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Reasonable and effective universality : conditions to the exercise by
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Droit
international

Vanessa Thalmann

Reasonable and effective universality

Conditions to the exercise by national
courts of universal jurisdiction over
international crimes



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DE GENÈVE
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Vanessa Thalmann

Reasonable and effective universality



Droit international

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Foreword

Paola Gaeta

Within the past decades, the question of whether national jurisdictions can prosecute international crimes based on the basis of the so-called principle of universality has sparked a vivid debate in diplomatic and academic circles. The arrest in London of General Augusto Pinochet for crimes committed in Chile while he was in power, further to a Spanish warrant issued on the basis of universal criminal jurisdiction, is the main event at the origin of this debate. Supporters of universal criminal jurisdiction argue that the latter is a crucial tool for bringing to justice perpetrators of serious crimes under international law and to close the so-called 'impunity gap'. The reason is clear. These are crimes that exhibit a sort of 'system criminality', in that they are normally perpetrated by state officials with the acquiescence, tolerance, or support of the authorities of the state. Domestic prosecutions in the state where the crimes have been committed or of nationality of the perpetrators are therefore unlikely. The expansion of the reach of national criminal jurisdiction on the basis of the principle of universal criminal jurisdiction would instead allow persons allegedly responsible for these crimes to be brought on to the docket. The more so if one considers that there is no international criminal court or tribunal that has automatic and mandatory jurisdiction over international crimes, independently of where they are committed or by whom. At the same time, there are commentators who claim that universal criminal jurisdiction risks of being used as a political tool against former foreign senior political leaders. They also claim that prosecutions of cases concerning serious crimes under international law based on universal jurisdiction are rare and have mainly taken place in western countries. In most cases they were brought against so-called 'low-cost defendants', namely former Nazis, or Rwandans, or former Yugoslavs, namely persons accused of crimes the repression of which was already decided by the Security Council through the establishment of ICTY and ICTR, or persons not 'protected' by their state of nationality. The only major exception to this pattern is the case brought in Senegal against Hissène Habré: this is the first trial based on universal criminal jurisdiction that has been brought in an African country against a former foreign head of state for charges of international.

The debate on universal criminal jurisdiction, however, has only sparsely focused on the conditions for its 'reasonable' exercise. The present book fills this gap, by examining national legislations, case law and practice on four issues that are relevant to the 'reasonable' exercise of universal criminal jurisdiction: i) respect for the legality principle, ii) the presence of the suspect on the territory of the forum state, iii) respect for the subsidiarity principle (as regards the more

concerned state(s) and the international criminal court), and iv) the initiation of universal jurisdiction proceedings by the prosecuting authority or by victims. The analysis is preceded by a discussion on the notion of universal jurisdiction, the relevance of the treaty-clauses on containing the *aut dedere aut prosequi/iudicare* obligation, and the crimes which potentially come under the purview of universal criminal jurisdiction.

The view point of this book is of a national criminal lawyer who analyses universal criminal jurisdiction as a tool of the system to fight against impunity, without forgetting that this it is integrated in the national criminal justice system of the forum state. This specific angle makes this book an important reference to understand the complexities of universal criminal jurisdiction from a legal perspective. In addition, the book relies on an impressive number of sources and material and therefore is an indispensable reference to all those who want to understand the state of art in national criminal legislations and case law on the aforementioned key issues concerning the application of universal criminal jurisdiction. The book also triggers new ideas, and raises a variety of stimulating questions for further research. Overall, in this book Vanessa Thalmann seeks to attain the goal of supporting the fight against impunity also through recourse to universal criminal jurisdiction, without losing sight of the fundamental principles of liberal criminal justice national systems. She certainly attained her goal.

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Introduction

I. The aim of the study

The recent conviction by a Senegalese court of Hissène Habré¹, the former president of Chad, for torture, war crimes and crimes against humanity committed in the 1980s, is not only a victory for Hissène Habré's victims, who have been fighting to bring him to justice for 25 years² but is also a landmark judgment for universal jurisdiction. That is to say, it is the first time in the world in which the national courts of one country have prosecuted and convicted the former ruler of another state for alleged human rights crimes committed in the latter as well as the only case to date in Africa in which the courts of one African country have used the principle of universal jurisdiction to prosecute the former ruler of another African country.

Universal jurisdiction is a highly controversial topic and has been the subject of many contributions by legal scholars at the international level. It was included in the agenda of the Sixth Committee of the General Assembly of the United Nations and has given rise to the adoption of many international and regional instruments.³ However, somewhat surprisingly, it remains quite unknown and absent from legal debates at the national level. This may be because the mere notion that a third state can prosecute and punish a foreign citizen for a crime committed outside its territory against another foreign citizen, when this state has no personal interest, reflects in fact a quite unique situation. Why would one resort to such a mechanism?

¹ He was sentenced to life in prison on 30 May 2016. 93 witnesses were heard and testified about torture, rape, sexual slavery, mass executions, and the destruction of entire villages.

² See Human Rights Watch, *Chad's Ex-Dictator Convicted of Atrocities*, 30 May 2016, available online at <https://www.hrw.org/news/2016/05/30/chads-ex-dictator-convicted-atrocities> (last visited 1 August 2017).

³ See inter alia African Union, *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*, Doc. Assembly/AU/14(XI), 11th session, Assembly of the African Union, Sharm El-Sheikh, Egypt; Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, September 2001; Amnesty International, *International Criminal Court: The Failure of States to Enact Effective Implementing Legislation*, AI Index: IOR 40/019/2004, 31 August 2004; Amnesty International, *Ending Impunity: Developing and Implementing a Global Action Plan Using Universal Jurisdiction*, 2009; Council of the European Union, *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, Brussels, 16 April 2009; FIFDH and Redress, *Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union*, December 2010; Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art*, Vol. 18, No. 5(D) (2006); *The Princeton Principles on Universal Jurisdiction* (2001).

3

Following the second World War and the creation of the International Military Tribunal (IMT) and the International Military Tribunal for the Far East, we have seen, in the context of the ex-Yugoslavia and Rwanda, the emergence of an era of ad hoc international criminal tribunals, including the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) and a number of hybrid tribunals, such as the Special Court for Sierra Leone and the Special Tribunal for Lebanon. While these courts have generated immense progress in the fight against impunity, they have also been subject to controversy because of their status as “ad hoc” tribunals created by the United Nations. Moreover, they have been costly and their jurisdiction remains limited to specific conflicts. On the basis of the foundations laid down by the ICTY and the ICTR, it seemed that the international community was ready for a permanent international court. However, as essential as it has been, it has taken the International Criminal Court (ICC) more than ten years to reach its first conviction. The ICC remains a court of last resort, built to deal with those *most responsible* for the gravest international crimes. Lower-level perpetrators of grave international crimes can only be held responsible with the help of national jurisdictions. Universal jurisdiction is thus a useful tool in “filling the impunity gap” between, on the one hand, the cases tried by territorial states and other states under the active, passive or protective jurisdictions, where there is an unwillingness or an inability of these states to prosecute, and, on the other, the very limited number of cases which are or can be investigated and prosecuted by international courts.⁴ As one scholar rightly points out, “the impunity gap is immense and there is an air of unreality in much of the discussion by governments and academics about its scope”.⁵ Firstly, the ICC can only investigate and prosecute crimes of genocide, crimes against humanity and war crimes. It does not have jurisdiction over other international crimes such as torture, enforced disappearances, extrajudicial executions or, as has become more significant recently, terrorism. Secondly, the ICC has limited temporary jurisdiction.⁶

⁴ See C. Hall, ‘The Role of Universal Jurisdiction in the International Criminal Court System’, in Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 201-232, at 214. There were (and still are) of course other international criminal courts; these include ICTY, the ICTR as well as the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon and the War Crimes of the Court of Bosnia and Herzegovina. However, these courts have a limited geographic and temporal jurisdiction. Most of them have either ceased to operate or will soon cease to operate.

⁵ Hall, *supra* note 4, at 214.

⁶ It only has jurisdiction over crimes committed before the entry into force of the Rome Statute on 1 July 2002; it does not have jurisdiction over crimes committed before the entry into force of the Rome State for each Member State and before the period recognized in the Article 12(3) declaration, providing for ICC jurisdiction.

Thirdly, the ICC does not have jurisdiction for crimes committed in the territory of states which have neither ratified the Rome Statute nor made declarations after those dates if the accused is not a national of a State Party, unless the Security Council has referred the situation to the Prosecutor. This leaves a considerable number of cases where the ICC does not have jurisdiction; in these cases, if the territorial/national state does not prosecute, the only option left in order to avoid impunity is the exercise of universal jurisdiction. According to one scholar, less than one tenth of one per cent of the more than several million individuals suspected of grave international crimes since the 1930s have been investigated or prosecuted in international or national courts.⁷

As most states have functioning criminal proceedings, prosecution offices and tribunals in place, the question then arises as to why they are not used to prosecute international crimes. Our analysis of domestic legislation shows that many efforts have been made at the domestic level to implement international crimes and universal jurisdiction legislation. However, prosecutions and convictions remain a rare occurrence. How can the international community work towards a better and yet reasonable use of what Antonio Cassese called this “*idée magnifique de la compétence universelle*”,⁸ which, “together with the exercise of international criminal courts and tribunals”, constitutes the “only alternative to the impunity resulting from insistence on jurisdiction by the territorial or national state”⁹

Many commentators have discussed the political pros and cons of universal jurisdiction. Others have underlined the numerous practical and evidence-related obstacles that exist. A review of the legal literature shows that some legal issues raised by the exercise of universal jurisdiction have been thoroughly debated; this includes in particular the issue of whether – from an international viewpoint – a link with the prosecuting state exercising such jurisdiction should exist. One author has focussed on the conceptual aspect of universal jurisdiction in international criminal law.¹⁰ Few contributions, however, have systematically examined the existing law in the various states and the legal issues that have been raised in domestic courts precisely in relation to this type of jurisdiction. It goes without saying that the exercise of universal jurisdiction is subject to many political and practical obstacles. However, it is our contention

⁷ Hall, *supra* note 4, at 216.

⁸ A. Cassese, ‘L’incidence du droit international sur le droit interne’, in Cassese and Delmas-Marty (eds), *Juridictions nationales et crimes internationaux* (Paris : Presses universitaires de France, 2002) 555-566, at 559.

⁹ A. Cassese, ‘Foreword to Symposium on the ‘Twists and Turns of Universal Jurisdiction’, 4 *Journal of International Criminal Justice* (2006) 559-560, at 559; See also A. Cassese, *Realizing Utopia: The Future of International Law* (Oxford: OUP, 2012), at 142 and 682.

¹⁰ A. O’Sullivan, *Universal Jurisdiction in International Law: The Debate and the Battle for Hegemony* (New York: Routledge, 2017).

that, aside from the political and practical challenges to which universal jurisdiction gives rise, the uncertainty and flaws regarding the legal conditions of the exercise of universal jurisdiction also contribute to the small number of prosecutions and convictions.

6

The aim of this study is to propose a comprehensive national legal framework for the effective and reasonable exercise of universal jurisdiction, which allows states to fulfil their international obligations to prosecute and punish the gravest human rights violations, while respecting other states' sovereignty and preserving the rights of each individual to a fair criminal prosecution and trial. The study focuses on the legal conditions underpinning the exercise of universal criminal jurisdiction over international crimes.

II. The scope of the study

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One of the first questions that arises when addressing the issue of universal jurisdiction concerns the body of crimes subject to universal jurisdiction. Indeed, in order for states to exercise universal jurisdiction in accordance with international law, the crimes over which they have the right – or the duty – to exercise it must be determined. Today, it is generally recognized that states have a right – if not a duty – to assert universal jurisdiction over core crimes and torture. In addition, there are a number of crimes, which are not necessarily conceived of as international crimes proper, but which can be qualified as “transnational” crimes and which are subject to treaty-based universal jurisdiction. Moreover, there are a number of international crimes whose status as international crimes subject to universal jurisdiction under international customary law remains uncertain. It is submitted, for instance, that piracy is a crime subject to universal jurisdiction but is not an international crime. It is also submitted that international terrorism is not (yet) a crime subject to universal jurisdiction because of the lack of a generally-accepted definition.¹¹ It has been argued that other crimes, such as slavery or human trafficking and enforced disappearances, are in the process of being (or should be) categorized as international crimes subject to universal jurisdiction. The issue of apartheid is more controversial.¹² The Apartheid Convention is highly contentious; until today, it has still not been ratified by a majority of western states. Furthermore, no trial or conviction for the crime of apartheid has ever occurred and national

¹¹ Some specific terrorist acts are however subject to universal jurisdiction according to numerous treaties.

¹² See R. Clark, 'Apartheid', in Bassiouni (ed.), *International Criminal Law* (3rd edn., Leiden: Martinus Nijhoff Publisher, 2008) 599-600.

courts do not appear to consider it a crime subject to universal jurisdiction.¹³ Other crimes may in the future come to constitute international crimes subject to universal jurisdiction. One can think of serious crimes against the environment¹⁴ or public health-related crimes. On the contrary, as is shown in Part II, which provides an overview of national legislation regarding universal jurisdiction, a number of domestic laws provide for universal jurisdiction over “ordinary crimes”, i.e. crimes that are not international crimes subject to universal jurisdiction under international law, thereby giving rise to a number of issues with regard to state sovereignty. However, due to the vast scope of this topic, the question of which international crimes today constitute international crimes subject to universal jurisdiction under international customary law will not be addressed in detail in this study.

The exercise of criminal jurisdiction (whether at an international or domestic level) over international crimes poses numerous challenges or “impediments”.¹⁵ This is especially the case concerning the exercise of extraterritorial jurisdiction by national courts, and even more so in respect of universal jurisdiction. The main legal obstacles to the exercise of criminal jurisdiction are: 1) rules granting amnesty for crimes, 2) statutes of limitations, 3) immunities and 4) the prohibition of double jeopardy.¹⁶ Other legal impediments have been identified; these include pardon and abuse of process.¹⁷ These legal impediments may prevent the prosecution of international crimes both at the national and international level. This thesis will not focus on these general legal obstacles to the prosecution of international crimes, which are not limited to universal jurisdiction, even though, as we will see below, they may also restrict the exercise of universal jurisdiction and limit its effectiveness.

8

¹³ In a decision of the United States Court of Appeals, *Khulumani*, 2007, it was held that the US could not exercise subject matter jurisdiction for claims made by South African apartheid victims against foreign corporate defendants of Foreign Relations Law; the court held that “apartheid has not been recognized as an offense subject to the exercise of universal jurisdiction”, available online at www.icrcr.org (last visited 1 August 2017).

¹⁴ See F. Mégret, ‘The Problem of an International Criminal Law of the Environment’, 36(2) *Columbia Journal of Environmental Law* (2011) 195-257.

¹⁵ See Cassese et al., *Cassese’s International Law* (3rd ed., Oxford: OUP, 2013) 309-325; Y. Naqvi, *Impediments to Exercising Jurisdiction over International Crimes* (The Hague: T.M.C. Asser Press, 2010).

¹⁶ *Ibid.* and M. Delmas-Marty, ‘La responsabilité pénale en échec (prescription, amnistie, immunités)’, in Cassese and Delmas-Marty, *Crimes internationaux et juridictions internationales* (Paris : Presses Universitaires de France, 2002) 613-652.

¹⁷ On pardons and abuse of process as legal impediments to the exercise of jurisdiction over international crimes, see Naqvi, *Impediments to Exercising Jurisdiction over International Crimes* (2010), 149-182 and 329-362.

9

This study is concerned with an earlier stage in the proceedings, namely the necessary conditions for a state to assert this type of jurisdiction. The analysis of state legislation and practice has led to the identification of four (potential) conditions to the exercise of universal criminal jurisdiction over international crimes: 1) the respect for the legality principle, 2) the need for the presence of the suspect on the territory of the prosecuting state, 3) the respect for the subsidiarity principle (in respect of the more concerned state(s) and the international criminal court), and 4) the initiation of universal jurisdiction proceedings by the prosecuting authority or by victims.

10

The distinction between the above-mentioned legal impediments to prosecution and these legal conditions may appear somewhat blurry. Indeed, reports and legal scholarship often address them together. However, unlike the legal obstacles, which may potentially restrict any prosecution (national or international) of international crimes, the conditions analyzed in this study are specific to the exercise of universal jurisdiction. Furthermore, in our view, a conceptual distinction exists between, on the one hand, the pre-conditions and legal framework of universal jurisdiction – or put differently, the scope and applicability of the universal jurisdiction principle –, and, on the other, the bars to prosecution that could be referred to as exceptions to jurisdiction. In other words, a state must have jurisdiction before one can examine whether possible bars to prosecution exist. Rather than focusing on all the possible obstacles to the exercise of universal jurisdiction, this study examines what conditions – if any – are required for a state to apply universal jurisdiction. On a more practical level, a comprehensive analysis of all conditions and obstacles to the exercise of universal jurisdiction, which would include all possible bars to national prosecutions, generally understood, would render the scope of this study too wide and quasi unlimited. This is all the more true since these impediments (immunities, amnesties, statutes of limitations, *ne bis in idem*) have been and remain the subject of much debate at the international level. In addition, these general impediments have been the focus of many legal studies, both as a whole¹⁸ and with regard to each specific impediment,¹⁹ especially

¹⁸ See Naqvi, *Impediments to Exercising Jurisdiction over International Crimes* (2010); Cassese et al., 'Legal Impediments to the Exercise of Criminal Jurisdiction', in Cassese, *Cassese's International Criminal Law* (3rd ed., Oxford: Oxford University Press, 2013) 309-325; Delmas-Marty, 'La responsabilité pénale en échec (prescription, amnistie, immunités)', in Cassese and Delmas-Marty (eds), *Crimes internationaux et juridictions internationales* (Paris: Presses Universitaires de France, 2002) 613-652.

¹⁹ On amnesties, see inter alia F. Z. Ntoubandi, *Amnesty for Crimes Against Humanity Under International Law* (Leiden: Martinus Nijhoff Publishers, 2007); Dugard, 'Dealing with Crime of a Past Regime. Is Amnesty Still an Option?', 12 *Leiden Journal of International Law* (1999) 1001-1015; On *ne bis in idem* see inter alia L. Trigeaud, 'La règle ne bis in idem devant les juridictions pénales internationales', in Puechavy (dir.), *Le principe "ne bis in idem"* (Brussels: Bruylant [etc.], 2012).

immunities.²⁰ In the last part of this introduction, we will present the impediments that are of particular relevance in the context of universal jurisdiction; this category includes immunities, amnesties and the problem of double jeopardy, as these jurisdictional obstacles have been the subject of much controversy in the legal literature and in the cases studied in this thesis. A brief presentation of these obstacles also appears useful because it is sometimes difficult in practice to draw a distinction with the legal conditions to the exercise of universal jurisdiction.

III. Terminology

A. Universal jurisdiction

The notion of “jurisdiction” and more specifically of “universal jurisdiction” is discussed in detail in Part I. It is defined as a state’s competence to criminalize and prosecute crimes committed outside the state’s territory and which are not linked to it by the suspect’s or the victim’s nationality, or by harm caused to the state’s own national interests or to a situation where the state is acting on behalf of another state.

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B. International crimes

The notion of “international crimes” in this study is subject to evolution. International crimes as understood for the purpose of this study include genocide, crimes against humanity, war crimes and torture as well as other crimes that are recognized under international customary law as constituting a threat to the fundamental values of the international community or a harm to human society.²¹ It does not, however, include the numerous transnational crimes which are subject to universal jurisdiction by states according to an international treaty. The term “international crimes” will be discussed in detail in Part I. In this study, it is understood as encompassing, in a rather narrow manner, the most heinous crimes.

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²⁰ On immunities, see inter alia D. Akande and S. Shah, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’, 21(4) *European Journal of International Law* (2010) 815–852, at 836, and A. Colangelo, ‘Jurisdiction, Immunity, Legality, and *Jus Cogens*’, 14 *Chicago Journal of International Law* (2013-2014) 53-92.

²¹ See G. Hallevy, *A Modern Treatise on the Principle of Legality in Criminal Law* (Berlin/Heidelberg: Springer, 2010), at 128.

C. “Reasonable and effective universality”: the principles guiding this study

13 The conditions to the exercise of universal jurisdiction will be examined with the aim of increasing the predictability and effectiveness of this type of domestic jurisdiction and the use of this legal tool, which is today available in most domestic legal systems. The examination of this issue necessarily implies that consideration is made of a number of principles that will guide the study: (1) the principle of sovereignty of states, (2) those concerning fair trial rights and (3) the principle of the rule of law.

D. Other terms

14 The term *territorial state* refers to the state in which the offence was committed. The *custodial state* is the state in which an offender can be found. The term *forum state* is used to refer to the state that intends to exercise jurisdiction.

IV. Structure, methodology and sources

15 The study is structured in three parts. Part I covers universal jurisdiction in international law. It begins by defining and discussing the notion of jurisdiction, more specifically universal jurisdiction. It then turns to the notion of international crimes subject to universal jurisdiction. The purpose of this part is to set out the international legal framework in which states may exercise universal jurisdiction. In other words, it responds to the question of what states are allowed – and/or obliged – to do under international law. Part II deals exclusively with national legislation on universal jurisdiction. Its aim is to identify what legal framework exists at a national level, and more specifically, if the universality principle is provided for, under what conditions can it be exercised and for what crimes. The aim is to provide a general overview of the positive state of various national legislations and to underline that while the universality principle exists in most countries, its legal framework varies greatly from one to another. However, it should be underlined at this point that, as with any attempt to provide an overview of the legislation of every country of the world, this task is a complex one. We have attempted to find available sources, but due to lack of access and language restrictions some of the information is not directly sourced; in some cases, the information has been reported by the relevant governments or was found in other indirect sources. Moreover, there is a possibility that some of the information contained in the analysis is not entirely accurate or up to date, whether it be because the versions of the law have changed or because the translations available in English or French themselves are inaccurate.

Our analysis of state legislation and practice has led to the identification of four potential preconditions to the assertion of universal criminal jurisdiction, which are developed in Part III, the main part of the thesis. These can be briefly set out here.

Firstly, domestic courts may, in principle, only assert universal jurisdiction over international crimes if they have applicable substantive law defining international crimes and if they have a legal basis to assert such jurisdiction. Part III, chapter 1 deals with the legality principle and the exercise of universal jurisdiction. The lack of incorporation or implementation of international crimes into domestic legislation has been the cause of many tensions between the respect for international obligations on the one hand, and the need to respect the legality principle on the other. It is submitted that, in certain cases, states may, if its legislation and practice so allow, exercise universal jurisdiction even in the absence of domestic substantive provisions implementing international crimes, that is to say, directly on the basis of international treaty or customary law. However, a domestic court cannot, without violating the legality principle, assert universal jurisdiction in the absence of a specific provision in its domestic legislation allowing it to do so. Efforts have been made in recent years to implement legislation on international crimes and universal jurisdiction at the national level. This chapter thus also addresses the issue of retroactive application of substantive and jurisdictional rules. Finally, in the last section of the chapter, the question of the extent to which the foreign law of the territorial state should be taken into account in order to comply with the *nullum crimen, nulla poena sine lege* principle is discussed. Firstly, it examines whether the dual criminal requirement – a general condition to the exercise of extraterritorial jurisdiction and to extradition – is justified in the exercise of universal jurisdiction over international crimes. Secondly, it briefly addresses the issue of whether the direct application of foreign law of the territorial state is required in order to fulfill the legality principle. Finally, it underlines the importance of taking into consideration the penalties provided for by the territorial state before sentencing a person on the basis of universal jurisdiction.

Thereafter, another issue arises, concerning whether the application of universal jurisdiction presupposes a link with the forum state other than those envisaged by the traditional bases of jurisdiction.²² Part III, chapter 2 deals with this potential condition and attempts inter alia to answer the following question: is the presence of the suspect within the territory a pre-condition for the assertion of universal jurisdiction? If the response is in the affirmative, at what stage of the proceedings is this presence necessary? It is submitted that under international law, the presence of the suspect on state territory is not a requirement for the assertion of universal jurisdiction in respect to certain

²² Generally, criminal jurisdiction is asserted by a state when an offence has been committed on its territory, by one of its nationals, against one of its nationals or against its interests.

international crimes. Moreover, it can be argued that international law not only allows universal jurisdiction in absentia but, in some cases, even requires it. Finally, it is submitted that states which require the residence of a suspect on their territory as a precondition to the application of universal jurisdiction over core crimes and torture violate their duties under international law.

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Moreover, the question arises of whether the application of universal jurisdiction is subject to the inability or unwillingness of a state with a (more) substantial jurisdictional link to the crimes – in particular, the territorial state – to exercise its own jurisdiction. Part III, chapter 3 addresses whether universal jurisdiction is governed by the principle of subsidiarity or by the principle of concurrence. This raises a number of legal issues including the following: Does the domestic court of the forum state even have a duty to examine this issue? Does it need to address a request to the territorial state? More generally, is the principle of subsidiarity a rule of policy or of international comity, or is it a binding legal rule? What is its content and to which state is it applicable? It is submitted that the subsidiarity principle should be a legally-binding rule, subject to strict criteria for the assessment of whether the territorial state is genuinely investigating and also to judicial review. The final part of this chapter addresses the question of a conflict of jurisdiction between a domestic court asserting universal jurisdiction and the International Criminal Court. Does the principle of complementarity apply to prosecutions on the basis of universal jurisdiction? While the ICC is silent on this issue, a number of pieces of domestic legislation provide that courts have universal jurisdiction only if proceedings cannot be conducted before the ICC. The chapter briefly analyses the relationship between the two regimes and concludes that, for a number of reasons, including the greater legitimacy attributed to the ICC, the complementarity principle should not necessarily apply to prosecutions made on the basis of the exercise of universal jurisdiction.

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Finally, Part III, chapter 4 deals with the initiation of universal proceedings. In recent years, there has been a trend among states to block the initiation of universal jurisdiction cases either by removing the rights of victims to initiate proceedings as civil parties, by removing the rights of other private individuals or groups (the so-called *acusaciones populares*) where such a right exists, or by subjecting the initiation of proceedings to the consent of governmental authorities, such as the Attorney General.²³ The first part of this chapter argues that the removal of rights of victims to initiate universal jurisdiction proceedings may constitute a violation of the victims' rights to an effective remedy. In states that do not provide for victims' rights in criminal proceedings, the right to an

²³ It is noteworthy that this tendency was recently confirmed in the 2013 *Kiobel* case, where the US Supreme Court denied the scope for the extraterritorial application of the ATS, which governs federal courts' jurisdiction "over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States". See 28 U.S.C., § 1350.

effective remedy in cases of international crimes committed abroad is guaranteed through universal civil jurisdiction.²⁴ In the second part of this chapter, it is submitted that there are indications that international law requires that the decision of the prosecuting authority to investigate in universal cases be understood in the same manner as in the case of any ordinary offence under the domestic law of the state.²⁵ Furthermore, in order to ensure transparency and fairness in states which grant prosecutorial or executive discretion, such discretion should be based on clear criteria and should be subject to judicial review.

V. Legal impediments to the exercise of criminal jurisdiction in the context of universal jurisdiction cases

As mentioned above, many legal impediments to the exercise of jurisdiction exist. The four following impediments have been subject to much debate in relation to universal jurisdiction: a) amnesties, b) statute of limitations, c) immunities and d) the principle of *ne bis in idem*. This section will briefly present three of these impediments due to their particular relevance in the context of universal jurisdiction cases: amnesties, immunities and *ne bis in idem*. 21

A. Amnesties

National laws that grant amnesties following situations of conflict or war are numerous.²⁶ Since there is no generally-accepted rule preventing states in which international crimes have been committed from adopting amnesty laws,²⁷ 22

²⁴ In the USA, the right to a remedy for international crimes is enforced through the ATS.

²⁵ See Art. 7.2 of the Torture Convention and Art. 7 of the 1970 Hague Convention.

²⁶ See Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (2006), at 200.

²⁷ On this issue, see the interesting discussion in the recent judgement of the ECtHR, *Marguš v. Croatia* case (Application no. 4455/10), 27 May 2014. With regard to torture, the United Nations Human Rights Committee noted in 1994 in its General Comment No. 20 on Article 7 of the International Covenant that some states had granted amnesty in respect of acts of torture; See also United Nations Human Rights Committee, Concluding observations, Lebanon, 1 April 1997, § 12 and United Nations Human Rights Committee, Concluding observations, Croatia, 30 April 2001, § 11. See also Inter-American Court of Human Rights, *Barrios Altos*, judgment of 14 March 2001, Merits, involving the question of the legality of Peruvian amnesty law; Inter-American Court of Human Rights, *Anzualdo Castro v. Peru*, Judgment of 22 September 2009, Preliminary Objection, Merits, Reparations and Costs; Inter-American Court of Human Rights, *Gomes Lund et al ("Guerrilha do Araguaia") v. Brazil*, judgment of 24 November 2010, Preliminary Objections, Merits, Reparations and Costs. In the *Gelman v. Uruguay* case, judgment of 24 February 2011, Merits and Reparations, the Inter-American Court

amnesties often preclude the prosecution of international crimes, at least by the territorial state. Several international and regional courts have adopted the view that amnesties granted for international crimes are prohibited by international law.²⁸ The Rome Statute is very clear on the issue.²⁹ The question of whether domestic courts exercising extraterritorial jurisdiction, including universal jurisdiction, have to recognize such amnesties or pardons is however subject to debate. Domestic legislation is generally silent on this question.³⁰ In our view,

analysed at length the position under international law with regard to amnesties granted for grave breaches of fundamental human rights. Inter-American Court of Human Rights, *The Massacres of El Mozote and Nearby Places v. El Salvador* case, judgment of 25 October 2012.

