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Universal jurisdiction:

Methodology, universal jurisdiction and functional immunity before national courts in international law.

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1 Introduction.

This thesis is dedicated to all the people who are remarkable, highly deserving of my admiration, for the fact that they are alive at all[1].

1.1 Topic.

The topic of this thesis concerns universal jurisdiction.

The focus will be on the limits of the principle in traditional international law, the *Arrest Warrant* case in the ICJ from 2002, application of the principle in national courts, the history of the principle, the theoretical debate among legal scholars and some dilemmas.

Universal jurisdiction is a principle of jurisdiction where the state that applies it does not have a link to the accused. The core of the principle and its history lie in a stated global fight against impunity for international crimes.

The principle became highly relevant in Norway after an asylum applicant reached Norway in 2017. The asylum applicant was found guilty by the Supreme Court of Norway in 2020, for having participated in a terror-organisation in Syria. He had no previous connection to Norway, and the Supreme Court therefore had to consider if the rules on universal jurisdiction in the *The Penal Code* of Norway could be used as a ground for prosecution. The Supreme Court answered this in the affirmative. The case was decided based on a presumption that universal jurisdiction is allowed in international law, as long as there isn't an international rule to the contrary[2]. The Supreme Court's reasoning has since been critizised in Norway[3].

The above mentioned Norwegian Supreme Court judgment from 2020 concerned a case where the accused had participated in an organisation *against* the state in the territory his acts

[1] Paraphrased from Bertolt Brecht's poem "I'm Not Saying Anything Against Alexander".

[2] Supreme Court of Norway judgment from 26th of June 2020, reference HR-2020-1340-A, par. 46.

[3] Vangen (2021).

were committed in. Instead of discussing the Norwegian Supreme Court's judgment mentioned above directly, this thesis will deal more with the methodological aspects of universal jurisdiction and its limits in international law.

The historical context is that there has been a conflict between state sovereignty and reducing impunity for international crimes since at least 1945. Germany's persecution of and then genocide on the Jews – the *Holocaust* – from 1933 until 1945 and war crimes during the Second World War laid an ethical and possibly legal foundation where certain acts are considered the "concern of other governments or of international society", and where other nations "would take a consenting part in such crimes" by remaining silent[4].

The Rome statute of the International Criminal Court (ICC) was signed in 1998 and entered into force in 2002. In the preamble of the Statute, the signatories drew attention to a stated determination to "put an end to impunity" to prevent the most serious crimes, said that "effective" prosecution must be ensured at the "national level", and that it is "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes"[5]. The Rome statute established the only permanent international court to prosecute individuals for the crime of genocide, crimes against humanity, war crimes, and crimes against peace, also called *the crime of aggression*.[6] The statute's preamble also emphasized that the ICC "shall be complementary to national criminal jurisdictions", which was further established in art. 1 of the statute. It is therefore a stated goal to end impunity for international crimes.

Cassese pointed out in 2008 that the "thousands of people who have physically carried out murder, torture, rape and other heinous acts" are not tried in international tribunals, and also claims that "it is precisely these perpetrators that the survivors and the relatives of the victims would like to see in the dock"[7]. Without discussing if Cassese's claim from 2008 about the survivors and families is fully correct, it would nonetheless be hard to argue that his claim doesn't at least bear *some* merit.

[4] Jackson (1946).

[5] Rome statute, preamble.

[6] Rome statute art. 5.

[7] Cassese (2008) p. 444.

Cassese had already said in 2002 that it "is *primarily* through the position and rank they occupy that they are in a position to order, instigate, or aid and abet or culpably tolerate or condone such crimes as genocide or crimes against humanity or grave breaches of the Geneva Conventions" (my emphasis)[8]. Genocide, crimes against humanity and grave war crimes are crimes that are typically committed from a top level by government officials, especially through a state apparatus from high-ranking government officials that are controlling the state.

But the physical acts on the ground are committed by individual human beings, not by an abstract state. Such acts are perpetrated against the survivors, the killed and their families. The physical acts give rise to individual criminal responsibility for government officials, in addition to questions of individual criminal responsibility for the state's leadership and state responsibility. To end impunity has a side to justice for the victims.

The world becomes more intertwined. Emigration and immigration increase for various reasons. It's therefore probable that more states will experience an arrival of individuals who have committed international crimes outside the state the suspect arrives in. An example may be that a former government official flees from a civil war in his home country, arrives in another state and applies for asylum, where the state he fled to thereafter discovers that he might have perpetrated an international crime in his homeland. A wish to try suspects can be based on various reasons, from a wish to prevent further organization of a crime, to justice for the victims and avoid becoming a "safe haven" for criminals.

1.2 Thesis question.

The thesis question is as follows: "Universal jurisdiction: Methodology, universal jurisdiction and functional immunity before national courts in international law".

A thread in the thesis will be how the limits for universal jurisdiction is established. A part of this will be a focus on an *obiter dictum* of the International Court of Justice (ICJ) on immunities in the *Arrest Warrant* case from 2002.

[8] Cassese (2002) p. 868.

1.3 Thesis structure.

This thesis will first present the 2002 *Arrest Warrant* case from the International Court of Justice (ICJ) in *Chapter 2*, before the thesis moves to *Chapter 3* on *Methodology*.

Chapter 3 on methodology will first present the sources in creation of international customary law, before some basic concepts are elaborated on. *Point 3.2.4* in *Chapter 3* will then move on to delimitations of the thesis.

Thereafter, there will be a *Chapter 4* on the *establishment of universal jurisdiction*. Two different approaches to its establishment will be discussed, before the thesis moves on to the methodology and particular establishment of a customary rule on universal jurisdiction. The focus will be traditional creation of international customary law, with a comprehensive discussion of its creation. There will also be a particular mention of *the Genocide Convention* and the question of universal jurisdiction for the crime of genocide in *Point 4.2.7.*

The later part of the thesis will first discuss an ongoing debate on universal jurisdiction in *Chapter 5* on *Controversies*, and then present some further dilemmas/arguments for and against the application of universal jurisdiction that is less often discussed in *Chapter 6*. This later part will be a part of the thesis that will include both legal presentations and arguments outside the traditional creation of international customary law.

2 The *Arrest Warrant* case in 2002.

After the *Arrest Warrant* case in 2002, universal jurisdiction was described in literature as having reached a zenith from the 1990s and until the early 2000s, both in regard to beliefs in its existence and reach and in national legislations[9] . This zenith has been claimed to have ended with *Arrest Warrant*, which will be discussed further in *Point 4.2.3* on *National court cases.* At the same time, the *Arrest Warrant* case did not discuss the question of universal jurisdiction. The case is therefore used here as a starting point for the source perspective.

2.1.1 *Arrest Warrant* – universal jurisdiction.

The *Arrest Warrant* case concerned a conflict between Belgium and the DR Congo (hereafter named "Congo"). A national Belgian court had issued an arrest warrant for the then-foreign minister from Congo in 2000.

The arrest warrant from the Belgian court in 2000 concerned war crimes and crimes against humanity. Congo filed an application against Belgium in the International Court of Justice (ICJ), whereafter the ICJ handed down a judgment in 2002. The ICJ found in Congo's favour, and ordered Belgium to "cancel the warrant in question and so inform the authorities to whom it was circulated"[10].

Congo had first argued its case in the ICJ based on both a claim that Belgium lacked jurisdiction and that Belgium had violated the immunity of the Congolese foreign minister.

Congo claimed that the arrest warrant was in violation "of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations"[11]. This was the argument against an application of universal jurisdiction in a national court outside Congo.

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[9] See e.g Cassese's (2003) "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction" and Reydams' (2011) "The Rise and Fall of Universal Jurisdiction".

[10] Congo vs. Belgium, par. 76.

[11] Congo vs. Belgium par. 1 and 17.

Congo also argued its case on the claim that Belgium had violated "the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State"[12]. This was the argument on that the accused was immune from national prosecution outside Congo.

Congo did not uphold the argument on that Belgium lacked jurisdiction. The majority of the ICJ therefore choose to solely consider the question of immunity.

The ICJ held that Belgium had failed to respect the personal immunity of the Congolese foreign minister. The ICJ therefore did not discuss universal jurisdiction. The ICJ has not dealt with this question. The limits for universal jurisdiction therefore has to be discussed based on other sources in international law than a judgment from the ICJ.

2.1.2 *Arrest Warrant – obiter dictum* on immunity and impunity.

According to article 59 in the ICJ statute, the decisions of the court are only binding for the parties to the specific cases. At the same time, the court's findings will usually be followed. The ICJ is the most specialized court for general international law, and for example Galand described the influence of the court as if that "national and international courts are reluctant to go against a finding of the ICJ, especially when it appears to spell out customary international law[13].

The majority of the court found Congo's favour, and based the result on that Belgium had failed to respect the personal immunity of the Congolese foreign minister.

