁸

Another scenario crystallising during the assertion phase that is of relevance to this paper shall be pointed out: again, it shall be departed from the basic scenario of **(1)**, but adding the situation State B finds itself in: **(1.C)** *B is in a phase of transitional justice and has not yet reformed its laws to prosecute certain acts committed by X. No ad hoc tribunal has been set up. The ICC is busy with high profile cases and, since X was not one of the "biggest fish", is not indicted by the ICC. The new government of State B is very keen on cooperating. State A sends an extradition request to B who gladly follows it as its resources do not allow to handle all the cases before domestic courts and reforms it faces in one go. X, who is, at the time of the request, still in state B, is arrested at the border when trying to leave the country and subsequently brought to State A. Trial and*

¹⁰⁸ e.g. the *Bazaramba* case in Finland (in TRIAL International, 'Evidentiary challenges in universal jurisdiction cases', (Universal Jurisdiction Annual Review 2019); available at: <https://trialinternational.org/wp-content/uploads/2019/03/Universal-Jurisdiction-Annual-Review2019.pdf>, page 9); see also FIDH, *supra* note 69, pages 12, 13, and 14, see especially page 9.

conviction happens in state A. In this scenario, the role universal jurisdiction as supporting mechanism to overstrained transitional justice establishments can be seen.

A last theoretical example, scenario **(2)**, to be here presented as part of those scenarios that show genuine use during the assertion phase, has the following facts:

(2) *War crime perpetrator X from State B tries to enter State A. State A has legislation enacted that is in accordance with article 1F of the UNCHR Refugee Convention¹⁰⁹ and denies X access. State A has also enacted legislation that, in the case art. 1F applies, the prosecution is informed and starts an investigation.* A possible outcome is that the trial of X takes place and he or she is convicted. Also the other possible outcome, that the trial takes place but person X is not convicted, can yet be considered as genuine and positive in its outcome. It shall be noted that the rationale for universal jurisdiction is not one that has the objective of resulting in punishment, but in accountability.

Scenario **(1)** furthermore provides an illustrative example for demonstrating genuine use in the application phase: the trial itself occurs without many of the obstacles that a national system usually faces when trying a perpetrator and hearing witnesses from a culturally different, and geographically distant, country. Also the virtues of the in scenario **(1.B)** described circumstances are reflected in the application phase. Trial is for victims and witnesses an agitated period, and at the same time the most important of the phases to the case, which, often, they have been awaiting for many years. If a genuine use, now, implies the protection and respect of the victims' and witnesses' situation, then clearly this also expands to the trial phase, which in the case of **(1.B)** was successfully done.

Whether a genuine use finds expression in the post-application phase, often depends on reactions of the defence as well as the public. Important is that here it is not that much the actual element of the genuine use but more its combination with a positive outcome which can set a precedent promoting, and in the future further enhancing, the genuine character of the principle.

The Negative Outcome Perspective

In regard to this sub-chapter the **good outcome-bad outcome** distinction assumes that only those scenarios can be considered belonging among the ones presented here (*i.e.*

¹⁰⁹ *see annex 9*

having genuine use **and** negative outcome as features) when the respective negative outcome could not have been reasonably foreseen by the asserting state.

Concerning examples where the genuine use mainly stems from the *assertion phase*, it shall be gone back to the facts of scenario **(1.A)**, with the difference that *neither A nor C allow for a trial in absentia and the state of X's health is so severe that not even in State they allow for a trial*, here to be called **(1.AB)**. State A asserted universal jurisdiction genuinely: C's lack of action is not to be brought back to a generally foreseeable reluctance to cooperate if C does not have any national interest at stake to help C's impunity that should have been foreseen by A. Instead, C put the humane aspect of not further endangering the life of an ill person above any extradition. However, a trial and all its related consequences that make up the main objectives for the use of universal jurisdiction, has not been reached – even though the principle was applied genuinely.

An equally negative outcome, despite genuine assertion, can be seen in the following scenario that, like **(1.B)** describes the relation between filing party and prosecution, and shall thus be called **(1.BA)**: *Y's filing had been rejected as State A has national interest at stake that would be negatively affected if the application went through. The reason is that perpetrator X, a national of State A which in this case is the state of commission of the crime, the national state of the defendant as well as of the victims, had an amnesty law in place that would, in the case of it being declared inapplicable, have broader implications. Instead, Y looks for a potential forum in State D that then willingly comes after the request. Y keeps cooperating with state D, but State A, already having halted an opening of the case based on territorial jurisdiction, now impedes the assertion as well as application phase by putting obstacles in investigations and pre-trial hearings conducted by state D.*¹¹⁰

Of the above-described scenarios, especially **(1.AB)** provides facts that unfold genuineness not only in assertion but also during the *post-application phase*. From the accountability part of view, the outcome is negative, but what remains as a fact is that - had it not been for the external circumstance of health issues- X would have been prosecuted. The acts committed by X thus are presented to the public as not acceptable, but humane behaviour by respecting threat to health and life of any person is here

¹¹⁰ facts of this scenario are close to the before-mentioned *Franco-Dictatorship* case, more in depth covered in chapter 4.

prioritised, which is in line with what a principle like universal jurisdiction fights for, and what is, in the end, respect of each and anyone's dignity and human rights.

Also in the following scenario **(3)** the effects of genuine use show significantly in the post-application phase: *The ICC requests its members to arrest international crime perpetrator X from state B. B has not signed the Rome Statute. X is travelling through the region which State A, B and C-H belong to. Those states, including B and C-H, furthermore have an inter-state community, with trade and customs agreements as well as regional courts. State A, signatory to the Rome Statute, arrests X upon his arrival to a conference that was to take place in state A. In the immediate aftermath, state A is excluded from all the community's agreements it was previously economically benefitting from and as a consequence suffers economic hardship.* Application of the universality principle (even though it is an ICC referral, which in this case, as state B is not signatory to the Rome Statute, has happened through UNSC authorisation and thus pursuant to the ICC's one possibility of an exercise of universal jurisdiction) has here led to suffering by the state that came up to their obligations under the Rome Statute by arresting X, and thus genuinely participated in the use of the universality principle and fight against impunity. The post-application phase to this scenario, however, produces a bad outcome, that jeopardises an acceptance and future use of the principle at least in the state community area of states A-H, if not even at a larger scale.

The last scenario to be presented in this sub-chapter, which is possible to occur in any above-given example according to whose facts a trial is conducted, is scenario **(4)**: *Before trial, prosecution and defence enter a plea-agreement according to which X will receive a mitigated sentence, resulting in a significantly shorter prison term than X would have received if a judgement was reached based on what was presented, and evaluated, in the courtroom.* If one assumes that universal jurisdiction does not exclude the possibility of plea-bargaining when it is fundamental part of the forum state's legal system, the application can be called genuine¹¹¹. However, in the post-application phase produces an outcome contrary to universal jurisdiction's core objectives: apart from the fact that, by mitigating the sentence, the severity of the crimes -despite being the reason for the application of the principle in the first place- is not acknowledged (which is here, however, to be seen as a side effect of allowing plea-bargaining in universal jurisdiction cases and thus should rather be seen as argument to refute its permissibility), especially

¹¹¹ note that the question whether plea-negotiations in universal jurisdiction cases are still in line with the principle's core objectives, is another debate the inclusion of which would exceed this paper's scope.

in terms of the objectives of **respecting the victims** and **deterrence**, the outcome can be considered highly negative. Victims will not feel that justice is done, and furthermore have to deal with the fact that the perpetrator is released much earlier than hoped for, which again raises security-related questions. Deterrence is not achieved to the extent it could have been, and -depending on how mitigated the sentence is- can potentially be not the case at all.¹¹²

Chapter 2.2: Loophole analysis: Identification of elements in a non-genuine use of universal jurisdiction

All scenarios above classified as being of *genuine* use can show up loopholes, which would be, the moment the state in question uses universal jurisdiction for one of those, indicative of details and examples of a *non-genuine* use.

The Positive Outcome Perspective

Even though possible, positive outcomes are from this point of view rather limited, as a non-genuine use surely most of the time results in an outcome contrary to the main objectives of universal jurisdiction, which was here equalled a negative outcome.

However, during the *assertion phase*, for example, a non-genuine use in combination with a positive outcome can be detected in what was established in a version of **(2)** if the reason to make use of article 1F and subsequent steps were based on the state's anti-immigration attitude. If X is guilty and the trial ends in a conviction the reason the outcome can be considered as positive is because accountability for the crimes committed was in the end achieved, despite the fact that the principle was used non-genuinely, to be here called **(2.A)**.

Another scenario, also showing resemblance to scenario **(2)**, is given when, in the same scenario of perpetrator X from State B, applying for immigration in state A, state A has universal jurisdiction laws that cover other (ordinary) crimes than those that were in the analysis above determined as the core crimes universal jurisdiction should be reserved for. Furthermore, State A is not party to any relevant treaty that would oblige it to prosecute any of the acts committed by X. In this scenario, to be called **(2.AB)**, *State A*,

¹¹² similar effects, even though the early release was not concluded by means of a plea-negotiation but was due to good conduct, one could observe in the *Zardad* case. (*Regina v Faryadi Sarwar Zardad* [2007] EWCA Crim 279 (UK, 7 February 2007), available at:

after initiation of an investigation of the applicant, asserts universal jurisdiction and the charges presented against X consist solely of those ordinary crimes. One can, to some extent (depending on the kind of ordinary crimes), speak of a non-genuine use already when the assertion was based on ordinary crimes, since universal jurisdiction and its extreme measures are here considered to be left for the most severe international crimes, but even more one can speak of a non-genuine application when furthermore the sole purpose was the denial of entry into state A.¹¹³

A non-genuine use can be detected during the application phase when what was established in **(2.A)** and **(2.AB)** and an anti-immigration attitude are followed by lack of impartiality during the trial, where *the court declares X guilty without having been able to prove beyond reasonable doubts his or her participation in the allegedly committed crime.* It does thereby not matter here whether X was actually guilty or not, but the fact alone that universal jurisdiction was used under false pretences makes it a non-genuine use already. It shall be noted, however, that if X was innocent, this results additionally in a negative outcome.

That a case of non-genuine application shows a good outcome in the post-application phase is possible in any scenario in which the non-genuine rationales for universal jurisdiction assertion either do not come to light and thus transmit a genuine application, or where following scenario departing from the facts of scenario **(1)**, however with the additional further development, here to be called **(1.D)**, is the case: *After conviction and imprisonment of X by state A, state B files a complaint before the ICC against state A claiming the assertion to be unlawful under international law.* If state A has indeed acted out of national interest and, due to that, its assertion lacked justification or if during the indictment unlawful acts were committed against X or state B, and the ICC furthermore finds so and as a consequence declares the arrest and trial of X as unlawful, then the non-genuine use by B has not led to a negative outcome, but instead to the contrary: the non-genuine use was detected, made notorious and the dispute furthermore adjudicated, which leaves in the post-application phase the genuine meaning of universal jurisdiction behind, and thereby creates a precedent that could deter other potential non-genuine users from doing the same. If, however, State B only filed the claim out of a defence attitude to A's

¹¹³ a somewhat less extreme, albeit factually accurate, example is given by the US assertion of universal jurisdiction in the *Jabbateh* case. (See pages 62-63, *infra* note 185)

assertion and application of the principle, but wins the case anyways, the outcome can hardly be described as positive.

The Negative Outcome Perspective

Negative outcomes, on the other hand, as will be seen on the following pages, are more likely to show up as a consequence of a non-genuine use.

The basic facts from scenario (1) serve also here as an illustrative example for non-genuine use crystallising in the assertion phase, moreover generating a negative outcome, if slightly amended towards the end, and here to be called scenario (1.E): *instead of extraditing, State C, refuses to come after such request, as state C is very interested in keeping good international relations with state B and does not want to damage those. X goes unpunished.* What one thus has is a behaviour on the side of state C not in line with universal jurisdiction's genuine purpose, thus a sign of non-genuineness (here due to national interest), and a failed attempt of assertion with a negative outcome entirely against the core aim of the principle – which is, in the end, avoiding impunity.

However, as mentioned, not only on part of the asserting or supposedly cooperating state does non-genuine usage commonly crystallise, but likewise on the side of the defendant's national state, or any other state involved in a given case by for example having a nexus that would give rise to a more traditional claim to jurisdiction. (5): *State A is a developing country that has recently signed relevant international treaties relating to international crimes. A has also implemented laws and corresponding mechanisms to facilitate universal jurisdiction in their country. A has suffered in many ways from actions of former president X of State B that is a highly developed Western country. The acts committed amount to international crimes both in A's, B's, as well as international, legislation. A's attempts to request extradition remain unsuccessful, as other states are influenced and highly dependent on State B. Eventually, State A refers to the ICC via its complaint procedure. State B has not ratified the Rome Statute, but the accusation bears charges so grave that the ICC refers to the UNSC in use of their universality mechanism. However, as state B is a permanent member to the UNSC, it uses its veto power to prevent the issuance of the international arrest warrant.* The first aspect to this scenario is, again, rejection of the principle upon prioritisation of national benefit. A second aspect, not directly linking to universal jurisdiction but to the greater apparatus of international criminal justice, is how it is shown the extent to which the founders undermine their

system: the only case scenario in which one can speak of the ICC exercising universal jurisdiction is through an institution that is led by powerful members which are not required to sign the ICC's statute nor to play by its rules, which creates the impression that the international criminal justice lacks respect of the rule of law. This paradox is therefore also relevant for universal jurisdiction: hypocrisy, as mentioned several times throughout this paper, is a fundamental issue and ongoing obstacle for states to take the mechanism fully seriously – ever more increased if states see that it even infiltrates the ICC and therewith an institution with the same aims that also universal jurisdiction by national courts is exercised for.¹¹⁴

An example showing the impact of non-genuine usage during the *application phase*, is a scenario departing from the facts of **(1)**. However, here, for the purpose of this sub-chapter, State A is considered to *not share a common official language with B, and neither do they belong to the same regional group. Former state official X is arrested when travelling to state A for medical reasons. The trial of X takes place in State A, and is cumbersome due to language issues, approach of and access to witnesses, victims and other sources, or the collection of other pieces of evidence.*¹¹⁵

Concerning the *post-application phase*, an example here of relevance, departing from the initial facts of **(1)**, is given with the following addition to it: **(1.F)** *the crime concerned ethnic cleansing of an ethnic minority living in region Y to State B. State A, the asserting state, has very low standards of victim and witness protection. As a result, the persons that have come forward as victims and witnesses are in great danger when returning to their countries.* In this scenario the non-genuine application is given by the fact that -even though being aware of their insufficient witness protection laws- state A claimed

¹¹⁴ Even though not entirely comparable to the facts of **(5)**, the example of the Kuala Lumpur War Crimes Commission (KLWCC) in Malaysia shows aspects of to the above-described scenario's inherent paradox: powerful western state, that have engaged in the commission of grave international crimes, do not take assertions or trials *in absentia* seriously, even though those depart from the same reasoning as those Western Powers have in exercise of universal jurisdiction in their own countries. In the case of Malaysia and its Kuala Lumpur War Crimes Tribunal (KLWCT) that was in this situation at least twice -once, trying former US president George W. Bush and former UK President Tony Blair for their invasion of Iraq (qualifying as crime of aggression), and a second time, trying Bush and others for their use of torture in the Guantanamo prison- it led to the KLWCT merely aiming for symbolic effects of each conviction, which, one can assume, partly stems from the prospect of non-recognition.