²⁸ See ICTY, *Furundžija* case, judgment of 10 December 1998, § 155: "The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law."; See also The Extraordinary Chambers in the Courts of Cambodia, in the Decision on Ieng Sary's Appeal against the Closing Order (case no. 09-2007-ECCC/OCIJ (PTC75), 11 April 2011), discussing the effects of the amnesty on prosecution, § 201: "The interpretation of the Decree proposed by the Co-Lawyers for Ieng Sary, which would grant Ieng Sary an amnesty for all crimes committed during the Khmer Rouge era, including all crimes charged in the Closing Order, not only departs from the text of the Decree, read in conjunction with the 1994 Law, but is also inconsistent with the international obligations of Cambodia. Insofar as genocide, torture and grave breaches of the Geneva Conventions are concerned, the grant of an amnesty, without any prosecution and punishment, would infringe upon Cambodia's treaty obligations to prosecute and punish the authors of such crimes, as set out in the Genocide Convention, the Convention Against Torture and the Geneva Conventions. Cambodia, which has ratified the ICCPR, also had and continues to have an obligation to ensure that victims of crimes against humanity which, by definition, cause serious violations of human rights, were and are afforded an effective remedy. This obligation would generally require the State to prosecute and punish the authors of violations. The grant of an amnesty, which implies abolition and forgetfulness of the offence for crimes against humanity, would not have conformed with Cambodia's obligation under the ICCPR to prosecute and punish authors of serious violations of human rights or otherwise provide an effective remedy to the victims. As there is no indication that the King (and others involved) intended not to respect the international obligations of Cambodia when adopting the Decree, the interpretation of this document proposed by the Co-Lawyers is found to be without merit."; See also Special Court for Sierra Leone, Appeals Chamber, Decision on Challenge to Jurisdiction, 13 March 2004, Cases Nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), § 82 and 84.

²⁹ See Alvarez, 'Alternatives to International Criminal Justice', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) 25-38, at 37.

³⁰ Art.19(1) (c) Ethiopian Criminal Code provides expressly that extraterritorial jurisdiction can be exercised only if "the crime was not legally pardoned in the country of commission and that

with regard to universal jurisdiction, the problem of amnesties is intrinsically linked to the larger issue of whether obstacles to prosecution created by one state have any binding effect outside its own jurisdiction. If criminal courts asserting universal jurisdiction were to apply the law of the territorial state, this question could be of great relevance. However, as we will see in Part III, chapter 1, this situation does not arise because states generally apply their own criminal law.³¹ Amnesties may, however, play a role when examining the dual criminality requirement, which is a condition to the exercise of universal jurisdiction that is provided for by various pieces of national legislation.³² Furthermore, the recognition of amnesties may also be raised in relation to the *ne bis in idem* principle if a state asserting universal jurisdiction were to consider the fact that a person subject to a pardon or an amnesty in another state does not constitute a bar to prosecution.³³ Finally, the adoption of amnesty laws may constitute an important indication that the territorial or national state has no intention of bringing the perpetrator to justice.³⁴ This last issue will be discussed in the chapter dedicated to the subsidiarity principle (Part III, Chapter 3).

prosecution is not barred either under the law of the country where the crime was committed or under Ethiopian law". See Part II.

- ³¹ On the issue of application of foreign criminal law, see Part I. It is noteworthy that in the UK *Pinochet* case, an amnesty had been granted by a military decree of 1978, which granted Pinochet unconditional and total amnesty for all crimes committed between 1973 and 1978. It is interesting to note that neither the defence, nor the Chilean government even raised the existence of the amnesty. Moreover, the majority of the Lords did not mention it. See Dugard, 'Dealing with Crime of a Past Regime. Is Amnesty Still an Option?', 12 *Leiden Journal of International Law* (1999) 1001-1015, at 1007.
- ³² This is at least true if one adopts a concrete approach to dual criminality, rather than an abstract one. Dugard, *supra* note 31.
- ³³ Some states also expressly provide that amnesties and pardons block universal prosecutions. See for example Ethiopia, *supra* note 30.
- ³⁴ See the Swiss *Nezzar* case. On the contrary, in the *Cavallo* case, a Spanish court concluded that the fact that the Argentinean Constitutional Court had ruled that the laws granting amnesty to perpetrators of grave crimes committed between 1976 and 1983 were unconstitutional, meant that Argentinean courts were therefore preferred to have jurisdiction. See Spain, *Audiencia Nacional, Auto declarando la incompetencia*, 20 December 2006 (in Spanish). The Spanish Supreme Court reversed this decision on 18 July 2007, stating that Spain had jurisdiction and that no principle existed according to which Argentina enjoyed priority of jurisdiction. Spain, *Tribunal Supremo, Sentencia*, N° 329/2007 (in Spanish). However, on 28 February 2008, with the consent of the Mexican authorities, the Spanish government authorized the extradition of Nezzar to Argentina. On 26 October 2011, he was sentenced to life imprisonment by the Argentinean courts.

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On a more general note, amnesty laws, especially if they are accompanied by truth commissions,³⁵ raise the delicate issue of whether the requirement to prosecute core international crimes is absolute, namely on the basis of universal jurisdiction, or whether in some cases amnesties are admissible because they contribute to the achievement of peace and reconciliation.³⁶ The question of whether, under the subsidiarity principle, the forum state should consider the territorial state “unable to prosecute” when it does not only adopt amnesty laws but also uses alternative accountability mechanisms – such as a truth and reconciliation commission – rather than criminally prosecuting the suspect falls outside the scope of this study.

B. Immunities

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The issue of immunities from jurisdiction has been raised in many of the universal jurisdiction cases examined in this study because the claims have involved current or former heads of states, heads of governments or ministers. Under international law, immunities include immunity from criminal jurisdiction.³⁷ With regard to core crimes and torture, it is today generally recognized that functional immunities are unavailable;³⁸ however, the debate is still ongoing.³⁹ The issue of personal immunities is more complicated, especially before domestic courts. Domestic legislation is often silent on the issue of immunities. Some states expressly provide for the non-application of their law to persons who enjoy immunity.⁴⁰ On the contrary, others have abrogated the

³⁵ The South African Promotion of National Unity and Reconciliation Act 1995 establishes a “Truth and Reconciliation Commission” and a “Committee on Amnesty” and provides a mechanism whereby amnesty shall be granted to persons who have revealed the truth.

³⁶ See Naqvi, *Impediments to Exercising Jurisdiction over International Crimes* (2009), at 132 ff. It should be noted that the question of whether amnesties even further peace and reconciliation is subject to debate.

³⁷ See Frulli, ‘Immunities of Persons from Jurisdiction’, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), at 368-369.

³⁸ *Ibid.*; The most famous case is the 1999 UK decision which denied *Pinochet* immunity for acts of torture in the extradition proceedings.

³⁹ See Akande and Shah, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’, 21(4) *European Journal of International Law* (2010) 815–852, at 836.

⁴⁰ Such a provision is for instance included in the Criminal Code of the United Arab Emirates, which provides at its Art. 25 that “Without prejudice to the provision in the first paragraph of Article (1), this law shall not apply to persons who enjoy immunity in accordance with international conventions or international law or domestic laws, within the territory of the United Arab Emirates.” Likewise, the Netherlands International Crimes Act provides that “criminal prosecution for one of the crimes referred to in this Act is excluded with respect to: (a) foreign heads of state, heads of government and ministers of foreign affairs, as long as they are in office, and other persons in so far as their immunity

impact of immunities in respect to charges of genocide, crimes against humanity and war crimes.⁴¹ Generally speaking, immunities, and especially personal immunities, constitute an impediment to the exercise of national jurisdiction.⁴² Thus, with regard to universal jurisdiction, the recognition of claims of immunity by current or former officials constitutes a serious obstacle to its exercise. As Dupuy rightly points out, “even though the problem of the immunity from jurisdiction of those responsible for policy and that of universal jurisdiction are quite distinct, the widened acceptance of the latter principle will, to a great extent, reduce the field of application of the former”.⁴³ Indeed, unlike other general impediments to prosecution, immunities have often led to the dismissal of universal jurisdiction cases. Nevertheless, criminal complaints based on universal jurisdiction have been launched against persons who enjoyed such immunities. Regretfully, this situation has paradoxically

is recognised under customary international law; (b) persons who have immunity under any Convention applicable within the Kingdom of the Netherlands.”; See Section 6 of the Netherlands International Crimes Act, available online at http://iccdb.webfactional.com/documents/implementations/pdf/Netherlands_International_Crimes_Act_2003.pdf (last visited 1 August 2017).

- ⁴¹ This is for instance the case of Niger, which provides at Art. 208.7 of its Penal Code that “*L’immunité attachée à la qualité officielle d’une personne n’empêche pas l’application des dispositions du présent chapitre*”. See *Code Pénal du Niger (2003) tel qu’amendé par la loi no. 2008-18*, available in French online at [http://www.icrc.org/applic/ihl/ihl-nat.nsf/0/3e747f82e6028e32c1257084002f7245/\\$FILE/Niger%20%20Criminal%20Code%202008%20fr.pdf](http://www.icrc.org/applic/ihl/ihl-nat.nsf/0/3e747f82e6028e32c1257084002f7245/$FILE/Niger%20%20Criminal%20Code%202008%20fr.pdf) (last visited 1 August 2017); This is also the case of South Africa. Section 4(2) of the South African Implementation of the Rome Statute of the International Criminal Court Act 2002, available online at <http://www.justice.gov.za/legislation/acts/2002-027.pdf> (last visited 1 August 2017), provides that “Despite any other law to the contrary, including customary and conventional international law, the fact that a person - (a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official; or (b) being a member of a security service or armed force, was under a legal obligation to obey a manifestly unlawful order of a government or superior, is neither- (i) a defence to a crime; nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime”.
- ⁴² See Cassese et al., *Cassese’s International Law* (3rd ed., Oxford: Oxford University Press, 2013), 318 ff. and Naqvi, *Impediments to Exercising Jurisdiction over International Crimes* (2009), 221 ff. See for example, the decision of the Court of Cassation in a decision of 13 March 2001 in the *Ghaddafi* case. The case concerned Gaddafi’s alleged complicity in terrorism for the bombing of an aircraft, which caused the death of 156 passengers and 15 crew members, including French citizens. The *Cour de cassation* held that in absence of any contrary international provision binding the parties concerned, international customary law prohibits the prosecution of heads of state in office before the criminal courts of a foreign state.
- ⁴³ Dupuy, ‘Crimes et immunités’, cited in M. Delmas-Marty Mireille, ‘The ICC and the Interaction of International and National Systems’, in Cassese et al. (eds), *The Rome Statute of the ICC* (Oxford: OUP, 2002), at 1920.

contributed to the recent modifications in state legislation, which have resulted in a narrowing of the exercise of universal jurisdiction.

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Indeed, the issue of immunities in universal jurisdiction cases has become the subject of much debate, particularly following Belgium's adoption in 1999 of a law expressly stating that immunity attached to a person's official status does not prevent prosecution;⁴⁴ this, *inter alia* led to the filing of complaints against Ariel Sharon, then Prime Minister of Israel, Amos Yaron, then Director General of the Israel Defence Ministry,⁴⁵ former US President George Bush and other senior American leaders, including Dick Cheney and Colin Powell, in respect to violations of the Geneva Conventions, committed during the first Gulf

⁴⁴ My translation of Art. 5(3) of the *Loi relative à la répression des violations graves de droit international humanitaire*, 10 February 1999: "*l'immunité attachée à la qualité officielle d'une personne n'empêche pas l'application de la présente loi.*"; In 2003, following the filing of private complaints in Belgium against Israeli leader Ariel Sharon and others, as well as against US military and political leaders including George W. Bush, Belgium amended its laws as a result of direct political and economic pressure from the United States. With regard to immunities, Article 5(3) of the Law modifying the 16 June 1993 Act Concerning Punishment for Grave Breaches of International Humanitarian Law" provided as follows: "International immunity attaching to the official capacity of a person does not preclude the applicability of this Act, other than within the limits established by international law". After passage of all these amendments, Israel sent its ambassador back to Belgium.⁴⁴ However, this new law was not enough to satisfy U.S. officials. In June 2003, they announced that American officials may stop attending NATO meetings in Belgium, "because of a law that allows 'spurious' suits accusing American leaders of war crimes". More importantly, Rumsfeld said the United States would withhold any further funding for a new NATO headquarters in Belgium, stating that "Belgium appears not to respect the sovereignty of other countries". Belgium modified its law again. With regard to immunities, the August 2003 Act inserted a new Art. 1bis, §2 in the *Titre préliminaire du Code de procédure pénale*, which states "In accordance with international law, the following persons are immune from criminal prosecution: foreign heads of state, heads of government and ministers of foreign affairs, while in office, and other persons whose immunity is recognised by international law; persons who enjoy full or partial immunity on the grounds of a treaty which is binding on Belgium".

⁴⁵ In June 2001, 23 Lebanese and Palestinian victims filed an application under the same 1993 law against Ariel Sharon, then Prime Minister of Israel and Amos Yaron, then Director General of the Israel Defence Ministry, alleging that the defendants had committed war crimes at the Palestinian refugee camps of Sabra and Shatila during the 1982 invasion of Lebanon by Israel. In a decision of 12 February 2003, the Court of Cassation considered that the case against Sharon should indeed be dismissed but on immunity grounds, essentially holding that Sharon could face trial after he left office. See Cassese, 'The Belgian Court of Cassation v. the International Court of Justice: The Sharon and others Case', 1 *Journal of International Criminal Justice* (2003) 437-452. The case was finally dismissed on immunity grounds. See Belgium, *Cour de cassation*, Arrêt, 12 February 2003, English version available in 42(3) *International Legal Materials* (May 2003) 596-605.

war in 1991.⁴⁶ The issuance by a Belgian magistrate of an international arrest warrant against Yerodia Ndombasi, then Foreign Minister of the Democratic Republic of Congo, in application of this law, also led to the famous ruling of the ICJ in the *Arrest Warrant* case. In its decision, the ICJ held that the arrest warrant constituted a violation of Belgium's legal obligations towards the Congo in so far as it failed to respect the immunity from criminal jurisdiction and the inviolability that the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law.⁴⁷ It is noteworthy that the Congo had challenged the legality of Belgium's arrest warrant on two separate grounds, namely on the basis of Belgium's claim to exercise universal jurisdiction and on the alleged violation of the immunities of the Minister of Foreign Affairs, then in office.⁴⁸ Interestingly, the ICJ chose not to address the issue of universal jurisdiction, thereby confirming that immunities and universal jurisdiction are indeed two independent legal concepts. The approach of the ICJ is nevertheless questionable and was rightly criticized by a number of judges who pointed out that "a court's jurisdiction is a question which it must decide before considering the immunity of those before it".⁴⁹ As President Guillaume correctly underlined, "there can only be immunity from jurisdiction where there is jurisdiction".⁵⁰ The Court itself recognized that "as a matter of logic, the second ground [immunity] should be addressed only once there has been a determination in respect of the first, since it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction".⁵¹ The relationship between immunities and jurisdiction was well-articulated by Judges Higgins et al. in their Joint Separate Opinion:⁵²

3. [...] If there is not jurisdiction *en principe*, then the question of an immunity from a jurisdiction which would otherwise exist simply does not arise. [...]

4. While the notion of "immunity" depends, conceptually, upon a preexisting jurisdiction, there is a distinct corpus of law that applies

⁴⁶ The case was finally dismissed by the Belgian Court of Cassation, applying the new law. See *Cour de Cassation*, 24 September 2003, available online at <http://competenceuniverselle.files.wordpress.com/2011/07/arret-24-septembre-2003-bush.pdf> (last visited 1 August 2017).

⁴⁷ ICJ, *Arrest Warrant* case, Judgment of 14 February 2002, § 75.

⁴⁸ *Ibid.*, § 45.

⁴⁹ ICJ, *Arrest Warrant* case, Separate Opinion of President Guillaume, at 35. See also ICJ, *Arrest Warrant* case, the Separate Opinion of Judge Rezek, at 91, who rightly points out that "the question of jurisdiction inevitability precedes that of immunity" and Dissenting Opinion of Judge Van Den Wyngaert, § 7.

⁵⁰ ICJ, *Arrest Warrant* case, Separate Opinion of President Guillaume, at 35.

⁵¹ ICJ, *Arrest Warrant* case, Judgment of 14 February 2002, § 46.

⁵² ICJ, *Arrest Warrant* case, Separate Opinions of Judges Higgins et al., § 3-5.

to each. What can be cited to support an argument about the one is not always relevant to an understanding of the other. In by-passing the issue of jurisdiction the Court has encouraged a regrettable current tendency (which the oral and written pleadings in this case have not wholly avoided) to conflate the two issues.

5. Only if it is fully appreciated that there are two distinct norms of international law in play (albeit that the one - immunity - can arise only if the other - jurisdiction - exists) can the larger picture be seen.

26 As mentioned above, our study focuses on this first stage, which is when there is a preexisting universal jurisdiction or universal jurisdiction “*en principe*”; it does not focus on the exceptions to the exercise of jurisdiction.⁵³

27 Following the ICJ decision, the Belgian courts have indeed rendered other decisions. The issue of immunities in universal jurisdiction cases has also been discussed in other states such as France,⁵⁴ Switzer-

⁵³ See L. M. Caplan, ‘State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory’, 97 *American Journal of International Law* (2003) 741-781, at 756-757; See also R. Higgins, ‘Certain Unresolved Aspects of the Law of State Immunity’, 29 *Netherlands International Law Review* (1982) 265-271, who states: “It is very easy to elevate sovereign immunity into a superior principle of international law and to lose sight of the essential reality that it is an exception to the normal doctrine of jurisdiction.”

⁵⁴ The question of immunities was for instance considered by the French Court of Cassation in a decision of 13 March 2001 in the *Gaddafi case*, (*Cour constitutionnelle*, N° 00-87215). The case concerned Gaddafi’s alleged complicity in terrorism for the bombing of an aircraft which caused the death of 156 passengers and 15 crew members, including French citizens. The *Cour de cassation* held that absent any contrary international provision binding on the parties concerned, international customary law prohibits the prosecution of Heads of State in office before the criminal courts of a foreign state. In the French *Rumsfeld case*, a complaint was filed against Rumsfeld for acts of torture when he was no longer the Minister of Defence, but rather at a moment when he was coming to France in a private capacity to give a presentation. By letter of 16 November 2007, the Paris prosecutor stated that the French Ministry of Foreign Affairs had indicated that “in application of the rules of customary international law recognized by the International Court of Justice, the immunity of heads of state, of government and Foreign Affairs Ministers continued after the end of their functions, for acts carried out in their official function, and that, as former secretary of defense, Mr. Rumsfeld must benefit, by extension, from the same immunity, for acts carried out in the exercise of his functions”. For the original French version, see *Courrier de Jean-Claude Marin, Procureur de la République* (Paris: 16 November 2007), available online at <http://www.fidh.org/IMG/pdf/reponseproc23nov07.pdf> (last visited 1 August 2017). The case was dismissed. The General Prosecutor confirmed this decision on 27 February 2008. On 17 November 2006, Judge Bruguière of France requested the issuance of international arrest warrants against nine Rwandan officials for their complicity in the April 1994 attack and suggested that the sitting Rwandan President, Paul Kagame, should be tried by the International Criminal Tribunal for Rwanda (ICTR). Although the order directly accused Paul Kagame, it noted that he enjoys the immunity granted in France to all sitting heads of state and should therefore not be

land⁵⁵ and Spain.⁵⁶ It is in fact mainly the lack of respect for immunities that has been the source of the recent concern expressed by the African Union in its

prosecuted. On this order, see V. Thalmann, 'French Justice's Endeavours to Substitute for the ICTR', 6(5) *JICJ* (2008) 995-1002. The issue of immunities was also raised in the *Brazzaville Beach* case. On 5 December 2001, a complaint was lodged by the FIDH, the LDH, as well as the *Observatoire congolais des droits de l'homme* against a number of Congolese officials including Denis Sassou N'Gusso, President of the Republic of the Congo, Pierre Oba, Interior Minister, Norbert Dabira, Inspector-General of the Congolese Armed Forces, and Blaise Adoua, Commander of the Republican Guard in relation to the disappearance of over 350 Congolese nationals in Brazzaville (Congo) in 1999. An investigation was opened in 2002 on the basis of Article 689-1 of the French Code of Criminal Procedure for crimes against humanity, enforced disappearances and acts of torture or inhumane treatment against persons unknown. On 9 December 2002, the Republic of Congo instituted proceedings against France before the ICJ and requested the immediate suspension of the proceedings against Congolese officials. The Congo submitted inter alia that France violated "the criminal immunity of a foreign Head of State -- an international customary rule recognized by the jurisprudence of the Court". ICJ, Application Instituting Proceedings, *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, 9 December 2002, at 5.

⁵⁵ On 17 September 2003, a criminal complaint was filed by the Swiss organization TRIAL against Mr. *Habib Ammar*, a Tunisian national, who was formerly Commander of the Tunisian National Guard and former Interior Minister. According to the complaint, Mr. Ammar actively participated in the torture of Tunisian people in the 1980s. The Swiss jurisdiction was based on Article 6bis of the Criminal Code and the Convention Against Torture. It was argued that Mr. Ammar did not enjoy any immunity, neither under an international treaty, nor under customary international law. The complaint was filed as Habib Ammar was expected to be in Geneva in order to participate in the preparatory work for a session of the World Summit on the Information Society (WSIS). The Geneva General Prosecutor dismissed the complaint and the case on the basis of Art. 12 of a Headquarters Agreement of 22 July 1971 between Switzerland and International Telecommunications Union, which provided for immunity for representatives of the members of the Union. See TRIAL, *Dénonciation pénale contre M. Habib AMMAR, actuellement résidant à l'hôtel Longchamp, rue Rothschild 32, 1202 Genève*, 17 September 2003, available online at <https://trialinternational.org/wp-content/uploads/2016/06/plainteAMMAR.pdf> (last visited 1 August 2017). In the recent Swiss *Nezzar* case, the Swiss Federal Criminal Court addressed the issue of immunities of the former Algerian Defence Minister. Basically, after citing a number of scholars, case law and reports, the Swiss Federal Criminal Court concluded that because of the gravity of the acts in question, the defendant was not entitled to immunity *ratione materiae*. According to the Court: "It would be contradictory and vain to, on one side, state our willingness to fight serious violations of the fundamental values of humanity and, on the other side, accept a large interpretation of the rules relating to functional immunity (*ratione materiae*) which benefits former potentates or officials and concretely results in preventing the opening of any investigation." See Federal Criminal Tribunal (*Tribunal pénal fédéral*), *Cour des plaintes, A. contre Ministère Public de la Confédération*, Decision of 25 July 2012.

⁵⁶ A number of Spanish cases involving incumbent heads of state or governments have been dismissed on the grounds that they contravene the principle of personal immunity of state representatives in office. Complaints have been filed against King Hassan II of Morocco, the President of Equatorial

decision concerning the “abuse of the principle of universal jurisdiction by judges from some non-African States against African leaders, particularly Rwanda.”⁵⁷ Likewise, the main concerns expressed by the African Union in the AU-EU Expert Report on the Principle of Universal Jurisdiction are in fact related to charges brought against sitting officials of African states.⁵⁸ In this respect, it is noteworthy to recall that Kenya has recently proposed an amendment to the ICC Statute, which has been approved by other African leaders and the African Union, to grant sitting heads of state and their “deputies” immunity from prosecution.⁵⁹ Indeed, according to the AU-EU report, European investigative magistrates and prosecutors have initiated approximately 60, and possibly more, investigations relating to people from Africa.⁶⁰ However, it is worth noting that proceedings in only eight states of the European Union were based on universal jurisdiction.⁶¹ In other cases, the proceedings were rather instituted on other jurisdictional bases, and in

Guinea Teodoro Obiang Nguma, the President of Cuba Fidel Castro, the President of Venezuela Hugo Chavez, Slobodan Milosevic, Silvio Berlusconi, as well as former Peruvian Presidents Alberto Fujimori and Alan Garcia. On 16 February 2008, a Spanish investigating judge also indicted 40 Rwandan officials, charging them with genocide, crimes against humanity, war crimes and terrorism committed against Hutus from 1990 to 2002. The Order states that President Kagame should be included in the indictment but that he cannot be prosecuted because he enjoys personal immunity as a sitting head of state. The Indictment cites Art. 23(4) of the Law on the Judiciary as well as the decision of the Constitutional Court in the Guatemala case.

⁵⁷ See African Union, *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*, Doc. Assembly/AU/14(XI), 30 June-1 July 2008, Assembly of the African Union, Sharm El-Sheikh, Egypt. See F. Lafontaine, ‘Universal Jurisdiction – the Realistic Utopia’, 10 *Journal of International Criminal Justice* (2012) 1277-1302, at 1279 and the references in footnote 15.

⁵⁸ Council of the European Union, *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, Brussels, 16 April 2009, § 33-38.

⁵⁹ See Kenya, *Proposal of Amendments*, available online at <https://treaties.un.org/doc/Publication/CN/2013/CN.1026.2013-Eng.pdf> (last visited 1 August 2017) which proposes an amendment to art. 27 by inserting in paragraph 3 the words “Notwithstanding paragraph 1 and 2 above, serving Heads of State, their deputies and anybody acting or is entitled to act as such may be exempt from prosecution during their current term of office. Such an exemption may be renewed by the Court under the same conditions”. The issue was already brought up by the African Union at the Assembly of States Parties (ASP) in November 2013. See *Assembly of States Parties to the Rome Statute of the International Criminal Court*, 12th Session, The Hague, 20-28 November 2013, Official Records, Volume I, Special Segment as requested by the African Union: ‘Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation’.

⁶⁰ It appears however that only 15 of these investigations led to arrest warrants or summons. See Jalloh, ‘Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction’, 21 *Criminal Law Forum* (2010) 1-65, at 15.

⁶¹ This was the case in Austria, Belgium, Denmark, France, Germany, the Netherlands, Spain and the UK. See *AU-EU Report*, § 26.

particular, the passive personality jurisdiction.⁶² Indeed, it should be noted that the French Investigating Judge's Order of 17 November 2006, which issued international arrest warrants against nine Rwandan officials for their role in the airplane attack that sparked the 1994 Rwandan genocide, and, which suggested that the sitting Rwandan President, Paul Kagame, be tried by the International Criminal Tribunal for Rwanda (ICTR) – leading to the arrest of Rose Kabuye, the Chief of Protocol of President Paul Kagame⁶³ – was in fact based on the passive personality principle and not the universality principle.⁶⁴ Moreover, a 2008 Spanish decision indicting 40 Rwandan officials led to the issuance of the Report of the African Union on the abuse of the Principle of Universal Jurisdiction. This Spanish case was based not only on the universality principle but also on the passive personality principle, with regard to the Spaniards.⁶⁵

Clear international rules on immunities and their strict and consistent application before domestic courts would certainly contribute to making universal jurisdiction more effective. It would also lessen the views of universal jurisdiction as an instance of Western judicial imperialism masquerading as an international rule of law. However, this study will refrain from addressing immunities – an issue of great contemporary relevance and the subject of numerous writings by scholars⁶⁶ – in great detail because it is not limited to universal jurisdiction and does not constitute a legal condition to its exercise.

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⁶² In the Belgian *Hissène Habré* case, proceedings were based on passive personality jurisdiction because the victims had acquired Belgian nationality.

⁶³ See Tribunal de Grande Instance de Paris, Cabinet de Jean-Louis Bruguière, *Délivrance de mandats d'arrêts internationaux*, Ordonnance de soit-communicé, 17 November 2006, available at http://www.olny.nl/RWANDA/Lu_Pour_Vous/Dossier_Special_Habyarimana/Rapport_Bruguiere.pdf (last visited 1 August 2017). The charges against Rose Kabuye were dropped in March 2009.

⁶⁴ Indeed, Bruguière's investigation followed a complaint filed on 31 August 1997 by the daughter of Jean-Pierre Minaberry, the French co-pilot of Habyarimana's plane, for acts of terrorism and complicity in such acts under French law. Other family members of the French victims were later accepted as *parties civiles*. It is noteworthy that the order does not rely on international crimes but on national crimes, namely, murder pursuant to Art. 221-3 of the French Penal Code. On this case, see Thalmann, 'French Justice's Endeavours to Substitute for the ICTR', 6 *Journal of International Criminal Justice* (2008) 995-1002, at 996.

⁶⁵ On this case, see Commentator, 'The Spanish Indictment of High-ranking Rwandan Officials', 6 *Journal of International Criminal Justice* (2008) 1003-1011.