The court also included a comprehensive *obiter dictum*, or a legal opinion that was not necessary in the particular case. The *obiter dictum* remarked on the topic of immunities and impunity. Since the court here remarked on what it considered to be customary international law, it may be expected that the *obiter dictum* will be followed by other states in other cases. This may be cases where personal immunity is not a relevant exception from prosecution in national courts.

[12] Congo vs. Belgium par. 1.
[13] Galand (2015) p. 3.

First, the Court's majority decided the case in Congo's favour, based on that the Congolese foreign minister had personal immunity due to his position. Thereafter, the court claimed that immunity does not mean impunity, and presented several scenarios where personal immunity do not represent a bar to criminal prosecution. One of those scenarios concerned cases where personal immunity is no longer relevant:

> According to the court, after "a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity"[14].

This *obiter dictum* from the ICJ seems to claim that a former high-ranking government official can only be prosecuted by another state for private acts, not for acts committed in an official capacity.

The court also claimed that immunity does not mean impunity, and that those two are "quite separate concepts"[15].

This *obiter dictum* will be further discussed in *Point 5.2* for functional immunities and *Point 5.4.* for impunity.

2.1.3 *Arrest Warrant* – dissenting and separate opinions.

The case includes the majority's judgment, and in addition nine different dissenting opinions, separate opinions, joint separate opinions and declarations. For example the three judges Higgins, Kooijmans and Buergenthal wrote a joint separate opinion where they considered universal jurisdiction[16]. Those writings will have status as a subsidiary source in international law, see *Point 3.1 Sources in the creation of international law*.

[14] Congo v. Belgium, par. 61.
[15] Congo v. Belgium, par. 60.
[16] Congo v. Belgium, Higgins et al.

3 Methodology.

3.1 Sources in the creation of international customary law.

The main sources of international law are, as described in article 38 of the International Court of Justice (ICJ) statutes, conventions, international custom and "general principles of law", and then judicial decisions and puplished teachings as subsidiary sources.

A convention is in principle only binding between the states that are parties to the conventions where the rules have been "expressly recognized"[17], while "international custom" in principle is binding for a state without acceptance from that state in particular. The international society does not, unlike e.g national political systems, have a legitimate legislative authority to pass legal acts. The question is thus how a rule of international customary law may be created.

The short answer is that such a rule can be created through "a general practice accepted as law"[18]. This constitutes two elements: State practice, and a belief that the practice is carried out in the belief that it is in accordance with international law, or *opinio juris*.

In the *Continental Shelf* case, where the judgment was handed down in 1969, the ICJ commented on if there exists a requirement for a certain time period of state practice to establish a rule of customary international law, and that a short period of time is not "of itself" a bar "to the formation of a new rule". However, state practice in a case where there has only passed a short period of time should have been "both extensive and virtually uniform" [19]. There should be "a very widespread and representative participation"[20].

The ICJ also commented on the relationship between state practice and *opinio juris* in the *Continental Shelf* case by saying that a state practice should occur "in such a way as to show a general recognition that a rule of law or legal obligation is involved"[21]. A "settled practice" is

[17] ICJ Statutes art. 38 (1)a.

[18] ICJ Statutes art. 38 (1)b.

[19] Germany v. Netherlands, par. 74.
[20] Germany v. Netherlands, par. 73.
[21] Germany v. Netherlands, par. 74.

evidence of state practice, but does not in itself demonstrate more than that a state carries out the practice due to "courtesy, convenience or tradition".

Opinio juris is a subjective element, where the acts are such, or is "carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it"[22] – or that the practice is allowed.

As Shaw describes, the "make-up of a custom" has two basic elements: a "subjective belief that such behaviour is law" and actual state behaviour[23]. Shaw further points out that the "relative importance" of those two elements is "disputed" among legal writers, where writers who place more weight on sovereignty "stress" that consent to rules through *opinio juris* is most important, while others claim that *opinio juris* is of less importance[24]. This approach may leave out that a positivist thinking – which focuses on state sovereignty – can just as easily be used to argue that a rule has been created even if there is little state practice: if *opinio juris* is the most important, why should there be a requirement for widespread state acts to prove the existence of the rule?

In the *Merits* of the *Nicaragua* case, where the ICJ handed down its judgment in 1986, the court held that state practice does not need to be "in absolutely rigorous conformity with the rule". Instead, "the conduct of States should, in general, be consistent with such rules", and inconsistent state practice

> "should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule"[25].

[22] Germany v. Netherlands, par. 77.
[23] Shaw (2021) p. 62.
[24] Shaw (2021) p. 63.
[25] Nicaragua v. United States of America (1986) par. 186.

Burden of proof:

The *Continental Shelf* case from 1969 followed the *Asylum case* from ICJ in 1950. The *Asylum case* had also held that the burden to prove a customary rule lies with the state that claims its existence[26].

Persistent objector:

The *Asylum case* had also held that it might be possible for a state not to be bound by a customary rule by being a so-called persistent objector[27].

The consequences of a state being a persistent objector had been brought up in the *Fisheries* case in 1951. In *Fisheries*, the United Kingdom and Norway had been in a long-standing conflict over fishing rights, or how far Norway's territorial claims extended into the sea. British trawler ships had entered Norwegian territory, violated a national Norwegian ban on foreign fishing, and the trawlers' crews were arrested. The court held that Norway had not violated international law[28].

The United Kingdom had claimed that there existed a customary rule on the extent of internal waters for a sovereign state. The court held both that this was not a "general" customary rule, and that such a "then-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norvegian coast[29].

The *Fisheries* case was highly specific, and the UK had already accepted that Norway would anyways be excempted from a customary rule on "historic grounds"[30]. Norway has an

[26] Colombia v. Peru, p. 276: "The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State".

[27] Colombia v. Peru, p. 277-278: "even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it".

[28] United Kingdom v. Norway, p. 132.

[29] United Kingdom v. Norway, p. 131.

[30] United Kingdom v. Norway, p. 130.

extremely long and complicated coastline, where the local population lived off the sea. The court described the "historical facts" as that a Danish-Norwegian complaint in the early 17th century had led to that "British fishermen refrained from fishing in Norwegian coastal waters for a long period, from 1616-1618 until 1906". Then, British fishing vessels started to appear from 1906 and 1908, "equipped with improved and powerful gear" to trawl fish[31].

The conflict that led to the *Fisheries* case was therefore highly specific, and decisions in the ICJ has "no binding force except between the parties and in respect of" the particular case the court has considered[32]. It may also be added that the court in *Fisheries* in 1951 seems to have been highly sympathetic to the Norwegian cause, which may or may not have influenced the decision[33]. It is therefore highly dubious whether a state can claim an exemption from an established customary rule and as such not bee in breach of an international obligation.

The value of UN General Assembly resolutions:

The *Nuclear weapons* case was an advisory opinion from the ICJ on the legality of nuclear weapons. On the value of General Assembly solutions in establishing customary international law, the court states this in paragraph 70:

> "General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradua1 evolution of the *opinio juris* required for the establishment of a new rule"[34]

[31] United Kingdom v. Norway, p. 124.

[32] ICJ statute, art. 59.

[33] See p. 126-128 in the judgment, where the court vividly describes the Norwegian coastline and nature, and ends as such: "In these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing. Such are the realities which must be borne in mind in appraising the validity of the United Kingdom contention that the limits of the Norwegian fisheries zone laid down in the 1935 Decree are contrary to international law".

[34] Nuclear weapons, par. 70.

Therefore, resolutions from the UN General Assembly can demonstrate that an *opinio juris* is in development. The quote may also be interpreted as if that resolutions may even demonstrate the existence of an *opinio juris*. The next paragraph 71 will shed light on this:

On the particular topic of nuclear weapons, the ICJ then said in paragraph 71 of the relevant resolutions on the topic that "although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons"[35].

The conclusion must be that resolutions from the UN General Assembly can demonstrate the existence of an *opinio juris*.

3.2 Basic concepts and delimitations.

3.2.1 "Forum state".

The term "forum state" refers in this context to a state that applies universal jurisdiction, in other words the state that prosecutes an accused individual.

3.2.2 What is "universal jurisdiction"?

The International Court of Justice (ICJ) has not given a precise legal definition of what "universal jurisdiction" is, and the term probably does not have a completely settled legal definition.

In a joint separate opinion in the *Arrest Warrant* case in ICJ in 2002, where the suspect had not been physically present on the territory of the forum state, three of the judges made a distinction between cases where the accused person is present in the territory of the "forum State" and where there's no territorial link.

[35] Nuclear weapons, par. 71.

The three judges describe cases without a territorial link as "pure" universal jurisdiction and as universal jurisdiction "properly so called"[36]. The *Arrest Warrant* case is an example of attempted use of legal authority based on proper universal jurisdiction. As the three judges say in their joint separate opinion, there exists "no case law" where the forum state has used "pure" universal jurisdiction, before they point out that non-existent case law doesn't necessarily indicate that it will be "unlawful" for a state to exercise "universal jurisdiction, properly so called"[37].