¹¹⁵ Similar obstacles were faced during the investigation and trial phase in the *Kumar Lama* case, where the UK asserted universal jurisdiction (*see* Hovell, *supra* note 23, page 2; *see also* Advocacy Forum Nepal, *Advocating against Torture in 2016 – The Challenges Achieving Justice* (June 2017, Kathmandu), page 4)

universal jurisdiction nonetheless, which points to an assertion based on anything but the best interest of the ones most affected by the crimes committed. The outcome is evidently negative, which shows most in the post-application phase, as the trial has like that made the victims' and witnesses' lives in their home countries more difficult or -in extreme scenarios- even impossible, rather than aiding the restoring of peace and justice and re-establishment of family life in the area of region Y.¹¹⁶

Another scenario is given by departing from the circumstances of scenario (3) but describing a slightly different version, which shall here thus be called (3.A): *State A, signatory to the Rome Statute like many other members of the state community C-H, does not come after the ICC request when X enters its territory, but is influenced by speeches of state B (a major economic force of the union of states) that call for cooperation between the states A-H of the community, as well as threatens with economic sanctions should anyone comply with the ICC request.*¹¹⁷ The difference between (3.A) and (3) is that here the mere threat of sanctions already impacts the entire procedure, and neither is the attempted exercise of the universality principle by the ICC successful, nor is impunity avoided. The only occurrence that -dangerously- remains as an after-taste of this attempted exercise of universality is the undertaken weighing-off of the idea of universal accountability for international core crimes against national benefit on the side of state A, as well as the transmitted message of a total disregard to, and rejection of, the existence of an international criminal justice and accountability mechanism on the side of state B by not only not prosecuting or referring their own national X, but by furthermore threatening other states into non-compliance with international law.

Even more extreme than in (3.A) the non-genuineness as well as negative outcome features crystallise in this version, (3.B): *State A knows that X is going to travel to its territory and withdraws from Rome Statute. A major chain effect of withdrawals happens*

¹¹⁶ Even though the UK did not have low witness protection standards at the time of the *Zardad* trial (*supra* note 112) the respective provisions were not effectively made use of, and, as a result, victims and witnesses faced danger. See Kate Clark, 'Afghan Criminal Zardad Freed: No Protection for Witnesses' *Afghanistan Analysts Network* (14 December 2016), available at: <https://www.afghanistan-analysts.org/afghan-war-criminal-zardad-freed-no-protection-for-witnesses/>

¹¹⁷ Note, for example, Malawi's role (or other African RS signatories) in the *Al-Bashir* case in which the ICC had issued, pursuant to the 2005 UNSC resolution concerning the situation in Darfur, an international arrest warrant requesting its member states to arrest Sudanese President Omar Al Bashir should he be present in any of the signatory's territory. The AU had asked its members not to cooperate relying on the in art. 98(1) of the Rome Statute (see **annex 10**) stipulated immunity clause, a behaviour which was subsequently declared unlawful under international law in *ICC, Pre-Trial Chamber I* (12 Dec 2011) *Decision on the failure by the Republic of Malawi to comply with the cooperation requests issued by the court with respect to the arrest and surrender of president Omar al Bashir*, see para. 37 and 41.

and states C-H withdrawal too.¹¹⁸ Both **(3.A)** and **(3.B)** pose dangerous precedents: **(3.A)** shows how flawed, when faced with non-cooperation, the international criminal justice system is, which can furthermore generate general questioning and raise doubts as to its efficiency, which then again would render it indeed increasingly inefficient, as a lack of cooperation would deprive it of its base. Furthermore, other states from the community A-H are very unlikely to cooperate in the near future, having seen that the threat by state B is real as otherwise state A had not backed away from arresting X. **(3.B)** has similar, albeit even more certain, precedent-setting potential.

To lead over to a distinct scenario that creates similar effects, likewise leaving to the entire community of states the message that, for some, national interest comes first regardless the severity of the situation, it shall be gone back to Scenario **(2.AB)**: as described above, **(2.AB)** can be considered a **non-genuine negative outcome use** even if the convicted defendant was guilty, as the facts of the case set a dangerous precedent: if it is obvious that the conviction stems from an anti-immigration attitude rather than from facts and evidence evaluated during trial, which was, however, conducted on basis of the universal jurisdiction doctrine, then it is quite likely that with the rising fear amongst states in view of refugees and other migrants, such use might spread. The sensation left behind by such use of the principle as described in **(2.AB)** is that universal jurisdiction can be a tool amendable to a given national need – hence, as established above, the exact opposite of its genuine character.

As conclusion, this collection of theoretical scenarios and their real life examples allow to deduce elements of a genuine use, which are further reaffirmed by the in 2.2 conducted analysis that has shown what occurs in their absence:

- 1) The convenience and suitability of the forum chosen: its thorough consideration plays a significant role and is part of any genuine use of the principle. Examples are geographical immediacy that often determines also cultural similarities or differences, which should be chosen in a way that it is not too far away for victims and witnesses to pose an additional challenge to the already difficult act of coming forward, but should neither be too close either as that could likewise intimidate victims, as it is in (cultural and geographical) proximity to the state, in which commonly numerous persons that are against the trial, live.

¹¹⁸ a resembling chain effect has begun amongst AU members, as described already above in *supra* note 33

- 2) Awareness of other claims to jurisdiction: if disregarded, latter could cause subsequent challenging of the assertion and application of the principle, that gives, if not used in its role as last resort, indeed rise to scrutiny.
- 3) Impartiality and non-bias from national affairs during every phase: if a state cannot prove that it is not driven by other interests than the accountability rationale as actor on behalf of the international community, then an assertion should ideally not occur in the first place.
- 4) Furthermore, one has seen that a clear distinction must be drawn between *political* obstacles willingly posed to hinder advancement of a universal jurisdiction case or to influence the outcome of the case, and *external* issues that likewise hinder advancement and could also influence the outcome but that do not point to a non-genuine use.

Chapter 3: Populism and state attitudes

Using the above described metaphor of a net¹¹⁹ for showing the role of state actors an ideal application of universal jurisdiction serves well to illustrate what occurs when met with rising populism. It is, namely, especially this potentially justice-granting net that changes through an overall growing populist attitude into a defective one, upon which a wide-spread use of universal jurisdiction would not only cast shadows over a genuine application but also promote its dangerous side of usage.

This chapter will thus serve to put in relation the phenomenon of populism to state heads' attitudes and will demonstrate how former impacts the latter, and more specifically, how this impact will change the dynamics of international, as well as international criminal, law – and therewith the net universal jurisdiction is intended to provide.

While already a decade ago scholarship recognised the populist mentality of this century¹²⁰, more recent years seem to have been identified as the peak of such development.¹²¹ The rather narrow scope this chapter is taking in view of describing the populist phenomenon, excludes any larger aim of going more in depth into the basic fundamentals of the concept, but will instead mainly focus on presenting arguments and evidence that point to a trend according to which more and more political actors seem to adapt a populist attitude, as well as such trend's effects. Concerning populism's actual content it shall just as much be said: also here scholars seem to agree that the definite substance is precisely not what determines populism – and neither is it of matter when considering that it is an attitude possibly covering various different political ideologies.¹²² What seems common to populism in general, regardless which ideology it pursues in a given place, is its challenging of whoever rules through representative politics¹²³ thereby not rejecting the system of representation *per se* but instead the people that are ruling, and

¹¹⁹ Stephen Macedo, *supra* note 1, page 4

¹²⁰ Ivan Krastev, 'The Populist Moment', *Eurozine* (18 Sept 2017), available at: <https://www.eurozine.com/the-populist-moment/?pdf>, page 1

¹²¹ Jan-Werner Müller, *What Is Populism?* University of Pennsylvania Press 2016, Penguin Books Ltd. Kindle Edition. (2017), page 3.

¹²² Krastev, *supra* note 120, page 1; *see also* Müller, *supra* note 121, page 3

¹²³ Müller, *supra* note 121, pages 19, 21, and 101

thus claiming that any other but their own “true” representation of the people is illegitimate.¹²⁴

Within the overall rise in populism, the type that is now most present, and moreover most influencing the international atmosphere, has been described as nationalist populism¹²⁵, which -in the current political climate- has come down to broadly equalling right-wing or fascist political attitudes¹²⁶. Such nationalist mind-set has shown up a pattern over the past years to contain several key attributes sufficiently contradictory to various fundamental notions of general principles of law to make it subject to this thesis: “*What they [populists] oppose is the representative nature of modern democracies, the protection of the rights of minorities, and the constraints to the sovereignty of the people, a distinctive feature of globalization*”.¹²⁷ Those features’ link to the research question and underlying hypothesis relies on the assumption that nationalist populism indeed impacts the international law regime, and thus further -following the established causal chain- the human rights regime, international proceedings in the name of human rights, and hence a genuine exercise of universal jurisdiction. To prove such starting assumption it has to be followed up if, and how, the causes of populism eventually lead to influencing international politics.

The reason, namely, for which the threat to universal jurisdiction posed by populism is acknowledged by this paper, coincides with a development which indicates the populist movement transcending the mere national level and infiltrating another sphere: it has only been in recent years that populist agendas influenced national governments in such a way that it would show impact on states’ foreign policy¹²⁸. It is thus the turn to what one could call *international populism* which is here seen as the trigger for the paper’s claim. Consequently, the question how it was possible that national populist parties -which are often not even the governing parties- reach such level of influence that even foreign policy is determined by nationalist populist agendas, comes up in the first place.

In order to explain such trend it has to be looked deeper into what is behind the notion of populism – not to the effects this time, but to the *causes*, and likewise the forums in which

¹²⁴ *ibid.* pages 19, 102-103, *see also* Balfour *supra* note 12, page 56

¹²⁵ Hugh Gusterson, ‘From Brexit to Trump: Anthropology and the Rise of Nationalist Populism’, *AMERICAN ETHNOLOGIST*, Vol. 44, No. 2, pp. 209–214, available at: <https://anthrosource.onlinelibrary.wiley.com/doi/pdf/10.1111/amet.12469>, page 209

¹²⁶ *ibid.*

¹²⁷ Krastev, *supra* note 120, page 2

¹²⁸ Balfour, *supra* note 12, page 59

the causes show, and where different *symptoms* -often further generating populism's success- crystallize.

A first cause commonly identified as root for populism to occur, and due to its related consequences, thrive in, is globalisation.¹²⁹ In this regard, rise and spread of populism has come together with an increase in the degree of globalisation and the effects the latter has shown. Globalisation as a *cause* can be viewed as implying two dimensions¹³⁰, one relating to *economic and social*, the other one relating more to its *cultural* aspects. One consequence as part of the first dimension is the resulting growing clash between parts of societies that benefit from globalisation and those other parts of societies that suffer its downside – i.e. growing inequality¹³¹. The frustration is expressed through a rejection of institutions that symbolise such inequality¹³² and takes like that also the shape of a symptom that allows populism to thrive further. Within the second -the cultural-dimension of globalisation's provision of a forum for populism to emerge from and grow in, one can establish from a *cultural* point of view that the consequences of certain movements possibly interpreted as attacks on states (e.g. immigration, terrorist attacks, or even the less extreme form of a merging of cultures), trigger a fear to lose national or cultural identity¹³³. The symptom will be pursuance of radical policies relating to the personal fear of individuals, often implying the same institutional rejections of establishments or parties that would be in favour of receiving immigrants, or appeal to the protection of minorities. In both dimensions, *symptoms* function well to spread the populist mentality by picking up the changed political context as well as citizens' personal fears and provide thus at the same time also a *forum*.

A second major cause to provide a forum for populism to thrive is what Rosa Balfour calls the “*crisis of advanced democracies*”¹³⁴, or the “*current failure of representation*”¹³⁵ as Jan-Werner Müller names it, which has furthermore also been identified elsewhere as crucial element in the growth of populism¹³⁶. As indicated above, this cause crystallises at the same time as *symptom* of populism when viewed as a facilitator for populism stemming from the ongoing globalisation. What it means when viewed as a *cause*,

¹²⁹ *ibid.* page 58; see also Gusterson *supra* note 125, page 210

¹³⁰ Balfour, *supra* note 12, page 57

¹³¹ *ibid.*

¹³² *ibid.*

¹³³ *ibid.*

¹³⁴ *ibid.* page 58

¹³⁵ Müller, *supra* note 121, page 103

¹³⁶ e.g. *ibid.*, page 19, or Krastev, *supra* note 120, page 2

however, is that the mere fact of existence of representative democracy itself, and the fact that it is an imperfect solution (albeit commonly considered the best of all imperfect solutions), thus always sensitive to being attacked, causes populists to make their claim to be the only direct and legitimate representation of the people¹³⁷. What it, controversially, however results in is above-mentioned illiberal, non-pluralist government conducting politics of exclusion and thus pushing representation of all people further away from being reality.¹³⁸

Those causes and symptoms are important to have in mind when, as stated above, it comes to explain the spread from the national to the international sphere.

In the past, namely, the field of foreign policies has been managed without significant scrutiny and interference from the citizens within their respective states¹³⁹. In the last decades, however, issues that are of international character and require foreign policy action have been internalised in a way that they started affecting national citizens in their everyday life.¹⁴⁰ How that facilitated now precisely populism to be concerned with, and influential in, those topics that have become of relevance at the domestic level -it shall be noted that the mere fact that citizens are affected by foreign policy decisions does not imply populism's concern and interference only but could include any other political actor as well- coincides with the nature of most of the internalised international issues. What can be observed, namely, is that those latter relate in one way or the other to cause-related consequences or symptoms that provide a ground for populism to grow further. Examples are to globalisation (i.e. *cause 1*) related issues like inequality, the fear of terrorism and uncontrolled immigration, or also the already attacked and questioned form of representative democracy (i.e. *cause 2*).

Within this development, Rosa Balfour describes two possible ways of how this results in various governments shifting towards making populist decisions also in the field of their international politics. Both possible ways evolve around a certain situation, in which the determining key factor is the one-sided influence flowing from populist parties to mainstream parties – either through latter's need to adapt, or by shifting to populism themselves¹⁴¹. The first way can occur through pressure¹⁴², often reflected in respective

¹³⁷ Müller, *supra* note 121, page 101; *see also* Balfour *supra* note 12, page 56

¹³⁸ *ibid.*, page 102.; *see also* Balfour, *supra* note 12, pages 56-57

¹³⁹ Balfour *supra* note 12, page 58

¹⁴⁰ *ibid.*, pages 59-60

¹⁴¹ *ibid.* page 58

¹⁴² *ibid.*

concessions made (mostly to ensure re-election or governance through coalition). Here the shift to populism does not necessarily represent the mentality of mainstream parties but is a reaction to the changing political context¹⁴³. In the second way of influence, populists act more as facilitators for mainstream parties to justify their radical nationalist policy choices, often implying mainstream parties starting to adapt more populist and nationalist views on various matters themselves, but are in need of some justification, which would here be the populist parties seemingly not leaving any other option.¹⁴⁴

In the end, both ways have the same outcome: even if it is pressure leading to concessions on the side of non-populist mainstream parties, those concessions have often happened in relation to fields of key issues and aspects particularly focussed on by populists and relating to what citizens are increasingly concerned with, which seem to be unfortunately precisely human rights-related concerns as for example immigration, or the rights of minorities, and with that fundamental core values of international law.

With the development of the populist movement and its influence in international politics thus being outlined, it shall now be turned the specifics concerning the changed state heads' attitudes and what that could mean for international law, as well as more specifically international criminal law.

Much of recent comments on international law by certain governments points to a rejection of especially international human rights law. One of the political figures most publicly criticising international effort that has led to institutional development in the areas of human rights is given with Donald Trump. His stance on the UN speaks for itself: "*We get nothing out of the United Nations. They don't respect us, they don't do what we want, and yet we fund them disproportionately (...)*".¹⁴⁵ In line with such standpoint - expressed through disagreement with transnational organisations like the UN and their created offices and mechanisms, as well as additionally also the NATO, the WTO or, especially in European countries, the EU- are the opinions of other populist-inclined states like, *inter alia*, the United Kingdom, Italy, Poland, Hungary, France, Denmark or Brazil – to just name a few, representative of a shift that can be observed occurring

¹⁴³ *ibid.* See and note also the examples of former Slovakian Prime Minister Roberto Fico, or Sarkozy's as well as Fillon's competition with the *Front National* in the French candidature – the tools of the competition being aspects of populism, in *ibid.* page 59

¹⁴⁴ *ibid.* page 59

¹⁴⁵ Transcript: Donald Trump Expounds on His Foreign Policy Views, *New York Times*, March 26, 2016, available at: <http://www.nytimes.com/2016/03/27/us/politics/donald-trump-transcript.html>, reprinted in Alston, *supra* note 6, page 4

globally.¹⁴⁶

Hence, what can be recognised regarding Donald Trump's attitude, and what appears as an almost necessary consequence of a policy based mainly on "*national security and sovereignty, economic nationalism, and deconstruction of the administrative state(...)*"¹⁴⁷ is a turning away from international cooperation and focus on national interests instead, whenever former would not serve the greater goal of benefitting the latter.

