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A Journey through the Institute of International Law

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A Journey through the Institute of International Law

SALWA SHKUKANI*

«The peoples of the earth have thus entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in one part of the world is felt everywhere.»[1] *This paper seeks to comprehensively study the concept of universal jurisdiction (UJ) within the sphere of the Institute of International Law. The paper examines UJ in the twenty-first century and reverts to the nineteenth century. In doing so, the author conveys a consistent critical perspective of UJ; questioning its presumed universal nature.*

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1 WITTICH STEPHAN, Immanuel Kant and Jurisdiction in International Law, in: Allen Stephen, Costelloe Daniel, Fitzmaurice Malgosia, Gragl Paul, Guntrip Edward (eds.), The Oxford Handbook of Jurisdiction in International Law, New York 2019, p 91.

Table of contents

I. Introduction

The independence of international law as a discipline disentangled from natural law and diplomacy was marked in the second half of the nineteenth century. This change is synonymous with departing from the province of the philosophers to arrive at the faculties of law.[2] In this time, scientification and professionalization of modern international law started to materialize.

The ray of light manifested in the first scholarly journal of international law «revue de droit international et de législation comparée» in 1869.[3] Afterwards, the light continued to brighten when the *«Institut de Droit International»* (hereinafter: Institute) was founded in 1873 at a meeting at the Ghent Town Hall, Belgium.[4] It was initiated with an invitation letter sent out by ROLIN-JAEQUEMYNS to a group of jurists calling for a *«collective scientific action»* rather than an *«individual scientific action»*.[5]

The aims of this scientific association are expressed explicitly in their Statute and can be summarized as to develop general principles, codify, and promote the progress of international law.[6] A fundamental aspect of the Institute's objectives is, *«striving to formulate the general principles…to correspond to the legal conscience of the civilized world»*.[7] This idea of shaping the legal conscience, plus the motto of the Institute «peace and justice»[8], form the connecting bridge to the destination of this paper – universal jurisdiction (UJ). To this end, UJ and the concept of the legal conscience of the international community are greatly intertwined. This is because UJ, in its essence, is a form of jurisdiction designated to revolve around specific crimes that have shocked the conscience of nations: *«these crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself»*.[9]

The Institute has contributed to the shaping of various international law concepts including UJ. It served as a platform to fuse the expertise of various jurists. As a result, the Institute was able to reveal the impact expertise had and continues to have on international law. This succession of expertise lingers and will be the guiding point to this paper's study of UJ.[10] The concept of UJ remains highly controversial in the area of international criminal law and lacks a specific global convention.[11] Hence, the stage is widely open to scholarly writings to dust off ambiguities and complexities following UJ.[12]

2 ABRAMS IRWIN, The Nobel Peace Prize and the Laureates: An Illustrated Biographical History 1901–2001, Massachusetts 2001, p. 55.

3 ABRAMS (Fn. 2), p. 55.

4 MACALISTER-SMITH PETER, Max Planck Encyclopedia of Public International Law, Institut de Droit international, 2011.

5 ABRAMS (Fn. 2), p. 55.

6 MACALISTER-SMITH (Fn. 4).

7 KOSKENNIEMI MARTTI, The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960, Cambridge 2001, p. 41.

8 ABRAMS (Fn. 2), p. 56.

9 BEIGBEDER YVES, International Justice Against Impunity: Progress and New Challenges, Leiden 2005, p. 47.

10 For example, an almost equivalent successor to the Institute that is present today in the twenty-first century and is specialized in UJ is «The Princeton Project on Universal Jurisdiction». The Project was first held at Princeton University in January 2001 where an assembly of scholars and jurists from around the world gather to contribute to the ongoing development of UJ; International Commission of Jurists, Princeton Principles on Universal Jurisdiction, New Jersey 2001.

11 REYDAMS LUC, Universal Jurisdiction: International and Municipal Legal Perspectives, New York 2003, p. 16–17.

12 ORENTLICHER DIANE, Universal Jurisdiction: A Pragmatic Strategy in Pursuit of a Moralist's Vision, in: Sadat Leila, Scharf Michael (eds.), The Theory and Practice of International Criminal Law: Essays in Honour of M. Cherif Bassiouni, Leiden 2008, p. 150; MAHMOUD CHERIF BASSIOUNI states that he is, «well aware of the po-

The objective of this paper is to study the concept of UJ in the framework of the Institute of International Law. Firstly, the paper separately tackles UJ in the context of the Institute in the twenty-first century (II). Proceeding, the paper separately engages in the historical background of UJ in general; then specifically in the context of the Institute with focus on the long nineteenth century (III). With a critical perspective, this paper then strives to investigate the parts that are not so obvious in historic comparison but are more obscure (IV).

II. Tackling Universal Jurisdiction Today

More recently, the Institute mapped out an overarching resolution on the concept of UJ. In its session held in Krakow on 26th August 2005, the seventeenth commission adopted the resolution on *«Universal Criminal Jurisdiction with regard to the Crime of Genocide, Crimes against Humanity and War Crimes»*, (hereinafter: Resolution).[13]

A. Definition

The Resolution defines UJ in its first paragraph as follows:

«Universal jurisdiction in criminal matters, as an additional ground of jurisdiction, means the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law.»[14]

The definition starts by pointing out the fact that the Resolution will address UJ in criminal matters. This is not to confuse it with civil UJ.[15] It then emphasizes that the principle of UJ is *«an additional ground of jurisdiction»*. Thus, before examining the exceptional principle of UJ, the paper will shortly touch upon the traditional forms of jurisdiction that include (1) the territorial principle, (2) the active personality principle, also known as the nationality principle, (3) the passive personality principle, and (4) the protective principle.[16] (1) The territorial principle is the principle whereby states exercise criminal jurisdiction over crimes committed on their own territory.[17] This basis of jurisdiction is the leading one as it respects the supremacy of a state over its territory.[18] (2) The active personality principle is a well-established principle. It vests a state with jurisdiction to prosecute a person accused of a crime committed abroad due to the fact that the accused is a national of the state.[19] The passive personality and protective principles are more controversial.[20] (3) The passive personality principle permits the home state of the victim of a crime to claim jurisdiction even if the crime took place abroad.[21] (4) While the protective principle gives the state the right to exercise jurisdiction over foreigners who commit or conspire to commit crimes abroad but still affect or threaten the state's security.[22] With one example being

tential influence of jurists in shaping international law».

13 INSTITUT DE DROIT INTERNATIONAL, Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, Krakow 2005, p. 1–2.

14 INSTITUT DE DROIT INTERNATIONAL (Fn. 13), p. 2.

15 VAN SCHAACK BETH, Justice Without Borders: Universal Civil Jurisdiction, in: American Society of International Law, 2005/99, p. 120 et seqq.

16 THOMPSON JUSTICE B., Universal Jurisdiction: The Sierra Leone Profile, 3. ed., The Hague 2015, p. 67.

17 THOMPSON (Fn. 16), p. 67.

18 THOMPSON (Fn. 16), p. 67.

19 THOMPSON (Fn. 16), p. 68.

20 HEINZE ERIC, Waging Humanitarian War: The Ethics, Law, and Politics of Humanitarian Intervention, New York 2009, p. 89.

21 HEINZE (Fn. 20), p. 89.

22 HEINZE (Fn. 20), p. 89.

counterfeit national currency.[23]

Finally, UJ is the most controversial out of all four bases of jurisdiction. It is the state's establishment of jurisdiction over a crime, irrespective of the place of perpetration – *«where the crime was committed»* – nationality of the accused, nationality of the victims, and any other nexus to a forum state's interests.[24] The jurisdiction is rather found on the basis of the nature of the crime committed. Thus, only a limited set of serious crimes activate the right to UJ.[25] In a moral tone, those crimes are so heinous that they do not know any borders; they are usually gross human rights violations.[26] These crimes violate *jus cogens* and activate *erga omnes* obligations.[27] They constitute special criminal offences, attacking the entire international community.[28] The uncontested category of international crimes is clarified by the Resolution in paragraph (3) (a):

«Universal jurisdiction may be exercised over international crimes identified by international law as falling within that jurisdiction in matters such as genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions for the protection of war victims or other serious violations of IHL…»[29]

It is important to mention that there are ongoing debates on whether the list of international crimes should be stretched out more to include other crimes such as terrorism.[30] For example, in *«US v. Yousef and others»*[31], the US Court of Appeal eliminated the possibility that UJ applies to the crime of terrorism.[32]

B. Legal Framework

As UJ falls in the field of international criminal law, its official sources are those of international law. This includes, most importantly, multilateral treaties. Here, some form of UJ can be spotted working hand in hand with the state's obligation to either extradite or prosecute («*aut dedere aut judicare*»).[33] Another source includes customary international law. Customary international law is established when both state practice and *opinio juris* are apparent.[34] This is reflected in paragraph (2) of the Resolution:

«Universal jurisdiction is primarily based on customary international law. It can also be established under a multilateral treaty in the relations between

23 HEINZE (Fn. 20), p. 89.

24 O'KEEFE ROGER, Universal Jurisdiction: Clarifying the Basic Concept, in: Cassese Antonio, Jeßberger Florian, Cryer Robert, Dé Urmila (eds.), International Criminal Law: Critical Concepts in Law, 4. ed., Oxford and New York 2015, p. 34.