O'Keefe points out in literature that "none of the judges in Arrest Warrant explicitly posits a definition of universal jurisdiction, despite the concept's centrality to the case"[38]. National rules on universal jurisdiction might demand the presence of the suspected perpetrator on the territory of the forum state, or the rules may allow for trial *in absentia* without his presence.

The three judges who wrote a joint opinion in *Arrest Warrant* were not the court's majority, so there does not exist an authorative decision from the ICJ on what universal jurisdiction is. For example, is a national legislation that rules out trials without the accused's presence *proper* universal jurisdiction, or a sub-type?

The dissenting judge Van den Wyngaert in *Arrest Warrant* said that "universal jurisdiction" has "no generally accepted definition" in international law[39], and that many "views exist as to its legal meaning". She then said that what "what matters" for the *Arrest Warrant* case between Belgium and Congo, is how "Belgium has codified universal jurisdiction on its domestic legislation" and if Belgium's application of it in that particular case is "compatible with international law"[40].

The main sources of international law are, as described in article 38 of the Statute of the International Court of Justice: Conventions, international custom and "general principles of law" as primary sources, and then judicial decisions and published teachings as subsidiary sources. Therefore, the various definitions in literature and the discussion from e.g. judge Van den

[36] Congo v. Belgium, Higgins et al, par. 45.
[37] Congo v. Belgium, Higgins et al, par. 45.
[38] O'Keefe (2004) p. 744.
[39] Congo v. Belgium, Van den Wyngaert, par. 44.
[40] Congo v. Belgium, Van den Wyngaert, par. 45

Wyngaert in the *Arrest Warrant* case in 2002 must be considered subsidiary sources. Yet, there seems to be a reasonable level of agreement of what "universal jurisdiction" includes at its core, and even though a discussion of its limit may be influenced by its definition, the definition could instead be narrowed or broadened where it's relevant. This thesis will therefore use a workable definition of "universal jurisdiction" and develop the definition when it's relevant for the topic being discussed.

For the present thesis, universal jurisdiction will be defined as a principle of jurisdiction where a state applies its legal authority over offenses committed outside its territory, over persons who did not have a link to the state at the time the offense was committed, neither through nationality or residency, and where the offense neither threatens the state's security nor gives rise to effects within its territory[41].

In other words, universal jurisdiction is a negatively defined ground for legal authority, and a contrast to the principles of territorial jurisdiction, nationality, the protective principle and the passive personality principle. All the other principles are based on a type of connection to the state, either through sovereignty over its own territory, authority over its own nationals, protection of the state's vital interests or protection of its own nationals.

3.2.3 Immunities.

Immunities from prosecution for state government officials can broadly be categorized into two types. First, there is the personal immunities. Those applies to the very top leadership of a state and the state's diplomatic agents. This first category also includes some diplomatic agents for international organizations. Secondly, there is functional immunity, which applies to state governments officials when they act in their official capacity. Their acts are then attributed to the state, not themselves[42]. Both of those types of immunities are relevant for international law, but not national law in the home state. For example, a diplomat can be recalled

[41] For a thorough analysis of the concept of universal jurisdiction, see O'Keefe's "Universal Jurisdiction: Clarifying the Basic Concept" (2004). See also Cassese's "When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case" (2002) on p. 856.

[42] Cassese (2008) p. 302-303.

to his home country and prosecuted there, and a state may freely prosecute its own government officials.

3.2.4 Delimitations.

Firstly, the focus in this thesis will be on functional immunities for national courts outside the state where a suspected crime was committed, and thus exclude questions about both personal immunities and also immunities in general for international tribunals. National courts where the suspected crime was committed also fall outside the scope of the thesis.

Secondly, much of thesis focuses on methodological aspects, historical developments, controversies in debate, and arguments for and against universal jurisdiction that is less discussed. There will therefore be less focus on drawing strong conclusions based on the empirical material.

Third, there is a practical limitation, which give rise to that this thesis should be read with some caution. The creation of traditional international customary law is based on state practice and *opinio juris*. This is to a large degree empirical topics. A comprehensive analysis and discussion would demand much research on state practice and *opinio juris*, and this will fall outside the remit of what is feasible to fully accomplish for a master's thesis that focuses more on methodology and legal debate. The present thesis seeks instead to explore the methodological aspects in establishing the limits for universal jurisdiction, with a special focus on functional immunities. In doing so, the analysis of the present thesis therefore also entails a closer exploration of the legal literature on issues surrounding universal jurisdiction and international customary law. The substantive legal rules will be presented and discussed based on the material present in the thesis. The conclusions should therefore be read with the above caveats in mind.

4 Establishment of universal jurisdiction.

4.1 The argument of *Lotus* vs. need for establishing a rule.

The question of universal jurisdiction has not yet been dealt with in an ICJ case. The question has historically been complicated due to that two different approaches may be taken in a national court: Either that universal jurisdiction is allowed as far as there doesn't exist a customary rule to the contrary, or that it's necessary to have an explicit rule that allows universal jurisdiction.

4.1.1 The *Lotus* approach – 'Everything is allowed until it's banned'.

For the approach that everything that's not explicitly forbidden is allowed, the *Lotus* case from 1927 is most often cited. In this case, the *Permanent Court of International* Justice held that Türkiye [43]could "extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory", as long as there is no prohibition [44].

The *Lotus* case was brought by France against Türkiye. The French steamer ship *Lotus* had collided with a Turkish collier on the high seas. The Turkish vessel was cut in two, and eight Turkish nationals died[45]. The French ship had Türkiye as her destination, reached Türkiye, and Türkiye started criminal prosecutions.

The court in the *Lotus* case gave a very liberal scope for what is allowed under international law in 1927. The court directly states that a state has a "wide measure of discretion" on its own territory, for "any case which relates to acts which have taken place abroad". In short, a state "remains free to adopt the principles which it regards as best and most suitable" [46].

What is especially interesting, is that the court based its judgment on the sovereignty of the forum state, instead of seeing what is today named universal jurisdiction as a use of power

[43] Türkiye is also called "Turkey" in English. The name Türkiye will be used in this thesis. References to the *Lotus* case will be written in the standard reference and therefore use "Turkey".

[44] France v. Turkey, p. 19.

[45] France v. Turkey, p. 10.

[46] France v. Turkey, p. 19.

into another state's affairs. The *Lotus* collision happened on the high seas, not in another state, but the court directly referred to "persons, property and acts outside" the forum state's territory and "acts which have taken place abroad".

The court then concluded with that "all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty"[47].

Instead of requiring a rule of permission to apply what is now termed "universal jurisdiction", the result from the *Lotus* case would require that a state which protests universal jurisdiction must prove the existence of a customary rule that prohibits it. As mentioned in *Point 3.1 Sources in the creation of international customary law* above on the *Asylum case,* the burden to prove a customary rule lies with the state that claims the rule's existence[48].

If the approach from *Lotus* could have been followed, it would be relatively simple to state that universal jurisdiction is allowed. The question would then be to establish the limits. At the same time, this would not *necessarily* entail that the possibilities to use universal jurisdiction would be far-ranging, or even be wider than they might be with a rule of permission.

To understand why this is so, two topics must be considered together: First, the *Lotus* approach to criminal prosecution and state sovereignty, which were already discussed in the *Lotus* itself in 1927, and secondly, what "universal jurisdiction" entails in a broader sense than the definition from *Point 3.2.2* on *What is "universal jurisdiction?"*

1.* Lotus*, criminal prosecution and state sovereignty:

Before the court in the *Lotus* case begins discussing that everything that's not forbidden is allowed, the court points out that a state can't "exercise its power in any form in the territory of

[47] France v. Turkey, p. 19.

[48] Colombia v. Peru, p. 276: "The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State".

another State". Jurisdiction "cannot be exercised by a State outside its territory"[49]. The French individuals from the *Lotus* steamer ship had already docked in today's Istanbul, and were therefore present on Turkish territory[50]. The court didn't have to consider any difficult questions with regards to the presence of the accused on the territory of the forum state. It might even be argued that Türkiye didn't attempt to use the state's power in another state's territory. There was neither an arrest warrant that circulated internationally, nor any attempt at extradition from another state, and the collision had taken place at the high seas. Türkiye instigated proceeding against suspected criminals on its *own* territory.

The *Lotus* approach would not necessarily entail that universal jurisdiction is completely without limits, and that only rules on e.g immunites will set boundaries for its application. On the contrary, the *Lotus* approach would seem to allow absolute universal jurisdiction, but at the same time base it on the sovereignty on the forum state solely in cases where the crime has happened outside *any* state's jurisdiction.

This means that very little would be allowed based on the principle of universal jurisdiction. The court in *Lotus* points out this about the domain of criminal law: "the exclusively territorial character of law relating to this domain constitutes a principle which, except as othervise expressly provided, would, *ipso facto*, prevent States from extending the criminal jurisdiction of their courts beyond their frontiers"[51].