What those direct side effects of populism -rejecting modern representative democracies, protection of minorities, and constraints on national sovereignty¹⁴⁸- has had as more remote and far-reaching long-term impact on the international law and human rights field is pointed out and summarised by Philip Alston in an article on the *populist challenge human rights face today*¹⁴⁹.

Out of five identified key issues, especially the fourth, the undermining of the international rule of law, and the fifth, the fragility of international institutions, are of relevance for any subsequent considerations by this thesis¹⁵⁰. In regard to the undermining of the international rule of law, Alston distinguishes, and focuses on, two main issues arising from it, one relating to the legal framework of the use of force, the other to international humanitarian law. A change in the former can be seen in form of a demolition of most of what has been established in this field so far. In brief, powerful countries seem to write their own laws¹⁵¹ when it comes to questions concerning the legality of the use of force in a given place. Already existing rules are disregarded to an extent that actions by certain states resemble the writing of a counter-proposal to the Rome Statute or Geneva Conventions. The amount of commissions of crimes of aggression, or other core crimes that are committed under operations to "self-defend" the nation carrying them out (e.g. the US 2003 invasion of Iraq), seems to outweigh the purpose of the creation of rules concerning the use of force (the latter being generally prohibited, but subject to two justifications¹⁵² in international law). Also the amount of

¹⁴⁶ Gusterson *supra* note 125, pages 209-210; *see also* Balfour *supra* note 12, page 57

¹⁴⁷ Alston *supra* note 6, page 3

¹⁴⁸ *see supra* note 127

¹⁴⁹ Alston, *supra* note 6, pages 7-15

¹⁵⁰ *note* that with the above-made selection it is not claimed that the other key issues (threat to democracy, shrunken space for civil society, linkage between equality and exclusion) make less important determinants in populism's attack of international law. It is however held here that the latter two provide a more substantial connection to universal jurisdiction for the conduction of a more specific analysis and focus on them.

¹⁵¹ Alston, *supra* note 6, page 12

¹⁵² UN-Charter art. 24, 25 and 51

unlawful conduct during those aggressions and acts of use of force (e.g. US bombardments resulting in the death of civilians, like in the city of Fallujah during the Iraq war¹⁵³) allow to reach the same conclusion of a constant undermining of the existence of an international law on the use of force. Most of the time, however, when speaking of acts by “powerful countries”, amongst which are primarily Western powers, it is referred to acts of interference: while the -at times questionably- as “self-defence” labelled concept is already controversial and difficult to justify, interference as non-party to a conflict has commonly even less obvious, thus more arguable, and more dubious, reasons as to why the use of force might be justified in a given case (e.g. humanitarian intervention or assistance to other states). And yet, their linking to lawful justifications seems often blurred and has always caused controversies in international law. Numerous cases of interference in the past decades have related to other highly debatable reasons, brought forward to mask sheer national interest, and the lawfulness of certain interferences thus challenged.¹⁵⁴

What one is thus faced with regarding the meaning of populism for the international rule of law, is the combination of conflicts (often already disrespecting the human rights framework) and the interference from previously more human rights supporting countries that like thus enhance the occurrence of targeted killings, aggression, executions, torture and other violations of international core rules.¹⁵⁵ International legal provisions protecting fundamental rights seem to have ceased being the general rule, but instead appear to resemble merely a useful reference, invoked and relied on only then when it comes in useful for the own nation – which is, bluntly said, the exact opposite of what the international legal system and its attempt to build up a community with consensus on common values and assurances of prevention of any violation of the latter, was intended for. Inherent respect for refraining from carrying out an “(...) *invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack*”¹⁵⁶ or that “*Fixed establishments and mobile medical units of the Medical Service may in no circumstances*

¹⁵³ Human Rights Watch, ‘Violent Response: The U.S. Army in al-Fallujah’, (Human Rights Watch, June 2013), available at: <https://www.hrw.org/report/2003/06/16/violent-response/us-army-al-falluja>

¹⁵⁴ geo-political interest-related interferences are, *inter alia*, given with Iraq, Syria, Yemen, or Crimea

¹⁵⁵ Alston, *supra* note 6, page 12

¹⁵⁶ Rome Statute, *supra* note 55, art. 8*bis* para. 2 (b)

*be attacked, but shall at all times be respected and protected*¹⁵⁷ is, even after many years of state practice and *opinio juris*, and thus a universal obligation to comply, evidently not to be seen in form of a necessary default rule the respective international treaties were, however, drafted to be: obligatory to consider while weighing off entering an armed conflict and its highly likely death toll against a diplomatic solution; while weighing off the attacking of civilians against the level of national security endangered; or while weighing off the restoring to torture of a captured combatant against receiving the desired information of state interest.

What this therefore means more specifically in relation to international criminal law is that severe international core crimes surrounding the use of force are happening, often justified through national security arguments, thereby additionally severely enhancing the likelihood for precedent-setting, especially in consideration of the evident hypocrisy such commission implies: international values promoted by majorly Western states are ridden roughshod over, therefore making the critique those rules were too Western and part of the power game by those Western states, a reality. If, namely, the countries that were the driving force behind the creation and spread of an international human rights framework, turn their back on their promoted rules (that were designed to have a global scope) whenever there is a trade-off between national benefit and standing by such principles, then it cannot be expected that the international human rights regime opponents see any reason anymore to follow the agreed-on laws. What remains is the impression that respecting international norms has come down to resemble a game of cherry picking, and further, that international crimes are divertible – i.e. that it can be chosen when the very same act is a crime and when it is not. Therewith, a dilemma long common in international criminal law (that countries push for prosecutions if they are on the victim side, but reject and challenge the entire system and its underlying values the moment accusation and potential prosecution is directed at them¹⁵⁸) is reinforced, even enhanced, and the by many less powerful states already challenged system further destabilised.

¹⁵⁷ International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, available at: <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0173.pdf>, art. 19

¹⁵⁸ A more general example is given by the US, who have shown that they are very reluctant towards multiple binding agreements that would potentially involve interference in their domestic affairs, but on the other hand quick to interfere with another state's sovereignty. In view of international prosecutions a more specific example is given by Israel: in the past, the country would go to extremes in the fight against impunity, especially in connection with prosecutions of 2nd World War criminals (e.g. the *Eichmann* trial), thereby heavily relying and making welcome use of the international criminal legal framework. In more recent times, however, any petition to end, for example, their unlawful use of force against Palestine and any attempted opened investigation or filed case was disregarded. An even more specific example that

In regard to the second aspect to the disrespect of the international rule of law, international humanitarian law, similar developments can be observed: the trend goes towards blunt disrespect of most fundamental IHL principles, the occurrence of which can be put in direct relation to nationalist-populism whenever the above-identified main policies as part of a populist state's agenda seem to be the justification for the violation. Again, rise in terrorist attacks and related fear for security provides a forum in which populist attitudes can flourish, thereby reinforcing the demarcation of the state where the commission took place from the rest of the state community and further leading government as well as citizens to prioritise national security over principles of international law. As one can see, this even reaches the compliance with what so far is the only as universal considered prohibition – torture. Polls carried out in 1999 and 2016 have, among citizens interviewed in the US, shown a 100% increase in favour of its use for obtaining confessions from captured combatants.¹⁵⁹

The other identified key issue, by Alston named as the fragility of international institutions¹⁶⁰, deals with one of the most crucial concerns to the main idea behind this paper, as any suggestion for institutional take-over of universal jurisdiction needs to take into consideration the general institutional breakdown in the face of the rising populist movement.

The European Court of Human Rights is facing challenging years – not only because of Brexit-related difficulties but furthermore the lack of financial contributions by other countries.¹⁶¹ The ICC faces an even more wide-spread challenge: there is ongoing attack on its work. Moot points are, amongst other, alleged bias through Western states or permanent UN Security Council members¹⁶², the effects of which are especially increased

shows the hypocrisy-dilemma based on nationalist attitudes, *i.e.* the making use of rules to interfere versus reluctance to be interfered with, is provided with the before-mentioned *Franco Dictatorship* case (*supra* note 69) which is covered more in detail in chapter 4.

¹⁵⁹ Alston *supra* note 6, page 13: while in 1999 a minority of 35% found the use of torture permissible, 17 years later 75% would agree to make such use, *i.e.* the amount of people doubled.

¹⁶⁰ *ibid.*, page 14

¹⁶¹ Jan Petrov, pointing to and explaining the challenges posed by Hungary, Russia and Turkey, pages 16, 20, 21 in 'The Populist Challenge to the European Court of Human Rights', (Jean Monnet Center for International and Regional Economic Law & Justice, March 2018), available at:

<https://jeanmonnetprogram.org/wp-content/uploads/JMWP-03-Jan-Petrov.pdf>; see also Alston *supra* note 6, page 15

¹⁶² Critique from among the ranks of especially African countries have been integral part of the ICC's history. Described as not representing justice "*but politics disguised as international justice*" (Paul Kagame), or as a "*tool of global power politics and not the justice it was built to dispense.*" (Uhuru

and amount to being quasi-existential¹⁶³ when considering that one of the main points of critique seem to be precisely the Court's main function: waiving immunity of state heads and officials is a concept many states are not ready to make concessions for¹⁶⁴. Amongst the states opposing are not only populist ones: there is a general rejection whose core argument is deeply rooted in international law and does not necessarily relate to populist attitudes. Despite the more recent emphasis on the condemnation of *ius cogens* crimes commissions, various states yet disapprove of such exceptional circumstances¹⁶⁵. However, even if not every rejecting state is necessarily a populist state, it is highly likely that populist states are amongst those disagreeing with the fundamental role of the ICC to fight impunity – especially the moment the prosecution would relate to themselves: as mentioned above, populism implies the populists' view of being the only legitimate representation of the people, which no interference should challenge. Additionally, as already mentioned above, nationalist populist policies clearly prioritise national sovereignty and thus reject foreign judicial interference. One recent expression of such an attitude is the behaviour of the United States in regard to the ICC's preliminary investigation of war crimes allegedly committed in Afghanistan following the 2001 US invasion: by revocation of ICC prosecutor Fatou Bensouda's visa, her entry into the country was denied.¹⁶⁶ Such action leaves no doubt as to its intention, and sends the crystal-clear message that interference into US domestic affairs is not wished – even when allegations amount to the most severe human rights violations. The US announcements had begun as early as in September 2018, and have by now also turned warnings of yet going further than visa denials: “*These visa restrictions will not be the end of our efforts (...) We're prepared to take additional steps, including economic sanctions, if the ICC does not change its course.*”¹⁶⁷

Despite the crucial -and now crucially *endangered*- role of the ICC, also other institutions than courts are of significance from the international crimes prosecution point of view –

Kenyatta), criticism has, as mentioned, in the last years peaked in announced withdrawals from the Rome Statute. See Franck Kuwonu, ‘ICC: Beyond the threats of withdrawal’, (Africa Renewal, July 2017), available at: <https://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal>

¹⁶³ Alston *supra* note 6, page 25

¹⁶⁴ Alston *supra* note 6, page 25

¹⁶⁵ e.g. France, disconnected to their rather recent shift to nationalist populism in *ibid.*, page 25

¹⁶⁶ Reuters, ‘U.S. revokes ICC prosecutor's entry visa over Afghanistan investigation’, (Reuters, April 2019), available at: <https://www.reuters.com/article/us-usa-icc-prosecutor/u-s-revokes-icc-prosecutors-entry-visa-over-afghanistan-investigation-idUSKCN1RG2NP>

¹⁶⁷ US Secretary of State Mike Pompeo in ‘US to deny visas for ICC members investigating alleged war crimes’, (The Guardian, March 2019), available at: <https://www.theguardian.com/us-news/2019/mar/15/mike-pompeo-us-war-crimes-investigation-international-criminal-court>

investigative bodies like human rights commissions equally face challenges posed by populism. As depending on the budget of states, the populist prioritisation of spending on other areas has already shown its negative side effects on state funded institutions¹⁶⁸. Furthermore, financial assistance to regions or countries other than the own seems to be even more jeopardised in view of the lesser connection to own national benefit such aids would provide. In addition to regional or national human rights bodies, especially also UN institutions like the Human Rights Council (for which China and Russia have already announced their planned introduction of reforms¹⁶⁹), are amongst those being highly sensitive to political influence, as always determined by the P5 countries and their respective interests. UN establishments and their mechanisms as well as national human rights institutions have, however, played a major role in investigating international crimes or filing cases. Financial cutting and the related struggles mean that their capacity will be diminished, that, furthermore, international prosecutions might depend more on national efforts by either domestic courts or national institutions (which, however, evidently face equal capacity issues depending on their state head's attitudes), or that eventually the role could be left to non-governmental organisations and individual lawyers within their respective states. However, the two other levels already being significantly challenged by populism, also this latter level -civil society- will not have a positive outlook to maintain and increase such role when considering that also there populism has changed, and will continue to change, the dynamics. Closely related to the described challenge concerning the bringing forward of claims relating to international crimes, namely, is another by Alston pointed out key issue which also has potentially significant impact on the prosecution of international crimes: the shrunken space for civil society.¹⁷⁰ From the international criminal law point of view, this is an often overlooked, but actually enormous, drawback: civil society, and of latter especially NGOs, independent from their respective state's government have, namely, not only contributed in many countries to the advancement of human rights in general, but also played a major part in the prosecution of international crimes. Their societal role makes them well equipped to talk to victims or witnesses¹⁷¹, and their independence from states (financially as well as in

¹⁶⁸ examples are, *inter alia*, institutions like the Inter-American Commission of Human Rights, *see* Alston *supra* note 6, page 15

¹⁶⁹ *ibid.* pages 14-15

¹⁷⁰ *see* Balfour, *supra* note 12, page 59; Müller, *supra* note 121, page 102); *see also* Alston *supra* note 6, pages 9 and 10

¹⁷¹ TRIAL International, *supra* note 108, pages 9-10

mandate) allows them to carry out thorough investigations.¹⁷² However, as not being of judicial character, for an actual initiation of prosecution, the success of an NGO initiated case yet depends on the state's authorities, and in the case that the state is reluctant to prosecute, be it for bearing above-described characteristics of populism or any other political motive, NGOs will feel the same effects as national human rights institutions do. Populism in view of an NGOs capacity can thus have a two-fold impact: on one hand, the potential of NGOs to function in their contributing and necessary role concerning international criminal cases is decreasing as the populist government will pursue policies restrictive of civil, and especially *critical* civil, participation. On the other hand, even if there are yet NGOs left with sufficient influence to investigate cases and file complaints, they will most likely encounter objection by the government, and the success of even an opening of potential cases is thus at the latter's mercy.

What becomes evident is that the context those above-analysed three major key issues as direct effects of populism occur in are the fields of concern to this thesis, which will be dealt more in detail with in chapter 4.

What the situation has developed into until now gives at the same time some hints concerning what could happen should such trend continue. A point made by Alston is that the threat to international human rights law does not only come from the fact that various governments take up populist and anti-human rights attitude but moreover which countries make this shift.¹⁷³

The danger is that precisely these years the countries that used to represent a pro-human rights attitude seem to change. It is not that populism is a recent phenomenon, or that there were no human rights opposing governments before, on the contrary: those attitudes always existed. The difference is, however, that there were reliable countries acting as strong "pushbacks"¹⁷⁴ vis-à-vis those opposing countries, and it is their changed attitudes which the real danger flows from. Not only does it mean, namely, that the overall amount of human rights disregarding countries has risen and that a significant part of those human rights opponents are now economically strong, influential, and historical "role model" countries (like the US for example), but also that the countries with an already populist

¹⁷² note for example how in the *Bazaramba* case Finland's National Bureau of Investigation could rely on and receive information from a Finnish NGO conducting their own independent investigation concerning the accused (*see* *ibid.* page 9); note also the achievements of organisations or associations like, for example, TRIAL International, FIDH or LAG. *See also* Langer, *supra* note 30, page 253

¹⁷³ Alston *supra* note 6, page 5

¹⁷⁴ *ibid.*

and human rights opposing attitude are not met by those powerful pushbacks anymore. The development has the resemblance of an avalanche: the way for growth is freed when significant parts that have before acted as stabilisers join the ride down the mountain – the result then being exponential growth.