25 VAN DER WOLF W.J., Prosecution and Punishment of International Crimes by National Courts, The Hague 2011, p. 4.

26 INAZUMI MITSUE, Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law, 19. ed., Antwerp/Oxford 2005, p. 3.

27 BASSIOUNI MAHMOUD C., International Crimes: Jus Cogens and Obligations Erga Omnes, in: Law and Contemporary Problems, 1996/59, p. 63 et seqq.

28 CASSESE ANTONIO, Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction, in: Cassese Antonio, Jeßberger Florian, Cryer Robert, Dé Urmila (eds.), International Criminal Law: Critical Concepts in Law, 4. ed., Oxford and New York 2015, p. 64.

29 INSTITUT DE DROIT INTERNATIONAL (Fn. 13), p. 2.

30 TRAPP KIMBERLEY N., Jurisdiction and State Responsibility, in: Allen Stephen, Costelloe Daniel, Fitzmaurice Malgosia, Gragl Paul, Guntrip Edward (eds.), The Oxford Handbook of Jurisdiction in International Law, 2019, p. 358–360.

31 Decision of US District Court for the Southern District of New York «United States v. Yousef», 927 F. Supp. 673 of 1996.

32 CASSESE (Fn. 28), p. 63.

33 ROHT-ARRIAZA NAOMI/FERNANDO MENAKA, Universal Jurisdiction, in: Brown Bartram (ed.), Research Handbook on International Criminal Law, Glos and Massachusetts 2011, p. 360.

34 COHEN MIRIAM, Realizing Reparative Justice for International Crimes: From Theory to Practice, Padstow 2020, p. 173.

the contracting parties…»[35]

Investigating the legal basis for the international crimes that undergo UJ is of great importance. First, *The Convention on the Prevention and Punishment of the Crime of Genocide* of 1948 did not encompass UJ with respect to genocide.[36] Article VI limits the prosecution of the crime of genocide to the territorial state and international courts.[37] However, now implementing UJ over crimes of genocide has become part of customary international law widely confirmed by the International Court of Justice (ICJ), the European Court of Human Rights, and national jurisprudence.[38]

Second, with regards to grave breaches of international humanitarian law (IHL), the four Geneva Conventions were a breakthrough for incorporating UJ.[39] Paragraph (2) of articles 49/50/129/146 is common in all four conventions.[40] In addition to treaty law, the Geneva Convention rules have become part of customary international law.

Third, until this moment, there is no comprehensive treaty on all the crimes against humanity.[41] There are some crimes that are specifically regulated through a treaty such as the *International Convention on the Suppression and Punishment of the Crime of Apartheid* of 1973.[42] Also, the *International Convention for the Protection of All Persons from Enforced Disappearance* (CED) of 2006 now explicitly points out to UJ in art. (9/2).[43] Finally, art. (5/2) in *the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment* (UNCAT) of 1984 pins down UJ.[44] However, regardless of an absence of an international treaty, crimes against humanity are subject to UJ in accordance to customary international law.[45]

Noteworthy, CED and UNCAT require the presence of the offender on their territory to start up with UJ. This brings up the dominant distinction between *conditional* UJ and *pure*, *true*, *classical*, and *properly so called* UJ, also known as UJ *in absentia*.[46] Conditional UJ requires the custody of the accused by the state while UJ *in absentia* works with the absence of the accused.[47] The legitimacy of UJ *in absentia* is not settled yet but rather in constant flux.[48]

Adjacent to treaty and customary law, soft law as well has contributed towards UJ through United Nations General Assembly (UNGA) Resolutions and Special Rapporteur Reports.[49]

C. Rationale

In one of the scenes of the film *Marathon Man* an old woman recognizes Dr. Szell a former Nazi at the other side of the street.[50]

35 INSTITUT DE DROIT INTERNATIONAL (Fn. 13), p. 2.
36 GRANT PHILIP, National Prosecution of International Crimes and Universal Jurisdiction, in: Kolb Robert, Scalia Damien (eds.), Droit international pénal: précis, Basel 2012, p. 594–595.
37 GRANT (Fn. 36), p. 594–595.
38 GRANT (Fn. 36), p. 594–595.
39 GRANT (Fn. 36), p. 595.
40 GRANT (Fn. 36), p. 595.
41 GRANT (Fn. 36), p. 597–598.
42 GRANT (Fn. 36), p. 597–598.
43 GRANT (Fn. 36), p. 601.
44 GRANT (Fn. 36), p. 599.
45 GRANT (Fn. 36), p. 598.
46 O'KEEFE (Fn. 24), p. 42.
47 O'KEEFE (Fn. 24), p. 41–42.
48 O'KEEFE (Fn. 24), p. 39–49; EL ZEIDY MOHAMED M., Universal Jurisdiction In Absentia: Is it a Legal Valid Option for Repressing Heinous Crimes?, in: The International Lawyer, 2003/37, p. 835 et seqq.
49 ROHT-ARRIAZA/FERNANDO (Fn. 33), p. 361; International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind, New York 1996, p. 3.
50 MÉGRET FRÉDÉRIC, The elephant in the room in debates about universal jurisdiction: diasporas, duties of hospitality, and the constitution of the political, in: Transnational Legal Theory 2015/6, p. 89 et seqq.

She approaches him and starts to scream: *«My God, stop him! He's a murderer»*, and no one seems to notice her in a street full of pedestrians.[51] This short cinematic meeting between the victim of a crime and her perpetrator in a distant location explains the need for the existence of UJ.[52]

As the preamble of the Resolution declares, *«wishing therefore to contribute to the prevention and suppression of such crimes with a view to putting an end to impunity»*.[53] Thus, in a domino effect, the benefits behind UJ start with the aim to combat and ultimately terminate impunity so that perpetrators do not enjoy safe havens.[54] It continues to deter, prevent, reattribute, and ultimately enhance justice.[55] Importantly, UJ ends with solace and redress to victims and their families who go in search for justice abroad when they cannot find justice at home.[56]

D. Conditions and Provisions

UJ is governed by a set of conditions and provisions. This part will extract those conditions and provisions from the Institute's Resolution and outline them accordingly.

1. Universal Jurisdiction *in Absentia*

Paragraph (3) (b) of the Resolution reads:

«Apart from acts of investigation and requests for extradition, the exercise of universal jurisdiction requires the presence of the alleged offender in the territory of the prosecuting State...»[57]

Accordingly, the Institute has adopted a middle ground with regards to UJ *in absentia*.[58] It has made a clear distinction between both investigations and requests for extradition on one hand and trials on the other hand.[59] The Resolution has granted states the ability to conduct investigations *in absentia*. This might consequently lead to extradition requests for the state where the suspect is found, while it excludes the exercise of trials *in absentia*.[60]

2. Subsidiarity Principle

Paragraph (3) (c) of the Resolution affirms:

«Any State having custody over an alleged offender should, before commencing a trial on the basis of universal jurisdiction, ask the State where the crime was committed or the State of nationality of the person concerned whether it is prepared to prosecute that person, unless these States are manifestly unwilling or unable to do so. It shall also take into account the jurisdiction of international criminal courts.»[61]

This is a narrowed down version of UJ that is basically conditioned and mitigated.[62] UJ is seen as a *reserve tool* in the battle against im-