The court in the *Lotus* case seemingly wished to avoid an interference in another state's sovereignty. The judgment is very far from any idea on combating international crimes to end impunity and protect the victims of states.

Three judges wrote a joint separate opinion in the *Arrest Warrant* case in 2002, and pointed out this:

> "those States and academic writers who claim the right to act unilaterally to assert a universal criminal jurisdiction over persons committing such acts, invoke the concept of acting as

[49] France v. Turkey, p. 18.
[50] France v. Turkey, p. 10.
[51] France v. Turkey, p. 20.

> "agents for the international community". This vertical notion of the authority of action is significantly different from the horizontal system of international law envisaged in the "*Lotus*" case"[52].

To sum up: The court in the *Lotus* case in 1927 had state sovereignty as its rationale, while universal jurisdiction is based on combating international crimes on another state's territory. This follows from the rationale behind universal jurisdiction.

1. The rationale behind universal jurisdiction:

Shaw describes the basis for universal jurisdiction as the nature of the crimes themselves: that they are "regarded as particularly offensive to the international community as a whole"[53]. This may happen regardless of where the crime was committed or other links between the forum state and the offender.

Shaw claims that the approach has shifted since *Lotus*, and that it "is argued today that the emphasis lies the other way around"[54]. It is probably safest to assume that there is a requirement in traditional customary international law to prove the existence of a rule that allows it. This follows from that state sovereignty is the foundation of international law.

4.1.2 The need to establish a rule that allows universal jurisdiction.

The UN Charter, article 2, paragraph 1, says that the UN is based on "the principle of the sovereign equality of all its Members", paragraph 4 says that all members "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state", and paragraph 7 says that nothing "contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter".

[52] Congo v. Belgium, Higgins et al, par. 51.
[53] Shaw (2021) p. 574.
[54] Shaw (2021) p. 564.

Even though it's not explicitly stated in the UN Charter that a *state* cannot intervene in "matters which are essentially within the domestic jurisdiction" of another state, it must be considered customarily international law that it is such.

In the Merits of the *Nicaragua* case, where the ICJ handed down its judgment in 1986, the court stated that the "principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law"[55].

The question of what matters that are solely "within the domestic jurisdiction" is not explained in the UN Charter, and the *Nicaragua* case did not deal with universal jurisdiction.

In traditional creation of international customary law, the starting point is state sovereignty. Even the relevant sources are based on state sovereignty, in that a rule that allows universal jurisdiction is based on state practice and *opinio juris* from the world's states. Based on the state practice and *opinio juris*, a customary rule may be established that allows universal jurisdiction.

4.2 A customary rule allowing universal jurisdiction?

4.2.1 Relationship between state practice and *opinio juris*.

The limit for universal jurisdiction will here be discussed as a question of what a state is allowed to do, not of possible legal obligations to aply universal jurisdiction. This creates a conundrum: In the cases of obligations, such as in the *Continental Shelf* case, it would be possible to evaluate if there's sufficient state practice and if there exists an *opinio juris* for a customary rule to have formed. As the court says, the state acts must "be evidence of a belief that this practice is rendered obligatory by the existence of a rule of Iaw requiring it"[56]. However, when it comes to whether or not a behavior is allowed, there might be an *opinio juris* on that it's legal, while few states use it, for example due to political or economical reasons.

[55] Nicaragua v. United States of America (1986) par. 202.
[56] Federal Republic of Germany v. Netherlands, par. 77.

Stigen, in an article that's critical of claims that universal jurisdiction is far-reaching and has a solid foundation[57], yet points out that it's "difficult to imagine a universal *opinio juris* that a behaviour is allowed, while international law at the same time bans it due to little practice" ("vanskelig å tenke seg en universell *opinio juris* om at en atferd er tillatt, samtidig som folkeretten forbyr den på grunn av lite praksis")[58].

As Stigen says, the question is if there's state agreement on that the behaviour is legal or not, and if state practice "can prove such an agreement" ("bevise slik enighet"). Such an approach may solve a challenge in the development of new customary rules, while the approach at the same time may emphasize state sovereignty: On the one hand, how can a new rule be established through state practice, if this state practice must happen in the belief that the new rule already exists? On the other hand, why should there – from a positivist viewpoint – be a requirement for widespread state practice if there's sufficient accept for the rule?

Stigen's approach can intuitively seem at odds with the ICJ in the *Continental Shelf* case, where the court said that if only a short amount of time has passed, then state practice "should have been both extensive and virtually uniform in the sense of the provision invoked". This includes, according to the ICJ, state practice from the states "whose interests are specially affected" [59]. However, Stigen's approach is logical. In other words, state practice and *opinio juris* may be two distinct critera for a creation of a customary rule when the criteria are discussed in theory, but in practice, *opinio juris* might be deduced from state acts, and a legal rule may be created with little state practice if there's sufficient *opinio juris* about its legality.

It might therefore not be necessary to have worldwide, consistent national legislation that prescribes prosecutions based on universal jurisdiction for the rule to have formed, or have a high number of court cases. Instead, it may be enough to have *some* state practice, as long as it is generally accepted that universal jurisdiction is allowed.

In the Merits of the *Nicaragua* case, where the ICJ handed down its judgment in 1986, the

[57] Stigen (2009) p. 4, saying that "adgangen til å anvende universaljurisdiksjon er snevrere enn de fleste hevder".
[58] Stigen (2009) p. 13.
[59] Germany v. Netherlands, par. 74.

court held that state practice does not need to be "in absolutely rigorous conformity with the rule". Instead, "the conduct of States should, in general, be consistent with such rules", and inconsistent state practice:

> "should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule"[60].

In other words, if the states that argue against universal jurisdiction do so by appealing to an exception from the rule, it's a confirmation of the rule, not a weakening. For example, a state may recognize the principle of universal jurisdiction, but excuse a lack of its use in a particular instance or argue that the principle is being abused for political reasons.

4.2.2 The ILC on identification of state practice and *opinio juris*.

The International Law Commission (ILC) was established by the United Nations General Assembly, based on the UN Charter art. 1, on that the "General Assembly shall initiate studies and make recommendations for the purpose of […] encouraging the progressive development of international law and its codification".

The ILC consists of legal experts, the states do not participate, and its material should therefore not in itself be considered evidence of an *opinio juris*. This is unlike General Assembly resolutions, where the ICJ held in the *Nuclear weapons* case that resolutions may be evidence of opinio juris (see Point 3.1 *Sources in the creation of international customary law* in this thesis). However, the ILC has given a summary of how customary law is identified, wich will be used in the further discussion here. This summary follows the approach from the ICJ on that both sufficient state practice and opinio juris is necessary, and that the two requirements are distinct.

[60] Nicaragua v. United States of America (1986) par. 186.

In the report from the ILCs 68th Session, in 2016, the report included *Chapter V: Identification of customary international law*[61]. Identification of the two elements, state practice and *opinio juris*, are described in the report. The most relevant descriptions for a customary rule on universal jurisdiction are the following:

***ILC on state practice*:**

The ILC report says that state practice "consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions", and then further describes this conduct [62]. For the question of the limit of universal jurisdiction, the most relevant here is national legislation and decisions of national courts.

***ILC on* opinio juris:**

The ILC report says that evidence of *opinio juris* include, but is not limited to, "public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference"[63].

***ILC on both state practice and* opinio juris:**

For both elements, the ILC report says that "regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found". The report also says that both elements "is to be separately ascertained. This requires an assessment of evidence for each element"[64]. As mentioned above, the ILC summary follows the approach from the ICJ on that both sufficient state practice and *opinio juris* is necessary, and that the two requirements are distinct.

[61] ILC 2016 report (A/71/10).
[62] ILC 2016 report (A/71/10) p. 76-77.
[63] ILC 2016 report (A/71/10) p. 77.
[64] ILC 2016 report (A/71/10) p. 76.

Discussion – some remarks on what constitutes sufficient state practice:

As mentioned in *Point 4.2.1* on *The Relationship between state practice and* opinio juris, it is difficult to understand that a behavior could be considered illegal in traditional international law even if there is a consensus on its legality. However, based on ICJ jurisprudence and the report from the International Law Commission from 2016, there is a requirement of wide-spread state practice for a customary rule to have formed.

4.2.3 National court cases and *opinio juris*.

Criminal prosecutions in national law based on universal jurisdiction need legislation that bans a particular act, and actual court cases, see *Point 4.2.2* on identification of state practice above.

This *Point 4.2.3* considers national court cases.