With the populist threat still coming and growing rather than going one can observe that states are once again becoming perpetrators, in the rise of nationalist-populism committing horrendous acts and pursuing politics of exclusion against certain groups. With such an attitude, the actual possibility to have any human right fully granted, is endangered, especially as the accountability part lies mostly¹⁷⁵ in the hands of states. While in the past this problem was countered by creating a safety net in form of an international human rights framework, during these years, where such framework has long been in place and is at times even already outdated, it applies to now strengthen this complex net again. The wider populism spreads the more holes open up in the net whose last layer of safety should be universal jurisdiction. So far, its feasibility has mostly been put in connection with a universal acceptance. Under the current circumstances, a global spread and widening of the principal could, however, mean a globally spread destruction, with its aims and achievements being reversed – if no other solution is found according to which universal jurisdiction's successful and genuine exercise does not rely on global spread. How the exact deconstruction of the net looks like more technically will be seen in more detail in chapter 4.

¹⁷⁵ *note* again, as mentioned above, that even though there are international tribunals and courts, also those are determined by its state members' political contexts.

Chapter 4: Impact of the effects of populism on universal jurisdiction

Reiterating what the 21st century nationalist populist attitude's essence consists in, one can primarily see two features recurring: 1) the opposing to the protection of minorities, and 2) the rejection of constraints to the sovereignty of the people as (an indirect) reaction to globalisation.¹⁷⁶ The link of those main consequences of populism to universal jurisdiction, and the hypothesis made of the former's impact on the latter, strikes immediately. If now, by means of chapter 3, it has been proved so evidently that those are the two features all populist movements have in common, and previously, in chapters 1 and 2, already that this is what universal jurisdiction is mostly based on (i.e. it provides the subject-matter of a large percentage of its cases and builds the fundament for its procedural rationale), then the theoretical foundations having given rise to the hypothesis to this paper are proved to be based on real concern already. Whether the *exact premises* of the hypothesis have so far proven true shall be considered in the following.

The first part of the hypothesis claimed that, in the occurrence of populism, there is **an increased need but decreased willingness for universal jurisdiction**. It is here now looked at the increased need part that was reasoned through 1) an **increase in hate crimes** happening and 2) an increase in **persons in need of international protection**.

Concerning the relation of that part of the hypothesis to the first above-mentioned attribute, it shall be brought attention to the fact that universal jurisdiction assertions and trials have in the past been, and are today, more than often involving ethnic persecutions, ethnic cleansing, or genocide of “unwanted” minorities. Rwanda, Serbia, Northern Iraq, or Syria, are only few of many examples, and -even if some of them have occurred decades ago- up to the day, responsible of the respective massacres are still being tried before national courts. In fact, of the universal jurisdiction cases in recent years, the highest percentage goes to systematic mass crimes¹⁷⁷, and of those again a considerable amount can be brought back to being based on ethnic tensions, including direct attacks

¹⁷⁶ *supra* note 127

¹⁷⁷ out of the 72 pending cases before national courts at the beginning of 2018, 50 imply at least one charge of one of the systematic mass crimes, which makes roughly 70%.

against (suppressed) ethnic minorities¹⁷⁸. Also the high number of systematic mass crimes committed against political dissidents¹⁷⁹ –yet another feature of extreme nationalist populism¹⁸⁰– is noteworthy. However, it shall be pointed out that –despite opposing protection of minorities is one of the main reasons to see the commission of hate crimes under populist regimes increased– it is, as mentioned, not the only reason for an increased commission of international core crimes under a populist regime as this paper’s hypothesis assumes. As it was seen, in the name of national security or of the protection of national citizens or culture, international core crimes are wilfully committed if it serves the purpose of the former. Looking at the same selection of cases as above, the 72 pending at the beginning of 2019, one can see that, in addition to the 39 out of 50 as systematic mass crimes identified that could be brought back to nationalism or populism (out of which 35 were based on ethnic or political minority attacks, and 4 on nationalist non-government group attacks) a number of **11** out of the remaining 22 non-systematic mass crime cases can likewise be brought back to populism. Out of those, **5** were tackling crimes carried out under reasons other than minority or political dissident persecutions. Examples amongst those 5 cases are primarily national security related tortures, like the *Gina Haspel* case for example shows.

In both sets of reasons, one can evidently see the same core aim – demarcation of the own state and securing its “safe” borders. In total one can also see that out of 72 cases, **50** (out of which **41** were based on ethnic or political minority reasons (35 as systematic mass crimes and 6 as non-mass crimes), **5** based on national security reasons, and **4** based on an attack by a nationalist populist group against the government in place) can be –directly or indirectly– brought in relation to nationalism or populism. This makes a percentage of almost 70%. The first reason to the first part of the hypothesis, the hate crime-populism relation, can be considered as proved – and that by only looking at a fraction of cases, namely those that were serious enough to be amenable to universal jurisdiction, and of those also only those that made it all the way through to official initiation.

¹⁷⁸ out of the 50, **at least 23** are based on ethnic tensions or involve an attack against an ethnic (minority) group

¹⁷⁹ out of the 50, **at least 12** involve attacks on political dissidents by nationalist government, which together with the former makes about **35** (hence 70%) of those systematic crimes cases having as a reason features likely to occur in populist regimes. *Note* that additionally, of those 50, **at least 4** were based on the happenings as part of an attack of a nationalist group, which makes a total percentage of almost 80% of those 50 cases relatable to nationalist populist attitudes and therewith related tensions and effects.

¹⁸⁰ *see supra* note 123; *see also supra* note 121, page 37

As mentioned, the first part of the hypothesis (**populism and an increased need of the principle**) had in addition to the increased occurrence of hate crimes a second underlying reasoning, namely **the fact that those people** hate crimes are committed against under populist regimes **are the ones possibly left without protection**. However, considering the numbers above that do not simply provide an account of hate crimes happening, but relate to those that are *internationally prosecuted*, it looks like crimes against minorities due to nationalist or populist state heads is still taken seriously – with a number of **41** pending cases they make by far the largest fraction. However, what has to be considered is what precisely this high number indicates when put in relation with the cases' distribution: so far, not a single case involves Western nationalist-populist persecutions of ethnic minorities. The 50 systematic mass crimes cases talked about, out of which 39 can be brought back to crimes arising from populist attitudes, all 39 refer to nationalist struggles in non-Western states, and almost all of them (apart from the exception of the *Jammeh* case in Ghana) were furthermore tried by Western states. Also by looking at the bigger picture, out of the total of 50 nationalist-populism related cases, only 2 were conducted by non-western states (Ghana and Senegal), and also only 2 directed against Western states (France's Guantanamo investigation and Germany's *Gina Haspel* case). European persecutions of minorities related to rising populism¹⁸¹, however, do happen and what one has as living proof by those above-evaluated numbers is that universal jurisdiction is not used as accountability mechanism to punish, deter, and prevent responsible for those crimes.

Thus, one can see that also the second reason to the first part of the hypothesis that an increased need of universal jurisdiction through **lack of state protection for some persons, including especially minorities**, can to -some extent- be proved. "Some extent" has to be used and pointed out because it is not all states where this is crystallising, but provably especially those states that have in the past been actively engaging in universal jurisdiction exercises, and do so now. Those states (mostly Western-European states) shifting to populism means more hate crimes and exclusion of minorities in their own countries and in combination with the above-mentioned populism-conjured hypocrisy no application of those international safeguards against such crimes to their own ranks. When populism thus more and more becomes the norm by further spreading, then the mutually enhancing negative effects on minorities would be indeed *more need* on their

¹⁸¹ e.g. systematic exclusion of Roma

side, but *decreased willingness* to take responsibilities for those left without state protection on the states' side, and the second aspect, that there is **decreased willingness**, i.e. that the concept is not only more needed **but furthermore hindered through populism**, here by means of analysis of the first attribute mentioned as common to all populist ideologies, is theoretically proved.

Turning away from the minority-rejection attribute, and to the second feature named above, which referred to the rejection of what universal jurisdiction is in fact a remote end-product of – globalisation, and here more specifically, globalisation of certain laws and common standards resulting in the notion of universality of certain legal norms which then again led to universal adjudication. One has seen in the US a populist example that publicly seeks to impede those institution's work (e.g. threats to stop financial support UN, or the entry visa denial for ICC prosecutor). Hence, also here the second aspect of the thesis, now by means of analysis to the second as common to all populist ideologies mentioned attribute, is theoretically proved.

This paper has thus, throughout its preceding chapters as well as the deduction ultimately made above, so far brought various cases and incidences that prove the theory behind the first part to the hypothesis true. Hence, it has so far be reified beyond mere hypothesizing that there is reason for concern regarding the use of universal jurisdiction.

However, what has also been pointed out throughout the preceding chapters is that today, more countries have implemented national legislation authorising the principle than before¹⁸², and there has been no decrease in universal jurisdiction cases either.¹⁸³ In order to assess whether this seemingly paradoxical and thus not in the hypothesis fitting, development yet upholds the above-presented theory, or contrarily, proves it wrong, this chapter will now turn to the second aspect of the hypothesis, **that populism decreases genuine use and potentially even increases non-genuine use of the principle**, and analyse the interference of populism with the as genuine identified elements from chapters 1 and 2.

¹⁸² *see supra* note 44 and 45

¹⁸³ *see supra* note 99

How the effects of populism interfere with the as genuine identified elements

As one has seen throughout the paper so far, almost all aspects of commonly brought critique against universal jurisdiction do not have their origin of *evil potential* in what the principle was intended for *per se*, but rather in its execution by states. The risk factor that rising populism -if it leads states to have their acts be driven by considerations of national interest and political power- will facilitate the *evil* side of universal jurisdiction to come out ever more is thus high.

In this regard, it does not even matter that various scholars, judges, organisations, or draft proposals, have established safeguards to prevent such political abuse because -as seen- populist states are likely to ignore and divert from any type of international norms, and non-binding recommendations even more.

In this part to chapter 4 there are two concerns implied: **first**, it has to be looked at how a national populist attitude interferes with the as genuine identified elements from chapter 1 and 2.1 by analysing the in 2.2 presented loopholes more in depth and here now in specific regard to when they occur due to populism, so that then, **second**, the question can be answered whether national populism might not only interfere with genuine elements of universal jurisdiction exercises but additionally also causes the state actors concerned to make non-genuine use of it.

Regarding the above-mentioned concerns, an interference of populism with its genuine use can mostly be spotted by reiterating the scenarios from **chapter 2** which results in the following findings, classified according to their populism-related underlying driving forces for occurrence.¹⁸⁴

(1) National interest-based assertion

This non-genuine use potentially being enhanced by populism is in line with scenario **(2.AB)**. Actual expression this scenario finds in the *Jabbateh* case: the US, these years at their peak of pursuing radical national security as well as anti-immigration policy to the detriment of human rights, arrested Mohammed Jabbateh (former officer to the ULIMO rebel group in the First Liberian Civil War, and alleged war crime perpetrator) – for fraud and perjury, and not for what he carried as heavier burden from his past and which ranged, *inter alia*, from killings of civilians, executions, and mutilations of corpses to rape,

¹⁸⁴ note that now only those scenarios are brought which can be seen as being enhanced by populism

enslavement, cannibalism and torture. However, what the US picked out was him lying about his involvement when trying to immigrate into the United States. The culprit can be seen in what US legislation makes amenable to universal jurisdiction: they allow applicability of the principle in regard to international crimes related cases only as civil lawsuits.¹⁸⁵

Another incident to be named in this section is the development in *what crimes* are focused on, here especially to remark is the rising number of cases relating to terrorist attacks: while in 2015, there were but 4 (out of 33) cases including charges of terrorism, in 2019 the number was 13 (out of 72), which shows a rise from 12% to 18%. There is no treaty authorising universal jurisdiction by national courts over the general crime of terrorism, and thus such cases can be classified as pure universal jurisdiction assertions, that -as seen above- states have come to be rather reluctant towards. And in fact, for most other universal jurisdiction assertions of 2019 it does not even have to be debated whether they stem from pure or treaty-authorised assertions, as their charges are commonly covered by both treaty as well as customary international, and -in the forum state- national law. The prosecution of terrorism, a rising threat, newly especially also in Western states, is a crime that derives its rationale for prosecution also from the protective (i.e. state interest) principle, as it can be considered an attack against the state and its citizens as a whole. It is a plausible explanation that, when considering an increase in using the more extreme form of jurisdiction, i.e. universal jurisdiction, in relation to terrorism, states are now more willing to go to extremes due to feeling an increased need to protect themselves, which is a national security-related rationale for assertion. Such “going to extremes” is not an empty assumption, as one has seen in recent growingly radical counter-terrorism measures or other extreme policies when it comes to terrorists (e.g. Trump and torture). However, it holds true that in those areas where a terrorist attack goes against a state incapable of ensuring accountability for those crimes then the development is leading to a positive outcome, but yet clearly shows how nationalist attitudes already shape the -here however positive- evolution of universal jurisdiction practice. What shall not be forgotten is, however, that any evolution departing, even if only slightly, from being in accordance with the core features of universal jurisdiction, creates a risk of allowing for other evolutions that are not necessarily always still upholding the principle’s main aims to lead to more accountability and less impunity.

¹⁸⁵ TRIAL international, *supra* note 108, page 78

A similar example can be seen in the shift of rationale for assertion, identified as the “*no safe haven*” rationale now being predominant.¹⁸⁶ If regarded through the lens of nationalist-populism and related effects, it seems plausible to detect in it a rather *self-focused*, as opposed to the for the global enforcer rationale *international community-focused*, (nationalist-populist) attitude¹⁸⁷. Such national interest in not being put under international scrutiny by facilitating impunity through being a *safe haven*, but rather to be left alone, can go as far as overlooking when the potential forum state itself would not provide the best forum for trial (e.g. the UK and their repeated universal jurisdiction assertions with trials being impeded through inconveniency aspects).

National interest-based rejection or other impeding of an assertion

This finding potentially includes a wider range of actors: firstly, it can already concern the **prosecutor** of a potential forum state before it even comes to a an official assertion in the state where the assertion was attempted in. This finding was in line with what was described in scenarios **(1.BA)** or **(5)**. Secondly, it can also concern the **national defendant state** whose national interest lies in not having the case happen (in line with scenario **(5)** and seen in the Franco-Dictatorship case, or in attempts of assertions against former US president Bush by Malaysia or also Spain).

In the example of the Franco-Dictatorship case proof for the occurrence of both incidents can be seen best: an attempted filing by a Spanish judge against Rodolfo Martín Villa, then based on territorial as well active and passive personality, was halted. The authorities’ argument can be seen as nationalistic and contrary to universal jurisdiction notions the Spanish state had in previous years, when assertion was not against their own national sovereignty, still so extensively preached, and consisted in holding that the interpretation of the 1977 amnesty law (applicable to the accused and that was by the investigating judge declared as non-applicable due to the nature of the crimes) was “unfair” as it stood for “reunification”, and declaring the law inapplicable would mean an attack on the national unity and sovereignty of the Spanish state¹⁸⁸. The accused thereby

¹⁸⁶ *see supra* notes 100 and 101

¹⁸⁷ Assumptions like those are reaffirmed by the Zardad trial (*supra* note 112) where the UK was clear in their rationale for assertion: “*The verdict shows what can be achieved, and that the UK is not a safe haven for people like Zardad.*” (Clark, *supra* note 123, quoting Peter Clark); however, also clear was that the core aim of victims was not the main interest in this version of assertion, as an early release caused severe consequences to victims and witnesses, which indicates a usage of the safe haven rationale not in line with universal jurisdiction’s genuine aims.