51 MÉGRET (Fn. 50), p. 90.
52 MÉGRET (Fn. 50), p. 90.
53 INSTITUT DE DROIT INTERNATIONAL (Fn. 13), p. 1.
54 BASSIOUNI MAHMOUD C., Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice, in: Virginia Journal of International Law, 2001/42, p. 81 et seqq., p. 82.
55 BASSIOUNI (Fn. 54), p. 97.
56 ROTH KENNETH, The Case for Universal Jurisdiction, in: Foreign Affairs, 2001/80, p. 150 et seqq.
57 INSTITUT DE DROIT INTERNATIONAL (Fn. 13), p. 2.
58 KRESS CLAUS, Universal Jurisdiction over International Crimes and the Institut de Droit international, in: Journal of International Criminal Justice, 2006/4, p. 1 et seqq.
59 KRESS (Fn. 58), p. 16–19.
60 KRESS (Fn. 58), p. 16–19.
61 INSTITUT DE DROIT INTERNATIONAL (Fn. 13), p. 2.
62 MOODRICK-EVEN KHEN HILLY, Revisiting Universal Jurisdiction: The Application of the Complementarity Principle by National Courts and Implications for Ex-Post Justice in the Syrian Civil War, in: Emory International Law Review, 2015/30, p. 261 et seqq.

punity.[63] The subsidiarity principle entails that the territorial state that is willing and able to prosecute has priority in exercising jurisdiction.[64] In proficient terms it can be explained as the paper quotes:

«To prevent normative conflict as a result of overlapping jurisdictional claims, the international community should agree on procedures that circumscribe single states' unilateralist instincts. Subsidiarity is a procedural tool for this. Subsidiarity requires that bystander states defer to efforts made by other states that have a stronger link to the situation, while allowing them to protect global goods or values which states having a stronger regulatory link fail to address.»[65]

The subsidiarity principle makes UJ more convenient from a policy and practical perspective.[66] From a policy perspective, it highly takes into consideration the sovereignty of states.[67] Additionally, it is suitable for practice because it gives priority to the venue where the evidence is found; thus, saving a lot of time and resources.[68] Yet, the subsidiarity principle should be handled carefully. An excessively restrictive approach to it can cause the risk of cases being neglected in the state they took place. For example, Germany did not exercise UJ against DONALD RUMSFELD, the United States Defence Secretary, over alleged acts of torture committed by the US military under his responsibility in Iraq.[69] The prosecutor concluded that, based upon the principle of subsidiarity, Germany was not competent.[70] He explained that generally, *«allegations against low-ranking soldiers were already under investigation in the United States».*[71] In the end, DONALD RUMSFELD was neither prosecuted by Germany nor by the United States of America.[72]

3. Fair Trail Standards

Paragraph (4) of the Resolution reads as follows:

«Any State prosecuting an alleged offender on the basis of universal jurisdiction is bound to comply with the generally recognized standards of human rights and international humanitarian law.»[73]

As there can be lawless or corrupt judicial systems, due process issues must be anticipated.[74] Additionally, many countries lack judicial independence and have politicized judiciaries.[75] The case of the former Chadian president HISSÈNE HABRÉ, who committed crimes of sexual slavery, rape and ordered thousands of political killings and systematic tortures, demonstrates this aspect.[76] HABRÉ had escaped to Senegal when in 2000, he was indicted by a Senegalese court based upon UJ.[77] However, later the Senegalese Supreme Court decided that he could not be tried in the country.[78] There were many reasons to create suspension that the HABRÉ

63 HUMAN RIGHTS WATCH, Universal Jurisdiction in Europe The State of the Art, New York 2006, p. 32.
64 HUMAN RIGHTS WATCH (Fn. 63), p. 28.
65 RYNGAERT CEDRIC, Universal Jurisdiction over International Crimes and Gross Human Rights Violations, in: Capaldo Giuliana (ed.), The Global Community Yearbook of International Law and Jurisprudence 2015, 2016, p. 275 et seqq.
66 RYNGAERT (Fn. 65), p. 279.
67 RYNGAERT (Fn. 65), p. 279.
68 RYNGAERT (Fn. 65), p. 279.
69 HUMAN RIGHTS WATCH (Fn. 63), p. 32–33.
70 HUMAN RIGHTS WATCH (Fn. 63), p. 32–33.
71 HUMAN RIGHTS WATCH (Fn. 63), p. 32–33.
72 HUMAN RIGHTS WATCH (Fn. 63), p. 32–33.
73 INSTITUT DE DROIT INTERNATIONAL (Fn. 13), p. 2.
74 MORRIS MADELINE H., Universal Jurisdiction in a Divided World: Conference Remarks, in: New England Law Review, 2001/35, p. 337 et seqq., p. 352–354.
75 MORRIS (Fn. 74), p. 352–354.
76 BRODY REED, Chad: The Victims of Hissène Habré Still Awaiting Justice, 17. vol., New York 2005, p. 15.
77 BRODY (Fn. 76), p. 1.
78 BRODY (Fn. 76), p. 1.

case was actually dismissed due to political interference with the judiciary.[79]

4. International Assistance and Cooperation

Paragraph (5) of the Resolution declares the following:

«States should, where appropriate, assist and cooperate with each other in detecting, investigating, gathering evidence, arresting and bringing to trial persons suspected of having committed international crimes...»[80]

This so called *«mutual legal assistance»* had developed from what was known as «letters rogatory»; this is defined as, «*a comity-based system of requests for assistance with the taking of evidence*».[81] In the meantime, it is mostly treaty based and includes a vast range of measures.[82] In Europe, the basic multilateral instrument is the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters.[83]

5. Sovereign Immunities

Paragraph (6) of the Resolution emphasizes the following:

«The above provisions are without prejudice to the immunities established by international law.»[84]

As it is well-established under international law, current or former heads of states, heads of governments and ministers enjoy immunity from criminal jurisdictions.[85] An illustration of the clash between sovereign immunities and UJ is obvious in the *«Case Concerning Certain Criminal Proceedings in France»* (*Republic of the Congo v. France*).[86] In 2002, an application was filed to the ICJ by the Republic of Congo against France.[87] It was seeking to annul the investigation and prosecution procedures started by the French judicial authorities.[88] The Congo's reasoning was explained as follows:

«…alleged violation of the criminal immunity of a foreign Head of State – an international customary rule recognized by the jurisprudence of the Court.»[89]

This debate whether sovereign immunities should prevail such grave breaches is ongoing. In certain instances, sovereign immunity prevailed as with the Arrest Warrant case (*Democratic Republic of the Congo v. Belgium*) ruling.[90] However, in others, the gravity of breaches by state officials was able to penetrate the sovereign immunity veil. Such a rare case was the PINOCHET landmark case.[91]

E. International Criminal Court and Other Tribunals v. Domestic Courts

One of the founding members of the Institute, GUSTAVE MOYNIER, was famous for

79 MORRIS (Fn. 74), p. 353–354.
80 INSTITUT DE DROIT INTERNATIONAL (Fn. 13), p. 2.
81 VAN DER WOLF (Fn. 25), p. 188–190.
82 VAN DER WOLF (Fn. 25), p. 188–190.
83 VAN DER WOLF (Fn. 25), p. 188–190.
84 INSTITUT DE DROIT INTERNATIONAL (Fn. 13), p. 2.
85 THALMANN VANESSA, Reasonable and effective universality: conditions to the exercise by national courts of universal jurisdiction over international crimes, Geneva 2018, p. 22.
86 INTERNATIONAL COURT OF JUSTICE, Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v. France) Summary, The Hague 2003, p. 1–8.
87 INTERNATIONAL COURT OF JUSTICE (Fn. 86), p. 1.
88 INTERNATIONAL COURT OF JUSTICE (Fn. 86), p. 1.
89 INTERNATIONAL COURT OF JUSTICE (Fn. 86), p. 1.
90 ROTH-ARRIAZA NAOMI, Universal Jurisdiction: Steps Forward, Steps Back, in: Leiden Journal of International Law, 2004/17, p. 375 et seqq., p. 385.
91 WUERTH INGRID, Pinochet's Legacy Reassessed, in: The American Journal of International Law, 2012/106, p. 731 et seqq.

proposing the idea of a permanent international criminal court in the nineteenth century.[92] However, it was not until 2002 that the awaited International Criminal Court (ICC) was established. Particularly, the ICC's complementarity principle makes it a court of last resort.[93] UJ by national courts can step in to fight impunity when the ICC fails. The first reason is the short arm of the ICC, only reaching states which have ratified the Rome Statute.[94] In such a scenario, there is an exceptional feature that allows the UNSC to refer the case to the ICC even for non-member states.[95] However, the ICC may reach an impasse if the United Nations Security Council (UNSC) was blocked by a veto from one of the powerful five permanent members – as witnessed with Syria.[96] Secondly, ICC's temporal jurisdiction only covers the crimes committed after 1 July 2002.[97] Thirdly, the ICC particularly prosecutes those who bear the greatest responsibility only, addressing highly ranked leaders.[98] This refutes arguments abandoning UJ of domestic courts as if the ICC is a substitute that fully replaces it. The Institute in its Resolution accurately reflects the above: *«conscious of the importance of international judicial bodies entrusted with the suppression of international crimes».*[99]

Moreover, due to the limitations of the ICC, one can advocate for ad hoc tribunals like the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY). Both which were established through the UNSC.[100] Another option would be hybrid tribunals such as the Special Court of Sierra Leone, Lebanon, or Cambodia.[101] Those alternative forums also face some obstacles.[102] The political will and high expenses required for such ad hoc and hybrid tribunals make the probability of their establishment unlikely.[103] Thus, in many instances, UJ through national courts remains the only option.