⁶⁶ See among others Akande and Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', 21(4) *European Journal of International Law* (2010) 815-852; A. Bianchi, 'Immunity versus Human Rights: The Pinochet Case', 10(2) *European Journal of Human Rights* (1999) 237-277; Caplan, 'State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory', 97 *American Journal of International Law* (2003) 741-781, at 756-757; Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case', 13(4) *European Journal of International Law* (2002) 853-875; Colangelo, 'Jurisdiction,

However, it is worth noting that the universal jurisdiction cases examined in this study raise essentially two issues. Firstly, the question of which state officials are entitled to personal immunities and whether this immunity extends to official visits only or to private visits as well.⁶⁷ In the above-mentioned French case, Germany did not arrest Rose Kabuye on an earlier official visit to the country in April 2008, acknowledging that she was immune, but rather did so in November 2008, when she came for a private visit. In this respect, it has been argued that there are two types of immunity *ratione personae*: those which can be attached to a limited group of senior officials, in particular the Head of State, Head of Government and diplomats, and the immunity of state officials on special missions abroad.⁶⁸ With regard to this “special mission status”, it is noteworthy that in 2011, the British Government granted Tzipi Livni, the former Israeli Foreign Minister and at the time leader of the opposition, temporary “special mission” immunity to avoid arrest.⁶⁹ Indeed, in December 2009, at the request of a private party, a UK magistrate issued an arrest warrant against Tzipi Livni for war crimes allegedly committed in Gaza in which more than a thousand Palestinians were killed.⁷⁰ Two other high-profile Israelis – Benny

Immunity, Legality, and Jus Cogens’, 14 *Chicago Journal of International Law* (2013-2014) 53-92; M. Henzelin, ‘L’immunité pénale des ministres selon la Cour internationale de justice’, *Revue pénale suisse* (2002) 249-265; Higgins, ‘Certain Unresolved Aspects of the Law of State Immunity’, 29 *Netherland International Law Review* (1982) 265.

⁶⁷ In this regard, it should be noted that the Convention on Special Missions of 1969 stipulates that the person of officials abroad on special mission for their State are inviolable. The Convention on Special Missions was adopted by the UN General Assembly in 1969 and entered into force in 1985. As of 30 July 2013, the Convention only has 38 parties.

⁶⁸ See Akande and Shah, *supra* note 66, at 817.

⁶⁹ See O. Bowcott, ‘Tzipi Livni spared war crime arrest threat’, *The Guardian*, Thursday 6 October 2011, available online at <http://www.theguardian.com/world/2011/oct/06/tzipi-livni-war-crime-arrest-threat> (last visited 1 August 2017). In May 2014, Tzipi Livni, currently Israel’s Justice Minister, was given this temporary special mission for a second time. It is noteworthy that the United Kingdom has not ratified the Convention on Special Missions.

⁷⁰ This led to Tzipi Livni cancelling her trip to the UK. After Israel expressed concern over the possibility of exercising universal jurisdiction at the instigation of a private party, saying that it threatened the international relations of the United Kingdom, the UK then changed its legal provisions to restrict the ability of a private party to seek an arrest warrant based on universal jurisdiction. See Ian Black and Ian Cobain, ‘British court issued Gaza arrest warrant for former Israeli minister Tzipi Livni’, *The Guardian*, Monday 14 December 2009, available online at <http://www.guardian.co.uk/world/2009/dec/14/tzipi-livni-israel-gaza-arrest> (last visited 1 August 2017); A. Blomfield, ‘Tzipi Livni arrest warrant provokes Britain-Israel diplomatic row’, *The Telegraph*, 15 December 2009, available online at <http://www.telegraph.co.uk/news/worldnews/middleeast/israel/6819275/Tzipi-Livni-arrest-warrant-provokes-Britain-Israel-diplomatic-row.html> (last visited 1 August 2017); S. Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Oxford and Portland, Oregon: Hart Publishing, 2012), at 23.

Gantz, the Chief of Staff of the Israeli Army, and Doron Almog, a former Israeli Major General – were also granted special mission status for visits to the UK.⁷¹

Generally speaking, the position according to which personal immunities for a few restricted incumbent senior officials holding office be respected before national courts exercising extraterritorial jurisdiction should be approved. Such a solution does indeed appear to provide “a ‘satisfactory’ way to conciliate the exigencies of international cooperation and relations with those of international criminal justice”.⁷² It should be noted that these personal immunities are only temporary in their nature and that high state officials may be tried – until now at least – by international criminal courts where they are available.⁷³ However, what appears important in order to avoid the criticism of “double-standards” is that the category of persons who benefit from personal immunities before national courts must be strictly defined in order to ensure equality among states.⁷⁴ Secondly, there has been a number of national prosecutions of former

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⁷¹ In 2005, an arrest warrant was issued against retired Israeli Major Doron Almog for violations of the Geneva Conventions, committed in 2002 against Palestinians in Gaza, when he was commanding officer of the Israeli defence forces. Apparently, he returned to Israel without leaving his plane after hearing an arrest warrant had been issued in his name. See ‘Israeli evades arrest at Heathrow over army war crime allegations’, *The Guardian*, available online at <http://www.theguardian.com/uk/2005/sep/12/israelandthepalestinians.warcrimes> (last visited 1 August 2017). See J. Foakes, *The Position of Heads of State and Senior Officials in International Law* (Oxford: OUP, 2014), at 134.

⁷² Lafontaine, ‘Universal Jurisdiction – the Realistic Utopia’, 10 *Journal of International Criminal Justice* (2012) 1277-1302, at 1279, who also argues that “To allow states to arrest and prosecute sitting high-level officials can only seriously disrupt international relations and severely undermine the necessary interstate cooperation and friendly relations needed to attain the common goal of accountability for the worst crimes”. See also Cassese, ‘The Belgian Court of Cassation v. the International Court of Justice: *The Sharon and others Case*’, 1 *Journal of International Criminal Justice* (2003) 437-452, at 452.

⁷³ See Frulli, ‘Immunities of Persons from Prosecution’, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), at 369.

⁷⁴ This category includes the Head of State, the Head of Government and – according to the ICJ in *the Arrest Warrant* case – the Minister of Foreign Affairs (ICJ, *Arrest Warrant* case, § 53), as well as diplomatic officials if they are exercising their functions. The position of the ICJ has been widely criticized. See among others Akande and Shah, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’, 21(4) *European Journal of International Law* (2010) 815-852, at 825; In the Swiss *Nezzar* case, the Federal Court also extended personal immunities to Ministers of Foreign Affairs. See Swiss Federal Criminal Court, Tribunal pénal fédéral, Cour des plaintes, A. [*Khaled Nezzar*] v. I *Office of the Attorney General of Switzerland*, Decision of 25 July 2012, unofficial English translation available online at http://www.asser.nl/upload/documents/_20130221T040104-Nezzar_Judgm_Eng_translation%2025-07-2012.pdf (last visited 1 August 2017). In a case relating to the then Israeli Defense Minister, a UK court held that immunity *ratione personae* extends not only to the Foreign Minister but also to defence ministers. See *Decision of District Judge Pratt*, Bow Street

foreign state officials for international crimes – under different jurisdictional bases, including the universality principle – in which courts have recognized (implicitly) the lack of immunity *ratione materiae* in respect to core international crimes.⁷⁵ However, there have also been several universal jurisdiction cases regarding international crimes that were dismissed based on the immunity *ratione materiae* of the person.⁷⁶ Arguably, as underlined by Akande and Shah, “the primary reason for permitting universal jurisdiction is that persons who commit such international crimes are often connected to the state concerned and might escape justice if only their home state had jurisdiction”.⁷⁷ International crimes themselves generally presuppose the direct or indirect involvement of states.⁷⁸ Consequently, universal jurisdiction would lose much of its purpose if it excluded acts committed in an official capacity.⁷⁹ It is thus submitted that immunity *ratione materiae* does not apply in the case of domestic prosecution of foreign officials for most international crimes.⁸⁰ Having said this, it is argued in this study that universal jurisdiction should provide a complementarity approach to the ICC. It should not necessarily focus only on the highest-ranking leaders, but also on persons operating at a lower level who have controlled the apparatus of the state and “have been instrumental in the criminal strategy being carried out”.⁸¹

Magistrates Court, England, February 2004. In another decision, a UK court recognized the immunity of a Chinese Minister of Commerce. See *Re Bo Xilai*, 8 November 2005, Bow Street Magistrates Court, 129 ILR 713. See Frulli, *supra* note 73, at 369.

⁷⁵ See the cases cited in Cassese, ‘When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case’, 13(4) *European Journal of International Law* (2002) 853-875, at 870-871: *Priebke and Hass* in Italy, *Barbie* in France, under the universality principle, *Eichmann* in Israel, *Bouterse* in the Netherlands, and *Pinochet* and *Scilingo* in Spain.

⁷⁶ In November 2007, the Paris prosecutor refused to act on a complaint that former US Defence Minister was responsible for torture on the grounds that the ICJ had held that former Heads of State, Heads of Government and Foreign Ministers continued to have immunity from prosecution. See FIDH, *France in Violation of Law Grants Donald Rumsfeld Immunity, Dismisses Torture Complaint*, available online at <http://www.fidh.org> (last visited 1 August 2017).

⁷⁷ Akande and Shah, *supra* note 66, at 836.

⁷⁸ Delmas-Marty, ‘La responsabilité pénale en échec (prescription, amnistie, immunités)’, in Cassese and Delmas-Marty (eds), *Crimes internationaux et juridictions internationales* (Paris : Presses Universitaires de France, 2002) 613-652.

⁷⁹ The position was well summarized by Lord Phillips in *Pinochet* (No. 3).

⁸⁰ See for instance the French *Brazzaville Beach* case.

⁸¹ See Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort* (2010), at 157.

C. Ne bis in idem

One argument advanced by the opponents of universal jurisdiction is “the problem of double jeopardy”.⁸² While most states recognize the principle *ne bis in idem* – more often known as double jeopardy in the common-law world – according to which an accused cannot be tried twice for the same facts in the same country,⁸³ a majority of states do not generally recognize a *ne bis in idem* effect in respect to the criminal judgments of other states’ courts.⁸⁴ Consequently, generally speaking, the foreign judgment rendered by a third state does not constitute a bar to the prosecution of crimes, meaning that a state may prosecute and convict a person notwithstanding the fact that this person has already been prosecuted and convicted (or acquitted) in another state.⁸⁵ As such, it is argued that by increasing the problem of competing jurisdictional claims, the states’ exercise of universal jurisdiction increases the risks of a person being tried more than once, in different states, for the same crime. Some commentators argue in particular that the territorial state does not recognize a judgment rendered by a state exercising universal jurisdiction.⁸⁶

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⁸² See G. Fletcher, ‘Against Universal Jurisdiction’, 1(3) *Journal of International Criminal Justice* (2003) 580-584, at 582.

⁸³ This principle is recognized as an individual right in numerous international human rights treaties, notably at Art. 14(17) of the UN Covenant on Civil and Political Rights, Art. 8(4) of the American Convention on Human Rights and Art. 41(1) of Protocol of the European Convention on Human Rights. Art. 75(4)(h) of the 1977 Additional Protocol I to the Geneva Conventions also provides for the prohibition of double jeopardy in the same state.

⁸⁴ This is because of the general conception that each sovereign state may prosecute an offence against its own laws. In other words, it is generally admitted that the territorial state is entitled to prosecute crimes committed on their own territory, because of the trouble that such crimes have caused to “the social order and values upheld in the local community” (Cassese et al., *Cassese’s International Criminal Law*, at 316); See Colangelo, ‘Universal Jurisdiction as an International False Conflict of Laws’, 30(3) *Michigan Journal of International Law* (2009) 881-926, at 919. This is similar to the so-called “dual sovereignty doctrine”, according to which an individual’s conduct violates the laws of two sovereigns. In the United States, a single act may violate the laws of government and therefore a prosecution at the federal level will not prevent a state from prosecuting the person again for the same act. See *Heath v. Alabama*. See Naqvi, *Impediments to Exercising Jurisdiction over International Crimes* (2009), at 311; Colangelo, ‘Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory’, 86 *Washington University Law Review* (2009) 769-885, at 837.

⁸⁵ It should be noted that some states do however recognize foreign judgments and thus refrain from their own prosecution, others recognize foreign judgements when they are exercising extraterritorial jurisdiction and others still accept foreign judgements when they are exercising extraterritorial jurisdiction. See *infra* Part II.

⁸⁶ See Fletcher, ‘Against Universal Jurisdiction’, 1(3) *Journal of International Criminal Justice* (2003) 580-584.

It appears necessary to recall that the problem of concurrent jurisdiction and the non-recognition of a transnational *ne bis in idem* principle⁸⁷ is by far not limited to universal jurisdiction cases. It is not even limited to international crimes, but concerns transnational as well as ordinary crimes. International conflicts arise when several states assert jurisdiction on various traditional jurisdictional bases. As underlined by Eser, “it would be hardly imaginable to abandon all classical principles for the application of national law to extraterritorial crimes altogether, rather than to resolve the concurrence problem by rules of conflict.”⁸⁸ Put simply, the problem is not universal jurisdiction in itself but the absence of a transnational *ne bis in idem* principle.⁸⁹ Many legal scholars have thus argued that a transnational *ne bis in idem* principle is needed. One can only agree with this from the point of view of the rights of the accused. In this respect, a transnational *ne bis in idem* principle with regard to universal jurisdiction was proposed in the Princeton Principles.⁹⁰ Fletcher

⁸⁷ In the international context *ne bis in idem* refers to the recognition of foreign criminal judgments as having a *ne bis in idem* effect. Such a transnational *ne bis in idem* principle does not necessarily exist. Indeed, human rights bodies have repeatedly held that this principle applies only to multiple prosecutions within the same sovereign state and not at the transnational level. Moreover, it cannot be said that an international principle prohibiting double jeopardy exists under international customary law. On this question, see Cassese et al., *Cassese's International Law*, at 314. Some states do recognize the *ne bis in idem* effect of foreign judgments. See Part II.

⁸⁸ A. Eser, 'For Universal Jurisdiction: Against Fletcher's Antagonism', 39 *Tulsa Law Review* (2003-2004) 955-978, at 958.

⁸⁹ It should be noted that, in Europe, there is a growing tendency to apply the *ne bis in idem* principle between the different countries, although an exception is possible for states wishing to exercise jurisdiction over crimes committed on their own territory. See Art. 54 of the Convention implementing the Schengen Agreement of 14 June 1985, which states that “A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party”. Furthermore, it should be noted that most states provide that, in the determination of the sentence, courts must take into account a sentence served in the other state, under the “deduction principle” (*principe d'imputation*). See for instance, Art. 3(2) and 4(2) of the Swiss Penal Code, which provide for the “principe d'imputation” when Switzerland is exercising territorial jurisdiction or jurisdiction based on the protective principle.

⁹⁰ Principle 9 - Non Bis in Idem/Double Jeopardy reads as follows: “1. In the exercise of universal jurisdiction, a state or its judicial organs shall ensure that a person who is subject to criminal proceedings shall not be exposed to multiple prosecutions or punishment for the same criminal conduct where the prior criminal proceedings or other accountability proceedings have been conducted in good faith and in accordance with international norms and standards. Sham prosecutions or derisory punishment resulting from a conviction or other accountability proceedings shall not be recognized as falling within the scope of this Principle; 2. A state shall recognize the validity of a proper exercise of universal jurisdiction by another state and shall recognize the final judgment of a

argues that a principle of double jeopardy concerning the exercise of universal jurisdiction – as has been suggested by a number of international criminal lawyers – is “a project inherently unlikely to succeed”.⁹¹ In this respect, two considerations should be highlighted. Firstly, state practice shows that this is not entirely true. A number of pieces of domestic legislation do – to some extent – recognize the *res judicata* effects of foreign criminal judgments, generally in cases where the suspects are foreign nationals or when courts have universal jurisdiction.⁹² Moreover, both civil and common law systems have recognized the legitimacy of foreign acquittals and convictions.⁹³ However, with the exception of New Zealand, this recognition is limited to offences committed abroad. Thus, admittedly the problem remains – at least theoretically – whereby the territorial state does not recognize a judgment rendered by a state asserting universal jurisdiction. This is however not as much a problem as it may appear at first glance.

Firstly, it is useful to recall that the problem with universal jurisdiction is generally not that there are too many states wanting to exercise such jurisdiction. On the contrary, when a case is submitted to a state under the universality principle, it is generally because it is impossible to prosecute the suspect in the territorial state or in a state with another “traditional” jurisdictional basis, often because the authorities in the territorial and national jurisdiction states may themselves be the perpetrators of universal crimes.⁹⁴ Therefore, in such cases, it can be assumed that the territorial or national state will not be inclined to prosecute the suspect and therefore that the *ne bis in idem* issue will not be a problem. If they do prosecute the individual, it will generally be precisely to acquit him, that is to say, in order to prevent ongoing foreign proceedings. This appears to have been the case for instance in the French

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competent and ordinary national judicial body or a competent international judicial body exercising such jurisdiction in accordance with international due process norms. 3. Any person tried or convicted by a state exercising universal jurisdiction for serious crimes under international law as specified in Principle 2(1) shall have the right and legal standing to raise before any national or international judicial body the claim of non bis in idem in opposition to any further criminal proceedings.”

⁹¹ Fletcher, *supra* note 86, at 580-584.

⁹² See Part II. The recognition of foreign judgments is provided for in the Swiss Penal Code at Articles 5(2) [regarding offences committed abroad on minors], 6(3) [regarding offences committed abroad prosecuted in terms of an international obligation], 7(4) [regarding other offences committed abroad, namely on the basis of the active personality principle, passive personality principle and universality principle]. See Cassani, 'Art. 5', in Roth and Moreillon (eds), *Commentaire Romand: Code Pénal* (Basel: Helbing Lichtenhahn Verlag, 2009).

⁹³ See Naqvi, *Impediments to Exercising Jurisdiction over International Crimes* (2009), at 313.

⁹⁴ Colangelo, 'Universal Jurisdiction as an International False Conflict of Laws', 30(3) *Michigan Journal of International Law* (2009) 881-926, at 598.

Brazzaville Beach case.⁹⁵ The defence of Norbert Dabira,⁹⁶ who was charged in France in 2013 for crimes against humanity in relation to the disappearance of some 350 refugees in Brazzaville (Congo) in 1999, claimed that he should not be prosecuted and tried a second time in France, because he had already been prosecuted and acquitted by the Criminal Court of Brazzaville (Congo) in 2005.⁹⁷ Victims argue that this trial was in fact a “*procès-mascarade*”, designed to prevent proceedings in France.⁹⁸

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In other cases, where the territorial or national state may be willing and able to prosecute, it is submitted that the problem of the non-recognition of the *ne bis in idem* effect of a judgment rendered under the universality principle can be resolved – at least partly – by the application of the subsidiarity principle, which will be discussed in Part III, chapter 3. Indeed, most states provide for priority to be attributed to the territorial and national state in their domestic legislation or in their case law. Moreover, in many universal jurisdiction cases, courts have held that the subsidiarity principle bars states from prosecution if the territorial state has already initiated proceedings.⁹⁹ *A fortiori*, such a position appears to suggest that domestic courts would not exercise universal jurisdiction if the territorial or national state had already prosecuted and tried the person, but that

⁹⁵ On 22 August 2013, Norbert Dabira, former Inspector-General of the Congolese Armed Forces and now High Commissioner for the Re-Integration of Former Soldiers, was arrested in France and charged for crimes against humanity in relation to the disappearance of some 350 refugees in 1999 by the magistrates of the “pole crimes contre l’humanité” of the Paris TGI. The Congo expressed its anger following this decision, stating that the “decision by a French judge to launch fresh investigations in this matter is unacceptable, because no one who has been legally acquitted can be charged for the same reasons, even under different jurisdiction”.

⁹⁶ Other officials included Pierre Oba, Interior Minister, and Blaise Adoua, Commander of the Republican Guard in relation to the disappearance of over 350 Congolese nationals in Brazzaville (Congo) in 1999.

⁹⁷ It appears that the Criminal Court of Brazzaville acknowledged that 85 people had disappeared, but said it could not explain how this had happened and offered compensation to relatives. See ‘Congo’s Gen Dabira arrested in France over ‘massacre’’, *BBC News Africa*, 23 August 2013, available online at <http://www.bbc.com/news/world-africa-23808344> (last visited 1 August 2017).

⁹⁸ See ‘Disparus du Beach : Le parquet veut poursuivre l’instruction en France’, *RFI*, 4 July 2014, available online at <http://www.rfi.fr/france/20140704-disparus-beach-le-parquet-appuie-parties-civiles-sassou-nguesso-dabira-richard-baudo/> (last visited 1 August 2017). It should be noted in this regard that investigations in France began in 2002 following a complaint lodged by the FIDH, the LDH, as well as the *Observatoire congolais des droits de l’homme* against a number of Congolese officials including the President of the Republic of the Congo and Norbert Dabira, Inspector-General of the Congolese in relation to the disappearances. Judges should decide on this issue in October of this year.

⁹⁹ See for instance Spanish Constitutional Court, *Guatemala Genocide Case*, 26 September 2005, English translation provided by the Center for Justice and Accountability, at 20 and Austria, *Oberste Gerichtshof*, 150s99/94, 13 July 1994.

they would rather give priority to the territorial state, thereby avoiding any potential future transnational *ne bis in idem* problem. This argument is supported by the universal jurisdiction cases that we have studied here which rarely give rise to a problem of dual conviction.¹⁰⁰

Having said this, there do remain cases in which dual prosecutions might be possible; this situation might arise, for instance, if there is a change in the regime of the territorial state, and where that state claims to exercise jurisdiction over offences committed on its territory notwithstanding that the suspects have already been convicted elsewhere. One can therefore only encourage a better protection of the accused against transnational multiple prosecutions; today this is admittedly unsatisfactory. However, since “it is not universal jurisdiction that is uniquely to be blamed,”¹⁰¹ further developments relating to the content and scope of the *ne bis in idem* principle fall outside the scope of this study.¹⁰²

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¹⁰⁰ There have been some cases in which this problem has arisen. Fletcher mentions, for instance, the case of *Finta*, who was convicted *in absentia* by Hungarian courts for crimes committed against Jews and then retried – and acquitted – by a Canadian court “without showing the slightest concern for the problem of double jeopardy”. See Fletcher, *supra* note 86, at 582. It may be worth noting that Finta’s punishment in Hungary was statute-barred and that in 1970, a general amnesty was issued in Hungary which applied to Finta. On this case, see E. Haslam, ‘Finta’, in Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) 673-675.

¹⁰¹ Eser, ‘For Universal Jurisdiction: Against Fletcher’s Antagonism’, 39 *Tulsa Law Review* (2003-2004) 955-978, at 965.

¹⁰² In the context of universal jurisdiction, three comments will be made in relation with the *ne bis in idem* principle. Firstly, it is submitted that a decision not to prosecute a universal jurisdiction case or the fact that a state “investigated” should not prevent other states, exercising universal jurisdiction, from taking on these cases. This will be further discussed in Part III, Chapter 3 *infra* N 685 ff. Secondly, the exception regarding sham trials appears particularly important in the context of universal jurisdiction cases, in order to prevent states from putting suspects on trial in the interest of protecting them by using the *ne bis in idem* principle. This is in fact what is provided by Art. 20 of the Rome Statute, which can serve as a useful measuring tool. Thirdly, the issue of whether other accountability mechanisms, such as truth-for-amnesty deals, should be given a *ne bis in idem* effect in respect to international crimes is not entirely clear under international law. It is suggested that such mechanisms should not be completely excluded from the *ne bis in idem* principle. On this issue, see Naqvi, *Impediments to Exercising Jurisdiction over International Crimes* (2009), at 326.

Part I: Universal jurisdiction in international law

Chapter 1: Jurisdiction

I. Definition

There is no generally accepted definition of the term “jurisdiction”. Beal defines it as “the power of a sovereign to affect the rights of persons, whether by legislation, by executive decree, or by the judgment of a court”.¹⁰³ More generally, Mann states that jurisdiction involves a State’s right to exercise certain of its powers.¹⁰⁴ Akehurst specifies that jurisdiction refers to “powers exercised by a state over persons, property or events”.¹⁰⁵

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As explained by Donnedieu de Vabres, jurisdiction is also generally linked to territory.¹⁰⁶ Indeed, a State’s jurisdiction clearly includes the right to make and enforce laws within its geographical boundaries.¹⁰⁷ Therefore, foreign nationals become subject to the laws of the State they enter and face its penalties.¹⁰⁸ According to Beale, “Within his own territory, the jurisdiction of a sovereign is exclusive, except indeed in so far as he may by his own will permit the exercise of jurisdiction by another sovereign”.¹⁰⁹

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The problem of jurisdiction arises in matters not exclusively of domestic concern, i.e. when these matters present links with other legal orders.¹¹⁰ When a foreign element is present, i.e. when the State tries to reach foreign nationals or when facts of the case occurred abroad, a problem may arise; international jurisdiction serves to regulate and delimit the respective competences of states.¹¹¹

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¹⁰³ J. H. Beale, ‘Jurisdiction of a Foreign State’, 36 *Harvard Law Review* (1923) 241-262, at 241.

¹⁰⁴ F. A Mann, ‘The Doctrine of Jurisdiction in International Law’, 111 *Recueil des Cours* (1964) 1-162, at 9.

¹⁰⁵ P. Malanczuk, *Akehurst’s Modern Introduction to International Law* (7th ed., London/New York: Routledge, 1997), at 109.

¹⁰⁶ See Donnedieu de Vabres, *Les principes modernes du droit pénal international* (1928), at 13.

¹⁰⁷ C. de Than and E. Shorts, *International Criminal Law and Human Rights* (London: Sweet and Maxwell, 2003), at 35.

¹⁰⁸ *Ibid.*, at 35.

¹⁰⁹ Beale, ‘Jurisdiction of a Foreign State’, 36 *Harvard Law Review* (1923) 241-262, at 245.

¹¹⁰ Bianchi, ‘Reply to Professor Maier’, in Meesse (ed.), *Extraterritorial Jurisdiction in Theory and Practice* (1996), at 76.

¹¹¹ Mann, ‘The Doctrine of Jurisdiction in International Law’, 111 *Recueil des Cours* (1964) 1-162, at 14-15.

II. Types of jurisdiction

A. Prescriptive, adjudicatory and enforcement jurisdiction

39 A distinction is often made between three types of criminal jurisdiction: legislative, judicial and executive. Legislative jurisdiction – or jurisdiction to prescribe – refers to the ability to prescribe laws and to make them applicable to particular persons. Judicial or adjudicative jurisdiction refers to the power of domestic courts to hear cases and to apply laws. Finally, executive jurisdiction – or jurisdiction to enforce – refers notably to the power to enforce judicial decisions.

40 According to the principle of state sovereignty, no state has the right to exercise enforcement criminal jurisdiction, i.e. to perform an arrest, on the territory of another state without its consent. Even in cases of serious international crimes, a state cannot, for instance, apprehend an alleged criminal on the territory of another state, without violating the fundamental principles of international law.

41 The relevant jurisdictions in this study are legislative and judicial. In criminal matters, it is generally agreed that legislative and judicial jurisdictions are “congruent in scope”.¹¹² In other words, the authority of national courts to adjudicate claims follows from the jurisdiction to prescribe.¹¹³ Unlike other spheres of law where domestic courts may apply foreign laws,¹¹⁴ the global rule in criminal law is that a domestic court does not apply foreign criminal law.¹¹⁵ It is interesting to note that this traditional rule, according to which criminal judges always apply the criminal legislation of their own countries, was already contested and considered “*dépassé*” by Donnedieu de Vabres in the 1920s.¹¹⁶

¹¹² C. Kress, ‘Universal Jurisdiction over International Crimes and the Institut de Droit international’, 4 *Journal of International Criminal Justice* (2006), at 564; See M. Akehurst, ‘Jurisdiction in International Law’, 46 *British Yearbook of International Law* (1975) 145–257, at 179, who states that “in criminal law legislative jurisdiction and judicial jurisdiction are one and the same.” and H. Donnedieu De Vabres, ‘Essai d’un système rationnel de distribution des compétences en droit pénal international’, 19 *Revue de droit international privé* (1924), at 48, who states that “*en matière criminelle, la compétence législative et judiciaire se confondent*”.

¹¹³ Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Oxford and Portland, Oregon: Hart Publishing, 2012), at 11.

¹¹⁴ See Hallevey, *A Modern Treatise on the Principle of Legality in Criminal Law* (2010), at 83 and cases cited footnote 6.

¹¹⁵ *Ibid.*, at 83.