Number of court cases before contra after 2002:

As described in *Point 3.2.4* above on a delimitation of this thesis, it's not feasible for a master's thesis that focuses on methodology to fully research state practice and *opinio juris* for the topics. But based on the more accessible sources, there seems to be some state practice on prosecutions before 2002, while the period after 2002 has not necessarily been an era of the "fall" of universal jurisdiction: One overview of court cases based on universal jurisdiction was given by Langer in 2015, based on his own research, where he said this:

> "the 'rise and fall' universal jurisdiction narrative does not capture the trajectory of universal jurisdiction in the last three decades. Since the arrest of Pinochet in 1998, substantially more, rather than fewer, states have passed statutes giving universal jurisdiction to their courts.[9] Also, universal jurisdiction complaints or cases considered by authorities by their own motion were presented against 211 individuals between 2004 (the year after Belgium's statute was twice amended) and 2009.[10] This average of 35.17 complaints or cases considered by authorities by their own motion per year is not substantially lower than the average number of 39.71 complaints or cases considered by authorities by their own motion per year between 1983 and

2003, and we should also notice that from 1 July 2002, the International Criminal Court (ICC) presented a new venue for complaints ('communications') on core international crimes,[11] and that before 2004 there were a number of massive investigations against Nazis in Australia, Canada and the United Kingdom (UK), against former Yugoslavs in Germany, and against the Argentine military in Spain.[12].

Figure 1 (Source: Own Database on Universal Jurisdiction Complaints[13]) shows that universal jurisdiction trials over core international crimes did not diminish after the amendments to the Belgian statute in 2003 and to the Spanish statute in 2009.

After the Belgian amendments in 2003, courts heard 21 of the 39 universal jurisdiction trials over at least one core international crime in the period 1961-2013. In other words, in the ten-year period between 2004 and 2013, 53.8 per cent of all universal jurisdiction trials over core international crimes were held.[14] In 2005, verdicts were issued regarding six defendants, the most universal jurisdiction trial verdicts during the period of 1961-2013. 2013 was the third year with the most universal jurisdiction trial finished, with four trials. In addition, while between 1994 and 2003 there was at least one universal jurisdiction trial verdict every other year, between 2004 and 2013 there was at least one universal jurisdiction trial verdict every year except for 2006.

The 'rise and fall' narrative thus does not capture accurately the trajectory of universal jurisdiction in criminal cases in the last 30 years. In some respects, universal jurisdiction has been expanding, not decreasing in recent years; there have been more universal jurisdiction statutes and trials. In other senses, as with the average number of complaints, universal jurisdiction has declined but not substantially after the amendments to the Belgian statute in 2003"[65].

There seems to be some court cases based on universal jurisdiction. In addition, the reason why not more states use universal jurisdiction might be due to political or economical reasons, instead of a lack of *opinio juris* on its legality, or those states may argue based on exceptions. Again, the area is difficult due to that it's the limit of universal jurisdiction that is considered, instead of an obligation on the state.

[65] Langer (2015) p. 247-249.

The* Eichmann *case:

When it comes to prosecution of foreign government officials in national courts, the most well-known case is probably the case of *Eichmann* in Jerusalem in 1962. Shaw describes the case as "the" starting point for universal jurisdiction in domestic courts[66]. The case concerned a former high-ranking Nazi official that had fled to Argentina after 1945. He was captured by Israeli Mossad agents in Argentina in 1960, against the wishes of Argentina, and transported to Israel. Eichmann's acts had been stopped in 1945, three years before Israel was founded in 1948. Eichmann was sentenced to death and hanged in 1962. The judgment was based on universal jurisdiction.

Opinio juris in the* Eichmann *case:

In the *Eichmann* case, the Israeli Supreme Court claimed that even without universal jurisdiction, the court could have prosecuted Eichmann based on the protective principle or the passive personality principle for jurisdiction. The court chose to base Eichmann's conviction on universal jurisdiction, and said that not only does "all" his crimes have "an international character", but the character of the crimes themselves gives Israel the right to prosecute them based on universal jurisdiction "in the capacity of a guardian of international law and an agent for its enforcement"[67]. Israel could have focused on the crimes Eichmann had committed especially against Jews, instead of trying him for other crimes, and as such link the crimes to Israel as a Jewish state. The Supreme Court chose, however, to base its judgment specifically on universal jurisdiction.

The passive personality principle concerns crimes against a state's own nationals abroad. Israel was not founded before 1948, and the *Holocaust* was stopped in 1945. It's therefore difficult to see how the passive personality principle could have been used.

[66] Shaw (2021) p. 577.
[67] Israel v. Eichmann, p. 304 in English translation.

The protective principle concerns a state's vital interests. The *Eichmann* case was a criminal trial against an individual that had been living in hiding for 15 years. It might be argued that the case concerned Israel's vital interests based on the following hypotethical logic:

1) Israel is a Jewish state.
2) The punishment of Eichmann and other *Holocaust* perpetrators was a necessary part of securing Jewish existence.
3) Eichmann was one of the worst perpetrators of the *Holocaust* against the Jews.
4) Therefore, the case concerned Israel's vital interests.

However, such an argument sidesteps why Israel's interests were threatened, and the rationale behind why it was so important to punish Eichmann. It was the character of the acts themselves, both against Jews and others, and the stated reason from the court was that this gave Israel the right to punish the perpetrator.

The trial against Eichmann was based on a principle which was laid down in 1946 in the Nuremberg trials from Nuremberg prosecutor Jackson: That certain acts are considered the "concern of other governments or of international society", and where other nations "would take a consenting part in such crimes" by remaining silent[68].

Israel's Mossad had entered Argentinian territory against Argentinia's wishes to capture Eichmann, in a clear ciolation of Argentina's sovereignty. It's difficult to imagine a global acceptance for the *Eichmann* trial if the accused had instead committed normal crimes. The *Eichmann* case is probably best understood as an example of universal jurisdiction, with the belief that its application was legal.

4.2.4 National legislation and *opinio juris*.

Two thorough overviews of national legislation for universal jurisdiction in different states might be found in two reports by *Amnesty International*, from 2011 and 2012[69]. The reports

[68] Jackson (1946).

[69] See Amnesty International: *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World (2011)* and Amnesty International: *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World - 2012 Update (2012).*

are similar, where the 2011 report was a preliminary survey and the 2012 report an update from the previous year's report. The reports contain easily accessible tables with an overview of the states, on pages 16 til 21 in both reports, and points towards a situation where state practice in the form of legislation is very widespread and comprehensive.

Goodman critizised Amnesty's report by saying that Amnesty "appears to count states as having enacted universal jurisdiction if the state is a party to the Rome Statute for the International Criminal Court" and that Amnesty therefore had inflated the number of states with national legislation that provides for universal jurisdiction[70], while Heller contradicted Goodman by saying that Heller does "not believe Amnesty is doing what [Goodman] says it is", and that Amnesty "does not seem to be suggesting that implementing the Rome Statute *simpliciter* is enough to consider a state to have universal jurisdiction over the international crimes therein"[71].

A representative for Amnesty replied to Goodman by saying that Amnesty had based their claims "on domestic legislation that enacts universal jurisdiction for all crimes in treaties (including for example the Rome Statute) that they have ratified"[72].

The UN Secretary-General's report from the UNs Sixth Committee in 2022 gave an overview of national legislation that points towards a less comprehensive national legislation worldwide, based on fewer states[73]. The empirical material will not be further discussed here, due to that the focus on this thesis is on methodology.

Opinio juris *for national legislation:*

Stigen says that many states experience pressure to pass broad legislative provisions for universal jurisdiction, and that provisions which goes further than (the limits in) international law will not have actual consequences before they're applied. Therefore, according to Stigen,

[70] Goodman (2013).
[71] Heller (2013).
[72] Relva (2013).
[73] UN Secretary General report 2022 (A/77/186) p. 2-6.

prosecution is "a more reliable indicator than legislation on what states consider to be applicable international law" ("straffeforfølgning er derfor en sikrere indikator enn lovgivning på hva stater anser som gjeldende folkerett")[74].

Such a claim leaves out that a state may have an *opinio juris* on that the provision is in accordance with the limits on universal jurisdiction, and has chosen to legislate accordingly, while the state or the courts may choose to carry out few actual prosecutions due to political, economic, diplomatic or practical reasons.

A case in point is the political aftermath of the possible Bangladeshi genocide of 1971. In 1971 "the Pakistan army launched a massive killing campaign against its Bengali population, in what was then East Pakistan and is now Bangladesh". India accused Pakistan of committing genocide, and the killing campaign only ended after Indian military intervention[75]. Pakistan committed a possible genocide against the Bangladeshi.

Bangladesh was then founded, and this newly created Bangladeshi state "desperately needed global acceptance as an independent state". Bangladesh feared Pakistan[76]. In an article from 2016, Bass pointed out that Bangladesh had to bargain justice for security, and that India did the same.

India had first accused Pakistan of "genocide to justify" going to war, but afterwards "abandoned prosecutions for those same atrocities in order to safeguard India's security"[77]. According to Bass in 2016, the reason why India chose not to pursue prosecutions for the Pakistani leadership after 1971 "was not legal, but military"[78]. Bass claims that India "painfully realized that international criminal law could not be enforced without substantial military and political power"[79].