This chapter examined UJ in the present twenty-first century within the confines of the Institute's 2005 Resolution. The crimes subject to UJ in the present tense cover genocide, war crimes, and crimes against humanity. While in the past, the crimes subject to UJ differed; evolving from piracy.

III. Historical Background: The Nineteenth Century

This part will explore the origins of the concept of UJ, focusing on the long nineteenth century. The historical premises on which UJ was built are somewhat shaky. In other words, the evolution of this concept is not a result of a linear and direct progressive process.

92 HALL CHRISTOPHER KEITH, The First Proposal for a Permanent International Criminal Court, in: International Review of the Red Cross, 1998/38, p. 57 et seqq.
93 VAN DER WOLF (Fn. 25), p. 1.
94 ROTH (Fn. 56); for example, Syria, Yemen and other States are outside the scope of the ICC where grave breaches of international law have been committed.
95 AMERICAN BAR ASSOCIATION, Universal Jurisdiction: Its Successes, Failures and Opportunities to Hold Perpetrators of Human Rights Violations Accountable, 2019.
96 AMERICAN BAR ASSOCIATION (Fn. 95).
97 HUMAN RIGHTS WATCH, Basic Facts on Universal Jurisdiction Prepared for the Sixth Committee of the United Nations General Assembly, New York 2009.
98 REDRESS, Universal Jurisdiction.
99 INSTITUT DE DROIT INTERNATIONAL (Fn. 13), p. 1.
100 GRANT (Fn. 36), p. 583.
101 GRANT (Fn. 36), p. 583.
102 ROHT-ARRIAZA/FERNANDO (Fn. 33), p. 366.
103 ROHT-ARRIAZA/FERNANDO (Fn. 33), p. 366.

A. Piracy

«The crime of Piracy, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to Sir Edward Coke, hostis humani generis. …declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self- defence, to inflict that punishment upon him…»[104]

The most prominent and classical precursor to UJ, apparent in most literature, is the piracy hypothesis.[105] It can be traced back to MARCUS CICERO who drew a line between piracy and the civilized Roman.[106] However, this does not mean that the concept of UJ was at that point equipped to deal with the Cilician pirates.[107] As a continuation to Cicero's perception, ALBERICO GENTILI, HUGO GROTIUS, and EMER DE VATTEL had a substantial impact on the development of UJ and its connection to piracy.[108] Pirates were deemed as the enemies of all humankind *«hosits humani generis».*[109]

Despite the general agreement between scholars on piracy being the predecessor of UJ, critics rise arguments that question the validity of this analogy.[110] It might seem as inappropriate because of its peculiar characteristics for two reasons.[111] First, pirates practiced their evil acts on the high seas.[112] The high seas, as *res omnium communes*, are not under the territorial jurisdiction of any state.[113] Second, for piracy to constitute a crime, it is only narrowed to private actors of private ships and for private gains.[114] Thus, they are not associated with the state's sovereignty.[115] All of this leads to the conclusion that jurisdiction over piracy is justified and uncontroversial – unlike the concept of UJ today – because it does not overstep the sovereignty of any state.[116] In 1927, the dissenting opinion of Judge JOHN MOORE in the Lotus case[117] heard by the Permanent Court of International Justice (PCIJ) eloquently mirrored this distinct nature of piracy by stipulating that piracy in its jurisdictional aspects is truly *sui generis.*[118]

Another argument by both EUGENE KONTOROVICH and ALFRED RUBIN doubts that piracy was considered a heinous crime.[119] Thus, it urges for piracy not be perceived in parallel with modern heinous crimes of UJ, such as genocide, war crimes, and crimes against humanity.[120] This questioning of the heinous nature of piracy is evident by the Somali pirates' example. None of the countries calling for prosecution of foreign war criminals were willing to prosecute a dozen Somali pirates captured by the Dutch Navy.[121] It was as if no one was outraged by letting go of those *hosits humani generum.*[122]

104 NEOCLEOUS MARK, The Universal Adversary: Security, Capital and 'The Enemies of All Mankind', Abingdon/New York 2016, p. 118.
105 CHADWICK MARK, Piracy and the Origins of Universal Jurisdiction: On Stranger Tides?, Leiden 2019, p. 83.
106 CHADWICK (Fn. 105), p. 83.
107 CHADWICK (Fn. 105), p. 83.
108 CHADWICK (Fn. 105), p. 83.
109 CHADWICK (Fn. 105), p. 83–84.
110 CHADWICK MARK, Opinio Juris, Emerging Voices: Theorising Universal Jurisdiction–Time to Reappraise the «Piracy Analogy»?, 2019.
111 REYDAMS (Fn. 11), p. 58.
112 REYDAMS (Fn. 11), p. 58.
113 REYDAMS (Fn. 11), p. 58.
114 REYDAMS (Fn. 11), p. 58.
115 REYDAMS (Fn. 11), p. 58.
116 REYDAMS (Fn. 11), p. 58.
117 Decision of The Permanent Court of International Justice «France v. Turkey», No. 10 of 1927.
118 REYDAMS (Fn. 11), p. 58.
119 GOULD HARRY D., The Legacy of Punishment in International Law, New York 2010, p. 87–88.
120 GOULD (Fn. 119), p. 87–88.
121 REYDAMS LUC, The rise and fall of universal jurisdiction, in: Schabas William, Bernaz Nadia (eds.), Routledge Handbook of International Criminal Law, Oxon and New York 2011, p. 350.
122 REYDAMS (Fn. 121), p. 350.

Regardless of the various doubts regarding the historical extension of the UJ over piracy analogy; piracy remains a key pillar in the development of UJ. There are countless proofs on how the analogy is widely accepted in modern international law. One of the examples of UJ, where it was utilized as the backbone of the case, is the famous trail of the former Nazi ADOLF EICHMANN in Israel in 1961.[123]

B. Slave Trade and Slavery

«Piracy and slave trading are the prototypical offenses that any state can define and punish because pirates and slave traders have long been considered the enemies of all humanity.»[124]

The attempts towards the suppression and abolition of international slave trade, similar to the piracy analogy, are building blocks aiding in the rise of UJ. Numerous treaties surpass the piracy analogy in claiming slave trade to be piracy *per se*.[125] These include mainly the 1815 *Declaration of the Congress of Vienna*, the 1841 *Treaty for the Suppression of the African Slave Trade*, and its successor, the 1862 *Treaty for the Suppression of the Slave Trade*.[126]

As in the case of piracy, slave trade and its past connection to UJ was also subject to the judgments of critics. As seen from the aforementioned treaties, the jurisdiction over slave traders is based upon bilateral and narrow multilateral treaties in contrast to customary law being the main regulator of piracy.[127] The issue that arises is linked to the basic principle of treaty law *pacta tertiis nec nocent nec prosunt*.[128] In accordance with the *Vienna Convention on the Law of Treaties*, treaties by their nature are not universal but rather restricted, as they are only binding upon the signatory parties.[129] Thus, it is argued that slave trade did not create UJ per se, but rather these conventions created a realm of shared jurisdiction solely among the member states.[130] KONTOROVICH emphasized this by stating: *«the use of formal treaties shows that international custom did not recognize a right of third-party nations to prosecute slave traders»* and *«none of the treaties provided for universal jurisdiction…»*[131]

Despite these uncertainties surrounding the historical ties between treaty-based prohibition of slave trade and the evolution of UJ, slave trade prohibition had a substantial impact. This can be proven with various texts that endorse slave trade as a crime subject to UJ. The separate Opinion of Judge ABDUL KOROMA concludes, *«together with piracy, universal jurisdiction is available for certain crimes…including the slave trade and genocide»*.[132] This comes in addition to domestic legislation that provide for UJ in relation to slave trade such as the penal codes of Cameroon, Costa Rica and Austria.[133]

In distinction between slave trade and slavery, it must be noted that UJ was initially directed at the deterrence from slave trade and not the institution of slavery itself.[134] For

123 CHADWICK (Fn. 105), p. 231; Decision of District Court of Jerusalem Justice «Attorney General of the Government of Israel v. Adolf Eichmann», No. 40/61 of 1961.