¹¹⁶ See P. Gaeta, ‘The Need Reasonably to Expand National Criminal Jurisdiction over International Crimes’, in Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford: Oxford University

According to him, nothing prevents judges who are exercising universal jurisdiction from applying foreign criminal legislation, namely the law of the State where the crime was committed, especially if it is more favourable to the defendant. On the contrary, he submits that this solution would provide a greater respect for the legality principle, especially in respect to penalties, which can vary greatly from one State to another.¹¹⁷ The *Association Internationale de droit pénal* also argued that the application of foreign criminal law was justified in exceptional cases to ensure “le respect du droit individuel et l'intérêt des bonnes relations internationales”.¹¹⁸ More recently, it has also been argued that the application of foreign criminal law could provide an answer to the critiques of legal imperialism formulated by the African Union against the exercise of universal jurisdiction.¹¹⁹ However, despite the recommendations of various scholars¹²⁰ and despite the fact that the application of foreign domestic law is a settled practice in private international law, the fact remains that, in practice, criminal courts systematically refuse to apply foreign criminal law.¹²¹ It should be noted that foreign criminal law is, to some extent, taken into account, for example, in order to respect the principle of double criminality¹²² or in the

Press, 2012), at 604 and H. Donnedieu de Vabres, *Les Principes modernes du droit pénal international* (Paris: Sirey, 1928), at 171 ff.

- ¹¹⁷ Donnedieu de Vabres, 'Essai d'un système rationnel de distribution des compétences en droit pénal international', 19 *Revue de droit international privé* (1924), at 48.
- ¹¹⁸ See also 'Association internationale de droit pénal, IIe Congrès International de droit pénal (Bucarest, 6-12 October 1929)', in *Résolutions des congrès de l'Association Internationale de Droit Pénal (1926-2004)*, 20 *Nouvelles études pénales* (2009), at 64-66.
- ¹¹⁹ Gaeta, 'The Need Reasonably to Expand National Criminal Jurisdiction over International Crimes', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012), at 604.
- ¹²⁰ On this subject, see Donnedieu de Vabres, *Les principes modernes du droit pénal international*; J. Le Calvez, 'Compétence législative et compétence judiciaire en droit pénal (La remise en cause du principe selon lequel le juge répressif n'applique que sa loi nationale)', *Revue de Science Criminelle et Droit Pénal Comparé* (1980), at 13-14; A. Huet, 'Pour une application limitée de la loi pénale étrangère', 109 *Journal du droit international* (1982), at 625; M. J. L. Decroos, 'Criminal Jurisdiction Over Transnational Speech Offenses From Unilateralism to the Application of Foreign Public Law by the National Courts', *European Journal of Crime, Criminal Law and Criminal Justice* (2005), at 391; Gaeta, *supra* note 119; More generally, see W.S. Dodge, 'Breaking the Public Law Taboo', 43 *Harvard International Law Journal* (2002), at 161.
- ¹²¹ See for instance Court of Appeals of New York, *Loucks v. Standard Oil Co.*, 120 N.E. 198 (N.Y. 1918) 201-02. Swiss courts for instance never apply foreign national law. See A. Petrig, 'The Expansion of Swiss Criminal Jurisdiction in Light of International Law', 9(4) *Utrecht Law Review*, (September 2013), at 34-55, footnote 1.
- ¹²² Some pieces of domestic legislation require that the conduct also be punishable at the *locus delicti commissi*. See for instance Art. 6 (1)(a) of the Swiss Criminal Code which states that "Any person who commits a felony or misdemeanor abroad that Switzerland is obliged to prosecute in terms of an

determination of the penalty.¹²³ We will come back to this issue in the Chapter dedicated to the legality principle.

B. Criminal and civil jurisdiction

42 A further distinction common to all national systems is drawn between civil and criminal jurisdiction. The present study is concerned with criminal jurisdiction and does not generally address the issue of the exercise of jurisdiction for the purpose of obtaining civil law remedies.

III. The two approaches of public international law

43 In public international law, there are two general approaches to the question of jurisdiction. According to the first approach – adopted by the Permanent Court of International Justice in the *Lotus* case – international law only intervenes to restrain the freedom of states.¹²⁴ This “principle of freedom”¹²⁵ recognizes that the exercise of extraterritorial jurisdiction over international crimes is possible *unless* it is prohibited by rules of international law. According to the second approach, criminal jurisdiction is essentially territorial and, thus, a rule of international law must *allow* states to exercise extraterritorial jurisdiction, such as that of extraterritorial jurisdiction over nationals (active personality principle) or based on other principles such as passive personality, protective and universality principles. It is useful to recall these two approaches.

A. The *Lotus* approach

44 In 1927, the Permanent Court of the International Court of Justice (hereafter “PCIJ” or “Court”) delivered a landmark judgment in the famous *Lotus* case on

international convention is subject to this Code provided: a. the act is also liable to prosecution at the place of commission or no criminal law jurisdiction applies at the place of commission”.

¹²³ For instance, Art. 6 of the Swiss Penal Code (on offences committed abroad prosecuted in terms of an international obligation) states at paragraph 3 that “The court determines the sentence so that overall the person concerned is not treated more severely than would have been the case under the law at the place of commission.”; See Petrig, ‘Extraterritorial Jurisdiction – The Applicability of Domestic Criminal Law to Activities Committed Abroad in Switzerland’, in Sieber et al. (eds.), *National Criminal law in a Comparative Legal Context: General limitations on the Application of Criminal law* (Berlin: Duncker & Humblot, 2011) 319-321.

¹²⁴ Gaeta, *supra* note 119, at 599.

¹²⁵ See, Judgment No. 9, *The Case of the S.S. “Lotus” (France v. Turkey)*, Permanent Court of International Justice (Series A, No. 10), 7 September 1927, at 20.

the issue of the exercise of extraterritorial criminal jurisdiction by domestic courts. The case arose out of the collision, on 2 August 1926, on the high seas between the French steamer, the *Lotus*, and the Turkish steamer, *Boz-Kourt*.¹²⁶ Some Turkish sailors and passengers, who were on board the *Boz-Kourt*, were killed. When the French steamer arrived in Constantinople the next day, the Turkish authorities started an investigation into the case and finally arrested Lieutenant Demons, the French officer in charge of the watch on board the *Lotus*. Despite Lieutenant Demons' objections that Turkish Courts lacked jurisdiction, on 15 September 1926, a Turkish Criminal Court sentenced him to eighty days' imprisonment and a fine of twenty-two pounds. Since the beginning of the case, the French government had protested against their citizen's arrest and had demanded his release and transfer to French Courts. On 12 October 1926, Turkey and France finally signed a special agreement in which they "submitted to the Permanent Court of International Justice the question of jurisdiction which had arisen between them following the collision which occurred on August 2nd 1926, between the steamships *Boz-Kourt* and *Lotus*".¹²⁷ In a controversial verdict – decided by the President's casting vote, the votes being equally divided – the PCIJ ruled that by instituting criminal proceedings in pursuance of Turkish law against the French officer, Turkey had not acted in conflict with the principles of international law.¹²⁸

In its judgment, the Court made a distinction between enforcement jurisdiction and legislative jurisdiction. Regarding the former, it ruled that "the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention".¹²⁹

Regarding the latter however, the majority expressed the view that the exercise in its own territory of extraterritorial jurisdiction over crimes committed abroad was possible as long as international law did not prohibit it. The Court held:

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the

¹²⁶ *Ibid.*, at 10.

¹²⁷ *Ibid.*, at 5.

¹²⁸ *Ibid.*, at 32.

¹²⁹ *Ibid.*, at 18.

jurisdiction of their courts to persons, property and acts 'outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.¹³⁰

47 According to the Court, the principle of territorial sovereignty thus appears to largely ban extraterritorial enforcement jurisdiction, but does not prevent states from exercising extraterritorial legislative jurisdiction in their own territory. The Court then went on to determine whether general international law contained a rule prohibiting Turkey from prosecuting the French officer and concluded that such a rule did not exist. It then asked itself whether these considerations really applied as regards criminal jurisdiction or whether this jurisdiction was governed by another principle.¹³¹ It did not give an answer on this point because it considered that the exercise of jurisdiction by Turkey corresponded to the assertion of territoriality since the effects of the offence were produced on the Turkish vessel.¹³²

48 In sum, according to the *Lotus* approach, there exists a presumption in favor of the exercise of extraterritorial prescriptive criminal jurisdiction, including universal jurisdiction; it is up to the states challenging it to prove the existence of a specific prohibitive rule. Although the case concerned ordinary crimes, the reasoning of the Court is *a fortiori* applicable to international crimes.¹³³ The PCIJ did however rule that the exercise of jurisdiction over crimes committed abroad is not without limits. Regrettably, the Court did not specify what these prohibitive rules are. Gaeta mentions two possible rules: i) immunities and ii) the principle of non-interference in domestic affairs.¹³⁴ The International Court of Justice upheld the first rule in the *Arrest Warrant* case, at least in respect to the international rules on personal immunities.¹³⁵ As for the principle of non-interference, it will be briefly discussed below in subsection D.

¹³⁰ *Ibid.*, at 20.

¹³¹ *Ibid.*, at 49.

¹³² *Ibid.*, at 60.

¹³³ Gaeta, *supra* note 119, at 194.

¹³⁴ P. Gaeta, 'Les règles internationales sur les critères de compétence des juges internationaux', in Cassese and Delmas-Marty (eds), *Crimes internationaux et juridictions internationales* (Paris : Presses Universitaires de France, 2002), at 192.

¹³⁵ ICJ, *Arrest Warrant* case, Judgment of 14 February 2002, § 17.

B. The modern approach

In 1927, Joseph H. Beal wrote that “it is clear that the sovereign cannot confer legal jurisdiction on his courts or his legislature when he has no such jurisdiction according to the principles of international law”.¹³⁶ Mann and other scholars severely criticized the approach of the majority of the judges in the *Lotus* case and “the delimitation of jurisdiction by the State itself rather than international law”, stating that the position of the majority reflects “a most unfortunate and retrograde theory”.¹³⁷ Judge Van den Wyngaert, in a more moderate way however, in her Dissenting Opinion in the *Arrest Warrant* case, also considered that the *Lotus* approach is “too liberal and that, given the complexity of contemporary international intercourse, a more restrictive approach should be adopted today”.¹³⁸

Indeed, according to the more modern approach defended by many scholars, extraterritorial jurisdiction is only possible if it is expressly allowed by a rule of international law.¹³⁹ For instance, a treaty rule must specifically allow – or oblige – a state to exercise jurisdiction outside its territory. According to Mann, “The existence of the State’s right to exercise jurisdiction is exclusively determined by public international law.”¹⁴⁰ Under this approach, Bowett defines jurisdiction as “the capacity of a State *under international law* to prescribe or to enforce a rule of law”.¹⁴¹ Thus, the starting point in defining jurisdiction is no longer State sovereignty, but international law as a “distributeur des compétences des Etats”.¹⁴² In other words, international law confers rights and

¹³⁶ See J. H. Beale, *A Treatise on the Conflict of Laws, volume 1: Jurisdiction* (New York: Baker, Voorhis & Co. 1935); Mann, ‘The Doctrine of Jurisdiction in International Law’, 111 *Recueil des Cours* (1964) 1-162, at 11.

¹³⁷ Mann, *supra* note 135, at 1-162. It is interesting to point out that, ten years later, in what Mann considers “an unexplained and inexplicably retrograde change of heart”, Beal seems to suggest the complete opposite in the following statement: “The determination of jurisdiction, therefore, is with us a question of our own common law, and not of a generally accepted doctrine of the law of all nations.”

¹³⁸ ICJ, *Arrest Warrant* case, Dissenting Opinion of Judge Van den Wyngaert, § 51.

¹³⁹ See Gaeta, *supra* note 119, at 596 and 599; J. D’Aspremont, ‘Multilateral Versus Unilateral Exercises of Universal Criminal Jurisdiction’, *Israel Law Review* (2010) 301-329, at 309.

¹⁴⁰ Mann, *supra* note 136, at 11.

¹⁴¹ D. W. Bowett, ‘Jurisdiction: Changing Patterns of Authority Over Activities and Resources’, 53 *British Yearbook of International Law* (1982) 1-26, at 1, citing American Law Institute, Restatement of the Law, Second (1965), *Foreign Relations of the United States*, at 20 (emphasis added).

¹⁴² M. Henzlin, *Le principe de l’universalité en droit pénal international : Droit et obligation pour les Etats de poursuivre et juger selon le principe de l’universalité* (Geneva/Brussels: Helbing & Kichtenhahn/Brylant, 2000), at 150.

obligations upon states in relation to their territories and in accordance with the principle of sovereign equality.¹⁴³

51 With regard to the topic under discussion – universal jurisdiction over international crimes – this second approach would therefore seem to imply the need to find a treaty rule or a rule of customary international law that allows – or obliges – the exercise of such jurisdiction. This issue will be addressed in Section IV below. Before closing this introductory section on the notion of jurisdiction and turning to examine the different bases of jurisdiction, it appears useful to briefly address the relationship between extraterritorial jurisdiction and the principles of sovereignty and non-intervention.¹⁴⁴

IV. Extraterritorial jurisdiction and the principles of sovereignty and non-intervention

52 It is often argued that limits to jurisdiction may flow from the principle of sovereign equality between states, which is laid down in Article 2(1) of the UN Charter, and its corollary, the principle of non-intervention or non-interference in domestic affairs (hereafter “principle of non-intervention”).¹⁴⁵ Under the principle of non-intervention, states are prohibited from intervening in the domestic affairs of other states.¹⁴⁶ The principle was first formulated by Vattel¹⁴⁷ and has since been the subject of many resolutions of the General Assembly of the United Nations. It is now considered to be part of customary international law,¹⁴⁸ although its content is not entirely clear.

53 The 1970 Declaration on Principles of International Law concerning Friendly Relations contains an entire section entitled “The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter”.¹⁴⁹ It states, inter alia, that “No State or group

¹⁴³ Gaeta, *supra* note 119, at 599.

¹⁴⁴ The term “non-interference” (in domestic affairs) is also used.

¹⁴⁵ See D. Francis Donovan and A. Roberts, ‘The Emerging Recognition of Universal Civil Jurisdiction’, 100 *American Journal of International Law* (2006), at 142; On the distinction between the two terms, see Henzelin, *Le principe de l’universalité en droit pénal international : Droit et obligation pour les Etats de poursuivre et juger selon le principe de l’universalité*, at 162-163; According to Oppenheim, the prohibition of intervention “is a corollary of every state’s right to sovereignty, territorial integrity and political independence”; *Oppenheim’s International Law* (2008), at 428.

¹⁴⁶ C. Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2008), at 144.

¹⁴⁷ E. de Vattel, *Droit des gens ou principes de la loi naturelle*, Vol. 1 (London/Neuchâtel, 1758), § 37.

¹⁴⁸ Henzelin, *Le principe de l’universalité en droit pénal international : Droit et obligation pour les Etats de poursuivre et juger selon le principe de l’universalité*, at 163.

¹⁴⁹ UN GA, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, A/RES/25/2625, 24 October 1970.

of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State". The ICJ reaffirmed the principle in the *Nicaragua* case.¹⁵⁰ The general principle includes the prohibition on the use of force, as set forth in Article 2.4 of the UN Charter,¹⁵¹ but also prohibits intervention in the internal affairs of other states in ways not involving the use of force. The principle has been invoked a number of times by states who opposed the exercise of universal jurisdiction by another state. It was, for instance, invoked by Chile to oppose Spanish and British claims to universal jurisdiction.¹⁵²

Indeed, regarding extra-territorial jurisdiction, the principle of non-intervention, applied strictly, could mean that "any jurisdictional assertion that reaches beyond a State's boundaries is a violation of international law".¹⁵³ This is not the approach opted for by the international community, as has been shown in the two approaches outlined above.

Above all and as affirmed in the *Lotus* judgment, this principle prohibits the exercise of enforcement jurisdiction by one State in the territory of another.¹⁵⁴ As mentioned above, universal jurisdiction, in the sense used in this study, is generally not concerned with enforcement jurisdiction. It should be noted, however, that if a state exercises universal jurisdiction *in absentia*, a state cannot – without violating the principle of non-interference – arrest a person on the territory of another state, i.e. the territorial or national state without this state's consent. In this regard, the "arrest" of Adolf Eichmann by Israel in Buenos Aires in 1960 is a good example of a breach of Argentina's sovereignty. Likewise, the abduction of Alvarez-Machain, a Mexican national suspected of having tortured and murdered a Drug Enforcement Administration (DEA) agent, on Mexican territory, was unanimously considered a violation of Mexico's sovereignty.¹⁵⁵ However, in our view, when a state *issues* an international arrest warrant, it is still acting within the frame of the wider form of prescriptive jurisdiction, as

¹⁵⁰ Judgment, *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (Merits), Permanent Court of International Justice, 27 June 1986.

¹⁵¹ Art. 2(4) of the Charter states 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, or in any other manner inconsistent with the Purposes of the United Nations".

¹⁵² Henzelin, *Le principe de l'universalité en droit pénal international : Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité*, at 165.

¹⁵³ Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2008), at 144.

¹⁵⁴ Bowett, 'Jurisdiction: Changing Patterns of Authority Over Activities and Resources', 53 *British Yearbook of International Law* (1982) 1-26, at 17.

¹⁵⁵ See Henzelin, *Le principe de l'universalité en droit pénal international : Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité*, at 175 and the references cited.

opposed to asserting enforcement jurisdiction within the territory of a foreign state.¹⁵⁶

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It is generally agreed that the principle of non-intervention constitutes a limit to the establishment and exercise of legislative and judicial extraterritorial jurisdiction, although this is subject to some controversy.¹⁵⁷ The general view is that the establishment and exercise of any type of jurisdiction, including legislative and judicial jurisdiction over ordinary crimes, may infringe upon the principle of state sovereignty.¹⁵⁸ In this sense, it can be argued that the exercise of universal jurisdiction, based exclusively on the domestic legislation of the state and having no foundation in conventional or customary international law (so-called “unilateral universal jurisdiction”), violates the principles of non-intervention and of the equality of states before the law.¹⁵⁹

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However, what is also generally agreed among scholars¹⁶⁰ is that the principle of non-intervention does not prevent the exercise of extraterritorial

¹⁵⁶ In fact, the term international arrest warrant is somewhat misleading, because it may suggest that the arrest warrant is enforced in other states without the consent of the authorities of that State. This is not the case. Indeed, unlike the European arrest warrant, which, when issued, is automatically enforced in other European countries, the “international arrest warrant” is in fact a national arrest warrant issued by a State which is generally communicated to Interpol and enforced by the authorities of the receiving state. On this subject see the Dissenting Opinion of Judge Van den Wyngaert, § 76-79.

¹⁵⁷ Feller, for instance, disagrees with such a view, arguing that even with regard to regular offences, “The view that criminal jurisdiction over offences committed within the territory of another state involves a violation of the sovereignty of that state, particularly when the offender or the victim is not connected by citizenship or by residence to the first state, went out of fashion a long time ago. The jurisdiction, *per se*, is exercised within the territory of the first state and not within the territory of the state in whose territory the offence was committed as a reaction to offences which, although committed outside its borders, threaten its vital interests. This does not involve any violation of the sovereignty of the state in whose territory the offence was committed, nor of the sovereignty of any other state to which the offence is connected by any other linkage”, in S. Z. Feller, ‘Concurrent Criminal Jurisdiction in the International Sphere’, 16(1) *Israel Law Review* (1981) 40-74, at 47.

¹⁵⁸ See the discussion and references in Henzelin, *Le principe de l’universalité en droit pénal international : Droit et obligation pour les Etats de poursuivre et juger selon le principe de l’universalité*, at 179-182. See also Cassese et al., *Cassese’s International Criminal Law*, at 282.

¹⁵⁹ In this direction, see Permanent Mission of Chile to the United Nations, *The Principle of Universal Jurisdiction: Comments by the Government of Chile*, § 3.

¹⁶⁰ See Cassese et al., *Cassese’s International Criminal Law* (2013), at 282; Henzelin, *Le principe de l’universalité en droit pénal international : Droit et obligation pour les Etats de poursuivre et juger selon le principe de l’universalité*, at 170-171; Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2008), at 144; M. Inazumi, *Universal Jurisdiction in Modern International Law. Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law* (Antwerp: Intersentia, 2005), at 136.

prescriptive jurisdiction over crimes whose prohibition is rooted in international customary law,¹⁶¹ “since prohibition of these crimes is intended to safeguard values regarded as fundamental by the whole international community”.¹⁶² Indeed, as stated in the *Cairo-Arusha Principles*, “The principle of non-interference in the internal affairs of States, [...] shall be interpreted in light of the well-established and generally accepted principle that gross human rights offences are of legitimate concern to the international community, and give rise to prosecution under the principle of universal jurisdiction”.¹⁶³ The same position was held by the Institute of International Law in its Resolution on *The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States*.¹⁶⁴

For other international crimes that are only prohibited by treaty, the assertion of jurisdiction on specific extraterritorial grounds, namely universal jurisdiction, must be established by a treaty provision in order to ensure that the principle of non-interference is respected.¹⁶⁵ In such cases, the exercise of universal jurisdiction is exclusively limited to the territories of the state parties to the treaties.

In our view, in all cases – even for the most heinous international crimes – the principles of state sovereignty and non-intervention should serve as guiding principles in the discussion regarding the challenges to the *exercise* of universal jurisdiction, namely the application of the subsidiarity principle and the presence.

V. Bases of criminal jurisdiction

Aside from jurisdiction based on territoriality principles which is exercised by the state where the crime was committed (subsection A), international law has generally recognized four types of extraterritorial principles:¹⁶⁶ Active Personality/Nationality, which is asserted by a state whose national is the

¹⁶¹ The question that is posed is to determine what are the “crimes prohibited by customary international law”.

¹⁶² See Cassese et al., *Cassese’s International Criminal Law* (2013), at 282.

¹⁶³ The Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offenses: An African Perspective.

¹⁶⁴ Institute of International Law in its *Resolution on The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States*, 1989; Henzelin, *Le principe de l’universalité en droit pénal international : Droit et obligation pour les Etats de poursuivre et juger selon le principe de l’universalité*, at 170-171.

¹⁶⁵ See Cassese et al., *Cassese’s International Criminal Law* (2013), at 282.

¹⁶⁶ See Hallevy, *A Modern Treatise on the Principle of Legality in Criminal Law* (2010), at 118. Some controversy remains with respect to passive personality jurisdiction.

perpetrator of the crime (subsection B); Passive Personality/Nationality, which is asserted by a state whose national is the victim (subsection C); Protective Personality, which is based on the national interest affected (subsection D); and Universality, which refers to the competence of a state when none of the other internationally recognized prescriptive links exist at the time of the alleged commission of the offence (subsection E).¹⁶⁷

A. Territoriality principle

61 As an integral part of State sovereignty, territorial jurisdiction has long been recognized to be the most basic jurisdiction under customary international law.¹⁶⁸ In the *Lotus* case, the Permanent Court of International Justice held that “in all systems of law the principle of the territorial character of criminal law is fundamental”.¹⁶⁹ Indeed, one of the main functions of a state is to maintain order within its own territory.¹⁷⁰ Most international treaties provide for territorial jurisdiction. This is, for instance, the case with the Genocide Convention in its Article 6 and of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment. Its Article 5(1)(a) states that “Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State”.

62 There are obvious reasons why the place where the crime has been committed is generally the *forum conveniens*, i.e. the appropriate place for trial. First of all, in terms of the efficiency of proceedings, it is the easiest place to collect evidence, hear witnesses and victims, etc. In addition, the territorial state is generally the place where the rights of the accused are best safeguarded.¹⁷¹ Indeed, it is likely to be the place where he is familiar with the laws and where he knows the language, unless of course he is a foreigner who is merely on a

¹⁶⁷ See R. O’Keefe, ‘The Grave Breaches Regime and Universal Jurisdiction’, 7 *Journal of International Criminal Justice* (2009) 811-831.

¹⁶⁸ See Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law* (Antwerp: Intersentia, 2005), at 22 and D. Tezcan, *Territorialité et conflits de juridiction en droit pénal international* (Ankara: Université de Ankara, 1983), at 121.

¹⁶⁹ Judgment No. 9, *The Case of the S.S. « Lotus » (France v. Turkey)*, Permanent Court of International Justice (Series A, No. 10), 7 September 1927, at 10.

¹⁷⁰ Akehurst, ‘Jurisdiction in International Law’, 46 *British Yearbook of International Law* (1975), 145-257.

¹⁷¹ See Cassese et al., *Cassese’s International Criminal Law* (2013), at 275.

visit. Many other reasons support the exercise of territorial jurisdiction.¹⁷² For instance, as Orentlicher rightly points out, “provided they enjoy legitimacy, trials in the territorial state are more likely than prosecutions abroad to inspire a sense of ‘ownership’ by societies recently scourged by atrocious crimes”.¹⁷³ It is also argued that “the cathartic process of criminal trials will be more effective if the prosecution and sentence occur on the territory where the crime was committed”.¹⁷⁴ Judges are also more accountable to the community in terms of the manner in which they dispense justice, since they are members of the society where the crimes took place and are therefore “conscious of the public’s close scrutiny on their administration of justice”.¹⁷⁵ Finally, by administering justice on crimes committed on its territory, the state contributes to promoting the deterrence of the commission of future crimes.¹⁷⁶ The judicial process can, for instance, help to “strengthen a fragile democracy and reinstate the rule of law by signalling the condemnation of a former violent regime”.¹⁷⁷

The problem with the traditional principle of territoriality and international crimes is that these crimes are often committed by state or military officials – or at least with their complicity or their acquiescence.¹⁷⁸ This is typically the case of war crimes committed by servicemen, of acts of torture perpetrated by police officers or of genocide carried out with the (tacit) approval of state authorities.¹⁷⁹ In such cases, state authorities are naturally reluctant to prosecute state agents or private individuals when these proceedings may eventually involve state organs. Furthermore, if prosecution and trial do take place in the territorial state,

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¹⁷² These reasons will be further discussed in the Chapter dedicated to the subsidiarity principle. Part III, Chapter 3, *infra* N 685 ff.

¹⁷³ D. Orentlicher, ‘The Future of Universal Jurisdiction in the New Architecture of Transnational Justice’, in Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (Philadelphia: University of Pennsylvania Press, 2006) 214-239, at 236.

¹⁷⁴ F. Pocar and M. Maystre, ‘The Principle of Complementarity: A Means Towards a More Pragmatic Enforcement of the Goal Pursued by Universal Jurisdiction’, in Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 247-303, at 251.

¹⁷⁵ *Ibid.*, at 251.

¹⁷⁶ *Ibid.*

¹⁷⁷ J. Stigen, ‘The Relationship between Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes’, in Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 133-160.

¹⁷⁸ Pocar and Maystre, ‘The Principle of Complementarity: A Means Towards a More Pragmatic Enforcement of the Goal Pursued by Universal Jurisdiction’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 247-303, at 253.

¹⁷⁹ *Ibid.*, at 252.

proceedings may not be credible, fair or safe.¹⁸⁰ The perpetrator may, for instance, enjoy immunities under national law or be covered by an amnesty law. On the other hand, the courts of the foreign state do not (necessarily) have to recognize the immunities or the amnesty.

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There have been examples of territorial states prosecuting and trying authors of international crimes. This has been possible in those instances where there has been a change of regime, as in Rwanda, where the Tutsis (victims) took over power after the 1994 genocide. Rwandan courts have convicted thousands of authors of the genocide.¹⁸¹ Generally speaking however, prosecution for serious international crimes in the territorial state has been rare. This, however, appears to be changing. In 2013, for the first time, a former Latin American Head of State in the Americas stood trial for genocide and crimes against humanity before the tribunals of the state in which he allegedly committed the crimes.¹⁸² On 10 May 2013, former Guatemalan dictator Efraín Ríos Montt was sentenced to 80 years' imprisonment for genocide and crimes against humanity committed against 1771 victims. However, his conviction was overturned by the Constitutional Court for due process violations. The trial resumed in early 2015. On 3 June 2016, the First Court of Appeals suspended the trial indefinitely due to the accused's health condition. On 31 March 2017, a new trial against Ríos Montt for genocide and crimes against humanity. In addition, the fact that amnesties in a number of countries have been formally annulled and that international crimes have been recently incorporated into domestic penal codes has led to further prosecutions of international crimes based on territorial jurisdiction.¹⁸³

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In his individual opinion in the *Arrest Warrant* case, President Guillaume declared that allowing the courts of every state in the world to prosecute international crimes – whomever their authors and victims, and irrespective of the place where the offender is to be found – would “risk creating total judicial chaos”.¹⁸⁴ In our view, one can argue that this “chaos” can be found in the exercise of jurisdiction on each of the bases discussed,¹⁸⁵ and has been the case, for example, where the prosecution is made by the state of commission of the

¹⁸⁰ Orentlicher, 'The Future of Universal Jurisdiction in the New Architecture of Transnational Justice', in S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (Philadelphia: University of Pennsylvania Press, 2006) 214-239, at 236.

¹⁸¹ See V. Thalmann, 'Rwandan Genocide Cases', in Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: OUP, 2009) 498-505.

¹⁸² See N. Roht-Arriaza, 'Just a 'Bubble'? Perspectives on the Enforcement of International Criminal Law by National Courts', 11 *Journal of International Criminal Justice* (2013) 537-543.

¹⁸³ *Ibid.*, at 538.

¹⁸⁴ ICJ, *Arrest Warrant* case, Separate Opinion of President Guillaume, § 9.