[74] Stigen (2009) p. 13.
[75] Bass (2016) p. 140.
[76] Bass (2016) p. 148.
[77] Bass (2016) p. 182.
[78] Bass (2016) p. 143.
[79] Bass (2016) p. 142.

Bass described the 1971 Bangladeshi case in 2016, based on "unexplored declassified Indian government papers" and analyzed the "real reasons" why India and Bangladesh did not attempt to prosecute after 1971[80].

To research and consider all national legislation in the world on universal jurisdiction falls outside the scope of a master's thesis, and the Bangladesh case was on a particular case, not legislation. The main point above is that it's possible for a state to pass a criminal legislation that includes universal jurisdiction, and that there is an *opinio juris* on the legality of the national legal provisions, even though the provisions are not used in particular instances.

Not only may the state consider the legislation or court cases to be legal under customary international law. Hypothetically, the state may even consider itself to have a duty to prosecute individuals that have committed international crimes. Again, the difficult question is what constitutes sufficient state practice.

4.2.5 *Opinio juris*.

As presented above in *Point 4.2.3* and *Point 4.2.4*, there is probably a reasonable amount of national court cases and criminal legislation that give evidence of state practice for a customary rule of universal jurisdiction, based on the empirical sources in this thesis. However, further research will be needed to consider the particular cases. Instead of examining each country and case separately, evidence of an *opinio juris* on the rule will here be given in the form of state conduct in the UNs Sixth Committee and General Assembly resolutions.

The Sixth Committee of the UN is "the primary forum for the consideration of legal questions in the General Assembly. All of the United Nations Member States are entitled to representation on the Sixth Committee as one of the main committees of the General Assembly"[81]. This is unlike the International Law Commission (ILC) described above in *Point 4.2.2*, which consists of legal experts. According to the ILC, a broad range of evidence may be used to demonstrate the existence of an *opinio juris*, see *Point 4.2.2* above.

[80] Bass (2016) p. 142.

[81] Web page of the Sixth Committe: https://www.un.org/en/ga/sixth/

As described in *Point 3.1* on the value of UN General Assembly resolutions, the *Nuclear weapons* advisory opinion from the ICJ described that General Assembly resolutions can demonstrate that an *opinio juris* is in development and the existence of an already-established *opinio juris*. And in the Merits of the *Nicaragua* case, the ICJ pointed towards that if a state "defends its conduct by appealing to exceptions or justifications contained within the rule itself", the rule is confirmed instead of weakened[82].

In 2009, the Group of African States asked the General Assembly of the UN to discuss the "scope and application of the principle of universal jurisdiction"[83]. What followed was a considerable amount of resolutions from the UN General Assembly and extensive work in the UN Sixth Committee, which is best summed up as that the principle is widely acknowledged as a rule, while there at the same time is considerable disagreement on its scope and application. The General Assembly referred the topic to the Sixth Committee in 2021. A full overview may be found on the pages of the Sixth Committee from the 2022 General Assembly session[84]. The UN General Assembly resolution 77/111 from year 2022 also gives an overview, and in this resolution the assembly also states its "commitment to fighting impunity", while both this resolution and the previous ones bear the title "The scope and application of the principle of universal jurisdiction". That the principle exists do not seem to be controversial. The disagreement lies in its scope and application.

4.2.6 Preliminary conclusions.

Based on the overview above, it may be said that there seems to be a reasonable amount of state practice that demonstrates a customary rule of universal jurisdiction, while the underlying empirical material should be treated with caution. There exists an *opinio juris* on that universal jurisdiction is acknowledged as a rule of costomary international law, while there at the same time is considerable disagreement on its scope.

There probably exists a rule that universal jurisdiction, to a certain extent, is allowed under traditional customary international law.

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[82] Nicaragua v. United States of America (1986) par. 186.

[83] UN Letter from the Group of African States (2009).

[84] Web page of the Sixth Committe 2022: https://www.un.org/en/ga/sixth/77/universal_jurisdiction.shtml

4.2.7 Special mention of universal jurisdiction and *the Genocide Convention*.

For the crime of genocide, *the Genocide Convention* neither present a barrier to prosecutions of government officials and punishment outside the state where the crime was committed, nor does it demand such prosecutions.

The states are obliged to "prevent and to punish" the crime of genocide, regardless of if the crime is committed in "time of peace or in time of war"[85], and this explicitly includes everyone who commits the crime, "whether they are constitutionally responsible rulers, public officials or private individuals[86].

Article VI says that the accused "shall" be prosecuted by the state where the crime was committed or by a (future) international court[87]. In an advisory opinion in 1951, regarding reservations to the convention, the ICJ said that "the principles underlying the Convention" are binding on a state without this state entering into a treaty and that the Convention was intended to be "definitively universal in scope"[88].

As Cassese points out, the "substantive" parts of the convention are customary law[89]. When it comes to the procedural question of how genocide *can* be punished, it should first be noted that article VI on how a suspect shall be tried is a provision and an obligation, not an exclusion of other prosecutions outside the convention itself. Then it should be noted that the convention has as its aim *to prevent and punish* the crime of genocide "in order to liberate mankind from such an odious scourge"[90]. It would run counter to the purpose of the convention to interpret article VI on how a suspect "shall" be tried as excluding prosecutions outside the convention itself, instead of seeing the word "shall" as an obligation.

[85] The Genocide Convention art. I.
[86] The Genocide Convention art. IV.
[87] The Genocide Convention art. VI.
[88] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, p. 23.
[89] Cassese (2008) p. 130.
[90] The Genocide Convention, preamble.

In 1996, the ICJ considered the question of territorial scope, and stated that the convention "merely provides" for the types of trial that are described in the convention, before the court moved into an area of *obiter dictum*: The court referred to the court's own advisory opinion from 1951 on reservations, and concluded that "the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*". Therefore ("thus") the obligations to prevent and punish are "not territorially limited by the Convention"[91].

The limits for universal jurisdiction over the crime of genocide therefore have to be established through customary law outside the Convention.

[91] Bosnia and Herzegovina v. Serbia and Montenegro (Preliminary Objections) par. 31.

5 Debate controversies – some comments.

This chapter will deal with an ongoing debate surrounding universal jurisdiction and immunities. There has been an ongoing debate since before the *Arrest Warrant* case in 2002 and also afterwards. After *Arrest Warrant*, there has been a reasonable number of critical articles towards NGOs and human rights organisations that tried to influence state behaviour. Several legal theorists and scholars of international law have claimed that the NGOs misrepresented the customary law on the topic, and more than hinted that the human rights organisations are engaging in neo-colonialism. The comments in this *Chapter 5* will instead comment critically against this perspective.

The *obiter dictum* from the *Arrest Warrant* case will also be covered: The question of functional immunity will be discussed based on what it might have as a consequence in *Point 5.2*, and the *obiter dictum* on that 'immunity does not equal impunity' will be critically remarked upon in *Point 5.4.*

5.1 The debate on universal jurisdiction and the historical context post-1945.

After the *Arrest Warrant* case in 2002, universal jurisdiction was described in literature as having reached a zenith from the 1990s and until the early 2000s, both in regard to beliefs in its existence and reach and in national legislations[92].

Van der Wilt pointed out in literature in 2015 that there's two sides in an ongoing debate, and that as "both sides tend to accuse each other of selective indignation and bias, the discussion is inevitably 'tainted' by politics."[93]. This makes it challenging to evaluate sources without a considerable amount of original research.

Traditional customary law is based on state practice and *opinio juris*. In other words, those are legal questions based on empirical research. The scope of material is immense, and not feasi-

[92] See e.g Cassese's (2003) "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction" and Reydams' (2011) "The Rise and Fall of Universal Jurisdiction".

[93] Van der Wilt (2015) p. 241.

ble to fully research based on primary material for a master's thesis. In addition, there is considerable difficulty in evaluating if more accessible second-hand sources present the relevant material fully. To illustrate how contentious the topic is when it comes to presentations of primary material, and how polarized the discussion has been in legal literature, an article by Reydams from 2011 may illustrate.

Reydams said in 2011 that he had before "unwittingly" been part of "a so-called *transnational advocacy network*" and participated in human rights seminars for universal jurisdiction[94]. In 2011, years after 2002, Reydams first describes his newly found opponents as that they're giving "distorted" historical interpretations from the period before 1945"[95]. Reydams then considers the legacy of the Nuremberg trial later in the same article, and describes the *International Military Tribunal for the Far East* (more commonly known as the Tokyo tribunal).