124 NANDA VED P., Exercising Universal Jurisdiction over Piracy, in: Scharf Michael, Newton Michael, Sterio Milena (eds.), Prosecuting Maritime Piracy: Domestic Solutions to International Crimes, Cambridge 2015, p. 61.

125 GOULD (Fn. 119), p. 89.

126 GOULD (Fn. 119), p. 89.

127 GOULD (Fn. 119), p. 91.

128 LIIVOJA RAIN, Treaties, custom and universal jurisdiction, in: Liivoja Rain, Petman Jarna (eds.), International Law Making: Essays in Honour of Jan Klabbers, 2014, p. 302.

129 LIIVOJA (Fn. 128), p. 301.

130 GOULD (Fn. 119), p. 90.

131 GOULD (Fn. 119), p. 90.

132 ORENTLICHER (Fn. 12), p. 132.

133 THALMANN (Fn. 85), p. 186–190.

134 HAJJAR LISA, Universal jurisdiction as praxis: An option to pursue legal accountability for super-

example, Britain was a promoter of UJ – giving it some control over the sea – in order to ban the seaborne transport of African slaves to other continents.[135] The dominant concern of the state was to fight labor cost advantages of slave based economies, and not the support of the slave rights.[136] However, with regards to antislavery campaigns, their effect on the appearance of the concept of UJ is still critical, but less obvious than that of slave trade.[137] Those antislavery movements, countering the suffering and repression of slaves in Belgian Congo and the Americas, were considerate of strangers due to a sense of *«shared humanity»*.[138] In that sense, UJ, although distinct, is at the same time related to the evolving concept of the responsibility to protect.[139] It calls for the international community to help the state protect the wellbeing of those on its territory, for example through military humanitarian intervention.[140] This idea of shared humanity is the core essence of UJ.

C. Humanitarianism of Warfare

«Such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.» [141]

In the nineteenth century, the idea of humanity and humanitarian law strongly arose. The *Lieber Code* (Instructions for the Government of Armies of the United States in the Field) applied in the American Civil War was the first attempt to codify the laws of war.[142] It specifically rules regarding *jus in bello.*[143] The author of this code is FRANCIS LIEBER, an American-German jurist and professor at Columbia University.[144]

A key pillar of the code is the balance between military necessity and humanity. Art. (16) of the code affirms that, *«military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge … [and] does not include any act of hostility which makes return to peace unnecessarily difficult»*.[145] It also distinguishes between enemy soldiers and irregular enemies.[146] Enemy soldiers are defined as soldiers whose actions are inside the boundaries of the soldiers' competence.[147] Irregular enemies are defined in accordance to art. (82) as:

«Men, or squads of men, who commit hostilities…without being part and portion of the organized hostile army…»[148]

Enemy soldiers are granted the status of prisoners of war when captured under art. (49).[149] By contrast, irregular enemies shall be *«treated summarily as high robbers and pirates».*[150] As such, irregular enemies do not enjoy the protection of the law and are rather labeled as *outlaws*, since their activities

power torturers, in: Sarat Austin, Hussain Nasser (eds.), When Governments Break the Law: The Rule of Law and the Prosecution of the Bush Administration, New York 2010, p. 89.

135 HAJJAR (Fn. 134), p. 89.

136 HAJJAR (Fn. 134), p. 89.

137 HAJJAR (Fn. 134), p. 90.

138 HAJJAR (Fn. 134), p. 90.

139 INTERNATIONAL JUSTICE RESOURCE CENTER, Universal Jurisdiction.

140 INTERNATIONAL JUSTICE RESOURCE CENTER (Fn. 139).

141 LILLIAN GOLDMAN LAW LIBRARY, General Orders No. 100: The Lieber Code – Instructions for the Government of Armies of the United States in the Field, Connecticut 2008.

142 BARTROP PAUL R./TOTTEN SAMUEL, Dictionary of Genocide, 2. ed., Connecticut 2008, p. 260.

143 BARTROP/TOTTEN (Fn. 142), p. 260.

144 BARTROP/TOTTEN (Fn. 142), p. 260.

145 LILLIAN GOLDMAN LAW LIBRARY (Fn. 141).

146 O'SULLIVAN AISLING, Universal Jurisdiction in International Criminal Law: The Debate and the Battle for Hegemony, Abingdon/New York 2017, p. 40–41.

147 O'SULLIVAN (Fn. 146), p. 40–41.

148 LILLIAN GOLDMAN LAW LIBRARY (Fn. 141).

149 LILLIAN GOLDMAN LAW LIBRARY (Fn. 141).

150 LILLIAN GOLDMAN LAW LIBRARY (Fn. 141).

are not linked to any state.[151] Consequently, based upon the piracy analogy, the Lieber Code formulates an exceptional jurisdiction for irregular enemies to be under the jurisdiction of the capturing party – regardless of nationality and other connections.[152] In the American Civil War, this is reflected by the Union of Armed Force's assertion that they are eligible to prosecute irregular enemies for crimes outside state territory notwithstanding any legal nexus to the offence or offender.[153] This idea of prosecution in the absence of any nexus to the offence or offender is highly comparable to the basic concept and foundations of UJ, and can be seen as a precursor.

D. Sovereignty Blockade and the Contribution of the Institute

To summarize, notions of piracy, slave trade and the humanitarianism of warfare all result in the embryo of UJ. Although the complete maturity of the modern concept of UJ was not witnessed at that time, the aforementioned notions constitute the fundamental triggers for UJ.

Besides the piracy analogy, a domestic law analogy is presented with regards to UJ.[154] In a civil wrong where an injury has taken place, the aggrieved person must personally sue the wrongdoer.[155] However, for example in the case of a murder or robbery, the state prosecutes on behalf of all the citizens.[156] This is because all citizens of the community have an interest in the prosecution of the perpetrator.[157] Thus, in a similar manner, in relation to international crimes of high gravity, all states have an interest in prosecuting the perpetrator and not merely the state that has a direct link.[158]

The long nineteenth century did not see much of UJ due to the sovereignty barrier. The most prominent principles of the nineteenth century were those of sovereign equality, self-determination, and non-intervention. Constituting the peak of the Westphalian state,[159] it was the age of nationalism and building of the *«Nation State»*.[160] In this setting, the application of UJ is in constant clash with national sovereignty, as both concepts are alien to each other.[161] However, WIN-CHIAT LEE explains how UJ actually fits comfortably with the idea of sovereignty.[162] The author calls upon a crucial reminder that sovereignty, legitimacy and authority given to a state are conditional.[163] If a state sponsors or condones crimes against individuals, especially its own citizens, it signals a malfunction, making it lose its exclusive legitimate authority to prosecute the perpetrators of those crimes on its territory and in relation to its nationals.[164] An interesting simile in LEE's argument is that, *«the situation is like the fox put in charge of guarding the henhouse. After preying on the*

151 O'SULLIVAN (Fn. 146), p. 41–42.
152 O'SULLIVAN (Fn. 146), p. 41–42.
153 O'SULLIVAN (Fn. 146), p. 41–42.
154 INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, Hard Cases: bringing human rights violators to justice abroad – a guide to universal jurisdiction, Versoix 1999, p. 5.
155 INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY (Fn. 154), p. 5.
156 INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY (Fn. 154), p. 5.
157 INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY (Fn. 154), p. 5.
158 INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY (Fn. 154), p. 5.
159 MACFARLANE NEIL/SABANADZE NATALIE, Sovereignty and self-determination: Where are we?, in: International Journal, 2013/68, p. 609 et seqq., p. 624.
160 MACFARLANE/SABANADZE (Fn. 159), p. 614.
161 KÖCHLER HANS, Global Justice or Global Revenge? International Criminal Justice at the Crossroads, Austria 2003, p. 17.
162 LEE WIN-CHIAT, International Crimes and Universal Jurisdiction, in: May Larry, Hoskins Zachary (eds.), International Criminal Law and Philosophy, 2009, p. 17–18.
163 LEE (Fn. 162), p. 19.
164 LEE (Fn. 162), p. 29.