¹⁸⁵ M. Delmas-Marty, *Vers une Communauté des valeurs ? Les Forces imaginantes du droit* (Paris : Éditions du Seuil, 2011), at 132.

crimes. One example is the trial of Saddam Hussein for alleged crimes against humanity; he was tried by the Iraqi Special Court, a process that led to a highly mediatised execution, which shocked the world for its clear violation of human rights. Other examples are identifiable, including that of Charles Taylor, which was supposed to take place in Freetown, Sierra Leone, but was transferred to The Hague for security reasons and because of the risk that the trial would destabilize the whole region.¹⁸⁶

B. Active nationality principle

1. *In general*

The nationality of the offender is another generally accepted basis for the exercise of jurisdiction by a state, especially in civil-law jurisdictions.¹⁸⁷ In most cases, the circumstances satisfy both the territoriality and the active principles, because the criminal act is perpetrated by a national within the territory of his home state. When this is not the case, i.e. when a national commits an offence extraterritorially, there are two different solutions adopted by states.¹⁸⁸ Some states exercise jurisdiction over their nationals regardless of whether the conduct is criminal under the law of the territorial state. The idea is that the state wants its nationals to comply with its own law, regardless of where the offence was committed. Other states exercise criminal jurisdiction over their nationals only if the conduct is also punishable under the law of the territorial state. The idea behind this approach is that the state does not want to extradite its nationals and must therefore provide a possibility of prosecuting and trying the accused, so as to avoid a situation in which he'd remain unpunished.¹⁸⁹

The active personality principle generally also covers non-nationals serving the state as members of the armed forces or as members of the diplomatic service. Some states extend this principle by claiming jurisdiction over crimes committed abroad by their permanent residents. For instance, the United Kingdom International Criminal Code Act provides that the section therein regarding genocide, crimes against humanity and war crimes also applies to “acts committed outside the United Kingdom [...] by a United Kingdom resident or a person subject to UK service jurisdiction”. This is also provided for in a

¹⁸⁶ *Ibid.*

¹⁸⁷ See Akehurst, 'Jurisdiction in International Law', 46 *British Yearbook of International Law* (1975), 145-257, at 152.

¹⁸⁸ Pocar and Maystre, *supra* note 178, at 251. On

¹⁸⁹ *Ibid.*, at 252.

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number of international treaties.¹⁹⁰ It can in fact be seen as a form of universal jurisdiction.

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Generally, states require “double incrimination”, i.e. that the offence is punishable both in the territorial state and in the state of the victim who wishes to exercise jurisdiction. The idea underpinning this approach aims to avoid the situation where a person could be prosecuted for an act which is not considered an offence in the territorial state, a result that would be contrary to the fundamental principle of legality, *nullum crimen sine lege*.¹⁹¹

2. *The active nationality principle and international crimes*

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The principle of active nationality is laid down in the Convention against Torture. Its Article 5(1)(b) states that “Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: (a) When the alleged offender is a national of that State.” The Genocide Convention does not expressly provide for active and passive nationality jurisdiction (Article VI *a contrario*). However, at the time of the drafting of the Genocide Convention, this issue was raised by some states.¹⁹² The Committee finally adopted an explanatory text inserted into the report, stating that: “The first part of article VI contemplates the obligation of the State on whose territory acts of genocide have been committed. Thus, *in particular*, it does not affect the right of any State to bring to trial before its own tribunals any of its nationals for acts committed outside the State”.¹⁹³ However, the *legal validity* of this statement is questionable.¹⁹⁴ It can be understood as the interpretation by a majority of states of Article VI; this interpretation cannot however be binding on states whose delegations opposed it.

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In any case, it is today generally agreed that even though Article VI of the Genocide Convention only obliges the territorial State to prosecute and punish

¹⁹⁰ See for instance Art. 5(1)(b) International Convention against the taking of hostages.

¹⁹¹ Pocar and Maystre, *supra* note 178, at 252. On dual criminality and the legality principle, see *infra* N 571 ff.

¹⁹² See for instance the statement of the Swedish delegation: “Since article VI did not require countries to extradite their nationals, the provisions of article VI, under which the accused were to be tried by a competent tribunal of the State in the territory of which the act was committed, constituted no guarantee that the crime would be punished in every case.” (*UN Sixth Committee, Summary Records of Meetings*, 21 September-10 December 1948, at 397). An amendment to Article VI was submitted by India, according to which nothing in the article should affect the right of states to bring to trial before its own tribunals any of its nationals for acts committed outside the State (*Report of the Sixth Committee*, UN Document A/760 & Corr 2, at 500).

¹⁹³ *Ibid.* (emphasis added).

¹⁹⁴ N. Robinson, *The Genocide Convention: A Commentary* (New York: Institute of Jewish Affairs, 1960), § 84.

persons who committed genocide, it does not prevent other states from exercising their competence based on other jurisdictional bases, namely the active nationality principle.¹⁹⁵ The Geneva Conventions provide for an obligation of each State to “bring persons, *regardless of their nationality*, before its own courts”, without especially mentioning the active nationality principle, or any other principle for that matter. The active personality principle is also provided for in a number of treaties against terrorism.¹⁹⁶ Some provide an obligation for states to establish jurisdiction over offences committed by their nationals,¹⁹⁷ while others simply allow for the exercise of this jurisdictional basis.¹⁹⁸

Generally, civil law countries tend to apply this principle more than common law countries.¹⁹⁹ Common law jurisdictions do however provide for this active nationality jurisdiction over international crimes.²⁰⁰ This principle was applied as early as 1902 by the US Court Martial against American servicemen who had fought in the Philippines.²⁰¹ There were also the famous “Leipzig Trials” against Germans in 1921-1922 and the trials before the US Court Martial for crimes committed in Vietnam.²⁰²

The problems with the active nationality principle are similar to those exposed earlier regarding the territorial principle. When an international crime is committed by a state or military official, the national state is usually reluctant

¹⁹⁵ See V. Thalmann, ‘National Criminal Jurisdiction over Genocide’, in P. Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford: OUP, 2009) 231-258, at 241.

¹⁹⁶ See Art. 6(1)(c) International Convention for the Suppression of Terrorist Bombings of 25 November 1997; Art. 7(1)(c) International Convention for the Suppression of the Financing of Terrorism of 9 December 1999; Art. 9(1)(c) International Convention for the Suppression of Acts of Nuclear Terrorism.

¹⁹⁷ See for instance Art. 3(1)(b) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons; Art. 5(1)(b) International Convention Against the Taking of Hostages; Art. 7(1)(c) International Convention for the Suppression of the Financing of Terrorism of 9 December 1999, which states that “1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when: [...] (c) The offence is committed by a national of that State”; Art. 6(1)(c) of the 1988 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.

¹⁹⁸ See for instance Art. 4(b) of the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft.

¹⁹⁹ See Akande, ‘Active Personality Principle’, in Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), at 228-229.

²⁰⁰ See for instance Section 51(2)(b) of the UK International Criminal Code Act.

²⁰¹ G. Mettraux, ‘US Courts-Martial and the Armed Conflict in the Philippines (1899-1902): Their Contribution to National Law on War’, 1(1) *Journal of International Justice* (2003) 135-150.

²⁰² See A. Cassese, *International Criminal Law* (2nd edition, Oxford: Oxford University Press, 2008), at 337, n. 3.

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to prosecute. As it has been put by one commentator, “offending state leaders cannot be expected to punish themselves”.²⁰³ The result, again, might be that the offender may enjoy immunity or be covered by an amnesty law.

C. Passive nationality principle

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Jurisdiction based upon the nationality of the victim (passive nationality or passive personality principle) is also relied upon by states, although it is more controversial than the territorial or active national principles. Put simply, with this principle, states can exercise jurisdiction over crimes committed abroad against their nationals. The rationale behind this principle is (i) the need to protect nationals abroad; and (ii) a mistrust in the exercise of jurisdiction by the territorial state.²⁰⁴ As with the active nationality principle, states generally require “double incrimination”, i.e. that the offence is punishable both in the territorial state and in the victim’s state who wishes to exercise jurisdiction.

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The passive nationality principle is somewhat controversial under international law and some English-speaking states have even claimed that it is in fact contrary to international law.²⁰⁵ Some argue that this principle creates legal uncertainty, because people are not necessarily aware of the victim’s nationality²⁰⁶ and are exposed to the application of laws without being able to determine which laws apply to their conduct.²⁰⁷ In our view, this objection is somewhat difficult to sustain in the case of core international crimes because one can hardly argue that the law does not prohibit such serious violations of human rights; moreover, the double incrimination requirement addresses this concern. However, this principle may raise issues with respect to the principle of foreseeability of penalties.

²⁰³ F. Malekian, *International Criminal Law: The Legal and Critical Analysis of International Crimes*, vol. I, (Uppsala: Malekian, 1991), at 301.

²⁰⁴ See Cassese, *International Criminal Law* (2008), at 337, n. 2.

²⁰⁵ Akehurst, ‘Jurisdiction in International Law’, 46 *British Yearbook of International Law* (1975), 145-257, at 163. See the critiques of Mann, ‘The Doctrine of Jurisdiction in International Law’, 111 *Recueil des Cours* (1964) 1-162, at 39.

²⁰⁶ D. Ireland-Piper, ‘Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine’, 9(4) *Utrecht Law Review* (2013) 68-89.

²⁰⁷ See Akande, ‘Passive Personality Principle’, in Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), at 451. Pocar and Maystre, ‘The Principle of Complementarity: A Means Towards a More Pragmatic Enforcement of the Goal Pursued by Universal Jurisdiction’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 247-303, at 258.

It is also argued that this basis of jurisdiction is not suitable for certain crimes like crimes against humanity or torture. With regard to crimes against humanity, Cassese argues:

[b]y definition, these are crimes that injure humanity [...] regardless of the nationality of the victim. As a consequence, their prosecution should not be based on the national link between the victim and the prosecuting state. This is indeed a narrow and nationalistic standard for bringing alleged criminals to justice, based on the interest of a state to prosecute those who have allegedly attacked one of its nationals. The prosecution of those crimes should instead reflect a universal concern for punishment; it should consequently be better based on such legal grounds as territoriality, universality or active personality. It follows that, as far as such crimes as those against humanity, torture and genocide are concerned, the passive nationality principle should only be relied upon as a *fallback*, whenever no other state (neither the territorial state, nor the state of which the alleged criminal is a national, or other states acting upon the universality principle) is willing or able to administer international criminal justice.²⁰⁸

The same can be said for the crime of genocide. Conversely, this ground of jurisdiction may be more appropriate for crimes like terrorism, where the victims are often selected based on their nationality and where the state of nationality has a particularly strong interest in preventing such crimes.²⁰⁹

The principle is neither provided for in the Genocide Convention, nor in the Geneva Conventions (at least not expressly). It is laid down in the Convention Against Torture at its article 5(1)(c). However, unlike for other jurisdictional bases, the Convention specifies that the state party can exercise this passive personality jurisdiction “if that state considers it appropriate”. The Convention thus merely *allows* states to exercise passive personality jurisdiction over torture, but does not oblige them to do so.²¹⁰ A number of other conventions “allow” states to exercise jurisdiction on the basis of this principle. This is, for instance, the case with the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft,²¹¹ the International Convention Against the

²⁰⁸ Cassese, *International Criminal Law* (2008), at 337-338, note 3.

²⁰⁹ Akande, *supra* note 207, at 452.

²¹⁰ See the differences between the provisions allowing states to exercise jurisdiction and those imposing the exercise of jurisdiction in Gaeta, ‘Les règles internationales sur les critères de compétence des juges internationaux’, in Cassese and Delmas-Marty (eds), *Crimes internationaux et juridictions internationales* (Paris: Presses Universitaires de France, 2002) 191- 213, at 197 ff.

²¹¹ See Art. 4(B) of the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft.

Taking of Hostages,²¹² the 1999 International Convention for the Suppression of the Financing of Terrorism,²¹³ the International Convention for the Suppression of Terrorist Bombings,²¹⁴ the Convention on the Safety of United Nations and Associated Personnel,²¹⁵ and the International Convention for the Suppression of Acts of Nuclear Terrorism.²¹⁶ Other conventions do not explicitly mention this principle but expressly state that the “Convention does not exclude any criminal jurisdiction exercised in accordance with national law”.²¹⁷

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Although this principle is established as a basis for jurisdiction in a number of domestic legislative acts,²¹⁸ such as in Mexico, Brazil and Italy, some states do not provide for this form of jurisdiction or they limit it. The United States, for instance, does not recognize this principle, except in cases of terrorism. According to the Restatement of the Law, “The principle has not been accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state’s nationals by reason of their nationality”.²¹⁹

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In domestic case law, the most famous example of passive personality jurisdiction over international crimes is probably the *Eichmann* case, where Israel sought to assert *jurisdiction* on behalf of the Jewish victims. The problem was that the victims were not Israeli nationals at the time Eichmann committed his crimes, seeing as the state of Israel did not exist. The Court held that because Israel was a nation of Jews, it had a nexus to the crimes committed by Eichmann. It thus relied on an expanded notion of the passive personality principle. The court also concluded that Israel had jurisdiction on the basis of the protective principle (see below) and the universality principle.

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The passive nationality principle has often been used in cases of war crimes, particularly after the cessation of hostilities by the victorious state against the former enemies.²²⁰ Courts have also relied on this principle to prosecute torture. This was true, for instance, in the case of *Alfredo Astiz*, an Argentine officer who

²¹² According to Art. 5(1)(d) of the International Convention against the taking of hostages, “Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in article 1 which are committed [...] with respect to a hostage who is a national of that State, if that State considers it appropriate.”

²¹³ Art. 7(2)(a) of the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999.

²¹⁴ Art. 6(2)(a) of the International Convention for the Suppression of Terrorist Bombing.

²¹⁵ Art. 10(2)(b) of the Convention on the Safety of United Nations and Associated Personnel.

²¹⁶ Art. 9(2)(a) of the International Convention for the Suppression of Acts of Nuclear Terrorism.

²¹⁷ See for instance art. 6(1)(c) of the 1988 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.

²¹⁸ See for instance Art. 13 of the Israeli Penal Code.

²¹⁹ *Restatement*, para 402, Comment g., at 240.

²²⁰ Cassese et al., *Cassese’s International Criminal Law*, at 277.

had tortured two French nuns in Argentina and was convicted *in absentia* in France and sentenced to life imprisonment.²²¹ Other cases have been brought before Italian courts for crimes committed against Italians in Argentina.²²²

D. Protective principle

The protective principle allows for the extraterritorial exercise of jurisdiction where the offence in question is directed at the security or essential national interests of the state. This principle is well established in the Western world.²²³ When state interests, namely national security and state property, are attacked outside of its territory, it is considered that the interests of the state have been harmed and that it has the jurisdiction to prosecute the authors of the offence. Given that the content of the notion of “national interests” is not entirely clear and that it is therefore up to each state to determine what its relevant interests are,²²⁴ the principle is open to abuse.²²⁵ In practice, these interests are generally related to offences against national security, peace, national emblems, attacks on the constitutional order, treason, espionage and offences against national defence.²²⁶ The jurisprudence of the US courts has also considered “national interests” under the protective principle as including acts which do not necessarily have an actual effect within the US territory.²²⁷

The protective principle is neither provided for in the Genocide Convention, nor in the Geneva Conventions. It is rather generally provided for in relation to terrorist offences, including in the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft,²²⁸ the 1998 International

²²¹ Cour d'Assises de Paris, *In Re Alfredo Astiz*, Judgment No. 1893/89, 16 March 1990.

²²² See Rome Court of Assizes (*Corte di assise*), *Suàrez Masòn and others*, 6 December 2000; see Lutz and Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America', 2 (1) *Chicago Journal of International Law* (2001), at 21, 23.

²²³ Hallevy, *A Modern Treatise on the Principle of Legality in Criminal Law*, at 121.

²²⁴ *Ibid.*, at 121.

²²⁵ Ireland-Piper, 'Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine', 9(4) *Utrecht Law Review* (2013) 68-89, at 77.

²²⁶ See for instance Art. 4(1) and 265 to 278 of the Swiss Penal Code and Art. 113-10 of the French Criminal Code. Relevant offences might also include the forging of coins, banknotes or official state papers.

²²⁷ Bantekas and Nash, *International Criminal Law* (3rd ed., Routledge: New York, 2007), at 84 and the references.

²²⁸ Art. 4(C) of the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft stipulates that "A Contracting State which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except in the following cases: [...] (c) the offence is against the security of such State."

Convention for the Suppression of Terrorist Bombings²²⁹ and the 2000 International Convention for the Suppression of Financing of Terrorism.²³⁰ It is noteworthy that these treaties merely *allow* states to exercise jurisdiction based on the protective principle.

83 In the *Eichmann* case, Israel also asserted its jurisdiction on the basis of the *protective principle*. According to the Court: “the extermination of European Jewry which was carried out with intent to annihilate the Jewish people was directed not only against those Jews who were exterminated, but against the entire Jewish People [...] This crime very deeply concerns the vital interests of the State of Israel, and pursuant to the “protective principle”, this State has the right to punish the criminals.”²³¹ Critics of this judgment alleged that the protective principle is designed to protect an existing state and could not apply as the state of Israel did not exist at the time of the commission of the crimes.

E. Universal principle

84 This principle will be examined under Chapter 2.

F. The representation principle

85 Finally, some scholars also distinguish another jurisdictional basis: the representation principle (*compétence de représentation* or *competence déléguée; stellvertretende Strafrechtspflege*) also known as the principle of vicarious administration of justice.²³² Under this principle, the custodial state – the state on whose territory the offender is found – prosecutes an offence on behalf of

²²⁹ Art. 6(2) states that “A State Party may also establish its jurisdiction over any such offence when: [...] b) The offence is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; or [...] d) The offence is committed in an attempt to compel that State to do or abstain from doing any act.”

²³⁰ Art. 7(2) states that “A State Party may also establish its jurisdiction over any such offence when: [...] (b) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), against a State or government facility of that State abroad, including diplomatic or consular premises of that State; c) The offence was directed towards or resulted in an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), committed in an attempt to compel that State to do or abstain from doing any act.”

²³¹ Judgment, *The Trial of Adolf Eichmann*, § 35, available online at <http://www.nizkor.org> (last visited 1 August 2017).

²³² See for instance J. Meyer, ‘The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction’, 31 *Harvard International Law Journal* (1990) 108-116; See also Ryngaert, *Jurisdiction in International Law*, at 21.

another state, following an extradition request.²³³ The exercise of this jurisdiction is generally subjected to the condition that the offence is one for which extradition is permissible but that extradition is denied or otherwise impossible.²³⁴ A further distinction is made between cases where the state has requested representation ("*compétence de représentation*") and cases where it has not and the state's consent is therefore implied (sometimes known as "*compétence de substitution*").²³⁵ The representation principle is not widely used; indeed, most states do not provide for this jurisdictional basis. They exercise jurisdiction only when another state makes a request and when this request is based on a treaty, providing an *aut dedere aut judicare/prosequi* obligation.²³⁶ This principle is mostly known in Europe. It is for instance provided for in France,²³⁷ Germany,²³⁸ Austria²³⁹ and Switzer-

²³³ This is the general "*aut dedere aut judicare*" provision. See *infra* Section III, C.

²³⁴ See Meyer, *The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction*, at 115; See also Art. 7 (1)(c) of the Swiss Penal Code.

²³⁵ See Cassani and Roth, 'Le juge suisse au service de la communauté des peuples ? réflexions à propos des nouveaux articles 3 à 8 CP', in Donatsch et al. (eds), *Strafrecht, Strafprozessrecht und Menschenrechte : Festschrift für Stefan Trechsel zum 65. Geburtstag* (Zürich : Schulthess, 2002) 449-475, at 464 ff.

²³⁶ See B. Swart, 'La place des critères traditionnels de compétence dans la poursuite des crimes internationaux', in Cassese and Delmas-Marty, *Juridictions nationales et crimes internationaux* (Paris : Presses Universitaires de France, 2002) 567-587, at 579.

²³⁷ See Art. 113-8-1 of the French Penal Code, which provides that "*Sans préjudice de l'application des articles 113-6 à 113-8, la loi pénale française est également applicable à tout crime ou à tout délit puni d'au moins cinq ans d'emprisonnement commis hors du territoire de la République par un étranger dont l'extradition ou la remise a été refusée à l'Etat requérant par les autorités françaises aux motifs, soit que le fait à raison duquel l'extradition avait été demandée est puni d'une peine ou d'une mesure de sûreté contraire à l'ordre public français, soit que la personne réclamée aurait été jugée dans ledit Etat par un tribunal n'assurant pas les garanties fondamentales de procédure et de protection des droits de la défense, soit que le fait considéré revêt le caractère d'infraction politique, soit que l'extradition ou la remise serait susceptible d'avoir, pour la personne réclamée, des conséquences d'une gravité exceptionnelle en raison, notamment, de son âge ou de son état de santé.*"

²³⁸ Section 7(2) of the German Penal Code, available online in English at http://iccdb.webfactional.com/documents/implementations/pdf/German_-_Criminal_Code_amend_Oct_2009.pdf (last visited 1 August 2017) provides that "German criminal law shall apply to other offences committed abroad if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal law jurisdiction, and if the offender: [...] 2. was a foreigner at the time of the offence, is discovered in Germany and, although the Extradition Act would permit extradition for such an offence, is not extradited because a request for extradition within a reasonable period of time is not made, is rejected, or the extradition is not feasible."

²³⁹ See § 65(1) of the Austrian Criminal Code, available in German online at <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002296> (last visited

land.²⁴⁰ In these states, it is generally prescribed in different provisions from those providing universal jurisdiction over genocide, crimes against humanity and war crimes or those providing for universal jurisdiction over crimes based on international treaties.²⁴¹

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Some scholars see this principle as a sub-category of universal jurisdiction that they call “representative universal jurisdiction”²⁴² or “universal jurisdiction by representation”.²⁴³ These two principles are in fact conceptually distinct. The fundamental difference between the representation principle and the universality principle is that in the former, the state acts on behalf of another state (generally the territorial state) while in the latter, it acts in the interest of the international community as a whole. Another difference is the gravity of the crimes subject to these jurisdictional bases. The representational principle justifies the exercise of national jurisdiction over lesser crimes, where there is no basis for jurisdiction.²⁴⁴ However, it should be noted that if one adheres to the conception according to which international crimes inflict injury both to the international community as a whole, but also to a specific community, a state exercising universal jurisdiction is also representing this community.²⁴⁵ The reference here to the representation principle is thus only one where the state exercising jurisdiction is exclusively acting on behalf of another.

1 August 2017) which provides that “Für andere als die in den §§ 63 und 64 bezeichneten Taten, die im Ausland begangen worden sind, gelten, sofern die Taten auch durch die Gesetze des Tatorts mit Strafe bedroht sind, die österreichischen Strafgesetze: [...] 2. wenn der Täter zur Zeit der Tat Ausländer war, im Inland betreten wird und aus einem anderen Grund als wegen der Art oder Eigenschaft seiner Tat nicht an das Ausland ausgeliefert werden kann.”

²⁴⁰ See Art. 7 of the Swiss Penal Code.

²⁴¹ See for instance Art. 7, para 2 a) of the Swiss Penal Code according to which “If the person concerned is not Swiss and if the felony or misdemeanour was not committed against a Swiss person, paragraph 1 is applicable only if: a. the request for extradition was refused for a reason unrelated to the nature of the offence.”

²⁴² See for instance Kress, *Universal Jurisdiction over International Crimes and the Institut De Droit International*, at 567.

²⁴³ See P. Grant, ‘National Prosecution of International Crimes and Universal Jurisdiction’, in Kolb and Scalia, *Droit international penal* (2nd ed., Basel: Helbing Lichtenhahn, 2012) 579-604, at 594.

²⁴⁴ Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law*, at 112.

²⁴⁵ See A. Addis, ‘Imagining The International Community: The Constitutive Dimension of Universal Jurisdiction’, 31 *Human Rights Quarterly* (2009) 129-162, at 157.

G. Other principles

Some scholars recognize other jurisdictional bases. The principle of the flag, which we considered above as an extension of the territorial principle, is sometimes considered to provide a separate jurisdictional basis. Under this principle, a state may claim jurisdiction over offenses committed on board vessels or aircraft flying under its national flag. 87

The “effects principle” is sometimes considered as a separate jurisdictional basis.²⁴⁶ According to this principle, states may assert jurisdiction over conduct occurring extraterritorially, if that conduct has an effect on their territory.²⁴⁷ This principle is only provided for in a limited number of states²⁴⁸ and is subject to much criticism.²⁴⁹ In the US, for instance, it is accepted that a State may assert jurisdiction when acts committed abroad have had substantial effects within US territory.²⁵⁰ 88

²⁴⁶ See for instance Ireland-Piper, *Prosecutions of Extraterritorial Criminal Conduct and The Abuse of Rights Doctrine*, at 78.

²⁴⁷ *Ibid.*

²⁴⁸ This is for instance the case in the United States, Argentina, Mexico, China, Cuba and Italy. See Ireland-Piper, ‘Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine’, 9(4) *Utrecht Law Review* (2013), at 68-89.

²⁴⁹ Parrish argues that it is “problematic for both conceptual and pragmatic reasons”, that it provides no constraint and that it guarantees an increase in overlapping jurisdictional conflicts. See A. Parrish, ‘The Effects Test: Extraterritoriality’s Fifth Business’, 61(5) *Vanderbilt Law Review* (2008), at 1478.

²⁵⁰ See Decroos, ‘Criminal Jurisdiction Over Transnational Speech Offenses from Unilateralism to the Application of Foreign Public Law by the National Courts’, 13(3) *European Journal of Crime, Criminal Law and Criminal Justice* (2005) 365-400, at 391; A. Aust, *Handbook of International Law* (2nd ed., Cambridge: Cambridge University Press, 2010).

Chapter 2: The universal jurisdiction doctrine

I. The notion of universal jurisdiction

There is no universally accepted definition of universal jurisdiction, neither in conventional law nor in customary international law.²⁵¹ According to the International Law Commission, “Under the principle of universal jurisdiction a state is entitled or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim”.²⁵² The *AU-EU Report of the Council of the European Union* states that “Universal criminal jurisdiction is the assertion by one state of its jurisdiction over crimes allegedly committed in the territory of another state by nationals of another state against nationals of another state where the crime alleged poses no direct threat to the vital interests of the state asserting jurisdiction”. Put simply, one can say that universal jurisdiction allows for the prosecution and trial of crimes committed by anyone, anywhere in the world.²⁵³

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Universal jurisdiction is also often defined in relation to the special nature of the crime.²⁵⁴ The *Princeton Principles*, for instance, define universal jurisdiction as “criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction”.²⁵⁵ It is sometimes argued that “instead of deriving from a State’s independent national entitlements, universal jurisdiction derives from the commission of the crime itself under international law. It is the

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²⁵¹ See ICJ, *Arrest Warrant* case, Dissenting Opinion of Judge van den Wyngaert, § 44.

²⁵² International Law Commission, *Final Report on the Exercise of Universal Jurisdiction*, London Conference (2000), at 2.

²⁵³ See Comments from Kenya, *The Scope and Application of the Principle of Universal Jurisdiction: The Report of the Sixth Committee*, A/64/452-RES 64/117.

²⁵⁴ See for instance C. Bassiouni, *Crimes Against Humanity in International Criminal Law* (Dordrecht, Boston, London: M. Nijhoff, 1992), at 511; Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law*, at 59; C. Joyner, ‘Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability’, 59(4) *Law and Contemporary Problems* (Autumn 1996) 153-172, at 165; T. Moghadam, ‘Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunals Applied to the Case of Hissène Habré’, *Columbia Human Rights Law Review* (2008) 471-528, at 476.

²⁵⁵ Princeton Principles, Principle 1(1).

international nature of the crime – its very substance and definition under international law – that gives rise to jurisdiction for all States”.²⁵⁶

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In fact, as such, the term “universal jurisdiction” is not necessarily linked to the nature of the crime.²⁵⁷ Universal jurisdiction was originally developed in relation to piracy, which is not necessarily a crime against the international community. The term simply describes jurisdiction exercised by a state over crimes committed abroad where there are no links to that state at the time of commission of the crimes.²⁵⁸ Indeed, some states provide for universal jurisdiction over ordinary crimes such as murder, assault or rape.²⁵⁹ This has even been useful for the prosecution of international crimes in cases where states had not defined international crimes under their domestic law. Those states can thus nevertheless exercise jurisdiction over the conduct amounting to an international crime when it constitutes an ordinary crime.²⁶⁰ This type of universal jurisdiction is sometimes referred to as “unilateral universal jurisdiction”. In addition, a number of conventions allow for the exercise of universal jurisdiction for crimes such as aircraft hijacking, hostage taking, and various acts of terrorism, which are not the most serious of international crimes and are clearly not *jus cogens* crimes, merely because a number of states have agreed to prosecute and punish these crimes on this jurisdictional basis. This type of universal jurisdiction is sometimes referred to as “delegated universal jurisdiction”. These distinctions will be discussed below.

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Having said this, it is nevertheless true that for the most serious international crimes, the *rationale* for allowing – or even imposing – universal jurisdiction is “based on the notion that certain crimes are so harmful to international interests that states are entitled – and even obliged – to bring proceedings against the perpetrator, regardless of the location of the crime or the nationality of the perpetrator or the victim”.²⁶¹ This view assumes that every state has an interest in prosecuting certain crimes. It is thus argued that when exercising universal jurisdiction over international crimes, the national judge is in fact acting as an agent of the international community enforcing international

²⁵⁶ A. Colangelo, ‘Universal Jurisdiction as an International False Conflict of Laws’, 30(3) *Michigan Journal of International Law* (2009) 881-926, at 889.