¹⁸⁸ The Local Spain, ‘Spanish Ex-Cop Denies Franco-Era Torture Claim’ *The Local Spain* (10 April 2014); available at: <https://www.thelocal.es/20140410/spanish-cop-argentina-franco-billythekid-spain>

still protected was holder of a state medal rewarding him with an increased pension. The state medal stands for the awardee showing “*the virtues of patriotism, loyalty and will to serve in the highest degree*”¹⁸⁹, and by disregarding the fact that in this case the awardee was a perpetrator of grave international crimes shows an attitude of prioritising those *virtues of patriotism and loyalty* to the state over the protection of international law. When the case was then continued by an Argentinian judge and thus turned into an actual universal jurisdiction case, the interference with genuine elements in **(5)** can be seen: the Spanish state actively impeded advancement of the trial (e.g. rejection of extradition requests or prevention of exhumation of bodies in mass graves as part of the investigation).

Sovereignty-protection based rejection

This finding covers a wide category of cases, in line with scenarios **(1.D)**, **(5)**, as well as to some extent **(3.B)** or **(1.AB)**. The case of Congo in the dispute over the lawfulness concerning Belgium’s arrest warrant¹⁹⁰, the hypocritical behaviour of Israel¹⁹¹, as well as all populism or nationalism-determined countries that stress the importance of the state sovereignty principle to be valued above universal jurisdiction at UN 6th Committee meetings over the past few years¹⁹², enable to identify the existence of populism as enhancing this non-genuine usage. Also with the Kuala Lumpur Commission’s *symbolic* prosecution of US political leaders, the undesirability for nationalist-populist states to have their sovereignty interfered with another example is given.¹⁹³

One of the most universal jurisdiction impacting and thus remarkable examples is how

¹⁸⁹ Natalia Junquera, ‘Franco-era Cop Accused of Torture has Four Medals that Fatten his Pension by 50%’ *El Pais* (Madrid, 26 June 2018); available at:

https://elpais.com/elpais/2018/06/26/inenglish/1529999067_258647.html

¹⁹⁰ *see*, for example, *Arrest Warrant* (Judgement), *supra* note 24, para. 17, *or also* para. 45

¹⁹¹ making use of the universality principle during early years of statehood, but rejection of complaints filed under universal jurisdiction concerning their more recent conduction of hostilities and commission of international crimes, by, *inter alia*, exercising diplomatic pressure on the asserting states (e.g. UK as well as Belgium’s arrest warrant withdrawals and granting of immunities concerning the *Tzipi Livni* case; *note also* the ongoing *Kilani* case in Germany; *note especially* the Spanish investigations attempts to assert universal jurisdiction assertion concerning the *Gaza Freedom Flotilla* case)

¹⁹² e.g. statements made, *inter alia*, by the United States, Indonesia, Rwanda, and *especially* Syria concerning agenda item 85, UNGA Doc (A/C.6/72/SR.14), *supra* note 7, *see also* statements by, *inter alia*, Iran, Algeria, Sudan, and China (A/C.6/72/SR.13).

¹⁹³ *note* that the KLVCC arose out of the need they saw in establishing an alternative tribunal upon the ICC’s reluctance to indict Western leaders. This points both to ICC member states attitude as well as to UNSC permanent member attitudes, and the reaction of ignorance on the side of US by KLVCT prosecuted leaders, as well as by Western media, speaks for itself. *See* Richard Falk ‘Kuala Lumpur Tribunal: Bush and Blair Guilty’ *Aljazeera* (28 November 2011), available at: <https://www.aljazeera.com/indepth/opinion/2011/11/20111128105712109215.html>

the rejection of the concept of universal jurisdiction can reach the level of diplomatic relations and find use as a tool to create pressure against the principle itself: opponents of universal jurisdiction were, through diplomatic pressure, capable of influencing use of the principle to such extent that Spain introduced two reforms to their universal jurisdiction laws¹⁹⁴ in 2009 and 2014 that basically eliminated a pure form of universal jurisdiction from their criminal code by replacing it with other principles of jurisdictions, including treaty-based authorisations¹⁹⁵. The more specific reason for such pressure was directly sovereignty-related: Spain was using it (arguably too excessively maybe) how the principle should be used: selection of perpetrators to indict and hold accountable not according to where they are from and committing crimes but according to *how grave* their crimes are and how little the likelihood for accountability would be if the asserting state did not step in – which, in the case of Spain included planned assertions against also Western states (e.g. Bush and torture, or Israeli government officials)¹⁹⁶, which relates to and shows, again, the hypocritical character a principle that is supposed to be universally applicable brings out.

Lack of sense for international cooperation

The populism-caused loss of sense for what the international community could mean, and further what good it could mean for national states, has shown how it can unfold non-genuine use in scenarios **(1.AB)**, **(1.BA)**, **(3)**, **(3.A)**, **(3.B)**, and also, to some extent in **(5)**. A first example can be seen in the very same that was brought forward as last point of the previous section which can furthermore be seen as relating to scenario **(1.BA)**. Proof for occurrence can, again, be seen in the Franco-Dictatorship case where Spain, despite knowing that the case was going on in Argentina and their previous attempts to halt the case thus unfruitful, nevertheless refused to cooperate.

A next example can be seen in line with scenarios **(3)**, **(3.A)**, and **(3.B)** which find their proof in the *Al-Bashir* case, where one can more speak of an incitement of a non-genuine use through not only paying disregard to the international community of states but moreover through proclaiming the notion of a regional community as supposedly running

¹⁹⁴ Rosa Ana Alija Fernández, ‘The 2014 Reform of Universal Jurisdiction in Spain – From All to Nothing’ ZIS 13/2014, pp. 717-727, (Barcelona, 2014), page 717, available at: http://zis-online.com/dat/artikel/2014_13_883.pdf

¹⁹⁵ Ministry of Foreign Affairs and Cooperation, Contribution of Spain on the topic “The scope and application of the principle of universal jurisdiction”, 16-05499 (E), (Madrid, 22 February 2016), available at https://www.un.org/en/ga/sixth/71/universal_jurisdiction/spain_e.pdf

¹⁹⁶ Soeren Kern, ‘Spain Changes Tack on Universal Jurisdiction’, *Grupo de Estudios Estratégicos* (6 October 2009), available at: <http://www.gees.org/articulos/spain-changes-tack-on-universal-jurisdiction>

counter to the international community of states. The AU has furthermore demonstrated how far it would allow this lack of cooperation show effect by *actively* calling for non-cooperation. Another example is posed by the *Hissène Habré* case: Senegal's and other African states' initial behaviour of showing non-cooperation by not coming after Belgium's extradition request, which would have certainly brought Habré earlier before court. Instead, the AU decided to take the case on themselves, but interruptions through judgements by ECOWAS, and the creation of the EAC in order to prosecute Habré took years from Belgium's extradition request onwards, so that by the time Senegal was able to prosecute the by Belgium initiated proceedings before the ICC had already resulted in the Court to request Senegal to extradite or prosecute. Had Senegal, as well as the AU recognised at the moment of the Belgium extradition request that their forum was not the most convenient, but that through international cooperation one would have been provided, then justice would have been done earlier.

Also enhanced through nationalist and populist ideologies is such non-genuine use at the UNSC level where the permanent members, having most influence over the one organ that stands per definition for the prevention of impunity, the ICC, seem to be given the power to also hinder its aim from being achieved by demolishing its foundations¹⁹⁷, which was in line with scenario (5). If permanent members that have a saying over an ICC universal jurisdiction exercise are driven by nationalism or populism it seems to be disregarded what the ICC stands for, and that it is to apply its rule equally – which thus also here leads back to the by populism caused loss of sense for an international community.

Hence, what can be said after this sorting out of those risk factors amongst the non-genuine uses that stem from populism or could be enhanced by it, is that there is indeed a connection between populism and non-genuine use, and furthermore that also the second aspect of the second part of the hypothesis (that apart from a decrease in genuine use, **there is an increase in non-genuine use**) could be proved as *theoretically true*. However, even though, cases above give to some extent the impression that it is not only theoretically provable but furthermore practically, and thus based on real concern would be a bit too far-fetched – one cannot yet make a statement that populism *per se* always systematically causes states to use the principle non-genuinely. In order to base such

¹⁹⁷ see page 41.

assumption on more certainty, it should be first considered where the benefits lie for a populist state to do so.

As underlying driving force can be identified the behavioural pattern of self-contradiction leading to hypocritical conduct, which, as identified above, populists have no problem whatsoever with, which has here has led to hypocritical behaviour towards the use of universal jurisdiction: concerning ***national interest based rejections or assertions***, one could see that, since a nationalist populist state's interest does not go beyond own borders, there has to be a sufficient level of self-reference to make use of it. (e.g. Senegal's initial behaviour concerning the Hissène Habré prosecution, or Greece and Italy in their initiation of cases that, as from the late 1990s onwards to grant victims of war crimes during the Second World War reparations¹⁹⁸). As can be seen, whenever there is enough national interest involved, this can even lead to an early net application, i.e. the disrespect of other states' jurisdictions with potentially better claims due to a more traditional nexus, or to a going to extremes for application of the principle (e.g. Israel in *Eichmann*). Also in the ***state-sovereignty protecting rejections*** one can see the from self-contradiction resulting hypocritical behaviour reflected: rejecting the use of universal jurisdiction by another state in *one* case, solely based on the notion of state sovereignty, should lead to own non-usage in *any* case. However, as mentioned, protecting own sovereignty has often been carried out by infringing another's sovereignty (e.g. US and Israel). And lastly, self-contradiction-triggered hypocrisy could also be seen in the way the ***international community*** and its international criminal law system is viewed and used: the rules are accepted and invoked when serving the state's interest, but refuted when they would mean self-criticism and challenges to own policies, laws or state officials' individual behaviour, and the sense of what international community, and taking the floor on its behalf, means is not present (e.g. Israel and US, African states' initial behaviour concerning the Hissène Habré prosecution).

The assumption is thus not far that, then, under consideration of the populist driving force behind all mentioned scenarios and their real life examples, the non-genuine use of universal jurisdiction by populist states could indeed be more than a coincidence.

¹⁹⁸ Areios Pagos (Supreme Court), Prefecture of Voiotia v. Federal Republic of Germany, 11/2000 (288933), Judgement, 4 May 2000, available at: <http://www.internationalcrimesdatabase.org/upload/ICD/Upload3247/Prefecture%20of%20Voiotia%20v.%20Germany%20-%20Greece%20-%202000.pdf>; and International Court of Justice Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), 2012/2, judgement, 3 February 2012, available at: <https://www.icj-cij.org/files/case-related/143/143-20120203-JUD-01-00-EN.pdf>

Furthermore, universal jurisdiction cases receive a considerably high degree of attention, and if the case results in a conviction this means positive publicity.

How a non-genuine use could be triggered

Even though those above-mentioned reasons would indicate that the cases demonstrating non-genuine use as emerging practice by non-populist states could now indeed be seen as more than a mere coincidence, namely an actual benefit to a populist's cause in line with their ideologies, cases alone, as seen so often throughout this paper, do not provide substantial proof. Still regarding the second concern implied in evaluation of the second part of the hypothesis, it is analysed in the following **where else one can find proof** for such non-genuine behaviour becoming practice, or **what other risk factors** seem to play a role.

Reduction in emphasising political abuse safeguards

An important observation in this regard is that, while at the beginning still recognised, in later guidelines or draft legislations, safeguards against **political abuse** seem not to be prioritised anymore¹⁹⁹. Priority is rather given to enhancing the scope of crimes amenable to universal jurisdiction. It is, however, questionable whether this is the right approach if existing (already only semi-) consensus concerning so far to universal jurisdiction amenable crimes has yet to ensure more prevention of political abuse. Certain, the fact that over the years there were a lot of so-called safeguards included, could be an explanation of such de-prioritisation, but if abuse was not a risk anymore, then it would neither be picked up considerably in the 6th committee meetings²⁰⁰, nor would there be so much rejection of assertions labelled as “political power abuse”, which does not necessarily relate only to the asserting state actually abusing its power, but also to the state using this phrase potentially as an excuse to have the assertion being labelled as unlawful – which, however, then again constitutes another abuse itself.

Conflict focus

The next here brought explanation looks, at first glance, like it was disproving the hypothesis to this thesis: recent and current cases seem to target perpetrators where conflicts are most worrying and civilians severely suffering. The cases do not only seek to account for long passed conflicts (e.g. Rwanda, Liberia, Franco-Regime) but

¹⁹⁹ compare for example Princeton v Cairo-Arusha v Madrid-Buenos Aires Principles

²⁰⁰ See for example country statements of Rwanda, The Congo, Argentina, or comments by the ICRC (A/C.6/72/SR.14) *supra* note 192

furthermore help to the account for momentarily happening, or very recently occurred conflicts. (e.g. Yemen, Syria, Israel-Palestine). Hence, by simply looking to the facts of pending cases, there seems to be no substantial evidence that the theory holds true. The number of **57** out of the total of 72 pending cases this year, however, hints at what evidence concerning their mere existence remains silent on: regimes suffer during conflicts and, after, are often (financially, politically, as well as judicially) weakened and overstrained. The asserting states do not face the challenges they probably would if the government (either ordering the commission of, or whose nationals were committing, the crimes) was still in office. However, universal jurisdiction's function is ***not only*** to ensure accountability for crimes happening during war, but has a wider scope. And yet, focus of assertions seems to be on those states where the successful execution of the application of the principle looks promising. On one hand, this hints at the possibility that the asserting states' apparent focus on the most horrendous crimes is not necessarily an *actual* focus on the crimes involved but on where the assertion is easiest. On the other hand, it also allows to make an assumption as regards the state asserted against: if the situation was not one of conflict or post-conflict, one can suppose that of the many attempts in which cases were failed against regimes still at the peak of their power, even more would have ended through tactical rejections on part of the states asserted against.

Increased shifting to the no safe haven rationale

Another fact here to mention and that furthermore relates to the just discussed idea of an increased post-conflict orientation in use of the principle, is the general shift to the *no safe haven* rationale, which countries nowadays seem to rather adhere to, instead of interfering anywhere as *global enforcer*²⁰¹, which implies often that they are more likely to allow use of the principle after perpetrators leave the war-torn countries, and find themselves in the respective potential forum states. From a national interest point of view, it is safer if an assertion involved defendants that left their country after a war, and not a judicial interference with another government that is in office, potentially providing economic benefit to the forum state. Several examples illustrate (e.g. assertions against the Israeli or Syrian government) that many of those attempts were extinct due to the forum state foreboding diplomatic issues (e.g. Spain asserting against Israel).

²⁰¹ *supra* note 100

NGOs as main initiators

Only very few, if not none, cases exist where there was no NGO involvement, but what particularly strikes is the number of NGOs that have provided substantial help to either the victims in their filing or to the authorities in their investigations: at least in **25-30** out of the 72 pending cases the involvement of NGOs is especially mention-worthy and is here considered as *substantial* NGO involvement.²⁰²

This high number is in line with the described shift to a focus on victims²⁰³, but at the same time also in line with the identified risk for a lack of willingness on the side of states to get involved in the absence of national interest. Furthermore, in consideration of the above-described conflict-zone focus, the fact that there are more and more international NGOs arising which often facilitate the necessary and important cooperation between states more than governments do, the high number of cases and the high number of those concerning the places where most horrendous crimes occur and international support is needed, can be attributed to the substantial involvement of NGOs (e.g. US: *Jabbateh* case that was initially backed up by a Swiss NGO's investigations).

Distribution of cases

Of the countries that had cases pending in the last year, the highest number interestingly goes to countries that have experienced a rise in in populism over recent years. France with 20 out of 72 cases makes the largest fraction, while Germany follows with (initially 18, but after some were joined) a number of 14. Also this fact seems, at first glance -even though not necessarily proving the hypothesis wrong (if namely, in each of the cases by those leading countries sufficient national interest or any other driving force-related evidence can be found)- to definitely pose a challenge to it. However, at second glance, it strikes that -when considering that European countries' populism is a rather recent phenomenon- most of those European countries, including Germany and France, have in the past ensured that their legal system has a certain degree of impartiality. This could be a plausible explanation, furthermore in line with the hypothesis, why the effects do not enter the application of international criminal law in those countries whose laws are based on safeguarding the branches of power in their states against nationalist or populist agendas. Hence, under such consideration, one can already say that this paper's concern could, if this was true, be slightly limited and instead be seen as relating to those countries

²⁰² *supra* note 96

²⁰³ *supra* note 92

that have longer pursued a nationalist agenda or whose laws, at the time populism arose in their respective area, were not in line with important standards. Those Western countries' potential abuse could be automatically prevented when cases are filed internally, by virtue of their long history of a separation of powers and effective judicial systems, which does not necessarily show effect externally in view of other nationalist-populist states without effective separation of powers. Hence, the assumption still holds true, but, for now -at least as long as Western countries' populism like does not go as far as amending their penal codes and general justice system- on a smaller scope than feared.