hens, the fox needs to be dealt with, but not by the fox itself».[165] So universality in this case, as ANTONIO CASSESE explains, operates as a default jurisdiction.[166]

The second argument for stepping over sovereignty is explained by MAHMOUD CHERIF BASSIOUNI:

«Normative universalist position, which recognizes the existence of certain core values that are shared by the international community. These values are deemed important enough to justify overriding the usual territorial limitations on the exercise of jurisdiction.»[167]

In its 1883 session in Munich, the Institute adopted a resolution on criminal jurisdiction entitled *«règles relatives aux conflits des lois pénales en matière de compétence»*.[168] The territorial principle was dominant in the resolution as reflected in art. (1).[169] The resolution mirrors the nineteenth century style of respecting the absolute sovereignty of states.[170]

At the same time, the resolution has a substantial impact on UJ.[171] It submits that when the territorial state is unidentifiable or extradition is unattainable, the custodial state should have criminal jurisdiction.[172] To elaborate, CARL LUDWIG VON BAR and EMILIO BRUSA cite examples of when extradition is unattainable.[173] First, the territorial state is *«not civilized»*, as the offender would encounter *«barbaric justice»* if extradited.[174] Second, the territorial state is in a *«state of revolution»*, making the extradition of the offender *«dangerous»*.[175]

Where extradition is unfeasible, the custodial state's jurisdiction is complementary and subsidiary to the state with closer connections to the crime.[176] In other words, it is a last resort jurisdiction.[177] This is specifically stipulated in art. (10):

«Every Christian State, which has custody over an offender may try and punish him when not withstanding prima facie evidence of a serious crime and culpability, the locus delicti cannot be determined, or when the extradition of the culprit, even to his home State, is not granted […] or is considered dangerous…»[178]

Subsequently, several countries endorsed a narrow version of UJ in their domestic legislation with the contours introduced by the Institute in the previous resolution.[179] With regards to the underlying logic on which this resolution was passed, the Institute split into two sides.[180] The first group claimed that a state's right to punish in such a case is extracted from its obligation to maintain internal order since having an unpunished criminal on its territory is a threat to its internal security.[181] Meanwhile, the second group built its rational upon natural law and the concept of universal justice.[182]

The role of the Institute extending beyond the nineteenth century and entering the beginning of the twentieth century is allocata-

165 LEE (Fn. 162), p. 29.
166 CASSESE (Fn. 28), p. 65.
167 ORENTLICHER (Fn. 12), p. 146.
168 INSTITUT DE DROIT INTERNATIONAL, Règles relatives aux conflits des lois pénales en matière de compétence, Munich 1883, p. 1–4.
169 O'SULLIVAN (Fn. 146), p. 46.
170 O'SULLIVAN (Fn. 146), p. 46.
171 SOARES PATRICIA P., Article 17 of the Rome Statute of the International Criminal Court: Complementarity – Between Novelty, Refinement and Consolidation, in: Bergsmo Morten, Ling Cheah, Tianying Song, Ping Yi (eds.), Historical Origins of International Criminal Law, 4. ed., 2015, p. 297.
172 SOARES (Fn. 171), p. 297.
173 REYDAMS (Fn. 11), p. 30.
174 REYDAMS (Fn. 11), p. 30
175 REYDAMS (Fn. 11), p. 30
176 SOARES (Fn. 171), p. 297.
177 SOARES (Fn. 171), p. 297.
178 SOARES (Fn. 171), p. 297.
179 SOARES (Fn. 171), p. 298.
180 SOARES (Fn. 171), p. 298.
181 SOARES (Fn. 171), p. 297.
182 SOARES (Fn. 171), p. 297.

ble through two texts. First, on 3 August 1931, the Institute held a session in Cambridge and issued the *Resolution on the Conflict of Penal Laws with respect to Competence*.[183] Art. (5) is closely linked to UJ:

«Every State has the right to punish acts committed abroad by a foreigner who is found on its territory, provided these acts violate general interests protected by international law (such as piracy, trade in negroes, trade in white women, propagation of contagious diseases, attacks on international communications means and destruction of undersea cables, counterfeiting of currency and securities, etc.) if extradition of the accused is not requested or if the territorial State of nationality of the offender do not accept an extradition offer.»[184]

This 1931 text significantly expands the scope of criminal jurisdiction in comparison to its earlier 1883 resolution.[185] Art. (5) gives every state the right to prosecute foreign individuals that committed offences abroad if the following conditions are met: (i) the perpetrator is present on its territory (ii) the acts constituted an offence against general interests protected by international law.[186] Second, the *«déclaration des droits internationaux de l'homme»* does not explicitly discuss UJ. However, it is of high relevance due to UJ and human rights being intertwined. On 12 October 1929, in its session held in New York, this declaration on *«the Universal Rights of Man»* was drafted by ANDRÉ MANDELSTAM.[187] It was evident that, *«he was particularly adamant in stressing the importance of the Declaration as testimony to the end of absolute state sovereignty»*.[188]

Moving away from the nineteenth century towards the twentieth and twenty-first century, UJ becomes more crystalized.[189] A globalized world requires a global jurisdiction.[190]

IV. A Critical Vision of Contemporary Universal Jurisdiction

Today, the concept of UJ is being under scrutiny and questioned by many. As MAHMOUD CHERIF BASSIOUNI points out, the gap between legal expectations and legal realities is perpetual.[191] The optimal expectation of UJ in wanting to terminate impunity and spread justice is legitimate. But will this legal expectation be in harmony with the legal reality? And «will universal jurisdiction prosecutions lead to jurisdictional imperialism?»[192] Others phrase the inquiry as *«post-colonial injustice or universal jurisdiction?»*[193]

Jurisdictional imperialism is used to point out the concern that the majority of UJ prosecutions are taking place in European courts.[194] They are mainly set in Austria, Belgium, Denmark, Finland, France, Germany, Netherlands, Norway, Spain, Sweden, Switzerland and the United Kingdom.[195]

183 INSTITUT DE DROIT INTERNATIONAL, Le conflit des lois pénales en matière de compétence, Cambridge 1931, p. 1–2.

184 REYDAMS (Fn. 11), p. 37.

185 O'SULLIVAN (Fn. 146), p. 57.

186 O'SULLIVAN (Fn. 146), p. 57.

187 INSTITUT DE DROIT INTERNATIONAL, Déclaration des droits internationaux de l'homme, New York 1929, p. 1–2.

188 AUST HELMUT P., From Diplomat to Academic Activist: André Mandelstam and the History of Human Rights, in: European Journal of International Law, 2014/25, p. 1105 et seqq., p. 1114.

189 REYDAMS (Fn. 121), p. 338.

190 REYDAMS (Fn. 121), p. 338.

191 ORENTLICHER (Fn. 12), p. 150.

192 INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY (Fn. 154), p. 20.

193 SCHIMMELPENNINCK VAN DER OIJE PITA J. C., A Surinam Crime Before a Dutch Court: Post-Colonial Injustice or Universal Jurisdiction?, in: Leiden Journal of International Law , 2001/14, p. 455 et seqq.

194 INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY (Fn. 154), p. 20–21.

195 INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY (Fn. 154), p. 20–21.

While most of those prosecuted are from developing countries.[196] The reasons that have reinforced this phenomenon include: (1) In recent years, a major part of the gravest human rights violations occurred in developing countries.[197] (2) Western countries are more likely to possess the adequate resources and legal structures to deal with UJ prosecutions.[198] In contrast, (3) developing countries face multiple obstacles, such as those in African domestic courts.[199] Some of the drawbacks when addressing UJ by African courts may include: lack of technical expertise in international criminal law, shortage in funding levels, inadequate domestic laws managing international crimes, and lack of political will to prosecute and lack of judicial independence.[200] Yet, this imbalance can cause the risk of curtailing the legitimacy of UJ and its claim to be universal in nature.[201] This critical vision will be conveyed on both the international and national level.