²⁵⁷ Hall, ‘The Role of Universal Jurisdiction in the International Criminal Court Complementarity System’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 202-205.

²⁵⁸ *Ibid.*, at 205.

²⁵⁹ See Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, AI Index: IOR 53/017/2001, September 2001. See also *infra* Part II.

²⁶⁰ See examples in Hall, *supra* note 257, at 205.

²⁶¹ M. Robinson, ‘Foreword’, in *The Princeton Principles on Universal Jurisdiction* (Princeton University Press, 2000) 15-22, at 16.

law.²⁶² This point of view was the one adopted by the Supreme Court of Israel in the *Eichmann* case:

Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed.²⁶³

This view was also supported by some of the judges of the International Court of Justice in the *Arrest Warrant* case. In their Joint Separate Opinion, Judges Higgins et al. held that “those States [...] who claim the right [...] to assert a universal criminal jurisdiction [...] invoke the concept of acting as ‘agents for the international community’”.²⁶⁴ Many scholars have also defended this approach.²⁶⁵

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II. Distinctions

A. Unilateral, delegated and absolute universal jurisdiction

Some scholars categorize universal jurisdiction based on their source. Henzelin, for instance, distinguishes three forms of universal jurisdiction: unilateral, delegated and absolute universal jurisdiction. “Unilateral universal jurisdiction” refers to a state’s power to exercise jurisdiction without having any link to the crime, without acting on behalf of another state linked to the crime and in the absence of any delegation on behalf of the international

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²⁶² See Hall, ‘The Role of Universal Jurisdiction in the International Criminal Court Complementarity System’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 201-232, at 203; Gaeta, ‘The Need Reasonably to Expand National Criminal Jurisdiction over International Crimes’, in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012), at 603.

²⁶³ *Attorney General of Israel v. Eichmann*, Supreme Court of Israel, 36 ILR 277 (1962).

²⁶⁴ ICJ, *Arrest Warrant* case, Joint Separate Opinion of Judges Higgins et al., at 78.

²⁶⁵ See in particular Colangelo, ‘Universal Jurisdiction as an International False Conflict of Laws’, 30(3) *Michigan Journal of International Law* (2009) 881-926.

community.²⁶⁶ An example of “unilateral universal jurisdiction” can be found in Article 5 of the Swiss Penal Code, which provides universal jurisdiction for offences committed against minors abroad.²⁶⁷ Universal jurisdiction over such crimes is not provided for in any of the international treaties on the protection of children, although they do not proscribe it,²⁶⁸ neither is it provided for under international customary law.

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The second form of universal jurisdiction is “delegated universal jurisdiction” which is acquired by a state when another state renounces, yields or delegates its jurisdiction in favour of the state where the perpetrator is found.²⁶⁹ This generally occurs by virtue of a bilateral or multilateral treaty. It can also derive from customary international law.²⁷⁰ It should be noted that this form of universal jurisdiction is different from the representation principle mentioned above in that, in the former, jurisdiction is generally delegated in advance for a certain category of offences²⁷¹ and applies only between the states party to the treaty.

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Finally, the last form of universal jurisdiction is “absolute universal jurisdiction” which is exercised by a state over a crime because of its nature and the fact that it affects the interests of all states. This form of universal jurisdiction can be exercised even against the will of the territorial state or of any other competent state.²⁷² Torture was considered as such a crime by the ICTY in the *Furundžija* case. According to the Trial Chamber, “one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction”.²⁷³

²⁶⁶ Henzelin, *Le principe de l'universalité en droit pénal international : Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité*, at 63 ; See also A. Poels, 'Universal Jurisdiction in Absentia', 23(1) *Netherlands Quarterly of Human Rights* (2005) 65-84, at 67.

²⁶⁷ The offences include trafficking in human beings, sexual acts with children and aggravated pornography.

²⁶⁸ See U. Cassani, 'Art. 5', in Roth/Moreillon, *Commentaire romand du Code pénal*, at 52-53.

²⁶⁹ Henzelin, *Le principe de l'universalité en droit pénal international : Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité*, at 71 and 244 ; See N. Strapatsas, 'Universal Jurisdiction and the International Criminal Court', 29(1) *Manitoba Law Journal* (2002-2003) 1-32, at 7.

²⁷⁰ See Henzelin, *Le principe de l'universalité en droit pénal international : Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité*, at 71.

²⁷¹ *Ibid.*, p. 71.

²⁷² *Ibid.*, p. 81.

²⁷³ ICTY, *Furundžija*, Trial Chamber II, Judgment of 10 December 1998, Case No. IT-95-17/1, § 156.

This distinction is very interesting from a theoretical point of view. In practice, these forms sometimes converge.²⁷⁴ For instance, universal jurisdiction over grave breaches to the Geneva Conventions is both “delegated” (by the state parties to the Geneva Conventions) and absolute. The distinction is however relevant for instance in the case of apartheid. The fact that universal jurisdiction is clearly provided for in the Apartheid Convention (delegated universal jurisdiction) does not necessarily mean that a non-state party has the right – or the obligation – to exercise universal jurisdiction over this crime.

Other scholars have made different distinctions based on the source of universal jurisdiction. D’Apresmont for instance distinguishes “multilateral exercises of universal jurisdiction” which is exercised within the framework of international conventions and “unilateral exercises of criminal jurisdiction” which do not rest on any conventional basis and may be accompanied with the possibility of exercising jurisdiction in the absence of the accused.²⁷⁵ Another scholar advances an interesting distinction between (i) universal jurisdiction based on customary international law, (ii) universal jurisdiction based on international treaty and (iii) universal jurisdiction based on domestic law.²⁷⁶

B. Conditional and absolute universal jurisdiction

Some scholars actually include the presence of the author in the definition of universal jurisdiction.²⁷⁷ Interestingly, in what Donnedieu de Vabres considered universal jurisdiction in the 1920s, the suspect was necessarily present in the state exercising this jurisdiction.²⁷⁸ Today, however, a distinction is generally

²⁷⁴ See Henzelin, *Le principe de l’universalité en droit pénal international : Droit et obligation pour les Etats de poursuivre et juger selon le principe de l’universalité*, at 381, who states that “on pressent d’emblée que les raisonnements de l’universalité déléguées et de l’universalité absolue coïncident parfaitement lorsqu’une infraction peut être poursuivie et jugée universellement selon le droit coutumier. Dans ce cas en effet, les Etats délégants se confondent avec la communauté internationale dans son ensemble”.

²⁷⁵ D’Apresmont, ‘Multilateral Versus Unilateral Exercises of Universal Criminal Jurisdiction’, 43 *Israel Law Review* (2010) 301-329, at 308.

²⁷⁶ See M. A. Chengyuan, ‘The Connotation of Universal Jurisdiction and its Application in the Criminal Law of China’, in Bergsmo/Ling (eds), *State Sovereignty and International Criminal Law* (Torkel Opsahl: Beijing, 2012), at 149-164.

²⁷⁷ See for instance, Donnedieu de Vabres, *Les principes modernes du droit pénal international*, at 135, who says that “[la compétence universelle] n’intervient que si l’Etat qui juge a le délinquant en sa possession.”

²⁷⁸ See H. Donnedieu de Vabres, ‘Le système de la répression universelle : Ses origines historiques – ses formes contemporaines’, in *Revue critique de droit international privé* (1922-1923) 533-564 ; See P.

made between conditional universal jurisdiction – which requires the physical presence of the suspect or another link between the suspect and the state – and absolute universal jurisdiction, also known as “pure universal jurisdiction”, “unconditional universal jurisdiction” or “universal jurisdiction in absentia” – which does not require any connecting link at all.

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As underlined by Donnedieu de Vabres, “jurisdiction of *the judex deprehensionis* is justified by the social trouble caused on a territory by the presence of the unpunished criminal”.²⁷⁹ Indeed, in this sense, linking universal jurisdiction to the presence of the author is still somewhat based on the classical notions of territorial sovereignty. In their joint separate opinion in the *Arrest Warrant* case, Judges Higgins et al. held that the provisions whereby a state prosecutes a suspect found on its territory “has come to be referred to as ‘universal jurisdiction’, though this is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere”.²⁸⁰ Likewise, Stern argues that the “universality principle [...] understood as giving jurisdiction to a state for acts committed by foreigners anywhere in the world, merely on the basis of the perpetrator being in that state’s territory [...] is an unduly limited interpretation of what universal jurisdiction should be [...]. If such a territorial link is required, real universal jurisdiction is not being exercised”.²⁸¹ In this sense, to include the requirement of the suspect’s presence in the general definition of universal jurisdiction would simply require another link with the forum state – as in all other jurisdictional principles – and would make universal jurisdiction lose its specificity and its *raison d’être*.

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In our view, the requirement of the presence of the suspect or of any other link (like the suspect’s residence for instance) is not a general legal condition under international law for the exercise of universal jurisdiction, but rather a legal limitation or obstacle which may (or may not) be present in international treaties and domestic legislation, along with other legal limitations such as the subsidiarity principle, i.e. the deferral of the case to the territorial or national state or to the ICC. Universal jurisdiction as such is not subject to any conditions, but its exercise may in certain cases be subject to conditions, namely the

Gaeta, ‘Donnedieu on Universal Jurisdiction : Introductory Note’, 9 *Journal of International Criminal Justice* (2011) 905-930, at 906.

²⁷⁹ See Donnedieu de Vabres, *supra* note 278, at 533-564, translation available in Gaeta, ‘Donnedieu on Universal Jurisdiction : Introductory Note’, 9 *Journal of International Criminal Justice* (2011) 905-930, at 908.

²⁸⁰ ICJ, *Arrest Warrant* case, Joint Separate Opinion of Judges Higgins et al., § 41.

²⁸¹ B. Stern, ‘Better Interpretation Better Interpretation and Enforcement of Universal Jurisdiction’, in Joyner (ed.), *Reining in impunity for international crimes and serious violations of fundamental human rights* (Erès: Toulouse, 1998).

presence of the suspect.²⁸² We will come back to this issue in the Chapter dedicated to the presence requirement.²⁸³

C. Other distinctions

Another distinction has also been made in legal scholarship between permissive universal jurisdiction – where a state has the right but not the obligation to exercise universal jurisdiction – and obligatory or mandatory universal jurisdiction – where the state has the obligation to exercise universal jurisdiction.²⁸⁴ Inazumi also distinguishes between supplemental universal jurisdiction and primary universal jurisdiction. In the former case, the state has the right²⁸⁵ or the obligation²⁸⁶ to exercise universal jurisdiction whenever the effort to extradite suspects has failed or when no extradition request has been made.²⁸⁷ In other words, priority is given to extradition, where states make the request. In the latter case, there is no priority to extradition. The State either has the right to exercise universal jurisdiction even when there is another State to which the suspect could be extradited (primary permissive universal jurisdiction) or the obligation to either exercise jurisdiction or to extradite (primary obligatory universal jurisdiction).²⁸⁸ The question of the relationship between universal jurisdiction and extradition brings us to the distinction between universal jurisdiction and the *aut dedere aut judicare/prosequi* principle.

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²⁸² For instance, the right to exercise universal jurisdiction over genocide, generally recognized by customary international law and expressly by the ICJ, is not subject to any particular criterion. See P. Grant, 'National Prosecution of International Crimes and Universal Jurisdiction', in Kolb and Scalia, *Droit international penal* (2nd ed., Basel: Helbing Lichtenhahn, 2012) 579-604.

²⁸³ See *infra* Part III, Chapter 2, *infra* N 601 ff.

²⁸⁴ Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law*, at 29.

²⁸⁵ In this case, Inazumi refers to "Supplemental Permissive Universal Jurisdiction".

²⁸⁶ In this case, Inazumi refers to "Supplemental Obligatory Universal Jurisdiction".

²⁸⁷ Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law*, at 29.

²⁸⁸ *Ibid.*, at 29-30.

III. Universal jurisdiction and *aut dedere aut judicare/prosequi*

A. Introductory remarks

103 Pursuant to the international law rule *aut dedere, aut judicare/prosequi* (hereafter
"aut dedere"), if a suspect is found on a state's territory, a state has the obligation
to either extradite him or to prosecute him.²⁸⁹ The vast majority of treaties
dealing with international or transnational crimes contain such a clause.²⁹⁰
While the concepts of universal jurisdiction and of *aut dedere* sometimes
"overlap",²⁹¹ they are nevertheless different.

104 Generally, two main differences between universal jurisdiction proper and
the *aut dedere* principle are identifiable. Firstly, it is said that while universal
jurisdiction is (generally) permissive, the "extradite or prosecute obligation" is
mandatory. States party to the treaty containing such a clause are required to
either extradite or prosecute. One should thus distinguish between the right of
states to establish universal jurisdiction proper and the obligation to prosecute
in cases where no extradition has been granted.²⁹² However, as stated in the AU-
EU report, "The obligation *aut dedere aut judicare* is nonetheless relevant to the
question of universal jurisdiction".²⁹³ Indeed, as will be shown below,²⁹⁴ in some
cases, the *aut dedere* rule may compel a state party to establish and exercise
universal jurisdiction.

105 A second difference sometimes mentioned is that the application of the *aut
dedere* principle is limited to the parties to a given convention, while universal
jurisdiction is not necessarily limited to a treaty. The question of whether the
principle of *aut dedere aut judicare* is an obligation under customary international
law is controversial.²⁹⁵ It is generally argued that states not party to a treaty are

²⁸⁹ The original phrase formulated by Grotius was "*aut dedere, aut punier*" (surrender or punish). The principle then became known as "*aut dedere, aut judicare*" (surrender or judge). In fact, and to be more consistent with the fundamental principle of the presumption of innocence, one should use the terms "*aut dedere, aut prosequi*" (surrender or prosecute).

²⁹⁰ Bantekas and Nash, *International Criminal Law* (3rd ed., New York: Routledge, 2007), at 91.

²⁹¹ Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law*, at 122.

²⁹² See R. Roth, 'The Extradition of Génocidaires', in Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009) 278-309, at 306.

²⁹³ See AU-EU Report, § 11.

²⁹⁴ See *infra* subsection IV. 5. entitled "The duty of states to prosecute or extradite", N 214 ff.

²⁹⁵ See Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law*, at 122; G. Acquaviva, 'Aut Dedere Aut

not bound by the principle.²⁹⁶ However, some scholars suggest that the obligation has acquired customary status for core international crimes such as genocide, crimes against humanity and war crimes.²⁹⁷ Bassiouni even considers one of the consequences of the *jus cogens* status of certain crimes is the obligation for states to prosecute or extradite.²⁹⁸ In other words, if a crime has attained the status of *jus cogens*, every state has the obligation to prosecute or extradite, independently from treaty obligations.

B. Categories of *aut dedere* clauses

The *aut dedere aut judicare* principle can be found in various forms, and different classifications of treaties have been made.²⁹⁹ On the basis of a classification established by the International Law Commission, the 60 or more conventions³⁰⁰ containing this clause can be divided into the following four categories: (a) conventions on extradition; (b) the 1929 Convention for the Suppression of Counterfeiting Currency and other conventions that have followed the same model; (c) the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft and other conventions that have followed the same model and (d) the 1949 Geneva Conventions and the 1977 Additional Protocol I.³⁰¹

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Judicare', in Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) 253-254, at 253.

²⁹⁶ See Ryngaert, *Jurisdiction in International Law*, at 105.

²⁹⁷ Van Steenberghe, 'The Obligation to Extradite or Prosecute Clarifying its Nature', 9 *Journal of International Criminal Justice* (2011) 1089-1116, at 1114; See also Bassiouni and Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht: Martinus Nijhoff, 1995).

²⁹⁸ C. Bassiouni, *Introduction to International Criminal Law* (2nd ed., Leiden/Boston: Martinus Nijhoff Publishers, 2013), at 143; Bassiouni and Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht: Martinus Nijhoff, 1995).

²⁹⁹ See the classification made by Bassiouni and Wise (*Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht: Martinus Nijhoff, 1995)); the classification made by Amnesty International; see the classification by the ILC. The ILC classifies conventions into four categories.

³⁰⁰ See A. Nollkaemper, 'Wither Aut Dedere? The Obligation to Extradite or Prosecute after the ICJ's Judgment in *Belgium v Senegal*', *Journal of International Dispute Settlement* (2013) 501-519, at 504.

³⁰¹ See International Law Commission Secretariat, *Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic "The obligation to extradite or prosecute (aut dedere aut judicare)"*, 62nd session of the ILC, UN Doc A/CN.4/630, 18 June 2010, paras 127-29. See also Bassiouni and Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht: Martinus Nijhoff, 1995), at 11-19.

1. *Extradition treaties*

107 The first category of treaties that contain the *aut dedere aut judicare* clause consists of extradition treaties, which do not necessarily deal with international offences.³⁰² The clause is introduced mainly because states generally refuse to extradite their nationals. Such treaties oblige states, subject to a number of conditions, to extradite persons to the state making the extradition request. Also, they all provide for grounds of refusal, in particular if the suspect is a national of the requested state. Under this model, states thus have a general duty to extradite unless there are grounds for refusal, in which case, they have to prosecute.

2. *The 1929 Convention for the Suppression of Counterfeiting Currency and other conventions that have followed the same model*

108 Like the first category, the second category of treaties can be identified as giving priority to extradition.³⁰³ These treaties are modelled on the basis of the International Convention for the Suppression of Counterfeiting Currency of 1929. Article 9 of this Convention provides:

Foreigners who have committed abroad any offence referred to in Article 3, and who are in the territory of a country whose internal legislation recognizes as a general rule the principle of the prosecution of offences committed abroad, should be punishable in the same way as if the offence had been committed in the territory of that country.

109 The obligation to take proceedings is subject to the condition that extradition has been requested and that the country to which application is made cannot hand over the person accused for some reason having no connection with the offence.

110 This form of the principle is characterized by the fact that (1) it gives priority to extradition; (2) it does not oblige states to create jurisdiction over persons committing these crimes, although there is clearly an incentive for states to recognize in their internal legislation “as a general rule the principle of prosecution of offences committed abroad”; and (3) in cases where national law

³⁰² Bassiouni and Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht: Martinus Nijhoff, 1995), at 11.

³⁰³ See Nollkaemper, ‘Wither Aut Dedere? The Obligation to Extradite or Prosecute after the ICJ’s Judgment in *Belgium v Senegal*’, *Journal of International Dispute Settlement* (2013) 501-519; M. Zgonec-Rozej and J. Foakes, ‘International Criminals: Extradite or Prosecute?’, *International Law, IL BP* (2013/01), at 7.

of the custodial State has established jurisdiction, the obligation to initiate proceedings is only triggered by a refusal following a request for extradition.³⁰⁴

3. *The 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft and other conventions that have followed the same model*

A third category of treaties is based on an alternative obligation to prosecute or extradite. It is notably embodied in Article 7 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft (the so-called “Hague formula”):

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The Contracting Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offense of a serious nature under the law of that state.

This so-called “Hague formula” has served as the basis for a number of international treaties,³⁰⁵ including the Torture Convention. According to this formula, the State is offered a choice between prosecuting the suspect and extraditing him (*aut dedere aut judicare*). Unlike the first two categories of treaties, states have an obligation to establish jurisdiction. In addition, the exercise of jurisdiction by states is not based on a prior request for extradition. It is also said that the difference between the second and third categories is based on the nature of the crime. Where the crime is a concern to the international community as a whole, the state has the choice between extradition and prosecution. Conversely, where the crime mostly affects one state’s interests, it is reasonable to give priority to extradition to the more interested state.³⁰⁶

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³⁰⁴ Nollkaemper, ‘Wither Aut Dedere? The Obligation to Extradite or Prosecute after the ICJ’s Judgment in *Belgium v Senegal*’, *Journal of International Dispute Settlement* (2013) 501-519, at 505.

³⁰⁵ See International Law Commission Secretariat, *Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic “The obligation to extradite or prosecute (aut dedere aut judicare)”*, 62nd session of the ILC, UN Doc A/CN.4/630, 18 June 2010.

³⁰⁶ Zgonec-Rožej and Foakes, ‘International Criminals: Extradite or Prosecute?’, *International Law*, IL BP (2013/01), at 7-8.

4. *The 1949 Geneva Conventions and the 1977 Additional Protocol I*

113 Finally, a fourth category of treaties can be identified; these treaties essentially provide for the opposite approach of the second category.³⁰⁷ Indeed, the wording of the common provision found in the Geneva Conventions suggests a model of *primo prosequi, secundo dedere* – i.e. a priority to prosecution over extradition.³⁰⁸ It reads as follows:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a 'prima facie' case.

114 Thus, the obligation to search for and to prosecute an alleged offender seems to exist irrespective of any request for extradition made by another party. According to Van Steenberghe, “the formula ‘*prosequi vel dedere*’ seems to be more suitable. It [...] reflects that states bound by this obligation have a free choice between prosecution and extradition, while emphasis is put on prosecution since extradition appears only as a means at the disposal of the custodial state for complying with its obligation to prosecute”.³⁰⁹ In other words, states are not obliged to extradite; rather, they are obliged to prosecute and have an option to release themselves from this obligation by extraditing the alleged offender.³¹⁰

C. The relationship between extradition and prosecution

115 As seen above, the relationship between the obligation to prosecute and the obligation to extradite varies from one treaty to another. In this respect, the treaties containing the formula *aut dedere* may be divided into two broad categories: (a) those which contain clauses imposing an obligation to prosecute only when extradition has been requested and not granted and (b) those which

³⁰⁷ Nollkaemper, *supra* note 304, at 517.

³⁰⁸ Henzelin, *Le principe de l'universalité en droit pénal international : Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité*, at 353.

³⁰⁹ Van Steenberghe, 'The Obligation to Extradite or Prosecute Clarifying its Nature', 9 *Journal of International Criminal Justice* (2011) 1089-1116.

³¹⁰ See Nollkaemper, *supra* note 304, at 507.

contain clauses imposing an obligation to prosecute, with the possible alternative of extradition.³¹¹

Under category (a) clauses, prosecution by the state on whose territory the alleged offender is found only becomes an obligation if a request for extradition has been made and refused, because of a number of factors, including, for example, the suspect's nationality. In other words, the obligation to prosecute is only triggered by the refusal of a request for extradition. States do not have any obligation to prosecute offenders present on their territory independently from a request for extradition. The first two types of clauses defined in Section 2 – i.e. those found in extradition treaties and the 1929 Counterfeiting Convention – fall into this category. Other treaties similarly falling into this category include the 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs,³¹² the 1937 Convention for the Prevention and Punishment of Terrorism,³¹³ the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others,³¹⁴ the 1961 Single Convention on

³¹¹ See International Law Commission Secretariat, *Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic 'The obligation to extradite or prosecute (aut dedere aut judicare)'*, 62nd session of the ILC, UN Doc A/CN.4/630 (18 June 2010), paras 127-136; See also ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Separate Opinion of Judge Yusuf, 20 July 2012, § 19.

³¹² Art. 8 of the 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs provides that "Foreigners who are in the territory of a High Contracting Party and who have committed abroad any of the offences set out in Article 2 shall be prosecuted and punished as though the offence had been committed in that territory if the following conditions are realized — namely, that: (a) Extradition has been requested and could not be granted for a reason independent of the offence itself; (b) The law of the country of refuge considers prosecution for offences committed abroad by foreigners admissible as a general rule."

³¹³ Art. 10 of the 1937 Convention for the Prevention and Punishment of Terrorism provides that "Foreigners who are on the territory of a High Contracting Party and who have committed abroad any of the offences set out in Articles 2 and 3 shall be prosecuted and punished as though the offence had been committed in the territory of that High Contracting Party, if the following conditions are fulfilled – namely, that: (a) Extradition has been demanded and could not be granted for a reason not connected with the offence itself; (b) The law of the country of refuge recognizes the jurisdiction of its own courts in respect of offences committed abroad by foreigners; (c) The foreigner is a national of a country which recognizes the jurisdiction of its own courts in respect of offences committed abroad by foreigners."

³¹⁴ This Convention does not contain any provision regarding the prosecution of non-nationals of a requested state. Art. 9 of the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others provides, "In States where the extradition of nationals is not permitted by law, nationals who have returned to their own State after the commission abroad of any of the offences referred to in articles 1 and 2 of the present Convention shall be prosecuted in

Narcotic Drugs,³¹⁵ and the 1971 Convention on Psychotropic Substances, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.³¹⁶

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On the contrary, in category (b) clauses, the obligation to prosecute is absolute. It arises as soon as a person alleged to have committed a certain crime is present on state territory.³¹⁷ It is only when an extradition request is made that the state has the choice between extradition and prosecution.³¹⁸ In other words, treaties that contain such a clause oblige states to *exercise* universal jurisdiction (“shall submit to”), when the suspect is present on their territory and not extradited. The Geneva Conventions, the Convention against Torture, as well as the International Convention for the Protection of All Persons from Enforced Disappearance³¹⁹ are classified in category (b).³²⁰ Other treaties that follow this model include the 1971 Convention for the Suppression of Unlawful Acts

and punished by the courts of their own State. This provision shall not apply if, in a similar case between the Parties to the present Convention, the extradition of an alien cannot be granted.”

³¹⁵ Art. 36(2)(a)(iv) of the 1961 Single Convention on Narcotic Drugs provides that “Serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgement given.”

³¹⁶ Art. 4(3) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography provides that “Each State Party shall also take such measures as may be necessary to establish its jurisdiction over the aforementioned offences when the alleged offender is present in its territory and it does not extradite him or her to another State Party on the ground that the offence has been committed by one of its nationals.” Art. 5(5) provides that “If an extradition request is made with respect to an offence described in article 3, paragraph 1, and the requested State Party does not or will not extradite on the basis of the nationality of the offender, that State shall take suitable measures to submit the case to its competent authorities for the purpose of prosecution.”

³¹⁷ International Law Commission Secretariat, *Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic ‘The obligation to extradite or prosecute (aut dedere aut judicare)’*, 62nd session of the ILC, UN Doc A/CN.4/630 (18 June 2010), § 127.

³¹⁸ *Ibid.*

³¹⁹ Art. 9(2) of the Convention on Enforced Disappearances provides that “Each State Party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.”

³²⁰ Lafontaine, ‘Universal Jurisdiction – the Realistic Utopia’, 10 *Journal of International Criminal Justice* (2012) 1277-1302, at 1289.

against the Safety of Civil Aviation,³²¹ the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,³²² the 1979 International Convention against the Taking of Hostages,³²³ the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation,³²⁴ the 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries,³²⁵ the 1994 Convention on the Safety of United Nations and Associated Personnel,³²⁶ the

³²¹ Art. 7 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation provides that "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."

³²² Art. 7 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents provides that "The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State."

³²³ Art. 8(1) of the 1979 International Convention against the Taking of Hostages provides that "The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a grave nature under the law of that State."

³²⁴ Art. 10(1) of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation provides that "The State Party in the territory of which the offender or the alleged offender is found shall, in cases to which article 6 applies, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State."

³²⁵ Art. 12 of the 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries provides that "The State Party in whose territory the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State."

³²⁶ Art. 14 of the the 1994 Convention on the Safety of United Nations and Associated Personnel provides that "The State Party in whose territory the alleged offender is present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the

1997 International Convention for the Suppression of Terrorist Bombings,³²⁷ and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.³²⁸

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Consequently, a distinction should be made between the implementation by states of category (a) clauses and the implementation by states of category (b) clauses. In the former case, states will generally ensure that jurisdiction can be established specifically for those cases in which they are not in a position to extradite the suspect to another state. Thus, if a state does not extradite the alleged perpetrator for some reason or another³²⁹ or if it is not in a position to do so, it generally ensures that its courts may exercise jurisdiction over the suspect. It should be underlined that in such cases, states are not exercising universal jurisdiction but jurisdiction by representation.³³⁰ Indeed, the custodial state that exercises jurisdiction is merely representing the state whose extradition request was rejected. It should be noted that in many pieces of domestic legislations, specific provisions exist for the implementation of category (a) clauses.³³¹ Such provisions should therefore be carefully distinguished from provisions that provide for universal jurisdiction – over core crimes for instance – subject to a number of conditions, which may include the presence of the suspect on the territory of the state and his non-extradition.

law of that State. Those authorities shall take their decision in the same manner as in the case of an ordinary offence of a grave nature under the law of that State.”

³²⁷ Art. 8 (1) of the 1997 International Convention for the Suppression of Terrorist Bombings provides that “The State Party in the territory of which the alleged offender is present shall, in cases to which article 6 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.”

³²⁸ Art. 11(1) of the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism provides that “The State Party in the territory of which the alleged offender is present shall, in cases to which article 9 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.”

³²⁹ This could for instance be because the court of the state requesting extradition does not give all the fair trial guarantees.

³³⁰ On the representation principle, see *supra* N 85 ff.