To conclude this chapter, one can say that even though, theoretically, evidence points to an increased non-genuine use, the few cases that affirm such idea are not enough to prove the assumption either right or wrong, at least not to the fullest degree of certainty. There are arguments against the hypothesis being true (e.g. the explained increase in world-wide universal jurisdiction implementation, or that most recent and current cases tackle the conflicts with most perilous situations attached) but those can likewise be counter-argued (i.e. an increase can be brought back to states seeing national benefit in having those laws implemented – e.g. as a use in their favour, or to escape international condemnation without any willingness to use them, or, contrarily, to substantial non-state actor involvement, or also the fact that in the states that have significantly contributed and produce most universal jurisdiction precedents, which are mostly Western-European states populism has not reached as far yet as dissolving traditional concepts of a separation of powers, thus independence of the judiciary and supremacy of the (non-populist) constitutions) which all make solid counter-arguments that cannot yet be seen as proving the hypothesis to be right, but do at least also not lead to a refutation of the hypothesis. This is why this paper holds that *theoretical* confirmation that the concerns are indeed based on reality, or even the slightest indication that there is a risk for the identified issues to take effect, is sufficient enough to consider their meaning in current and future years, and include them in any advancement of the principle of universal jurisdiction, which the next chapter will therefore address.

Chapter 5: Overcoming the identified issues

As seen in the previous chapter, the identified main driving force behind a risk for populism-enhanced non-genuine use of universal jurisdiction is the likely pattern of populist-driven states to put a self-contradicting and hypocritical conduct on display. That general safeguards and guidelines against political abuse, proposed by different principles, commentaries, or Sixth Committee working group discussions already exist seems therefore rather ineffective, as the state actors in questions are likely to divert from such standards. However, turning to the last part of the research question, it is here held that by recognising the risk *before* it turns into a more wide-spread and more visible reality, and thus *already* including populism-related issues as a point of concern in regulations around the principle rather than only *observing* whether the identified examples grow in occurrence, a genuine application of the principle can nevertheless be secured.

The question *how* making amendments to existing rules around the principle would be possible, is straightforward to answer: by using universal jurisdiction itself, i.e. the features inherent to its character – which here means its *flexibility*.

It has been shown that universal jurisdiction has a strong potential to evolve.²⁰⁴ In existing guidelines, case law, and scholarly articles this flexibility was furthermore used to argue for amendments in order to counter challenges new eras brought about.²⁰⁵ However, despite the fact that adaptation to new eras and respective issues has been held important already, this paper argues that relevant aspects of today's era have not been focussed on. If the tool of universal jurisdiction is thought to be adjusted through certain changes in definitions, regulations and mechanisms so that it is better fit for today's needs, then this aspect of flexibility should equally be used to shape it in a way that the current populist movements do not render the principle what it was long claimed to be – a ball in a game of power. In the words of human rights defenders and challengers of populism the use of human rights themselves to counter abuses thereof²⁰⁶, calls for “*human rights proponents (...) to rethink many of their assumptions, re-evaluate their strategies, and broaden their*

²⁰⁴ The Princeton Principles, *supra* note 2, page 39

²⁰⁵ *e.g.* in *ibid.* the calling for inclusion of further crimes that are emerging in the international world and reach a level of gravity equalling it to universal jurisdiction-amenable crimes.

²⁰⁶ Zarifi (Interview with Todeschini), *supra* note 12

*outreach, while not giving up on the basic principles” and for “innovative thinking and creative strategizing.”*²⁰⁷ It is thus here argued that, in view of populism threatening to demolish step by step the fundamentals universal jurisdiction is built on, amending certain aspects of those fundamentals is *the only way* to stay close to its basic meanings and functions. The call for creativity and rethinking then also implies a change of course of how universal jurisdiction is promoted: rather than sticking to current strategies of unlimited promotion at a global level or widening the scope of the principle, in view of the rise in implementation in combination with the identified risks of changes in usage, a more necessary call would be the selection of *certain limitations*.

How to exactly overcome the issues by using this flexibility, is already less straightforwardly to answer, as any proposal concerning a global tool requires feasibility at a *global* level, which is difficult considering cultural and resulting fundamental differences of states’ respective legal systems.

In the following, a few brief and modest proposals shall be made, that do not intend to be perfect, nor claim to be feasible solutions on their own, but rather point to incentives to think of solutions in a more success-promising way. Therefore, at the end, it will become apparent that aspects of those suggestions made can be summed up in form of a checklist that has regard to the main risks and counter-measures and could be applied to whichever of the proposals is pursued.

1. **The Monitoring Mechanism Approach: establish a 6th committee monitoring mechanism.** Already proposed at the first session the Sixth Committee (2009) was assigned universal jurisdiction as agenda item²⁰⁸, no such mechanism has been established yet. However, under consideration of the highly dangerous potential universal jurisdiction can have when used non-genuinely, it is here held that it deserves as much UN attention as other areas that have UN monitoring mechanisms assigned. In the end, universal jurisdiction bears implication of each of those other closely monitored human rights like torture or enforced disappearances have.
2. **The Statutory Legal Limitation Approach: require appropriate and necessary amendments to states’ statutory domestic laws.** ‘Appropriate’ and ‘necessary’ would

²⁰⁷ Alston, *supra* note 6, page 2

²⁰⁸ UNGA, *Consideration at the 64th Session* (2009), available at: <https://www.un.org/en/ga/sixth/64/UnivJur.shtml>

here imply the identified legislative challenges posed to a genuine application of the principle. Provisions highly prone to a risk of abuse thus are: universal jurisdiction and international crimes implementation laws that are not in line with a state's monist or dualist approach towards implementation of international treaties; assignment of universal jurisdiction over crimes that are not justifiably (under international law or customary law) grave enough to trigger the exercise of universal jurisdiction; or the attribution of an exclusive and too significant role of the national prosecutor.

3. **The Supra-National Organisation Approach: hand over the power.** Upon mutual accusations made by states to use the principle to their own benefit rather than to the international community's, a suggestion coming close to counter the risk seems a delegation of the principle to the ICC, which has furthermore been brought up amongst scholars.²⁰⁹ Other comments made in the past have addressed similar issues, like for example Browne-Wilkinson who expressed that he was entirely in favour of the principle, but entirely against its exercise being left to states²¹⁰. His fear, if projected to today, has already, or runs the risk to soon, come true if -as this paper holds- such statement is based on the findings of the previous chapters. However, in view of the ICC's crisis, especially precisely due to its alleged bias, this can be counter-argued with the very opposite suggestion:

3.4 Counter-Suggestion to 3 - The "states-only" Approach: It has been suggested that the rejection of the ICC's approach regarding the accountability of (immune) state officials' could potentially be overcome by making appropriate concessions.²¹¹ If a rejection of the idea of universality can be put in relation with a rejection of the ICC, especially in view of state heads being brought before court in The Hague, then -as a concession to states' emphasis on their national sovereignty- amending the functions of the ICC in order to not enhance this rejection, could have the wished-for effects: if, namely, an interference with state sovereignty and state heads' immunities is what the ICC stands for then a shift to it focussing on its other functions, and basically removing its authority to exercise universal jurisdiction, could possibly lead to states becoming more active in waiving immunity of state heads.

²⁰⁹ e.g. Dalila V. Hoover, Universal Jurisdiction not so Universal: a Time to delegate to the International Criminal Court *Cornell Law School Inter-University Graduate Student Conference Papers*. Paper 52. Available at: https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1081&context=lps_clacp

²¹⁰ Browne-Wilkinson, *supra* note 79

²¹¹ Alston, *supra* note 6, pages 24-25

4. **The State-Interest Approach: encourage states to strengthen their principle of state interest (protective principle).** Following the same reasoning as approach 3.A -that concessions can at times be necessary and productive in regard to the desired outcome- acceptance of the fact that populism-related national interest is powerful and in view of universal jurisdiction hard to counter if prioritised over any aspect connected to a conscience of humanity, results in the acknowledgement that it can be curse and blessing at the same time. Focussing too much on an unlikely elimination of the involvement of national interest in universal jurisdiction trials, can, as seen, even be counter-productive to the principle. That national interest at times leads to universal jurisdiction assertions can be used in the principle's favour: the state interest (or protective) principle, namely, already exists as one of the more traditional jurisdictional principle, is one of the second last "safety nets" before universal jurisdiction would be a justified option, and its intention, in the end, no other than preventing impunity of crimes affecting a wider scope than where their territorial commission took place. Especially in consideration of the finding that terrorism-related universal jurisdiction assertions are rising, and moreover in the identified countries that have a rise in universal jurisdiction usage and in nationalist-populism to report (e.g. Germany), the idea of strengthening the already existing and more accepted protective principle of jurisdiction that could also cover crimes of terrorism, could provide an increased acceptance for the extraterritorial prosecution of the same grave crimes that are currently prosecuted under the universality principle.
5. **The Private Actor Approach: encourage civil society (NGOs), judges and lawyers.** In line with decreased willingness for populist governments to fund human rights NGOs, a development has already taken place that marks a shift according to which NGOs begin to orient themselves elsewhere than within their national state and reach out beyond their national scope²¹², which should be further promoted.
6. **The Human Rights Approach: make human rights a direct parameter.** This proposal would be an attempt to counter that type of national interest which would run contrary to human rights. Putting universal jurisdiction laws, reasons for assertions by both states and other actors, as well as any amendment of the principle, in direct relation with the human right that is sought to be protected, would show positive impact in almost every one of the stages of use and furthermore ensure that

²¹² *ibid.* page 16

it is not lost sight of what the genuine meaning of universal jurisdiction is. E.g.: monitoring rationales for an assertion would be made less complicated as underlying intentions become more obvious, and any assertion that does not put human rights at the centre can be detected; it would also guide the development of the principle concerning the inclusion of new crimes and prevent arbitrary or national interest-based expansion; and lastly, it would express, and more effectively implement, the shift from a focus on the perpetrator to the victims – which is crucial in order to maintain the by this paper identified genuine use

In evaluation of the feasibility of the above-made suggestions, it becomes immediately apparent that most are highly unlikely to be successful²¹³ and even less when they are taken as alone-standing suggestions.²¹⁴

A potentially more feasible proposal could therefore be a combination of approaches (1) and (4) for example: by placing universal jurisdiction under UN mandate through establishing a Sixth Committee Commission consisting of states as members in charge of universal jurisdiction assertions. Such commission goes far beyond the existing working group: its members would be the only countries to apply the principle, and furthermore observe its development closely. Each state can apply for membership based on certain criteria like economic stability, a justice system respective of international legal standards, including the rights of the accused, witness and victim protections and due process, separation of powers and independence of the judiciary, all of which should come in addition to universal jurisdiction implementation laws that, *inter alia*, 1) establish that initiation is not based on the prosecutor or state's general attorney but incentivise initiation by NGOs on behalf of victims as well as independent judges, 2) limit notions of universal jurisdiction to core crimes, and 3) respect more traditional claims to jurisdiction by other states to the fullest extent possible. Upon fulfilment of those conditions membership can be granted, the process of which has to furthermore take into consideration the equal geographical distribution of the potential members. This approach

²¹³ e.g. approach (1) has in the past given rise to concern that a monitoring mechanism would interfere with independence of the judiciary; concerning approach (2), changes to the role of the prosecutor, fundamental institution of many state's legal system, in view of its involvement in universal jurisdiction proceedings at a global level is highly unlikely to take effect, which also applies to (3)

²¹⁴ e.g. approach (1) needs to be combined with other safeguards to counter the risk of an interference with the judiciary's independence; and also approach (6) is clearly in need of some external supervision for states to be accountable to during their assertions

could then furthermore lead to a successful application of approaches (2)²¹⁵, (5)²¹⁶ and (6). This solution would not require global amendments to states' domestic laws but rather extract those states that have genuine interest in applying the principle. If amongst those there are states that do not fulfil, or cannot prove fulfilment to a sufficient degree, it is up to the state to make the necessary legal amendments if the wish to be part of the commission persists. Also this special unit of states would require respective external monitoring in their members' applications of the principle in order to ensure that the latter act in accordance with the unit's mandate, which could be done by the existing Sixth Committee in enlargement of its working group's function, which then preferably consists during each period of other states than the ones that are members of the special unit.

Nevertheless, in addition to such combination of the above-made proposals by means of which a control as well as an application system would be created, the other suggestions would still contribute as valid and useful points to a "check-list" that would transcend each specific proposal and that can applied by any supra-national institution monitoring implementation laws, assertions and trials, as well as it could simply serve for any state authority that is in charge of initiating assertions.

²¹⁵ The unit implies, as said, statutory amendments to domestic laws, if necessary, as condition to membership.

²¹⁶ At Commission sessions or Sixth Committee meetings dialogue with international NGOs would be implied, which would increase their victim-focused and impartial role in importance.

Conclusion

Throughout this paper it has proved as impossible to either confirm or refute with certainty the hypothesis this paper as well as its research question are based on. The stage the spread of populism is at, in combination with universal jurisdiction having produced only rare numbers of attempted or completed cases, does not yet provide sufficient evidence to make statements in regard to current or potential future developments. Also comparisons or analogies are hard to make, as politicization of trials can possibly occur at any stage of a universal jurisdiction exercise, and each case (especially under consideration of how many stages there are) is thus unique in itself. What has been shown as a need whose necessity has been proved beyond theoretical concerns is that there is sufficient reason to closely observe upcoming trials from the perspective of nationalist-populism's interference with a genuine usage. Following the growing body of cases in the years to come will enable country-specific comparisons and allow to identify whether trends in regard to universal jurisdiction exercises taken by some populist countries will manifest as patterns.