It might be argued that UJ approaches senior officials from non-African countries and even powerful countries such as the United States of America and Israel.[202] Examples include: TZIPI LIVINI, GEORGE H. BUSH, ARIEL SHARON, DONALD RUMSFELD and AMOS YARON.[203] However, this argument can be rebutted by LUC REYDAMS distinction between *«virtual cases»* (those in the media) and *«hard cases»* (those in courts).[204] He refers to the above-mentioned examples as *«virtual cases»*, as they more or less produce headlines and diplomatic chaos, but not tangible outcomes.[205] In contrast, *«hard cases»* are those cases that actually have tried dozens of individuals, mainly in Europe, for horrors committed abroad.[206] The majority of those cases are for crimes committed in former Yugoslavia and Rwanda.[207] This distinction between *«virtual»* and *«hard»* cases strongly highlights the *«small fry v. big fish»* problem.[208] Obviously, *«hard cases»* have been directed towards small fry unlike *«virtual cases»* that targeted big fish.[209] The former prosecutor in the ICTY noted that the ICC Prosecutor is confronted with a challenge; the same applies to states exercising UJ, *«to choose from many meritorious complaints the appropriate ones for international intervention, rather than to weed out weak or frivolous ones»*.[210] Although arrest warrants have been issued against non-African personalities, most of them were not executed due to political pressure.[211] To circumvent

196 INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY (Fn. 154), p. 20–21; LANGER MÁXIMO, The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes, in: The American Society of International Law, 2011/105, p. 1 et seqq.; LA ROSA ANNE-MARIE, Preventing and repressing international crimes: towards an «integrated» approach based on domestic practice: report of the third Universal Meeting of National Committees on International Humanitarian Law, 2. ed., Geneva 2014, p. 123–131.

197 INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY (Fn. 154), p. 20–21.

198 INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY (Fn. 154), p. 20–21.

199 VENTURA MANUEL/BLEEKER AMELIA, Universal Jurisdiction, African Perceptions of the International Criminal Court and the New AU Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, in: Ankumah Evelyn (ed.), The International Criminal Court and Africa: One Decade On, Cambridge 2016, p. 452.

200 VENTURA/BLEEKER (Fn. 199), p. 452.

201 INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY (Fn. 154), p. 20–21.

202 REYDAMS (Fn. 121), p. 348.

203 REYDAMS (Fn. 121), p. 348.

204 REYDAMS (Fn. 121), p. 348.

205 REYDAMS (Fn. 121), p. 348.

206 REYDAMS (Fn. 121), p. 347–348.

207 REYDAMS (Fn. 121), p. 347–348.

208 REYDAMS (Fn. 121), p. 350.

209 REYDAMS (Fn. 121), p. 350.

210 ZEMACH ARIEL, Reconciling Universal Jurisdiction with Equality before the Law, in: Texas International Law Journal, 2011/47, p. 143 et seqq., p. 152.

211 MANDO BRIGHT, Challenging the Universal Jurisdiction Norm, in: Coleman Katharina, Tieku Thomas (eds.), African Actors in Interna-

UJ, suspected officials from powerful states were granted special mission or temporary diplomatic status by some European nations.[212] All of this creates the risk of UJ generating *«show trials»*, as argued by MARTTI KOSKENNIEMI and PÄIVI LEINO, *«when criminal law and diplomacy meet, the result is likely to be either undermining diplomatic freedom of action – or turning criminal justice into show trials»*.[213]

Additionally, there are other dangerous consequences recognized by the International Council on Human Rights:

«If all such prosecutions occur in western countries, and deal mainly with offenders from the developing world, will this be a credible means of enforcing international law? If prosecutors shy away from the big fish and only investigate those who followed orders, will this enhance or undermine support for the rule of law?»[214]

Zooming in, the prosecution of Rwandan genocidaires in Belgium and of AUGUSTO PINOCHET in Spain are prosecutions of crimes committed on the territory of a state's former colony.[215] Also, the case of DESIRÉ BOUTERESE of Suriname in the Netherlands might have left an impression of post-colonialism and a politically motivated case.[216] The reason behind this is the historical ties whereas Suriname was a former Dutch colony.[217] Adding to that is the Arrest Warrant case before the ICJ between the Democratic Republic of the Congo (DRC) and Belgium. Briefly, an arrest warrant for international crimes was issued by a Belgian investigating judge against the DRC's incumbent Minister of Foreign Affairs.[218] Judge FRANCISCO REZEK's opinion was expressed as follows, *«[i]t is not without reason that the Parties before the court have discussed the question of how certain European countries would react if a judge from the Congo indicted their officials for crimes supposedly committed in Africa»*.[219] This takes on a neo-colonial impression with Judge ad hoc SAYEMAN BULA-BULA criticizing the basis of UJ as an intervention by Belgium in its former colony.[220] More precisely, in his separate opinion, Judge ad hoc BULA-BULA stipulates that UJ is «*variable geometry*» jurisdiction, selectively exercised against some states to the exclusion of others.[221] Adding to that, HANS KÖCHLER believes that:

«It should not be overlooked that Belgium was the colonial power in the Congo and that, during colonial rule, Belgian officials were responsible for the commission of serious crimes against the population of that country. Because of the country's colonial past, the judicial system of Belgium simply may not enjoy the credibility that is required to handle a case of this nature.»[222]

This view of HANS KÖCHLER in the above quote, is comprehensible with the perspective of the *«clean hands»* doctrine.[223]

Moving on, the former President of the ICJ,

tional Security: Shaping Contemporary Norms, 2018, p. 199.

212 MANDO (Fn. 211), p. 199–200.

213 O'SULLIVAN AISLING, A Return to Stability? Hegemonic and Counter-Hegemonic Positions in the Debate on Universal Jurisdiction in Absentia, in: Handmaker Jeff, Arts Karin (eds.), Mobilising International Law for 'Global Justice', 2018, p. 163–164.

214 INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY (Fn. 154), p. 49.

215 REYDAMS (Fn. 11), p. 225.

216 SCHIMMELPENNINCK VAN DER OIJE (Fn. 193), p. 474.

217 SCHIMMELPENNINCK VAN DER OIJE (Fn. 193), p. 472.

218 KITTICHAISAREE KRIANGSAK, The Obligation to Extradite or Prosecute, New York 2018, p. 204–205.

219 VAN DER WOLF (Fn. 25), p. 118.

220 VAN DER WOLF (Fn. 25), p. 118.

221 KITTICHAISAREE (Fn. 218), p. 206–207.

222 KÖCHLER (Fn. 161), p. 98.

223 RYNGAERT CEDRIC, Cosmopolitan Jurisdiction and the National Interest, in: Allen Stephen, Costelloe Daniel, Fitzmaurice Malgosia, Gragl Paul, Guntrip Edward (eds.), The Oxford Handbook of Jurisdiction in International Law, New York 2019, p. 224.

Judge GILBERT GUILLAUME, in the Arrest Warrant case (*Democratic Republic of the Congo v. Belgium*) criticizes allowing the states to exercise UJ without any constraints:[224]

«*To do this would, moreover, risk creating total judicial chaos. Encourage the arbitrary for the benefit of the powerful…*»[225]

One carefully examining, those cases can provocatively show that the exercise of UJ is not as straightforward as it appears from a far distance.[226] It can be seen as potentially oriented in the special interest of states.[227] UJ has been criticized for its use in view of political gains instead of legal interests.[228] For example, in the AU's Assembly session in 2013, one of the heads of state mentioned, *«some European countries threaten African leaders with arrest under the universal jurisdiction norm particularly when an African country is changing its diplomatic and economic ties with them»*.[229] Put another way: UJ can be manipulated in order to shame other states or to influence their policies.[230] In such a scenario, there might be a national interest to prosecute perpetrators through UJ.[231] However, the basis on which said UJ builds is inappropriate.[232]

Even with the Rwandan government recording the involvement of some French officials in the Rwandan genocide, no arrest warrants were issued against any of them.[233] This notion of double standards was not only sensed by African countries. Testament to this is the reaction of the Chilean president, EDUARDO FREI, to the British authorities' arrest in 1998.[234] Based on a request by Spain, the arrest was that of the former Chilean president, AUGUSTO PINOCHET in 1998.[235] Frei expresses, *«if the Spanish judges were so keen to prosecute heinous crimes abroad, had they not done so in relation to abuses committed during Spain's own civil war?»*[236]

Thus, Africa is not solely affected by the double standards. It is rather clear, that UJ is generally put into force by powerful states against less powerful states.