The Tokyo tribunal was the tribunal the Allies established after World War 2 for Japan in 1946-48, and it was modeled on the Nuremberg trials against the Nazis in 1945-46. According to Reydams, "the edge" of an argument in support of universal jurisdiction from the Nuremberg trial can be "taken off by a passage from the Tokyo judgment":

> "Proponents of universal jurisdiction draw support from a passage in the Nuremberg judgment that "[t]he Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, *they have done together what any of them might have done singly*" [emphasis added]. The edge of this argument, however, can be taken off by a passage from the Tokyo judgment:
>
> > This is a special tribunal set up by the Supreme Commander under the authority conferred on him by the Allied Powers. It derives its jurisdiction from the Charter. […] In the result, *the members of the Tribunal, being otherwise wholly without power in respect to the trial of the Accused*, have been empowered by the documents, which constituted the Tribunal and appointed them as members, to try the Accused but subject always to the duty and responsibility of applying to the trial the law set forth in the Charter'. [emphasis added]"[96].

[94] Reydams (2011) p. 388.
[95] Reydams (2011) p. 337.
[96] Reydams (2011) p. 342.

The first paragraph in the above quote is from Reydams, and the second paragraph is Reydams' description of the Tokyo judgment. The emphasis in *italics* is Reydams'. The quote from the Tokyo judgment is not referenced by Reydams further than that it is from "the Tokyo judgment". The full quote can be found in the Judgment of 4th of November 1948, Part A – Chapter II – The Law - (a) Jurisdiction of the Tribunal, and goes as follows:

> "In our opinion the law of the Charter is decisive and binding *on the Tribunal*. *This is a special tribunal* set up by the Supreme Commander under authority conferred on him by the Allied Powers. *It* derives its jurisdiction from the Charter. *In this trial* its members have no jurisdiction except such as is to be found in the Charter. The Order of the Supreme Commander, which appointed the members of the Tribunal, states:
>
> > "The responsibilities, powers, and duties of the members of the Tribunal are set forth in the Charter thereof..."
>
> In the result, the members of the Tribunal, being otherwise wholly without power in respect to the trial of the accused, have been empowered by the documents, which constituted the Tribunal and appointed them as members, to try the Accused but subject always to the duty and responsibility of applying to the trial the law set forth in the Charter".

The historical context here is the period after 1945, and the principles that underlined the Nuremberg tribunal. As Reydams quotes from the Nuremberg tribunal, the states behind the tribunal did "together what any of them might have done singly". And the Tokyo judgment seems to be carefully worded to not risk a deviation from the principle of universal jurisdiction. The Tokyo judgment binds, but only for the specific trial and the special tribunal.

Van der Wilt pointed out in literature in 2015 that critics "of universal jurisdiction argue that the very concept impinges upon the (territorial) state's prerogatives, while advocates of universal jurisdiction assert that state sovereignty is abused to shield the perpetrators of heinous crimes. As both sides tend to accuse each other of selective indignation and bias, the discussion is inevitably 'tainted' by politics."[97]. This makes it challenging to evaluate sources without a considerable amount of original research.

[97] Van der Wilt (2015) p. 241.

Traditional customary law is based on state practice and *opinio juris*. It should be possible to discuss and agree on a framework, and then come to conclusions. This should apply to the principle of universal jurisdiction, just as it does for other questions. But yet, the debate is fraught with accusations and disagreement. To discuss why this may be, a rarely-discussed hypotetichal dilemma will be presented. The hypothetical dilemma will be the *obiter dictum* of the *Arrest Warrant* and the *Eichmann* case.

5.2 The *obiter dictum* of *Arrest Warrant* on functional immunity.

This *Point 5.2* goes back to the presentation of the *Arrest Warrant* case in *Point 2.1.2*.

According to article 59 in the ICJ statute, the decisions of the court are only binding for the parties to the specific cases. At the same time, the court's findings will usually be followed. The ICJ is the most specialized court for general international law, and for example Galand described the influence of the court as if that "national and international courts are reluctant to go against a finding of the ICJ, especially when it appears to spell out customary international law[98].

In the *Arrest Warrant* case, the court claimed that immunity does not mean impunity, and presented several scenarios where personal immunity does not represent a bar to criminal prosecution. One of those scenarios concerned cases where personal immunity is no longer relevant:

> According to the court, after "a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity"[99].

[98] Galand (2015) p. 3
[99] Congo v. Belgium, par. 61.

This part of the *obiter dictum* from the ICJ seems to claim that a former high-ranking government official can only be prosecuted by another state for private acts, not for acts committed in an official capacity.

Functional immunity applies to state governments officials when they act in their official capacity. Their acts are then attributed to the state, not themselves[100]. The logical consequence of the argument from the ICJ is that if Adolf Eichmann had been a former foreign minister of Germany, it would probably have been illegal under international law for Israel to judge him for his crimes due to his functional immunity.

Of course, few would openly argue that it would be illegal to prosecute Eichmann. Shaw describes it as that the judgments in the Nuremberg trials were legal, while "suggestions of war crimes" in "subsequent" conflicts has been controversial[101]. This probably also applies to the trial of Eichmann.

In addition, this part of the *obiter dictum* of *Arrest Warrant* may have overreached. Cassese argued in 2002 that there exists "a customary rule" that removes functional immunity for international crimes, and that this includes cases when the suspect is prosecuted in a national court outside the territory where the crime was committed, not only when the suspect is tried in an international tribunal. Cassese mentions a range of cases, from some cases concerning former Nazi officials (among them *Eichmann* in Israel and *Klaus Barbie* in France) to *Pinochet* in the UK and *Cavallo* in Mexico[102]. Wouters describes the obiter dictum on "private capacity" as being "probably the most controversial statement of the whole judgement", and pointed out "that four of the judges, while voting with the majority, express serious reservations concerning this paragraph"[103].

But the above criticism, which is based on a traditional creation of customary international law, does not solve the question: Would the *Eichmann* trial have been illegal, if it was considered so by most states?

[100] Cassese (2008) p. 302-303.
[101] Shaw (2021) p. 575.
[102] Cassese (2002) p. 870.
[103] Wouters (2003) p. 262-63.

The context of universal jurisdiction and immunities are crimes that shocks the conscience of humankind. It is therefore not surprising that arguments against universal jurisdiction that are similar to historical defences of Nazi criminals, and that includes harsh accusations towards human rights defenders, are countered with that state sovereignty is used as a shield for perpetrators. This will be remarked upon in the following *Point 5.3*.

5.3 The debate on universal jurisdiction and accusations.

When legal theorists debate universal jurisdiction, it may include accusations that the other side is using political instead of legal arguments. In other words, both sides claim that the other side is failing in applying the law correctly. It is also common to question the motives of the opponent.

Van der Wilt pointed out in literature in 2015 that critics "of universal jurisdiction argue that the very concept impinges upon the (territorial) state's prerogatives, while advocates of universal jurisdiction assert that state sovereignty is abused to shield the perpetrators of heinous crimes. As both sides tend to accuse each other of selective indignation and bias, the discussion is inevitably 'tainted' by politics."[104].

Both of those views have a legal side, but they also have an empirical side. What is seldom discussed is that one or both of the two sides may be partly or fully correct in its assessment of the facts, or at least believe they are correct. Maybe the proponenents of universal jurisdiction in the Western world are abusing the principle, acting like historical Western imperialists, and are attacking sovereign states. Or, maybe the opponents are using historical tactics to shield themselves from scrutiny. This is an empirical question, and may be considered on its evidence. This thesis will not try to consider such evidence for any current cases, but will solely point towards a historical example. The historical example is the *Klaus Barbie* trial, where the accused was put on trial by France as a forum state.

Barbie was a Nazi criminal with the nickname "the butcher of Lyon", and he was tried in France in 1987. The defence attorney for Barbie in the *Klaus Barbie* trial tried to shift the focus of the trial onto the forum state's colonial crimes. France is a former colonial power, and

[104] Van der Wilt (2015) p. 241.

France' acts against colonial subjects in Algeria in 1962 were gruesome. They were so gruesome that even the French state-owned broadcaster *France24* covered the case in 2022 with the words "France's shameful legacy" in the title, and warned that "time is running out" for justice 60 years after the crimes[105].

In the *Klaus Barbie* trial the lawyer was a "veteran Marxist revolutionary". The lawyer politicized the trial by transforming "the proceedings into a public attack on French actions in Algeria and on his perception of Western Imperialism generally"[106], while Barbie had described the context as a "lynching campaign set forth by the French media"[107].

It's nothing new that states or individuals who are accused of international crimes counter-attack the forum states by bringing up imperialism, colonialism or making ad-hominem-attacks. To avoid a 'he said she said'-approach, it might be better to consider each case on its merits.

5.4 Immunity and impunity.

The above mentioned *Klaus Barbie* trial concerned the defence of an accused. Barbie was accused of having committed a crime, which is a question of substantive law. In the *obiter dictum* of the *Arrest Warrant* case, the ICJ said that criminal responsibility is a question of substantive law, and held the question of immunity to be separate from the underlying accusation against the Congolese former foreign minister.

Before the court in *Arrest Warrant* gave examples of when immunity is not a bar to prosecutions in national courts, the court had first claimed that immunity does not mean "impunity".