³³¹ See for instance § 65(1) of the Austrian Criminal Code; Section 8(6) of the Danish Criminal Code; Art. 113-8-1 of the French Penal Code; Art. 9 of the Penal Code of Paraguay; Art. 7(2)(a) of the Swiss Penal Code; All of these provisions subject the application of the domestic law of the state to the denial of an extradition request.

On the contrary, in the case of category (b) treaty clauses, states are exercising universal jurisdiction. Indeed, they are obliged to prosecute an offence if the suspect is present on their territory unless they extradite him. In this case, the *aut dedere* obligation compels states to provide for all types of jurisdiction including universal jurisdiction.³³² This jurisdiction is a particular type of universal jurisdiction in that it generally arises under treaty, is strictly “custodial”³³³ and is mandatory.³³⁴ We can refer to this type of universal jurisdiction, linked to the *aut dedere aut prosequi* principle, as “obligatory custodial universal jurisdiction”.

D. Precedence of the “prosecute” obligation over the “extradite” obligation

With respect to core international crimes and in the context of the fight against impunity, there has been a growing tendency to consider that the obligation to ‘prosecute’ in treaties takes precedence over the obligation to ‘extradite’.³³⁵ As noted above, this is clear from the wording of the Geneva Conventions. Regarding genocide, the Genocide Convention does not expressly include such a clause, but it has been suggested that the *primo prosequi secundo dedere* model also applies to genocide.³³⁶ With respect to torture, as seen above, the Torture Convention incorporates the “Hague formula”. However, the question of the relationship between prosecute and extradite was recently addressed by the International Court of Justice in the *Belgium v Senegal* case.³³⁷ The Court held that the obligation to prosecute arises irrespective of the existence of a prior request

³³² Unless the state considers that it can exercise universal jurisdiction directly based upon its treaty-based *aut dedere aut prosequi* obligation. See Hall, ‘The Role of Universal Jurisdiction in the International Criminal Court Complementarity System’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 201-232, at 204.

³³³ This obligation to exercise universal jurisdiction only arises if the suspect is on the territory of the state.

³³⁴ See Currie and Rikhof, *International & Transnational Criminal Law* (2nd ed., Toronto: Irwin Law, 2013), at 98-101.

³³⁵ Lafontaine, ‘Universal Jurisdiction – the Realistic Utopia’, 10 *Journal of International Criminal Justice* (2012) 1277-1302, at 1288.

³³⁶ On this issue see Roth, ‘The Extradition of Génocidaires’, in Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009) 278-309, at 304 ff.

³³⁷ ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, § 94-95.

for the suspect's extradition.³³⁸ It also held that extradition under the Torture Convention is an option, not an obligation. According to the Court:

It follows that the choice between extradition and submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.

121 The ICJ thus opted for a construction of Article 7 of the Torture Convention in which precedence is given to the custodial state and in which extradition to the concerned state is considered to be an option, not an obligation. In fact, it therefore placed the Torture Convention (originally deemed to fall within the second category of clauses identified in Section 2) in the third category.³³⁹

122 If one admits that the obligation to prosecute (including that arising under universal jurisdiction) takes precedence over the extradition option, it is not entirely clear what this means in practical terms in relation to universal jurisdiction and, in particular, with regard to the principle of subsidiarity.³⁴⁰ Indeed, if the custodial state has an obligation to prosecute (including under universal jurisdiction) and only an option to extradite to a state with a stronger link, is this not in contradiction with the (possible) obligation for that same state, who is asserting universal jurisdiction, to defer to the state with a closer link, namely the territorial or national state? This issue will be examined in the Chapter dedicated to subsidiarity.³⁴¹

IV. Concluding remarks

123 In this study, universal jurisdiction is defined as the competence of states to criminalize and prosecute crimes committed outside of the state's territory, where those crimes are not linked to that state, either by the nationality of the suspect or of the victim, or by the harm to the state's own national interests or by the situation where the state is acting only on behalf another state. Put differently, universal jurisdiction is understood as the jurisdiction to prescribe or adjudicate for crimes when none of the five above-mentioned jurisdictional

³³⁸ See Zgonec-Rozej and Foakes, 'International Criminals: Extradite or Prosecute?', *International Law* (IL BP 2013/01), at 7.

³³⁹ Nollkaemper, 'Wither Aut Dedere? The Obligation to Extradite or Prosecute after the ICJ's Judgment in *Belgium v Senegal*', *Journal of International Dispute Settlement* (2013) 501-519, at 512.

³⁴⁰ It should be noted that the bases of the *primo prosequi* principle and the subsidiarity principles are different. While the ratio of the former is the fight against impunity, one of the grounds justifying the application of the subsidiarity principle is that it limits interference into state sovereignty.

³⁴¹ Part III, Chapter 3, *infra* N 685 ff.

bases (reflected in the territoriality, active nationality, passive personality, and protective and representation principles) exist. Universal jurisdiction, as referred to in this study, is not linked to the suspect's presence on the territory of the state exercising jurisdiction or to the nature of the crime committed.

Chapter 3: Universal jurisdiction and international crimes

I. Introductory remarks

There is not a single international convention which defines the crimes subject to universal jurisdiction. Therefore, a number of international advisory documents have attempted to do so.³⁴² Section I will begin by discussing the notions of international crimes and *jus cogens* crimes, and their link with the question of whether a crime is subject to universal jurisdiction. In section II, we will discuss (1) the specific crimes that are undoubtedly subject to universal jurisdiction under customary international law – namely war crimes, crimes against humanity, genocide and torture; and (2) the crimes that are subject to universal jurisdiction according to an international treaty (treaty-based crimes).

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II. International crimes and jus cogens

In this section, we will begin by discussing the notion of international crimes (subsection A), the categories and criteria proposed by scholars (subsection 1), as well as the attempts made by international bodies and tribunals to define and classify international crimes (subsection 2). Indeed, while the crimes under the ICC's jurisdiction and those subject to universal jurisdiction do not necessarily

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³⁴² See the 1996 Draft Code of Crimes against Peace and the Security of Mankind; the International Law Commission suggested that genocide, crimes against humanity, crimes against the United Nations and associated personnel, and war crimes are subject to universal jurisdiction. See also Principle 2 §1 of the Princeton Principles, according to which "serious crimes under international law" subject to universal jurisdiction include (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture. However, para. 2 of the Principle specifies that "The application of universal jurisdiction to the crimes listed in paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under international law". The 2005 Resolution of the *Institut de Droit international* provides that "universal jurisdiction may be exercised over international crimes identified by international law as falling within that jurisdiction in matters *such as* genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions for the protection of war crimes or other serious violations of international humanitarian law committed in international or non-international armed conflict". The list of crimes is therefore not exhaustive. The crimes listed in the African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes are genocide, crimes against humanity, war crimes, piracy, trafficking in narcotics and terrorism. Finally, the recent AU-EU Expert Report provides that "States by and large accept that customary international law permits the exercise of universal jurisdiction over the international crimes of genocide, crimes against humanity, war crimes and torture, as well as over piracy".

converge, crimes subject to the ICC provide an indication of whether they constitute international crimes under customary international law. Subsection A will also briefly analyse the debates regarding the crimes subject to the ICC. In subsection B, we will turn to examine the notions of *jus cogens* and *erga omnes* and their link to the question of whether a crime is subject to universal jurisdiction. We will in particular discuss the issue of whether the *jus cogens* nature of a crime entails a right or an obligation upon states to exercise universal jurisdiction over it.

A. The notion of international crimes

1. *Criteria and classifications of international crimes by scholars*

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As stated by Bassiouni, there is a great deal of confusion as to what constitutes an international crime and as to the criteria justifying the establishment of crimes under international law.³⁴³ In particular, it is important to note that many crimes are recognized as “international” because they are criminalized in an international treaty.³⁴⁴ However, some “treaty-based crimes” including counterfeiting or the bribery of foreign officials, generally do not threaten human life and dignity, and do not affect fundamental human values.³⁴⁵ These crimes are the object of treaties because they require international cooperation in order to ensure their suppression.³⁴⁶ For instance, the commission of certain crimes can be dispersed over the territory of several states, injuring an interest common to many states, thus obliging states to address them collectively.³⁴⁷ For example, this could also be the case for the crime of piracy: this crime poses jurisdictional problems because it is committed on the high seas and therefore escapes the territory of each state.³⁴⁸

³⁴³ C. Bassiouni, ‘International Crimes: The Ratione Materiae of International Criminal Law’, in Bassiouni (ed.), *International Criminal Law, vol. 1, Sources, Subjects and Contents* (3rd ed., Martinus Nijhoff Publishers, 2008), at 133.

³⁴⁴ W. Schabas, ‘International Crimes’, in Armstrong (ed.), *Routledge Handbook of International Law* (Abingdon (U.K.), New York: Routledge, 2009) 268-280, at 268-269.

³⁴⁵ *Ibid.*, at 269.

³⁴⁶ *Ibid.*

³⁴⁷ According to Donnedieu de Vabres, “*le fait d’une solidarité interétatique est apparu. Si la protection de leur sûreté ou de leur crédit respectif met les Etats en opposition les uns vis-à-vis des autres, la commission de certains délits spectaculaires dont les éléments sont ordinairement dispersés sur le territoire de plusieurs d’entre eux les oblige à dresser contre ces infractions un front commun*” (H. Donnedieu de Vabres, ‘De la piraterie au génocide... les nouvelles modalités de la répression universelle’, in *Mélanges Georges Ripert* (Paris : LGDJ, 1950) 226-254, at 228.

³⁴⁸ Schabas, *supra* note 344, at 269.

A brief overview of recent legal writings of scholars leads to the conclusion that there is no agreed set of criteria for the identification of international crimes, let alone for the identification of crimes subject to universal jurisdiction. The only general agreement seems to be on the existence of “core crimes”, namely war crimes, crimes against humanity and genocide,³⁴⁹ although some debate exists about the inclusion of the crime of aggression. While some authors include it in the list of “core crimes”,³⁵⁰ other scholars do not.³⁵¹ The rationale underpinning the distinction between “core crimes” and other international crimes is the fact that the former are directly punishable under international law, while in respect to the latter, there is no direct liability of individuals under international law.³⁵² For the rest, various classifications based on different criteria are proposed in legal scholarship.

Schabas, for instance, advances a distinction between international crimes which are *mala prohibita* (prohibited by law) – typically transnational crimes – and other crimes (also referred to as “new crimes”), which are *mal in se* (inherently evil), in that they affect “profoundly important values that are deeply rooted in all human societies”.³⁵³ These “new crimes”, which generally concern “crimes of states”, include those that emerged with the Charter of the International Military Tribunal, the Genocide Convention and the Geneva Conventions.³⁵⁴ They include genocide, crimes against humanity and war crimes. However, as Schabas rightly points out, when crimes such as terrorism and trafficking are considered, the distinction between crimes that are *mala prohibita* and those that are *mala in se* is not an easy one to make.³⁵⁵

In a comprehensive study on international crimes, Bassiouni proposes five criteria for the qualification of conduct as an international crime: (1) the prohibited conduct affects a significant international interest; (2) it is deemed offensive to the commonly shared values of the world community; (3) it has transnational implications; (4) it is harmful to an internationally-protected

³⁴⁹ See Bassiouni, *supra* note 343, at 133.

³⁵⁰ See for instance G. Werle, *Principles of International Criminal Law* (2nd ed., The Hague: TMC Asser Press, 2009), at 29; Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2010), at 4; Currie and Rikhof, *International & Transnational Criminal Law* (2nd ed., Irwin Law: Toronto, 2013), at 19; T. Einarsen, *The Concept of Universal Crimes in International Law* (Oslo: Torkel Opsahl Academic Publisher, 2012), at 278.

³⁵¹ See for instance, Bassiouni, *Introduction to International Criminal Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2013), at 143.

³⁵² See Werle, *Principles of International Criminal Law* (2nd ed., The Hague: TMC Asser Press, 2009), at 42, and Currie and Rikhof, *International & Transnational Criminal Law* (2nd ed., Irwin Law: Toronto, 2013), at 20.

³⁵³ Schabas, *supra* note 344, at 268.

³⁵⁴ *Ibid.*, at 269.

³⁵⁵ *Ibid.*

person or interest and (5) it “violates an internationally protected interest but it does not give rise to the level required by (1) or (2), however, because of its nature, it can best be prevented and suppressed by international criminalization”.³⁵⁶ He identifies 28 different international crimes³⁵⁷ and proposes the following three general categories, based on the protected interest embodied in each crime: (1) protection of international peace and security; (2) protection of human interests and (3) protection of social and cultural interests.³⁵⁸ Category (1) includes aggression and mercernarism. Category (2) is divided into two subcategories: (a) protection of human interests not associated with other internationally protected interests and (b) protection of human interests associated with other internationally protected interests. Category (2)(a) includes genocide, crimes against humanity and war crimes, as well as nuclear terrorism, theft of nuclear materials, apartheid, slavery, torture and unlawful human experimentation. Category (2)(b) includes crimes such as piracy, aircraft hijacking, crimes against United Nations and associated personnel, and terrorist acts provided in a number of conventions. Category (3) includes crimes such as drug trafficking, organized crime and counterfeiting.³⁵⁹

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There also appears to be some confusion surrounding the term “international crimes” itself. While Currie and Rikhof consider that the term “international crimes” covers the first two above-mentioned categories of crimes, other scholars use the term “international crimes” essentially for “core crimes”. Cryer et al., for instance, adopt a jurisdictional approach and define international crimes as “those offences over which international courts or tribunals have been given jurisdiction under general international law”.³⁶⁰ International crimes thus include crimes of genocide, crimes against humanity, war crimes and the crime of aggression. They do not include other crimes such as piracy, slavery, torture, terrorism or drug trafficking. The authors do however add that some of these crimes may “constitute international crimes within our meaning at some time in the future”.³⁶¹ Werle also adopts a rather narrow definition for international crimes.³⁶² According to him, an offence falls under international criminal law if it meets the following three conditions: (1) it entails individual responsibility and is subject to punishment; (2) the norm is part of the body of international law; and (3) the offence is punishable regardless

³⁵⁶ Bassiouni, *supra* note 343, at 133.

³⁵⁷ *Ibid.*, at 133-134.

³⁵⁸ *Ibid.*, at 139 ff.

³⁵⁹ *Ibid.*

³⁶⁰ Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2010), at 4.

³⁶¹ *Ibid.*

³⁶² Werle, *supra* note 352.

of whether it has been incorporated in domestic law.³⁶³ In the end, he only recognizes war crimes, crimes against humanity, genocide and the crime of aggression as crimes under international law.³⁶⁴ He does however advance that other crimes may be included because “here the development is in flux”.³⁶⁵

On the contrary, Ratner et al. do not limit international crimes to violations of human rights and humanitarian law, but include drug crimes and terrorist offences.³⁶⁶ The authors define three strategies for providing international criminal responsibility: (1) directly providing for individual culpability; (2) obligating some or all states, or the global community at large, to try and punish or otherwise sanction offenders; or (3) authorizing states or the global community to try and punish or otherwise sanction offenders.³⁶⁷ Thus, they assert that “a violation of international law becomes an international crime if the global community intends through any of those strategies (regardless of whether they are implemented through treaty, custom or other prescriptive method) to hold individuals directly responsible for it”.³⁶⁸ Thus, in addition to genocide, war crimes and crimes against humanity, the authors also examine the following “most significant areas with respect to human rights abuses”, namely slavery and forced labor, torture, racial discrimination and apartheid, forced disappearances and terrorism.³⁶⁹

In his contribution, in order to qualify “particularly grave offences of concerns to the world community as a whole”,³⁷⁰ Einarsen introduces the new concept of “universal crimes”, which he defines as “certain acts, or kinds of inhuman behavior, that are proscribed by norms that ultimately apply and might be implemented and enforced universally”. In his classification of international crimes, Einarsen formulates the following criteria: (1) the conduct must manifestly violate a fundamental universal value or interest; (2) it must universally be regarded as punishable due to its inherent gravity; (3) it must be

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*

³⁶⁵ *Ibid.*, at 30.

³⁶⁶ Ratner et al., *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (3rd ed., Oxford: OUP, 2009), at 10.

³⁶⁷ *Ibid.*, at 11.

³⁶⁸ *Ibid.*, at 12.

³⁶⁹ *Ibid.*, at 114 ff. While acknowledging that there is no agreed definition of international crimes, Aust considers that it is a “convenient term for those crimes that are a concern to every state because of their corrosive effect on international society or their particularly appalling nature”. He lists piracy, slavery, genocide, crimes against humanity, war crimes and aggression, but specifies that these “are not the only ones to be called international crimes”. Aust, *Handbook of International Law* (2nd ed., Cambridge: Cambridge University Press, 2010), at 250.

³⁷⁰ Einarsen, *The Concept of Universal Crimes in International Law* (Oslo: Torkel Opsahl Academic EPublisher, 2002), at 4.

recognized as a matter of serious international concern; (4) it must be proscribed by binding rules of international law; and (5) liability and prosecution must not require the consent of any concerned state. Thus, unlike other scholars, he explicitly introduces a “gravity clause” which he attaches to each specific type of crime.³⁷¹ He then classifies 150 specific international crimes into three groups: (i) “core international crimes”; (ii) “other international crimes against the peace and security of mankind”³⁷² and (iii) “international crimes not dependent on the existence of threats to international peace and security”.³⁷³

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Cassese appears to adopt a rather strict definition of international crimes, or of “international crimes proper”, as he calls them. He advances that an international crime is composed of the four following elements: (1) they consist of violations of international customary rules; (2) these rules are intended to protect values considered important by the entire international community and consequently bind all states and individuals; (3) there exists a universal interest in repressing these crimes and thus “subject to certain conditions, under international law, their alleged authors may in principle be prosecuted and punished by any state, regardless of any territorial or nationality link with the perpetrator or the victim, at the time of the commission of the crime”; and (4) if the perpetrator has acted in an official capacity, the state on whose behalf he has performed the prohibited act is barred from claiming immunity.³⁷⁴ In addition to war crimes, crimes against humanity and genocide, Cassese also recognizes torture, aggression and international terrorism as international crimes proper.³⁷⁵ According to him, the notion of international crimes proper does not however encompass piracy, apartheid or other crimes that are only provided for in treaties and not in customary law.³⁷⁶

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Despite the controversy that remains on the notion and categories of international crimes, one distinction that appears fundamental for our study is

³⁷¹ See R. J. Currie, ‘Terje Einarsen, *The Concept of Universal Crimes in International Law*, 12(1) *Journal of International Criminal Justice* (2013) 162-163.

³⁷² This group includes the following categories of crimes: “crimes against the United Nations and internationally protected persons”, “terrorist crimes” and “crimes of group destruction not encompassed by the Genocide Convention”.

³⁷³ He also identifies a group of “non-international crimes”, which include (i) national crimes; (ii) nationally imported international crimes; and (iii) transnational crimes. This group includes the following categories of crimes: “grave piracy crimes”; “grave trafficking crimes” and “excessive use and abuse of authorized power”. See Einarsen, *The Concept of Universal Crimes in International Law*, at 224 and 230. See also R. J. Currie, ‘Terje Einarsen, *The Concept of Universal Crimes in International Law*, 12(1) *JICJ* (2013), at 162-163.

³⁷⁴ Cassese et al., *Cassese’s International Criminal Law* (3rd ed., Oxford: Oxford University Press, 2013), at 20-21.

³⁷⁵ *Ibid.*, at 21.

³⁷⁶ Cassese, *International Criminal Law* (2nd edition, Oxford: Oxford University Press, 2008), at 12.

the one between international crimes that are directly criminalized in international customary law (“international crimes proper”) and “treaty-based crimes”,³⁷⁷ which are sometimes also qualified as “international crimes” because they are provided for in the treaties. However, they are not necessarily “international” in the sense of constituting a threat to the fundamental values of the international community.³⁷⁸ The second conclusion that appears from this brief overview is the emergence³⁷⁹ of a category of international crimes which are neither core international crimes (genocide, crimes against humanity and war crimes), nor treaty-based crimes, but which deeply affect commonly shared values of the world community and are therefore of universal interest, such as torture and other crimes including enforced disappearances, human trafficking and possibly international terrorism.

2. *Attempts by international bodies to identify and classify international crimes*

a. *From Nuremberg to the ad hoc tribunals*

The first real attempts to codify international crimes came in the 1940s with the Charter of the International Military Tribunal Nuremberg, the Genocide Convention and the Geneva Conventions. Following the Nuremberg judgment, the UN General Assembly adopted a resolution on 11 December 1946 affirming the Nuremberg principles, in which it recognized the three categories of crimes established by Article 6 of the Nuremberg Charter, namely crimes against peace, war crimes and crimes against humanity.³⁷⁹

In 1947, the United Nations General Assembly also charged the International Law Commission with identifying and codifying “offences against the peace and security of mankind”. In its early work, the International Law Commission had distinguished 12 categories of international crimes, which included terrorist activities.³⁸⁰ However, “with a view to reaching consensus”, the International Law Commission (ILC) finally considerably reduced this number and, in its 1996 Draft Code of Crimes against Peace and the Security of

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³⁷⁷ See N. Boister, ‘Treaty-based Crimes’, in Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford, Oxford University Press, 2009) 570 ff.

³⁷⁸ We will come back to this distinction below when discussing crimes subject to universal jurisdiction.

³⁷⁹ Resolution of the General Assembly adopted on 11 December 1946; See also A. Cassese, ‘Affirmation of The Principles of International Law Recognized by The Charter of the Nürnberg Tribunal’, *United Nations Audiovisual Library of International Law* (2009).

³⁸⁰ See *Report of the International Law Commission Covering the Work of its Sixth Session*, Official Records of the General Assembly, Ninth Session, Supplement No. 9 (A/2693), 3-28 July 1954, at 151 ff., Art. 2; On the evolution of the debates before the International Law Commission, see Schabas, ‘International Crimes’, in Armstrong (ed.), *Routledge Handbook of International Law* (Abingdon [U.K.], New York: Routledge, 2009) 268-280, at 271.

Mankind, the five following crimes were considered to be “crimes against peace and the security of mankind”: the crime of aggression, the crime of genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes.³⁸¹ In its report, the ILC pointed out that it was “understood that the inclusion of certain crimes in the Code does not affect the status of other crimes under international law, and that the adoption of the Code does not in any way preclude the further development of this important area of law”.³⁸² The ILC never defined the notion “international crimes”, nor did it propose “criteria for a policy of international criminalization”.³⁸³

137 In the early 1990s, the Security Council established the ad hoc tribunals, whose subject matter was limited to war crimes, crimes against humanity and genocide. These crimes, which were described as “serious violations of international humanitarian law”, did not include the crime of aggression or crimes against peace.³⁸⁴

b. *Debates about crimes subject to the ICC*

138 The International Criminal Court has jurisdiction over genocide, crimes against humanity and war crimes.³⁸⁵ These crimes are defined in Articles 6, 7 and 8 of the Rome Statute. Further details on the definition of the crimes are given in the Elements of Crimes. The ICC also has jurisdiction over the crime of aggression, although the Statute originally specified that the Court could not exercise jurisdiction until certain conditions have been fulfilled.³⁸⁶ A definition of the crime of aggression was adopted during the 2010 Kampala Conference, but the Court won’t be able to exercise its jurisdiction over this crime until after 1 January 2017, when a decision is made by state parties to activate the jurisdiction.

139 During the drafting of the Rome Statute, many discussions took place regarding the subject-matter jurisdiction of the Court. Suggestions were made to include other crimes such as apartheid, hostage-taking, hijacking, crimes of terrorism, and crimes involving illicit traffic in narcotic drugs and psychotropic

³⁸¹ Articles 16-20 of the Draft Code of Crimes Against Peace and Security of Mankind.

³⁸² *Report of the International Law Commission on the work of its forty-eighth session*, Official Records of the General Assembly, Fifty-first session, Supplement No.10, 6 May-26 July 1996, § 46.

³⁸³ C. Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’, 42 *Virginia Journal of International Law* (2001) 81-162, at 141.

³⁸⁴ Schabas, *supra* note 380, at 269.

³⁸⁵ Art. 5 Rome Statute.

³⁸⁶ Art. 5(2) Rome Statute.

substances, but there was no consensus on these crimes.³⁸⁷ In the 1994 Draft Statute for an International Criminal Court adopted by the International Law Commission, the crimes within the jurisdiction of the Court were: (a) genocide; (b) aggression; (c) serious violations of the laws and customs applicable in armed conflict; (d) crimes against humanity; and (e) crimes established under or pursuant to the treaty provisions listed in the Annex, which having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.³⁸⁸ A distinction was therefore made between the crimes provided for in paragraphs (a) to (d) which were crimes under “general international law” and the crimes provided for in paragraph (e), which were treaty-based prohibitions.³⁸⁹ According to the Annex, the treaties were the Geneva Conventions and Additional Protocol I, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention against Torture, several counter-terrorism conventions and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.³⁹⁰

While a consensus seemed to emerge regarding the crimes under international law – the “core crimes” –, which were already identified in the statutes of the ad hoc Tribunals, namely genocide, crimes against humanity and war crimes, debate persisted among states about the treaty-based crimes.³⁹¹ In the Ad Hoc Committee, the view was expressed that some of the treaty-based crimes were “of lesser magnitude” and that their inclusion “entailed a risk of trivializing the role of court, which should focus on the most serious crimes of concern to the international community as a whole”.³⁹² The debate continued in the Preparatory Committee. A number of states, notably India, were of the view

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³⁸⁷ See ‘Report of the Working Group on the question of an international criminal tribunal’, in *Report of the International Law Commission on the work of its forty-fourth session*, UN Doc A/47/10, 4 May-24 July 1992, at 58-77, § 57.

³⁸⁸ Art. 21 of the Draft Statute of the International Criminal Court, Text adopted by the Commission at its forty-sixth session, in 1994, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 1994*, vol. II (Part Two).

³⁸⁹ Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: OUP, 2010), at 105.

³⁹⁰ Annex, Draft Statute of the International Criminal Court, Text adopted by the Commission at its forty-sixth session, in 1994, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 1994*, vol. II (Part Two).

³⁹¹ See Schabas, *supra* note 389, at 116.

³⁹² United Nations, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, General Assembly Official Records, Fiftieth Session, Supplement No. 22 (A/50/22), § 81.

that international terrorism should be included in the Statute.³⁹³ The other crimes considered for inclusion were apartheid, torture, hostages, illicit drug trafficking, attacks against the United Nations and associated personnel, and serious threats to the environment.³⁹⁴ Prior to the 2010 Review Conference of the International Criminal Court in Kampala, the Netherlands proposed to include the crime of terrorism in the Rome Statute, arguing that the fact that there was no universally agreed definition of terrorism should not be grounds for the lack of jurisdiction of the Court over the crime; the proposition did not obtain support from other states.³⁹⁵ It was generally considered that international terrorism should not be included if there was no generally accepted definition of the crime.³⁹⁶

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Others stated that drug trafficking was not of the same nature as the other crimes and “were of such a quantity as to flood the Court”.³⁹⁷ Again, several delegations expressed the view that the jurisdiction of the Court should be limited to the core crimes under general international law. The reasons invoked were:

to avoid any question of individual criminal responsibility resulting from a State not being a party to the relevant legal instrument, to facilitate the acceptance of the jurisdiction of the Court by States that were not parties to particular treaties, to facilitate the functioning of the Court by obviating the need for complex State consent requirements or jurisdictional mechanisms for different categories of crimes, to avoid overburdening the limited financial and personnel resources of the Court or trivializing its role and functions, and to avoid jeopardizing the general acceptance of the Court or delaying its establishment.³⁹⁸

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In the final draft prepared by the Preparatory Committee, the only crimes left, besides the core crimes, were crimes of terrorism, crimes against the United Nations and associated personnel, and drug trafficking. The repression of torture as a discrete crime was abandoned but was included as a war crime – if

³⁹³ See Press Release, ‘Terrorism Should Be ‘Core Crime’ Of Proposed International Court India Tells Preparatory Committee’ (L/2766), 27 March 1996; See also United Nations, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996)*, General Assembly Official Records, Fifty-first Session, Supplement No. 22 (A/51/22), § 106-107.

³⁹⁴ United Nations, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I*, § 108-114.

³⁹⁵ *Annex II: Report of the Working Group on the Review Conference*, ICC-ASP/8/20, at 54.

³⁹⁶ United Nations, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, § 107.

³⁹⁷ *Ibid.*, § 112.

³⁹⁸ *Ibid.*, § 103.

committed in an armed conflict – and as a crime against humanity, if committed as part of a widespread or systematic practice. Likewise, the taking of hostages was included as a war crime and the crime of apartheid was included as a crime against humanity.