Once comparisons can be made with more certainty due to more substantial evidence, it is thought that this paper can be of use to detect non-genuine elements to watch out for and to help counter the national-populist based consequences that are feared to take effect. To such end, the last chapter included proposals in form of a more practical check-list that additionally provide a positive answer to the research question. By creatively rethinking existing principles and guidelines for universal jurisdiction through an inclusion of recent political developments of nationalist-populism, the safeguards within the proposed solutions point to the fact that there is yet hope that *a genuine application in the face of rising 21st century populism can indeed be secured.*

Bibliography

I. PRIMARY SOURCES

1. Legislation

1.1 *International*

International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, available at: <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0173.pdf>

International Criminal Court, *Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/1/Add.1 (2000), available at: <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>

UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, available at: <https://www.icc-cpi.int/nr/rdonlyres/add16852-ae9-4757-abe7-9cdc7cf02886/283503/romestatutengl.pdf>

UNHCR, *Convention and Protocol Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <https://cms.emergency.unhcr.org/documents/11982/55726/Convention+relating+to+the+Status+of+Refugees+%28signed+28+July+1951%2C+entered+into+force+22+April+1954%29+189+UNTS+150+and+Protocol+relating+to+the+Status+of+Refugees+%28signed+31+January+1967%2C+entered+into+force+4+October+1967%29+606+UNTS+267/0bf3248a-cfa8-4a60-864d-65cdfce1d47>

1.2 *Domestic*

Islamic Republic of Afghanistan, *Constitution of Afghanistan (2003)*, available at: <http://www.afghanembassy.com.pl/afg/images/pliki/TheConstitution.pdf>

Republic of Azerbaijan, *Criminal Code of the Azerbaijan Republic (1999)*; available at: <http://www.wipo.int/edocs/lexdocs/laws/en/az/az017en.pdf>

Islamic Republic of Iran, *Civil Code of the Islamic Republic of Iran (1928)*, available at: <https://www.wipo.int/edocs/lexdocs/laws/en/ir/ir009en.pdf>

Islamic Republic of Iran, *Constitution of the Islamic Republic of Iran (1979) with amendments through 1989*, available at: https://www.constituteproject.org/constitution/Iran_1989.pdf?lang=en

Islamic Republic of Iran, *Penal Code of the Islamic Republic of Iran (1991)*

- IHRDC Translation of the Islamic Penal Code of the Islamic Republic of Iran; Books One and Two (with amendments through 2012); available at: www.iranhrdc.org/files.php

- MEHR IRAN: Islamic Penal Code of Iran; Books One to Five; available at: http://mehr.org/Islamic_Penal_Code_of_Iran.pdf

State of Japan, Penal Code of Japan, Act No. 45 of 1907, amended through Act No. 54 of 2007; available at: <http://www.japaneselawtranslation.go.jp/law/detail/?id=1960&vm=04&re=02>

Mongolia, Criminal Code of Mongolia (revised 2002); available at: http://www.unodc.org/res/cld/document/mng/2001/criminal_code_of_mongolia_html/Mongolia_Criminal_Code_2002.pdf

Republic of Seychelles, Laws of Seychelles, Chapter 158, “The Penal Code” (of 1st February 1955); available at: <http://greybook.seylii.org/w/se/CAP158#!fragment/zoupio-Toc384202612/KGhhc2g6KGNodW5rxIVhbsSHb3JUZXh0OnpvdXBpby1fVG9jMzg0MjAyNjEYKSxub3Rlc1F1ZXJ5OicnLHNjem9sbEPEiMSKOiFuxLplYXLEh8SyxLTEtsS4xYfficSHU8SQdELEtIJFTEVWQU5DRSx0YWI6dMSgKSk=>

Parliament of the United Kingdom, United Kingdom Criminal Justice Act of 1988, c. 33, available at: <http://www.legislation.gov.uk/ukpga/1988/33/data.pdf>

Parliament of the United Kingdom, United Kingdom International Criminal Court Act of 2001, c.17, available at: <https://www.legislation.gov.uk/ukpga/2001/17/data.pdf>

Parliament of the United Kingdom, United Kingdom War Crimes Act of 1991 c. 13, available at: <https://www.legislation.gov.uk/ukpga/1991/13/data.pdf>

2. Case Law

Arrest Warrant Case

Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice (ICJ), 14 February 2002, available at: <https://www.icj-cij.org/files/case-related/121/121-20020214-JUD-01-00-EN.pdf>

Bazaramba Case

Porvoo District Court, *Prosecutor v. François Bazaramba*, R 09/404, 11 June 2010 (Finland), available at: <http://www.internationalcrimesdatabase.org/upload/ICD/Upload973/Bazaramba%20Judgment%20-%20part%20B.pdf>

Gaddafi Case

Cour de Cassation, Chambre Criminelle, Audience publique du 13 mars 2001, N° de pourvoi: 00-87215

Gaddafi case, General Prosecutor at the Court of Appeal of Paris, Appeal judgment, Appeal No 00-87215, Decision No 64, (2001) 125 ILR 490, (2001) RGDIP 474, ILDC 774 (FR 2001), 13th March 2001, France; Court of Cassation [Cass]; Criminal Division

Hissène Habré Case

Court of First Instance of N’Djaména, *The Prosecutor v. Hissène Habré*, Case No. 04/PR/MJ/93, Ordinance of Non-Competence, 23 November 2000, available at:

https://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Chad/Habr%C3%A9_Cour_Appel_23-11-2000.pdf

Court of Appeal of Dakar, *Opinion on the Extradition Request for Hissène Habré*, Decision, 25 November 2005, available at:

[https://www.asser.nl/upload/documents/20120419T034141-Habr%C3%A9_Cour_Appel_Avis_Extradition_25-11-2005\(Extraits\).pdf](https://www.asser.nl/upload/documents/20120419T034141-Habr%C3%A9_Cour_Appel_Avis_Extradition_25-11-2005(Extraits).pdf)

Court of Justice of the Economic Community of States of West Africa, *Hissène Habré v. Republic of Senegal*, Case No. ECW/CCJ/JUD/06/10, Judgment, 18 November 2010, available at: <https://www.asser.nl/upload/documents/20120419T034816-Habre%20Ecowas%202010.pdf>

Pinochet Case

Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet, Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division), 24 March 1999, available at:

<https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino7.htm>

Zardad Case

Regina v Faryadi Sarwar Zardad [2007] EWCA Crim 279 (UK, 7 February 2007, available at <https://www.legal-tools.org/doc/e047b9/pdf/>

3. Legal Documents

3.1 *UN Documents*

United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: <https://www.refworld.org/docid/3ae6b3930.html>

UN Office of the High Commissioner for Human Rights (OHCHR), *RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES*, Prosecution Initiatives, New York and Geneva 2006, HR/PUB/06/4, available at: <https://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>

Ministry of Foreign Affairs and Cooperation, Contribution of Spain on the topic “The scope and application of the principle of universal jurisdiction”, 16-05499 (E), (Madrid, 22 February 2016), available at https://www.un.org/en/ga/sixth/71/universal_jurisdiction/spain_e.pdf

UN General Assembly Resolutions

UN General Assembly, *Resolution adopted by the General Assembly on 7 December 2017*, (A/RES/72/120); available at: <https://undocs.org/en/A/RES/72/120>

UN General Assembly, *Resolution adopted by the General Assembly on 13 December 2016*, (A/RES/71/149); available at: <https://undocs.org/en/A/RES/71/149>

UN General Assembly, *Resolution adopted by the General Assembly on 14 December 2015*,

(A/RES/70/119); available at: <https://undocs.org/en/A/RES/70/119>

UN General Assembly, *Resolution adopted by the General Assembly on 10 December 2014*, (A/RES/69/124); available at: <https://undocs.org/pdf?symbol=en/A/RES/69/124>

UN General Assembly, *Resolution adopted by the General Assembly on 16 December 2013*, (A/RES/68/117); available at: <https://undocs.org/en/A/RES/68/117>

UN General Assembly, *Resolution adopted by the General Assembly on 14 December 2012*, (A/RES/67/98), available at: <https://undocs.org/en/A/RES/67/98>

UN General Assembly, *Resolution adopted by the General Assembly on 9 December 2011*, (A/RES/66/103), available at: <https://undocs.org/en/A/RES/66/103>

UN General Assembly, *Resolution adopted by the General Assembly on 6 December 2010*, (A/65/474), available at: <https://undocs.org/en/A/RES/65/33>

UN General Assembly, *Resolution adopted by the General Assembly on 16 December 2009*, (A/64/452), available at: <https://undocs.org/pdf?symbol=en/A/RES/64/117>

UN General Assembly Summary Records

UN General Assembly, Sixth Committee 72nd Session, Summary Record of the 13th meeting held at New York 11 October 2017, (A/C.6/72/SR.13), (New York, 6 December 2017), available at: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/C.6/72/SR.13

UN General Assembly, Sixth Committee, 72nd Session, Summary Record of the 14th meeting held at New York 12 October 2017, (A/C.6/72/SR.14), (New York, 13 November 2017), available at: <https://undocs.org/en/A/C.6/72/SR.14>

UN General Assembly, Sixth Committee 72nd Session, Summary Record of the 28th meeting held at New York 3 November 2017, (A/C.6/72/SR.28), (New York, 17 November 2017), available at: <https://undocs.org/en/A/C.6/72/SR.28>

UN General Assembly, Sixth Committee 72nd Session, Summary Record of the 30th meeting held at New York 10 November 2017, (A/C.6/72/SR.30), (6 December 2017), available at: <https://undocs.org/en/A/C.6/72/SR.30>

3.2 Other Legal Documents

Africa Legal Aid, *The Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Violations*, (Arusha, 2002), available at: https://www.africalegalaid.com/download/policy_document/Policy_Document.pdf

African Union, *Request for the inclusion of an additional item in the agenda of the sixty-third session, The scope and application of the principle of universal jurisdiction*, 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, 23 July 2009; available at: <https://undocs.org/pdf?symbol=en/A/63/237/Rev.1>

AU Assembly, 28th Ordinary Session, *Decision On The International Criminal Court (ICC)*, Doc. EX.CL/1006(XXX), AU Assembly Doc. Dec.622(XVIII), (Jan.30–31, 2017), available at: https://www.au.int/web/sites/default/files/decisions/32520-sc19553_e_original_-_assembly_decisions_621-641_-_xxviii.pdf

AU Executive Council, 21st Ordinary Session, *Decision On The African Union Model National Law On Universal Jurisdiction Over International Crimes*, Doc. EX.CL/731(XXI), (July 9-13 2012, Addis Ababa), available at: https://www.un.org/en/ga/sixth/71/universal_jurisdiction/african_union_e.pdf

International Congress on Universal Jurisdiction, *Madrid-Buenos Aires Principles of Universal Jurisdiction*, (Madrid and Buenos Aires, 2014-2015) available at: <http://www.hormantruth.org/ht/sites/default/files/files/universal%20jurisdiction/MADRID%20-%20BUENOS%20AIRES%20PRINCIPLES%20OF%20UNIVERSAL%20JURISDICTION%20-%20-%20-%20-EN.pdf>

The Princeton Principles on Universal Jurisdiction (Princeton University, 2001), available at: https://lapa.princeton.edu/hosteddocs/unive_jur.pdf

OAU, *African (Banjul) Charter on Human and Peoples' Rights*, OAU Doc. CAB/LEG/67/3, (27 June 1981), rev. 5, 21 I.L.M. 58 (1982), available at: http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf

II. SECONDARY SOURCES

1. Books

Macedo S, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, University of Pennsylvania Press, Feb 22, 2006

Müller J W, *What Is Populism?* University of Pennsylvania Press 2016, Penguin Books Ltd. Kindle Edition. (2017)

O'Sullivan A, *Universal Jurisdiction in International Criminal Law – The Debate and the Battle for Hegemony*, Routledge 2017

2. Journal Articles and Other Articles

Alija Fernández R A, 'The 2014 Reform of Universal Jurisdiction in Spain – From All to Nothing' ZIS 13/2014, pp. 717-727, (Barcelona, 2014), available at: http://zis-online.com/dat/artikel/2014_13_883.pdf

Alston P, 'The Populist Challenge to Human Rights' (February 2, 2018). *Journal of Human Rights Practice*, Volume 9, Issue 1, 1 February 2017, Pages 1–15, doi/10.1093/jhuman/hux007; NYU Law and Economics Research Paper No. 18-05. Available at: SSRN: <https://ssrn.com/abstract=3117093>

Bassiouni M C, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', 42 Va. J. Int'l L. 81 2001-2002, available at: <https://www.legal-tools.org/doc/052301/pdf/>

Becker S W, 'Universal jurisdiction. Global report', *Revue internationale de droit pénal*, vol. 79, no. 1, 2008, pp. 159-172. Available at: <https://www.cairn.info/revue-internationale-de-droit-penal-2008-1-page-159.htm>

Cassese A, 'Is the Bell tolling for Universality? A Plea for Sensible Notion of Universal Jurisdiction' (2003), *Journal of International Criminal Justice* 589, available at: <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jicj1&div=46&id=&page=>

Gusterson H, 'From Brexit to Trump: Anthropology and the Rise of Nationalist Populism'; *AMERICAN ETHNOLOGIST*, Vol. 44, No. 2, pp. 209–214, available at: <https://anthrosource.onlinelibrary.wiley.com/doi/pdf/10.1111/amet.12469>

Hoover D V, 'Universal Jurisdiction not so Universal: a Time to delegate to the International Criminal Court' *Cornell Law School Inter-University Graduate Student Conference Papers*. Paper 52. Available at: https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1081&context=lps_clap

Kamminga M T, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses.' *Human Rights Quarterly*, vol. 23, no. 4, 2001, pp. 940–974. *JSTOR*, available at: www.jstor.org/stable/4489367

Langer M, 'Universal Jurisdiction is Not Disappearing' (2015), *Journal of International Criminal Justice*, pages 245-256, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567036

Slaughter A M, 'Defining the Limits: Universal Jurisdiction and National Courts'. Published in *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*, edited by Stephen Macedo, (University of Pennsylvania Press, Philadelphia 2004) available at: <https://www.princeton.edu/~slaughtr/Articles/Universal.pdf>

3. Reports

Amnesty International, 'Universal Jurisdiction – A Preliminary Survey of Legislation Around the World', Amnesty International Publications (Oct 2011 London) available at: <https://www.amnesty.org/download/Documents/32000/ior530042011en.pdf>

Amnesty International, 'Universal Jurisdiction – A Preliminary Survey of Legislation Around the World – 2012 Update' Amnesty International Publications (Oct 2012 London) available at: <https://www.amnesty.org/download/Documents/24000/ior530192012en.pdf>

AU-EU Expert Report on the Principle of Universal Jurisdiction (16 April 2009), available at: <https://www.scribd.com/document/14984540/The-AU-EU-Expert-Report-on-the-Principle-of-Universal-Jurisdiction>

The Executive Council, Thirteenth Ordinary Session, 24-28 June 2008, Report of the Commission on the Use of the Principle of Universal Jurisdiction by Some Non-African States as Recommended by the Conference of Ministers of Justice/Attorney General, available at: <http://archives.au.int/bitstream/handle/123456789/3264/EX%20CL%20411%20%28XIII%29%20E.PDF?sequence=1&isAllowed=y>

FIDH, 'A Step-by-Step Approach to the Use of Universal (Criminal) Jurisdiction in Western European States', (FIDH, n°552a, April 2009), available at: <https://www.fidh.org/IMG/pdf/ComUniv522a2009.pdf>

International Committee of the Red Cross: ‘The People on War Report – Perspectives from 16 countries’ (ICRC, Dec 2006) available at:
<https://www.icrc.org/en/doc/assets/files/other/globalreport.pdf>

International Committee of the Red Cross: ‘People on War – ICRC worldwide consultation on the rule of war’ (Greenberg Research, Inc. 1999) available at:
<https://www.icrc.org/en/document/people-on-war>

Lawyers Committee for Human Rights, ‘Universal Jurisdiction: Meeting the Challenge through NGO cooperation’, (April 2002), available at: https://www.humanrightsfirst.org/wp-content/uploads/pdf/meeting_challenge310502.pdf

TRIAL International, ‘Evidentiary challenges in universal jurisdiction cases’, (Universal Jurisdiction Annual Review 2019); available at: https://trialinternational.org/wp-content/uploads/2019/03/Universal_Jurisdiction_Annual_Review2019.pdf

TRIAL International, ‘Make Way for Justice #4 – Momentum towards Accountability’, (Universal Jurisdiction Annual Review 2018); available at: <https://trialinternational.org/wp-content/uploads/2018/03/UJAR-Make-way-for-Justice-2018.pdf>

TRIAL International, ‘Make Way for Justice #3’, (Universal Jurisdiction Annual Review 2017); available at: https://trialinternational.org/wp-content/uploads/2017/03/UJAR-MEP_A4_012.pdf

TRIAL International, ‘Make Way for Justice #2’, (Universal Jurisdiction Annual Review 2016); available at: <https://trialinternational.org/wp-content/uploads/2016/06/Universal-jurisdiction-annual-review-2016-publication.pdf>

TRIAL International, ‘Make Way for Justice’, (Universal Jurisdiction Annual Review 2015); available at: <https://trialinternational.org/wp-content/uploads/2016/06/Universal-jurisdiction-annual-review-2015-publication.pdf>

4. Others

Advocacy Forum Nepal, *Advocating against Torture in 2016 – The Challenges of Achieving Justice* (June 2017, Kathmandu), available at:
http://www.omct.org/files/2017/09/24527/nepal_advocating_against_torture_in_2016.pdf

Balfour R, ‘The (Resistable) Rise of Populism in Europe and its Impact on European and International Cooperation’, IEMed. Mediterranean Yearbook 2017, available at:
https://www.iemed.org/observatori/arees-danalisi/arxius-adjunts/anuari/med.2017/IEMed_MedYearbook2017_rise_populism_europe_Balfour.pdf/