The court claimed that immunity and "individual criminal responsibility are quite separate concepts. While jurisdictional impunity is procedural in nature, criminal responsibility is a question of substantive law"[108]. This claim necessitates a skeptical comment, respectfully: Im-

[105] Gaillard for *France 24* (2022).
[106] Powderly (2011) p. 41.
[107] Powderly (2011) p. 42.
[108] Congo v. Belgium. Par. 60.

punity is the ability to perpetrate crimes without punishment. It can be described as "the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account"[109]. If a perpetrator is immune from prosecution, he can't be held responsible through punishment, and impunity will follow. The causal link between immunity and impunity is so obvious that *Collins dictionary* define impunity by describing it as being based on impunity[110]. To make a principled distinction between the two might lead to a legal construction that is difficult to reconcile with reality.

[109] UN Commission on Human Rights (2005) p. 6.

[110] See Collins online dictionary, where the first definition of "impunity" is listed as "exemption or immunity from punishment or recrimination".

6 Further dilemmas.

The dilemma between state sovereignty and combating impunity is well known, and is covered *de lege lata* – how the law is – in *Point 4.1* on the need to establish a rule based on customary international law. This *Chapter 6* will present some dilemmas/arguments for and against universal jurisdiction in national courts that are less commonly discussed.

6.1 Right to a fair trial for the accused.

It may be difficult to investigate and collect evidence from abroad on the territory of another state. It's possible that this could interfere with the accused's right to a fair trial.

6.2 'Non bis in idem' might block future prosecution.

A difficulty of collecting evidence from abroad may lead to acquittal of individuals that are guilty. 'Non bis in idem' is Latin for "not twice for the same". It is a term for a legal rule that an individual that has been found not guilty can't be put on trial again. A similar rule is called "double jeopardy" in the United States.

Van der Wilt refers to Fletcher and mentions that such rules may have a "detrimental effect", in that "an acquittal in a state exercising universal jurisdiction because of its inability to obtain the necessary evidence may create an obstacle for prosecution in a state with stronger claims"[111].

6.3 The risk of impunity.

In extreme cases, a lack of prosecution might lead to extreme consequences. Impunity might for example heighten the risk of further international crimes. The developments after the 1994 Rwanda genocide on the Tutsis will here be used to illustrate.

The Rwandan state was led in 1994 by an extremist regime based on the ideology 'Hutu Power'. Rwanda carried out a state-implemented, highly effective genocide against the Tutsi

[111] Van der Wilt (2015) p. 242.

minority. There existed an armed rebel force consisting of soldiers of mostly Tutsi ethnicity, which went by the name of RPF. The RPF intervened and stopped the genocide.

The 'Hutu Power' leadership fled abroad in a massive, organized emigration, along with a high number of the leadership's death militia, neighbourly perpetrators, supporters, and various other individuals. The emigration led to a well-known and immense refugee crisis, with temporary impunity for the perpetrators of the genocide.

What is less known is that the leadership of 'Hutu Power' and its supporters then organized and attempted to take over the Rwandan state again, seemingly in order to re-establish the genocide. As *Doctors without borders* later said, the refugee camps outside Rwanda "were transformed into rear bases from which the reconquest of Rwanda was sought, via a massive diversion of aid, violence, propaganda, and threats against refugees wishing to repatriate"[112]. Prunier went as far as saying that the "majority" of the camp inhabitants were in a "state of shock", were "waiting for orders", and termed the refugee camps outside Rwanda "war machines"[113].

The UN Genocide Convention is a convention for both the punishment and the prevention of genocide. The convention is not a convention for military intervention to stop genocide, but the convention covers conspiracy to genocide, incitement to genocide and attempts to commit the crime[114]. At least some of the acts and propaganda from the camps outside Rwanda seems to have fulfilled the critera of being punishable. The states where the camp were located could have prosecuted the génocidaires based on the territorial principle: That a sovereign state can prosecute individuals for acts committed on its own territory.

At the same time, the acts and propaganda from outside Rwanda was directly connected to the genocide that had already been perpetrated. Hypotethically, in such a case as the aftermath of

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[112] Binet for MSF (2014) p. 8.

[113] Prunier (2008) p. 25: "From the beginning these camps were an uneasy compromise between genuine refugee settlements and war machines built for the reconquest of power in Rwanda".

[114] See the *Genocide Convention article 3*, on that the following acts shall be punishable: "(a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide", in combination with *article 4*, on that any person who commits "genocide or any *of the other acts enumerated in article III* shall be punished" (my *italics* from the convention quotation itself).

the 1994 genocide, a lack of prevention for a resumption of the genocide *and* impunity for the genocide itself could have led to a re-establishment and continuation of one of the worst crimes in history.

Stanton describes denial of genocide as being "among the surest indicators of further genocidal massacres", and that the effective response to denial is "punishment by an international tribunal or national courts", so that the evidence is heard and the perpetrators punished[115]. Punishment of international crimes may thus have a preventive rationale behind it.

6.4 Victims' various perspectives.

This thesis started in *Point 1.1* on *Topic*. One of the themes described there is that the fight against impunity has a side to justice for the victims.

International tribunals usually receive much attention in global discource, and a fair amount of media coverage. National courts mostly receive very little attention and coverage. This also holds true when the courts try a leadership, not just lower-ranking government officials. An extreme example is the *Dergue tribunal* of Ethiopia. Ethiopia was ruled by a communist military junta from 1974 until 1991, which went by the name "Dergue" (meaning "council").

The Dergue was overtrown in 1991 by an armed liberation group[116]. An experienced journalist who reported from Ethiopia in 1995 summed up the *Dergue tribunal* as such:

> "In international human-rights circles, the trial of the Derg, which had been three years on preparation, was being spoken of as an African Nuremberg"[117].

And yet, the *Dergue* case remains hardly known. The criminal tribunals for Rwanda and the former Yugoslavia carried out prosecutions in approximately the same time span, for crimes that were committed later than the Dergue regime in Ethiopia. The international tribunals received far more attention.

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[115] Stanton (1998).

[116] Bouwknegt (2018) p. 552. Bouwknegt is a researcher at the NIOD Institute for War, Holocaust and Genocide Studies, serves as a trial monitor at the International Criminal Court (ICC), and has Africa as his regional focus: https://www.niod.nl/en/staff/thijs-bouwknegt (page visited on the 1st of April 2023).

[117] Ryle (1995) p. 50.

Universal jurisdiction is a term that is associated with the most heinous crimes, where the territorial state is not willing to prosecute, presumably because this state is itself implementing and ordering the crimes. And yet, it's a field where it's not possible to presume that the victims of state-organized crime wish for their home states to take primary responsibility to prosecute.

It may be difficult to map numbers of suspected perpetrators of international crimes that are living outside the state where the crimes were committed. This applies to both the world as a whole and individual cases. Even in the *Dergue* case, which Ethiopia investigated after 1991, it's not necessarily easy to find reliable numbers of how many suspects that fled abroad. The United States considered a number of 6,000 individuals reliable in 2007 during the trials in Ethiopia, and said that "half" of those "must be tried in absentia, as they are living in exile abroad"[118].

One of those suspects had reached the Netherlands long before 2007, and was convicted in the Hague District Court as late as 2017[119]. Ethiopia had carried out its own prosecution in parallel with the one in Netherland, and the Ethiopian courts sentenced the perpetrator to capital punishment in the *Dergue tribunal*[120]. Ethiopia "barred" investigations on site from the Netherlands[121], while the perpetrator's victims were living in both Ethiopia and abroad.

The Netherlands carried out an investigation that spanned at least three countries in addition to Ethiopia, questioned a large number of Ethiopian witnesses in the West, supported victims financially in their travels from Ethiopia to the Netherlands for a 10-day trial, and recorded a testimony from a former prosecutor from the *Dergue tribunal* itself[122].

[118] The US (2007).
[119] As described by Bouwknegt (2018) on p. 549.
[120] Bouwknegt (2018) p. 552.
[121] Bouwknegt (2018) p. 550.
[122] Bouwknegt (2018) p. 553 and further.

The perpetrator was arrested in 2015. The leading defence attorney questioned if "a witness from Canada was 'really too traumatised to give evidence.'"[123]. The perpetrator was sentenced to life imprisonment in 2017. Before 1998, there had been no knowledge that he lived in the Netherlands.

The case demonstrates that perpetrators of international crimes can end up being tried long after their acts, and that some victims might have an interest in a trial based on universal jurisdiction, even when the territorial state wishes to prosecute the case itself.

In the corridors of the Hague District Court in 2017, one of the victims said she was ready to forgive "through God" and wanted to give the accused a Bible. A man pointed to the courtroom and told her: "I am a humanist. My justice is in there"[124]. In Ethiopia, the perpetrator had already been sentenced to death.

[123] Bouwknegt (2018) p. 556.

[124] Bouwknegt (2018) p. 558-559.

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