There is more evidence to support a critical approach to UJ. One route follows the explanation of how some states were forced, under political pressure, to amend their domestic legislation.[237] The two national legislations that contain a considerably broad notion of universality were those of Belgium and Spain.[238] Unfortunately, their broadness was significantly reduced.[239]

Belgium, which is known to be the capital of UJ, was demanded to amend its expansive legislation by various foreign governments. They especially included powerful ones, whose officials had been named in criminal complaints before Belgian courts.[240] For example, the former Prime Minister of Israel, ARIAL SHARON, had a complaint filed against him in Belgium for war crimes, crimes against humanity, and genocide during the 1982 Israeli invasion of Lebanon.[241]

224 INTERNATIONAL COURT OF JUSTICE, Separate Opinion of President Guillaume, The Hague 2002, p. 43.
225 INTERNATIONAL COURT OF JUSTICE (Fn. 224), p. 43, Para. 15.
226 RYNGAERT (Fn. 223), p. 225.
227 RYNGAERT (Fn. 223), p. 225.
228 MANDO (Fn. 211), p. 199.
229 MANDO (Fn. 211), p. 199.
230 MANDO (Fn. 211), p. 199.
231 RYNGAERT (Fn. 223), p. 225.
232 RYNGAERT (Fn. 223), p. 225.
233 MANDO (Fn. 211), p. 199.
234 ARCHIBUGI DANIELE/PEASE ALICE, Crime and Global Justice: The Dynamics of International Punishment, Cambridge/Massachusetts 2018, p. 80.
235 ARCHIBUGI/PEASE (Fn. 234), p. 80.
236 ARCHIBUGI/PEASE (Fn. 234), p. 80.
237 CASSESE (Fn. 28), p. 62.
238 CASSESE (Fn. 28), p. 62.
239 CASSESE (Fn. 28), p. 62.
240 ORENTLICHER (Fn. 12), p. 128; MURPHY SEAN D., U.S. Reaction to Belgian Universal Jurisdiction Law, in: The American Journal of International Law, 2003/97, p. 984 et seqq.
241 ROHT-ARRIAZA/FERNANDO (Fn. 33), p. 364.

There also was a case against the former US President and other officials for their bombing acts in Bagdad during the 1991 Gulf War.[242] Lastly, Belgian courts trialed cases against US officials for their acts committed during the 2003 US invasion of Iraq.[243] In 2003, the United States of America, with Defence Secretary DONALD RUMSFELD, threatened Belgium of losing its status as the headquarters of the North Atlantic Treaty Organization (NATO) by moving it from Brussels to Warsaw.[244] The Belgian *1993/99 Act Concerning Grave Breaches of International Humanitarian Law* was twice subject to change in 2003.[245] In April 2003, the exercise of UJ was made conditional on a decision by the Belgian Federal Prosecutor.[246] Furthermore, the Minister of Justice was assigned the power to hand in the case to a foreign competent court or to the ICC.[247] In August, the Belgian law completely wiped out UJ.[248] It only kept the active and passive nationality principles; in addition, to the principle of legal residence in Belgium for a minimum of three years.[249] In addition, Germany stepped away from exercising its UJ authority granted through its criminal laws and from holding DONALD RUMSFELD accountable for torture.[250] This happened despite the submission of very strong incriminating evidence to the prosecutor.[251] Although it did not change its laws, Germany, for similar political reasons avoided this case.[252]

Moreover, Spain placed new restrictions on UJ in both 2009 and 2014, due to diplomatic pressures directed from China, Israel and the United States.[253] The second Spanish reform of UJ followed the release of an arrest warrant for five Chinese officials accused of genocide against Tibetan people.[254] As a similar echo to Belgium's legal reform on UJ, the Spanish Parliament required a tie to Spain or its interests in order to proceed.

The most powerful countries in the world have again safeguarded themselves. With a safety blanket from UJ, they successfully pushed foreign governments to adjust their national laws, making it almost impossible for powerful leaders to be subject to UJ. Based on state practice to this day, UJ does not reconcile with the principle of equality before the law.[255] Although it *«holds out the promise of greater justice»*.[256] Yet even its greatest supporters are aware that, *«this weapon against impunity is potentially beset by incoherence, confusion, and, at times, uneven justice»*.[257]

All of this signals a siren for an urgent reform that is dependent on the depoliticization and on contouring it to become compatible with the principle of equality before the law. As the Institute's 2005 Resolution sets out, *«the jurisdiction of States to prosecute crimes committed by non-nationals in the territory of another State must be governed by clear rules in order to ensure legal certainty»*.[258]

To encapsulate, the project of UJ is facing tension between the moralist stand, on one side, prioritizing the prevention of impunity.[259] Where the formalist stand, on the other side, prioritizes avoiding abusive, arbitrary or discriminatory UJ.[260] As actions speak louder

242 ROHT-ARRIAZA/FERNANDO (Fn. 33), p. 364.
243 HAJJAR (Fn. 134), p. 100.
244 HAJJAR (Fn. 134), p. 100.
245 CASSESE (Fn. 28), p. 62.
246 CASSESE (Fn. 28), p. 62.
247 CASSESE (Fn. 28), p. 62.
248 CASSESE (Fn. 28), p. 62–63.
249 CASSESE (Fn. 28), p. 62–63.
250 FALK RICHARD, Achieving Human Rights, New York/Abingdon 2009, p. 32.
251 FALK (Fn. 251), p. 32.
252 FALK (Fn. 251), p. 32.
253 ARCHIBUGI/PEASE (Fn. 235), p. 96.
254 ARCHIBUGI/PEASE (Fn. 235), p. 96.
255 ZEMACH (Fn. 210), p. 143.
256 ZEMACH (Fn. 210), p. 143.
257 ZEMACH (Fn. 210), p. 143.
258 INSTITUT DE DROIT INTERNATIONAL (Fn. 13), p. 1.
259 O'SULLIVAN (Fn. 213), p. 166.
260 O'SULLIVAN (Fn. 213), p. 166.

than words, all of the above concerns and condemnations around the abusive application of UJ have materialized. On the 11th AU-EU Ministerial Troika meeting, it was stated that:[261]

«Ministers discussed and underlined the necessity to fight impunity in the framework of international law…The African side stated that there are abusive applications of the principle which could endanger international law…Ministers agreed to continue discussions on the issue and to set up a technical ad hoc expert group to clarify the respective understanding on the African and EU side on the principle of universal jurisdiction…»[262]

In 2008, the African Union (AU) and the European Union (EU) found a team of independent experts and established the *AU-EU Technical ad hoc Expert Group on the Principle of Universal Jurisdiction*.[263] The team's objective is to work on making various recommendations on the improvement of the application of UJ, in order for it to be balanced and to keep away from any bias.[264] Moreover, the issue reached the agenda of the UNGA.[265] In 2011, the Sixth Committee of the UNGA set up *The Working Group on the Scope and Application of the Principle of Universal Jurisdiction*.[266] As observed with the Institute, once again, the expertise cycles in shaping international law.

V. Conclusion

A different side of international law was opened up by UJ, one not typically viewed. This leads to the proposition that law is not absolute in creating justice – but in some instances, can facilitate it. In the twenty-first century, international law is usually criticized for being *«hegemonic international law»*. This is mainly due to the various forms of sovereign inequalities that are being pursued. Out of the many forms of sovereign inequalities and asymmetrical relations witnessed in this century one most prominent is that attached to the implementation of UJ. A critical vision of its application shows how this universal principle may discriminate between perpetrators from powerful states and perpetrators from less powerful states. To this extent, some draw a post-colonial path out of this experience. UJ also is not able to escape the political trap. In other words, that is to say, *«[p]olitical considerations, power, and patronage will continue to determine who is to be tried for international crimes and who not»*.[267] In conclusion, the law is sometimes misused or is applied in an ultra vires manner. This especially is the case when it is unduly oppressed by politics and diplomacy. In certain instances, justice and equality before the law are being sacrificed and traded for the sake of politics and diplomatic relationships between states.[268]The lesson to be conveyed is that law should be constantly observed with an attentive eye. As in a blink, if lacking the good faith standard, the same law that was spreading peace and justice can suddenly be executed to give out biased and opposite results. A difficult question to be answered is where and when we draw the line between law that is applied in a just or unjust way. It leads us to always question: «*how universally applied are those universal concepts of international law when so many exclusions are taking place?*»

261 RELIEFWEB, AU–EU technical ad hoc expert group on the principle of universal jurisdiction: Report, 2009.
262 RELIEFWEB (Fn. 261).
263 KITTICHAISAREE (Fn. 218), p. 210.
264 KITTICHAISAREE (Fn. 218), p. 210.
265 KITTICHAISAREE (Fn. 218), p. 210.
266 KITTICHAISAREE (Fn. 218), p. 213.
267 CRYER ROBERT, International criminal justice in historical context: the post–Second World War trails and modern international criminal justice, in: Boas Gideon, Schabas William, Scharf Michael (eds.), International Criminal Justice: Legitimacy and Coherence, Glos and Massachusetts 2012, p. 168.
268 ARCHIBUGI/PEASE (Fn. 235), p. 96.