Cannon B J, Pkalya D R, Maragia B, ‘The International Criminal Court and Africa – Contextualizing the Anti-ICC Narrative’, available at:
https://www.researchgate.net/publication/320407768_The_International_Criminal_Court_and_Africa_Contextualizing_the_Anti-ICC_Narrative

Clark K, ‘Afghan Criminal Zardad Freed: No Protection for Witnesses’ *Afghanistan Analysts Network* (14 December 2016), available at: <https://www.afghanistan-analysts.org/afghan-war-criminal-zardad-freed-no-protection-for-witnesses/>

Falk R, ‘Kuala Lumpur Tribunal: Bush and Blair Guilty’ *Aljazeera* (28 November 2011), available at: <https://www.aljazeera.com/indepth/opinion/2011/11/20111128105712109215.html>

The Guardian, 'US to deny visas for ICC members investigating alleged war crimes', *The Guardian* (March 2019), available at: <https://www.theguardian.com/us-news/2019/mar/15/mike-pompeo-us-war-crimes-investigation-international-criminal-court>
Hovell D, 'The Authority of Universal Jurisdiction', LSE Law, Society and Economy Working Papers (Aug 2018), available at: http://eprints.lse.ac.uk/87545/1/Hovell_Universal%20Jurisdiction_Author.pdf

Human Rights Watch, 'Violent Response: The U.S. Army in al-Fallujah', (Human Rights Watch, June 2013), available at: <https://www.hrw.org/report/2003/06/16/violent-response/us-army-al-falluja>

Junquera N, 'Franco-era Cop Accused of Torture has Four Medals that Fatten his Pension by 50%' *El Pais* (Madrid, 26 June 2018); available at: https://elpais.com/elpais/2018/06/26/inenglish/1529999067_258647.html

Just Atonement, 'Universal Jurisdiction: A Practice Guide', (Just Atonement Inc. 2017), available at: <https://static1.squarespace.com/static/564295f2e4b0b0751fe054df/t/59952bd1cd39c3f65a76f8ab/1502948334580/JAI+-+Universal+Jurisdiction+Practice+Guide+v.1.pdf>

Kern S, 'Spain Changes Tack on Universal Jurisdiction', *Grupo de Estudios Estratégicos* (6 October 2009), available at: <http://www.gees.org/articulos/spain-changes-tack-on-universal-jurisdiction>

Kissinger H, *The Pitfalls of Universal Jurisdiction* (Global Policy Forum Foreign Affairs 2001), available at: <https://www.globalpolicy.org/component/content/article/163/28174.html>

Krastev I, 'The Populist Moment', (Eurozine 18 Sept 2017), available at: <https://www.eurozine.com/the-populist-moment/?pdf>

Kuwonu F, 'ICC: Beyond the Threats of Withdrawal', (Africa Renewal, July 2017), available at: <https://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal>

Petrov J, 'The Populist Challenge to the European Court of Human Rights', (Jean Monnet Center for International and Regional Economic Law & Justice, March 2018), available at: <https://jeanmonnetprogram.org/wp-content/uploads/JMWP-03-Jan-Petrov.pdf>

Reuters, 'U.S. revokes ICC prosecutor's entry visa over Afghanistan investigation', (Reuters, April 2019), available at: <https://www.reuters.com/article/us-usa-icc-prosecutor/u-s-revokes-icc-prosecutors-entry-visa-over-afghanistan-investigation-idUSKCN1RG2NP>

The Local Spain, 'Spanish Ex-Cop Denies Franco-Era Torture Claim' *The Local Spain* (10 April 2014); available at: <https://www.thelocal.es/20140410/spanish-cop-argentina-franco-billythekid-spain>

Todeschini V, Interview with Sam Zarifi, Secretary-General of the International Commission of Jurists, Human Rights in the Time of Populism, in *Rights!*, (Dec 17, 2018), available at: <https://rightsblog.net/2018/12/17/human-rights-at-the-time-of-populism/>

Annexes

Annex 1.

*List of treaties authorising a signatory's jurisdiction over therein contained crimes.**

Treaty	Article(s) authorising signatory's jurisdiction	Crime(s) implied
Geneva Conventions (1953)	49/50/129/146	War crimes
Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), and its Second Protocol (1999)	28 16	Unlawful Conduct during Times of War
International Convention for the Suppression of Unlawful Seizure of Aircraft (1970)	4.2	Terrorism
International Convention on the Suppression and Punishment of the Crime of Apartheid (1973)	5	Apartheid
Convention on the Prevention and Punishment against internationally protected persons, including diplomatic Agents (1973)	7	Crimes Against Protected Persons
International Convention against the Taking of Hostages (1979)	5.2	Terrorism
United Nations Convention on the Law of the Sea (1982)	105	Piracy
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)	7	Torture
United Nations Convention against Illicit Trafficking in Narcotic Drugs and Other Psychotropic Substances (1988)	4.2(b)	Drugs Trafficking
International Convention for the Suppression of Terrorist Bombings (1997)	6.4	Terrorism
International Convention for the Suppression of the Financing of Terrorism (1999)	7.4	Terrorism
United Nations Convention against Transnational Organised Crime (2000)	15.4	Financial Crimes (including money-laundering and corruption)
United Nations Convention against Corruption (2003)	42.4	Corruption
International Convention for the Suppression of Acts of Nuclear Terrorism (2005)	9.4, 9.5 and 11.1	Terrorism
International Convention for		Enforced Disappearance (as

the Protection of All Persons from Enforced Disappearance (2006)	9.2	crime against humanity)
Rome Statute	-	aggression, genocide, crimes against humanity, war crimes

**Note that this list is based on the author's own research and does not claim to be exhaustive but a compilation of treaties most commonly used to either justify universal jurisdiction laws in a state's domestic laws or an authorisation in a given case.*

Annex 2.

United Kingdom War Crimes Act of 1991 c. 13, art. 1

Article 1 - Jurisdiction over certain war crimes.

(1) Subject to the provisions of this section, proceedings for murder, manslaughter or culpable homicide may be brought against a person in the United Kingdom irrespective of his nationality at the time of the alleged offence if that offence—

(a) was committed during the period beginning with 1st September 1939 and ending with 5th June 1945 in a place which at the time was part of Germany or under German occupation; and

(b) constituted a violation of the laws and customs of war.

(2) No proceedings shall by virtue of this section be brought against any person unless he was on 8th March 1990, or has subsequently become, a British citizen or resident in the United Kingdom, the Isle of Man or any of the Channel Islands.

(3) No proceedings shall by virtue of this section be brought in England and Wales or in Northern Ireland except by or with the consent of the Attorney General or, as the case may be, the Attorney General for Northern Ireland.

Annex 3.

Penal Code of the Islamic Republic of Iran of 1991, art. 8

Article 8

Regarding the offences, which, according to a special law or international conventions, the offender shall be prosecuted in the country s/he is found, if the offender is arrested in Iran s/he shall be prosecuted and punished in accordance with the laws of the Islamic Republic of Iran.

Annex 4.

Penal Code of the Republic of Seychelles of 1955, art. 65

Article 65

(1) Any person who commits any act of piracy within Seychelles or elsewhere is guilty

of an offence and liable to imprisonment for 30 years and a fine of R1 million.

(2) Notwithstanding the provisions of section 6 and any other written law, the courts of Seychelles shall have jurisdiction to try an offence of piracy or an offence referred to under subsection (3) whether the offence is committed within the territory of Seychelles or outside the territory of Seychelles.

(3) Any person who attempts or conspires to commit, or incites, aids and abets, counsels or procures the commission of, an offence contrary to section 65(1) within Seychelles or elsewhere commits an offence and shall be liable to imprisonment for 30 years and a fine of R1 million.

(4) For the purposes of this section “piracy” includes-

(a) any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft and directed-

(i) on the high seas, against another ship or aircraft, or against persons or property on board such a ship or aircraft;

(ii) against a ship, an aircraft, a person or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it a pirate ship or a pirate aircraft; or

(c) any act described in paragraph (a) or (b) which, except for the fact that it was committed within a maritime zone of Seychelles, would have been an act of piracy under either of those paragraphs.

(5) A ship or aircraft shall be considered a pirate ship or a pirate aircraft if-

(a) it has been used to commit any of the acts referred to in subsection (4) and remains under the control of the persons who committed those acts; or

(b) it is intended by the person in dominant control of it to be used for the purpose of committing any of the acts referred to in subsection (4).

(6) A ship or aircraft may retain its nationality although it has become a pirate ship or a pirate aircraft. The retention or loss of nationality shall be determined by the law of the State from which such nationality was derived.

(7) Members of the Police and Defence Forces of Seychelles shall on the high seas, or may in any other place outside the jurisdiction of any State, seize a pirate ship or a pirate aircraft, or a ship or an aircraft taken by piracy and in the control of pirates, and arrest the persons and seize the property on board. The Seychelles Court shall hear and determine the case against such persons and order the action to be taken as regards the ships, aircraft or property seized, accordingly to the law.

Annex 5.

Penal Code of the state of Japan of 1907, arts. 3-2, 4-2

Crimes Committed by Non-Japanese Nationals outside Japan

Article 3-2

This Code shall apply to any non-Japanese national who commits one of the following crimes against a Japanese national outside the territory of Japan.

(i) The crimes prescribed under Articles 176 through 179 (Forcible Indecency; Rape; Quasi Forcible Indecency and Quasi Rape; Gang Rape; Attempts), 181

- (Forcible Indecency Causing Death or Injury);
(ii) The crime prescribed under Articles 199 (Homicide) and attempt thereof;
(iii) The crimes prescribed under Articles 204 (Injury) and 205 (Injury Causing Death);
(iv) The crimes prescribed under Articles 220 (Capture; Confinement) and 221 (Unlawful Capture or Confinement Causing Death or Injury);
(v) The crimes prescribed under Articles 224 through 228 (Kidnapping of Minors; Kidnapping for Profit; Kidnapping for Ransom; Kidnapping for Transportation out of a Country; Buying or Selling of Human Beings; Transportation of Kidnapped Persons out of a Country; Delivery of Kidnapped Persons; Attempts);
(vi) The crimes prescribed under Articles 236 (Robbery), 238 through 241 (Constructive Robbery; Robbery through Causing Unconsciousness; Death or Injury on the Occasion of Robbery; Rape on the Scene of Robbery; Causing Death Thereby), and 243 (Attempts).

Crimes Committed outside Japan Governed by a Treaty

Article 4-2

In addition to the provisions of Article 2 through the preceding Article, this Code shall also apply to anyone who commits outside the territory of Japan those crimes prescribed **under Part II** which are governed by a treaty even if committed outside the territory of Japan.

Annex 6.

Criminal Code of Mongolia of 2002, art. 14.4

Article 14

14.4. Foreign nationals and stateless persons who have committed crimes beyond the territory of Mongolia shall be subject to criminal liability under this Code if only an international agreement to which Mongolia is a party provides so.

Criminal Procedure Code of Mongolia, art. 4

Article 4 - Application of law on criminal procedure with respect to foreign citizens and persons without citizenship

4.1. In executing criminal proceedings in relation to crimes committed by foreign citizens or persons without citizenship on the territory of Mongolia, the rules set by this Law shall be adhered to.

4.2. With respect to foreign citizens possessing the right of diplomatic immunity and inviolability, criminal proceedings provided by the present Code shall be executed only upon their request or with their consent.

4.3. Consent for executing criminal proceedings with respect to persons enjoying diplomatic immunity and inviolability shall be sought through central state administration organ in charge of external affairs of Mongolia.

Annex 7.

Criminal Code of the Azerbaijan Republic of 1999, arts. 12.2-12.3, and 13.2-13.3, and art. 75

Article 12

12.2. Foreigners and persons without the citizenship, committed a crime outside of limits of the Azerbaijan Republic, shall be instituted to criminal proceedings under the present Code, in cases, if the crime shall be directed against the citizens of the Azerbaijan Republic, interests of the Azerbaijan Republic, and also in the cases, stipulated by international agreements to which the Azerbaijan Republic is a party, if these persons were not condemned in the foreign state.

12.3. Citizens of the Azerbaijan Republic, foreigners and persons without the citizenship, who have committed crimes against the peace and mankindâTMs, war crimes, terrorism, financing of terrorism, stealing of an air ship, capture of hostages, torture, a sea piracy, illegal circulation of narcotics and psychotropic substances, manufacturing or sale of false money, attack on persons or the organizations using the international protection, the crimes connected to radioactive materials, and also other crimes, punish of which stipulated in international agreements to which the Azerbaijan Republic is a party, shall be instituted to criminal liability and punishment under the Present Code, irrespective of a place of committing a crime.

Article 13

13.2. Foreigners and persons without the citizenship, who have committed a crime outside of limits of the Azerbaijan Republic and living on the territory of the Azerbaijan Republic, can be distributed to the foreign state for instituting to the criminal liability or servings of punishment according to international agreements to which the Azerbaijan Republic is a party.

13.3. If the persons, who have committed a crime outside of limits of the Azerbaijan Republic, shall not distributed out to the foreign state, and this action (action or inaction) is admitted as a crime according to the present Code, they shall be instituted to criminal proceedings in the Azerbaijan Republic.

Article 75 - Release from criminal liability in connection with expiration of time limits

75.5. Positions of present article shall not be applied to the persons who have made crimes against the peace and safety of mankind, terrorism, financing of terrorism and war crimes provided by appropriate articles of the Especial part of present Code.

Annex 8.

Implementation procedures of the Islamic Republic of Afghanistan and Iran*

Constitution of Afghanistan of 2003

Article 8

The state shall regulate the foreign policy of the country on the basis of preserving the independence, national interests and territorial integrity as well as non-interference, good neighbourliness, mutual respect and equality of rights.

Article 64

The President shall have the following authorities and duties:

- (17) Issue credential letter for conclusion of international treaties in accordance with the provisions of the law;

Article 90

The National Assembly shall have the following duties:

- (...)
- (5) Ratification of international treaties and agreements, or abrogation of membership of Afghanistan in them;

Article 3

No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.

Civil Code of Iran of 1928

Article 9

Treaty stipulations which have been, in accordance with the Constitutional Law, concluded between the Iranian Government and other government, shall have the force of law.

Constitution of Iran of 1979

Article 3

In order to attain the objectives specified in Article 2, the government of the Islamic Republic of Iran has the duty of directing all its resources to the following goals:

- (...)
- (5) the complete elimination of imperialism and the prevention of foreign influence;
- (16) framing the foreign policy of the country on the basis of Islamic criteria, fraternal commitment to all Muslims, and unsparing support to the mustad'afun of the world.

Article 4

All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the fuqaha' of the Guardian Council are judges in this matter.

Article 58

The functions of the legislature are to be exercised through the Islamic Consultative Assembly, consisting of the elected representatives of the people. Legislation approved by this body, after going through the stages specified in the articles below, is communicated to the executive and the judiciary for implementation.

Article 77

International treaties, protocols, contracts, and agreements must be approved by the Islamic Consultative Assembly

Article 72

The Islamic Consultative Assembly **cannot enact laws contrary to the usul and ahkam of the official religion of the country or to the Constitution**. It is the duty of the Guardian Council to determine whether a violation has occurred, in accordance with Article 96.

Article 96

The determination of compatibility of the legislation passed by the Islamic Consultative Assembly with the laws of Islam rests with the majority vote of the fuqaha' on the Guardian Council; and the determination of its compatibility with the Constitution rests with the majority of all the members of the Guardian Council.

Article 125

The President or his legal representative has the authority to sign treaties, protocols, contracts, and agreements concluded by the Iranian government with other governments, as well as agreements pertaining to international organizations, after obtaining the approval of the Islamic Consultative Assembly.

**Note that the above-quoted provisions are a selection undertaken by the author of this thesis of the very detailed, rather vague and non-transparent, laws regulating the implementation of international agreements in both respective countries. It was included the minimum necessary to demonstrate the in chapter 2 described issue.*

Annex 9.

UN Refugee Convention of 1951, article 1(F)

Article 1

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Annex 10

Rome Statute of the International Criminal Court, art. 98

Article 98 – Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.