In the end, the Rome Conference excluded all treaty crimes from the jurisdiction of the ICC. Crimes against United Nations personnel were included in war crimes. Regarding the crimes of terrorism and drug crimes, since no generally acceptable definition could be agreed upon, the Rome Conference “recommended that a Review Conference pursuant to article 123 of the Statute of the International Criminal Court consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court”.³⁹⁹

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3. *The legal consequences of international crimes*

The legal consequences of qualifying crimes as international crimes depend on how they are defined. Some scholars appear to link the conditions of “international crimes” with the particular legal consequences of universal jurisdiction. Cassese, for instance, considers that one of the elements of “international crimes proper” is the right of any state to exercise universal jurisdiction, subject to certain conditions.⁴⁰⁰

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Others are more cautious or vague. Einarsen states that one of the legal consequences of considering a crime as a “universal crime” is that “third states *may* have universal jurisdiction to investigate and prosecute”.⁴⁰¹ Likewise, according to Schabas, one of the consequences of characterizing an act as an international crime “is that this authorizes prosecution by courts that would not normally be allowed to exercise jurisdiction”.⁴⁰² Naqvi mentions one of the features characterizing international crimes as being the notion that “the enforcement of this norm requires universal jurisdiction because it is not sufficient to leave it up to the form of primary jurisdiction”.⁴⁰³ In the same vein, Aust states that “although it is by no means universally agreed, it is *likely* that

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³⁹⁹ *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries On the Establishment of an International Criminal Court*, U.N. Doc. A/Conf.183/10, 17 July 1998, available online at <http://legal.un.org/icc/statute/finalfra.htm>.

⁴⁰⁰ See Cassese et al., *Cassese’s International Criminal Law* (3rd ed., Oxford: Oxford University Press, 2013), at 20.

⁴⁰¹ Einarsen, *The Concept of Universal Crimes in International Law* (Oslo: Torkel Opsahl Academic EPublisher, 2002), at 233 (emphasis added).

⁴⁰² Schabas, ‘International Crimes’, in Armstrong (ed.), *Routledge Handbook of International Law* (Abingdon [U.K.], New York: Routledge, 2009) 268-280, at 274.

⁴⁰³ Naqvi, *Impediments to Exercising Jurisdiction over International Crimes* (The Hague: T.M.C. Asser Press, 2009), at 31.

international law allows a State to prosecute [international] crimes regardless of where they committed or the nationality of the accused (universal jurisdiction)".⁴⁰⁴

4. *Concluding remarks on the notion of international crimes*

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To conclude, in this study, unless otherwise specified, the notion of international crimes comprises the core crimes of genocide, crimes against humanity, war crimes and other international crimes under customary international law, namely torture (which we could call "international crimes proper"). The notion does not exclude crimes such as slavery, environmental crimes⁴⁰⁵ and international terrorism, which have not (yet) been criminalized in an international convention or in international customary law, but may be in the future.⁴⁰⁶ The study does not focus on the numerous crimes which state parties to various treaties are obliged to criminalize in their domestic law,⁴⁰⁷ although some crimes like war crimes or torture are not only international crimes proper but also treaty-based crimes. We will come back to these treaty-based crimes at the end of Part I.

B. *Jus cogens norms, obligations erga omnes and universal jurisdiction*

1. *The concepts of jus cogens and erga omnes norms and their legal consequences*

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When discussing crimes subject to universal jurisdiction, another question that arises is whether there exists a link between universal jurisdiction and *jus cogens*. Some scholars even argue that "an independent theory of universal jurisdiction exists with respect to *jus cogens* international crimes".⁴⁰⁸ It is generally accepted that some international crimes, namely core crimes and torture, are violations

⁴⁰⁴ Aust, *Handbook of International Law* (2nd ed., Cambridge: Cambridge University Press, 2010), at 250 (emphasis added).

⁴⁰⁵ See the Convention on the protection of the environment through criminal law, adopted by the Council of Europe on 4 November 1998.

⁴⁰⁶ See Naqvi, *supra* note 402, at 31-32.

⁴⁰⁷ Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2010), at 4-5.

⁴⁰⁸ See Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', 42 *Virginia Journal of International Law* (2001) 81-162, at 104.

of peremptory norms of international law (*jus cogens*).⁴⁰⁹ There is some controversy however on the consequences of the qualification of a crime as a *jus cogens* crime, and in particular on its connection with universal jurisdiction. Indeed, Article 53 of the Vienna Convention on the Law of Treaties merely states that “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. [...] A peremptory norm of international law is a norm accepted and recognized by the international community of states from which no derogation is permitted and which can be modified only by a subsequent norm of general law having the same character.” In other words, states cannot derogate from peremptory norms.

Jus cogens or peremptory norms of general international law may result in obligations *erga omnes*.⁴¹⁰ The notion of obligations *erga omnes* was introduced by the International Court of Justice in the 1970 *Barcelona Traction* case.⁴¹¹ The Court operated on a distinction between the obligations of a state toward the international community as a whole, and those arising vis-à-vis another state. The Court then held:

By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law . . . others are conferred by international instruments of a universal or quasi-universal character.

Although this case was in fact not related to international crimes or to the jurisdiction of states,⁴¹² some scholars inferred the universality principle from it.

⁴⁰⁹ See Naqvi, *supra* note 402, at 26. See also ICTY, Appeals Chamber, *Delalić and others*, § 172, footnote 225, in which the Court noted that “in human rights law the violation of rights which have reached the level of *jus cogens*, such as torture, may constitute international crimes”.

⁴¹⁰ M. Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerpen: Intersentia, 2002), at 55.

⁴¹¹ It should be noted that the *erga omnes* obligations and *jus cogens* norms do not necessarily correspond. Violations of *jus cogens* norms do not necessarily imply a responsibility of states vis-à-vis the international community. However, “the primary rules which belong to *jus cogens* and *erga omnes*” are basically the same. See S. Kadelbach, ‘The Identification of Fundamental Norms’, in Tomuschat and Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Leiden: Martinus Nijhoff Publishers, 2006) 21-40, at 25-27.

⁴¹² See Henzelin, *Le principe de l’universalité en droit pénal international : Droit et obligation pour les Etats de poursuivre et juger selon le principe de l’universalité* (Geneva, Brussels : Helbing and

Randall, for instance, suggests a link between the universality principle and the *jus cogens* and *erga omnes* doctrines. He argues that:

violations of fundamental obligations offend all other states. Violations of obligations *erga omnes* and *jus cogens* norms affect all states, whether committed by state actors or individuals. Indeed, domestic jurisdiction over those violations may draw support from the *Barcelona Traction* case dictum, which, though not without ambiguity, may support a type of *action popularis*, enabling any state to vindicate rights common to all. If that dictum supports judicial remedies against state offenders, it logically also supports judicial remedies against individual offenders, thus complementing the universality principle. In this way, the *erga omnes* and *jus cogens* doctrines may buttress the universal jurisdiction of all states.⁴¹³

150 The idea that the *erga omnes* or *jus cogens* character of a crime has, as consequence, “an entitlement to prosecute”,⁴¹⁴ was confirmed in several other ICJ judgments. In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, the Court held that “the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention”.⁴¹⁵

151 In 1998, the ICTY was the first international criminal court to consider that there was a clear connection between a *jus cogens* norm and the exercise of universal jurisdiction. In the *Furundžija* judgment, the ICTY Trial Chamber held that:

one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for

Kichtenhahn/Bruylant, 2000), at 396-397 and R. Higgins, *Problems and Process : International Law and How We Use It* (Oxford : Calrendon Press, 1994), at 62.

⁴¹³ K. C. Randall, 'Universal Jurisdiction under International Law', 66 *Texas Law Review* (1988) 785-851.

⁴¹⁴ See Naqvi, *supra* note 402, at 29.

⁴¹⁵ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), at 616, § 31.

States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes.⁴¹⁶

This position is supported by a number of scholars.⁴¹⁷ Cassese, for instance, defended the idea that one of the legal effects of *jus cogens* is to grant to national courts universal criminal jurisdiction over the alleged authors of acts whose prohibition have this peremptory character.⁴¹⁸ A few scholars go even further and consider that *jus cogens* norms involve *erga omnes* obligations which entail *obligations* on states to prosecute these *jus cogens* crimes at the national level, namely to establish and exercise universal jurisdiction.⁴¹⁹ Bassiouni argues that the "implications of *jus cogens* are those of a duty and not of optional rights".⁴²⁰ He considers that the international crimes that rise to the level of *jus cogens* constitute *obligatio erga omnes*, which are inderogable and include inter alia the obligation to exercise universal jurisdiction over perpetrators of such crimes.⁴²¹ He thus defends the position that one of the legal consequences of the *jus cogens* nature of these norms is not only the *right* of states to exercise universal jurisdiction but the duty for any and all national systems to resort to universal jurisdiction when necessary.⁴²²

This position also finds some support in national jurisprudence. In the 1999 *Pinochet III* case, for instance, the judges ruled that the violation of a *jus cogens* norm would result in the exercise of universal jurisdiction. Lord Browne-Wilkinson held that "The *jus cogens* nature of the international crime of torture

⁴¹⁶ ICTY, Trial Chamber, *Furundžija*, Judgement, IT-95-17/1-T, 10 December 1998, § 156. Similar findings can be found in the ICTY judgments *Mucić and Others* (16 November 1998, IT-96-21-T, § 454) and *Kunarac* (22 February 2001, IT-96-23-T and IT-96-23/1, § 466).

⁴¹⁷ See A. Orakhelashvili, *Peremptory Norms and the Allocation of Jurisdiction to States* (Oxford: OUP, 2008); C. Bassiouni, 'International Crimes, Jus Cogens and Obligatio Erga Omnes', 59 *Law and Contemporary Problems* (1996), at 63 ff; Randall, *supra* note 412, at 830; See Naqvi, *supra* note 402, at 29.

⁴¹⁸ A. Cassese, *International Law* (2nd ed., Oxford: Oxford University Press, 2005), at 208.

⁴¹⁹ See Naqvi, *supra* note 402, at 29; M. Garrod, 'The Protective Principle of Jurisdiction over War Crimes and the Hollow Concept of Universal Jurisdiction', 12 *International Criminal Law Review* (2012) 763–826, at 815 ff.

⁴²⁰ Bassiouni, *Introduction to International Criminal Law* (2nd ed., Leiden, Boston: Martinus Nijhoff Publishers, 2013), at 237.

⁴²¹ Bassiouni, 'International Crimes, Jus Cogens and Obligatio Erga Omnes', 59 *Law and Contemporary Problems* (1996) 63-74; Bassiouni, *supra* note 419, at 237; See also Randall, *supra* note 411, at 785-851.

⁴²² Bassiouni, *supra* note 419, at 935.

justifies states in taking universal jurisdiction over torture wherever committed".⁴²³ Referring to the *Demjanjuk v. Petrovsky* case⁴²⁴, he went on to say that "International law provides that offences *jus cogens* may be punished by any state because the offenders are common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution". In the same vein, Lord Hope held that the status of a norm of *jus cogens* "compels all states to refrain from such conduct under any circumstances and imposes an obligation *erga omnes* to punish such conduct".⁴²⁵ In the 2005 *Scilingo* case, a Spanish court held that crimes against humanity constituted a violation of *jus cogens* norms that injure the international community as a whole, with the consequence that there arises a universal claim to the repression of such violations.⁴²⁶ Finally, in a Belgian decision, a judge held that:

The prohibition on crimes against humanity was part of customary international law and of international *jus cogens*, and this norm imposes itself imperatively and *erga omnes* in our domestic order. [...] Even in the absence of treaty, national authorities have the right – and in some circumstances the obligation – to prosecute the perpetrators independently of the place where they hide. [...] we find that, as a matter of customary international law, or even more strongly as a matter of *jus cogens*, universal jurisdiction over crimes against humanity exists, authorizing judicial authorities to prosecute and punish the perpetrators in all circumstances.⁴²⁷

⁴²³ Lord Browne-Wilkinson, 'United Kingdom House of Lords: *Regina v. Bartle and The Commissioner of Police for The Metropolis and Others Ex Parte Pinochet*', in *International Law Materials* (24 March 1999) 581-663, at 589; See also Lord Hope of Craighead, *ibid.*, which held that "there was already [in 1992] widespread agreement that the prohibition against official torture had achieved the status of a *jus cogens* norm".

⁴²⁴ United States, *Demjanjuk v. Petrovsky* (1985) 603 F. Supp. 1468, 776 F. 2d. 571.

⁴²⁵ Judgment, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet; Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*. On Appeal from the Divisional Court of the Queen's Bench Division, Lord Hope.

⁴²⁶ G. Pinzauti, 'An Instance of Reasonable Universality: The Scilingo Case', 3 *Journal of International Criminal Justice* (2005) 1092-1105.

⁴²⁷ Translation in L. Reydam, 'Universal Criminal Jurisdiction: The Belgian State of Affairs', 11 *Criminal Law Forum* (2000) 183–216, at 208. According to the original French version "*le crime contre l'humanité est consacré par la coutume internationale et fait partie, à ce titre, du jus cogens international qui s'impose dans l'ordre juridique interne avec effet contraignant « erga omnes » [...] Même en dehors de tout lien conventionnel, les autorités nationales ont le droit, et même, dans certaines circonstances, l'obligation de poursuivre les auteurs de tels crimes indépendamment du lieu où ils se trouvent [...] nous considérons qu'il existe une règle coutumière du droit des gens, voire de jus cogens, reconnaissant la compétence universelle et autorisant les autorités étatiques nationales à*

It should be noted that there is nevertheless some controversy as to whether violations of *jus cogens* norms automatically confer the right to exercise universal jurisdiction.⁴²⁸ Some legal scholars reject the link between universal jurisdiction and the concept of *erga omnes*.⁴²⁹ In particular, it is argued that violations of *erga omnes* obligations presuppose that a *state* has violated a rule of international law; yet, acts of genocide, crimes against humanity and war crimes may be committed by persons whose acts are not attributable to any state.⁴³⁰

2. *The content of jus cogens norms*

Be that as it may, another problem that arises – as in the case of international crimes – is the identification of the content and catalogue of *jus cogens* norms in international law.⁴³¹ The criteria for the identification of such norms is also not entirely clear.⁴³² This is due to the fact that the very concept of *jus cogens* is one of the most controversial notions in public international law.

According to Cassese, an important clue as to the identification of peremptory norms can be found in the former Article 19 of the ILC Draft Articles on State Responsibility.⁴³³ By way of illustration, Article 19(4) makes reference to the following international crimes: aggression, “the establishment or maintenance by force of colonial domination”, slavery, genocide or apartheid,

poursuivre et traduire en justice, en toutes circonstances, les personnes soupçonnées de crimes contre l'humanité.”

⁴²⁸ See for instance Akande and Shah, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’, 21(4) *European Journal of International Law* (2010) 815-852, at 836.

⁴²⁹ See for instance Henzelin, *Le principe de l'universalité en droit pénal international : Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité* (Geneva/Brussels : Helbing & Kichtenhahn/Bruylant, 2000), § 1363.

⁴³⁰ See A. Zimmermann, ‘Violations of Fundamental Norms of International Law and the Exercise of Universal Jurisdiction in Criminal Matters’, in Tomuschat and Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Leiden, Boston: Martinus Nijhoff Publishers, 2006) 335-354, at 339.

⁴³¹ The problem is in fact even more complex because the concepts of *jus cogens* and *erga omnes* obligations do not necessarily converge. It is however outside the scope of this study to discuss the differences between these two categories. On this subject, see inter alia C. Tomuschat and J.-M. Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Leiden: Martinus Nijhoff Publishers, 2006).

⁴³² For instance, Naqvi considers that “international crimes are violations of jus cogens norms”. Naqvi, *Impediments to Exercising Jurisdiction over International Crimes* (The Hague: T.M.C. Asser Press, 2009), at 341. On this subject, see Kadelbach, ‘The Identification of Fundamental Norms’, in C. Tomuschat and C. Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Leiden: Martinus Nijhoff Publishers, 2006) 21-40, at 29.

⁴³³ *ILC Draft Articles on State Responsibility, Report of the ILC*, GAOR, Suppl. (No. 10), UN Doc. A/56/10.

as well as the “massive pollution of the atmosphere or the seas”. To this list of peremptory norms, Cassese adds the norms prohibiting the use or threat of force, the customary rules banning racial discrimination or torture, the general rules on self-determination, as well as the norms prohibiting war crimes and crimes against humanity.⁴³⁴

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In a later version of the Draft Articles, the International Law Commission considers the following peremptory norms as “clearly accepted and recognized”: the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.⁴³⁵ Bassiouni identifies the following crimes as international *jus cogens* crimes: genocide, crimes against humanity, war crimes, slavery and slave-related practices, torture and piracy (for historical reasons).⁴³⁶ However, he makes a distinction between “the four *jus cogens* crimes of genocide, crimes against humanity, war crimes and torture” and the other *jus cogens* crimes for which “the national system may develop criteria for selectivity or symbolic prosecution consistent with their laws, provided these criteria are not fundamentally unfair to the accused”.⁴³⁷ According to another scholar, “there is general agreement that customary law prohibits torture, disappearances, and extra-legal executions and that these prohibitions are peremptory norms”.⁴³⁸

3. Concluding remarks

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One might agree with Brown that, in a “logically coherent and integrated legal order”, the concepts of universal jurisdiction, *jus cogens* and *erga omnes* “might be different sides of the same coin, essentially coextensive and generally overlapping”.⁴³⁹ However, in practice this does not always appear to be the case.⁴⁴⁰ Firstly, not all crimes subject to universal jurisdiction are *jus cogens* or *erga omnes* prohibitions. Indeed, as will be explained below, over the years an

⁴³⁴ Cassese, *International Law* (2nd ed., Oxford: Oxford University Press, 2005), at 202-203.

⁴³⁵ *Commentary to Art. 26 of the ILC Draft Articles on State Responsibility, Report of the ILC, GAOR, Suppl. (No. 10), UN Doc. A/56/10, para (5), p. 208.*

⁴³⁶ Bassiouni, *Introduction to International Criminal Law* (2nd ed., Leiden/Boston: Martinus Nijhoff Publishers, 2013), at 934. In an earlier paper, he also included apartheid in the list. See Bassiouni, ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’, 42 *Virginia Journal of International Law* (2001) 81-162, at 108.

⁴³⁷ Bassiouni, *supra* note 435, at 944-945.

⁴³⁸ D. Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’, in Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. 1 (Washington, DC: US Institute of Peace Press, 1995) 375-415.

⁴³⁹ B. S. Brown, ‘The Evolving Concept of Universal Jurisdiction’, 35(2) *New England Law Review* (2001) 383-397, at 392.

⁴⁴⁰ *Ibid.*

increasing number of lesser crimes have been the object of conventions providing for universal jurisdiction: these include drug trafficking, for instance, which are clearly not *jus cogens* prohibitions. Secondly, as seen above, it is not unanimously accepted that the *jus cogens* status of a norm automatically confers a right or obligation upon states to exercise universal jurisdiction over crimes which violate such a norm. However, the fact that a crime violates a “peremptory” norm of international law (*jus cogens*) constitutes, in our view, a clear indicator that a crime is (or should be) subject to universal jurisdiction. Indeed, the *jus cogens* or *erga omnes prohibitions* character of norms may serve to justify the right – if not the obligation – of states to establish and exercise jurisdiction over these grave violations of human rights. We will come back to this issue when discussing the existence of a duty of states to establish and exercise universal jurisdiction.⁴⁴¹

III. Universal jurisdiction over core crimes and torture

A. Preliminary remarks: crimes subject to universal jurisdiction under international law

There is no generally accepted list of crimes subject to universal jurisdiction. In our view, the first legal obstacle regarding the exercise of universal jurisdiction is precisely the fact that some crimes are not clearly recognized as international crimes subject to universal jurisdiction. Crimes subject to universal jurisdiction can be divided into four categories. The first category includes the crimes that are clearly recognized under international criminal law as offenses subject to universal jurisdiction, namely genocide, crimes against humanity, war crimes and torture. These crimes will be discussed below in section B.

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Secondly, for a number of other serious international crimes which offend fundamental human values such as slavery, forced labour, piracy, apartheid, enforced disappearances, there is some controversy as to whether they constitute offenses subject to universal jurisdiction.⁴⁴²

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Furthermore, over the past decades, universal jurisdiction has been extended to numerous offences by conventional international law. For instance, subject to a number of conditions, universal jurisdiction is provided for in treaties against drug trafficking, money laundering or terrorist acts. These crimes are not necessarily “international” in the sense that they constitute a threat to the fundamental values of the international community. In addition,

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⁴⁴¹ See *infra* subsection IV N 192 ff.

⁴⁴² Aust, for instance, considers that piracy, slavery, war crimes, genocide and crimes against humanity are subject to universal jurisdiction, See Aust, *Handbook of International Law* (2nd ed., Cambridge: Cambridge University Press, 2010), at 44.

not all states are parties to these conventions. Sometimes referred to as “treaty-based crimes”⁴⁴³, “transnational crimes” or “crimes of international concern”, this third category of crimes will be presented at the end of this Part.

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Finally, a fourth category contains crimes that are neither international crimes proper (categories 1 and 2) nor treaty-based crimes (category 3), but for which states have unilaterally established universal jurisdiction. This is, for instance, the case in Switzerland regarding crimes committed abroad against minors.⁴⁴⁴ Crimes subjected to such jurisdiction thus depends on domestic law and varies from one state to another.⁴⁴⁵

B. Core crimes and torture

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The international crimes *stricto sensu* considered in this section are war crimes (subsection 1), genocide (subsection 2), crimes against humanity (subsection 3) and torture (subsection 4). As will be shown below, the system is not entirely satisfactory. Indeed, a treaty rule on jurisdiction only exists for genocide, torture and grave breaches, but does not exist for crimes against humanity and war crimes outside the grave breaches system.⁴⁴⁶ For these last two crimes, for universal jurisdiction to be exercised, it must be allowed – or imposed – by international customary law. In addition, even in the case of genocide, the treaty rule is far from clear as to whether universal jurisdiction is allowed, let alone imposed.

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Even following the more restrictive approach exposed above, it is generally accepted that the right of states to exercise universal jurisdiction over these four crimes is permitted under customary international law,⁴⁴⁷ although it may be subject to a number of limits that will be discussed in Part III. Furthermore, it is submitted that states should not only be allowed to exercise universal jurisdiction over these crimes, but also be obliged to do so (subsection 5).

⁴⁴³ See Boister, ‘Treaty-based Crimes’, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford, Oxford University Press, 2009) 570 ff.

⁴⁴⁴ See Art. 5 of the Swiss Penal Code; See U. Cassani, ‘Art. 5’, in Roth and Moreillon, *Commentaire Romand: Code pénal I* (Basel: Helbing Lichtenhahn Verlag, 2009), at 2.

⁴⁴⁵ We will come back to these ordinary crimes subject to universal jurisdiction under national law in Part II.

⁴⁴⁶ Gaeta, ‘The Need Reasonably to Expand National Criminal Jurisdiction over International Crimes’, in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012), at 600.

⁴⁴⁷ In this direction, see for instance P. Gaeta, ‘The History and the Evolution of the Notion of International Crimes’, in Bellelli (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (Farnham: Ashgate, 2010) 169-180, at 177.

1. War crimes

War crimes are serious violations of international humanitarian law incurring individual criminal responsibility.⁴⁴⁸ War crimes are generally divided into two categories.⁴⁴⁹ The first category consists of grave breaches to the Geneva Conventions,⁴⁵⁰ i.e. offences committed during international armed conflicts. These include, for instance, willful killing, torture or inhuman treatment.⁴⁵¹ The second category consists of serious violations of Common Article 3 of the Geneva Conventions and other serious violations of the laws and customs applicable in armed conflicts not of an international character.⁴⁵²

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With respect to the first category of war crimes, each of these conventions, as well as Additional Protocol I, contain a general obligation for states to punish individuals who have committed grave breaches of international humanitarian law. These provisions state that:

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Each High Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, *regardless of their nationality*, before their own courts.⁴⁵³

This provision thus contains a very general obligation for states to punish alleged perpetrators of war crimes. Two interpretations of the text are theoretically possible. The text either means that all perpetrators must be brought to justice, independent of their nationality, according to the traditional bases of jurisdiction, that is according to the territorial and active and passive personality principles. Or, a more extensive interpretation of the text would mean that state parties must bring the perpetrators to justice based on all types of jurisdiction, including universal jurisdiction. The analysis of the *travaux*

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⁴⁴⁸ S. R. Ratner, 'War Crimes, Categories of', *Crimes of War*, available online at <http://www.crimesofwar.org/a-z-guide/war-crimes-categories-of/> (last visited 13 September 2016).

⁴⁴⁹ See International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, London Conference (2000), at 6; Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences', 23(4) *Human Rights Quarterly* (November, 2001) 940-974, at 946.

⁴⁵⁰ The Geneva Conventions establish rules on the condition of the wounded and sick in armed forces in the field (GC I), at sea (GC II), on the treatment of prisoners of war (GC III) and on the protection of civilian persons in time of war (GC IV).

⁴⁵¹ Art. 50 GCI.

⁴⁵² See International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, at 6.

⁴⁵³ Art. 49 GCI; Art. 50 GCII; Art. 129 GCIII; and Art. 146 GCIV (emphasis added).

préparatoires shows that it is the second interpretation that must be upheld.⁴⁵⁴ Exercise of universal jurisdiction over this category of war crimes is therefore not only permissive but also mandatory.⁴⁵⁵

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The second paragraph of the common provision states that “[the state] may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case”.⁴⁵⁶ As rightly submitted by Henzelin, the provision establishes an unconditional universal jurisdiction. States have a primary obligation to exercise universal jurisdiction and not merely a choice between extradition and prosecution according to the principle *aut dedere aut prosequi*.⁴⁵⁷ Indeed, as underlined by Kress, “the duty to “bring such persons ... before its own courts” is the initial obligation and nothing in the subsequent text supports the idea that this duty is conditional on the receipt of an extradition request”.⁴⁵⁸ Moreover, the text of the Geneva Conventions does not explicitly impose the presence of the perpetrator.⁴⁵⁹

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Today, due to the universal ratification of the Geneva Conventions and the widespread implementation of state legislation, it is generally recognized that

⁴⁵⁴ See Gaeta, ‘Les règles internationales sur les critères de compétence des juges internationaux’, in Cassese and Delmas-Marty (eds), *Crimes internationaux et juridictions internationales* (Paris: Presses Universitaires de France, 2002) 191- 213, at 192.

⁴⁵⁵ See International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, at 6; Y. Dinstein, ‘The Universality Principle and War Crimes’, in Schmitt/Green (eds), *The Law of Armed Conflict: Into the Next Millennium* (1998), at 21; H. Jeschek, ‘War Crimes’, 3 *Encyclopedia of Public International Law*, at 297; Akehurst, ‘Jurisdiction in International Law’, 46 *British Yearbook of International Law* (1975), 145-257, at 160.

⁴⁵⁶ Art. 49 GCI; Art. 50 GCII; Art. 129 GCIII; and Art. 146 GCIV.

⁴⁵⁷ According to Henzelin, “*L’exercice de la compétence n’est pas subsidiaire à une extradition mais absolu. Le terme « extradition » n’est d’ailleurs pas prévu par l’article 49, qui utilise le terme « remettre », bien moins contraignante. En ce sens, l’obligation prévue par la Convention est une obligation de rechercher et de poursuivre en premier lieu, avec la possibilité facultative pour l’Etat où se trouve le prévenu de le remettre à un autre Etat, pour autant que celui-ci retienne également des charges suffisantes contre ce prévenu. On se trouve ainsi en présence d’un modèle [...] primo prosequi, secundo dedere.*” Henzelin, *Le principe de l’universalité en droit pénal international : Droit et obligation pour les Etats de poursuivre et juger selon le principe de l’universalité*, at 353 § 1112.

⁴⁵⁸ C. Kress, ‘Reflections on the Iudicare Limb of the Grave Breaches Regime’, 7 *JICJ* (2009) 789-809, at 796.

⁴⁵⁹ Henzelin, *Le principe de l’universalité en droit pénal international : Droit et obligation pour les Etats de poursuivre et juger selon le principe de l’universalité* (Geneva/Brussels: Helbing & Kichtenhahn/Bruylant, 2000), at 354 § 1113.

the obligation to prosecute the first category of war crimes based on universal jurisdiction is a customary rule of international law.⁴⁶⁰

The second category of war crimes consists of serious violations of Common Article 3 of the Geneva Conventions and other serious violations of the laws and customs of laws, namely violations of The Hague Convention IV of 1907 and its Regulations.⁴⁶¹ Under treaty law, universal jurisdiction is only provided for the first category of war crimes. Neither Common Article 3 of the Geneva Conventions, nor Additional Protocol II contains any provision on enforcement. The Geneva Conventions mandatory “try or extradite” regime does not apply to Common Article 3 or Additional Protocol II.⁴⁶² Likewise, the Hague Conventions and Regulations contain no provision on any duty for state parties to prosecute those who have breached the law.⁴⁶³ Traditionally, war crimes falling into the second category have not been considered to be subject to universal jurisdiction.⁴⁶⁴ However, today there is growing support towards recognition of this category of war crimes as covered by the principle of universal jurisdiction.⁴⁶⁵ In the famous *Tadić* decision, the ICTY Appeals Chamber held that under customary international law, many rules applicable to international armed conflicts apply to non-international armed conflicts and that violations of such rules entail individual criminal responsibility.⁴⁶⁶ In a 1999 Resolution relating to the human rights situation in Sierra Leone, the United Nations Commission on Human Rights held that the universal jurisdiction of states applied equally to crimes committed in international and internal armed

⁴⁶⁰ See Naqvi, *Impediments to Exercising Jurisdiction over International Crimes* (The Hague: T.M.C. Asser Press, 2009), at 34.

⁴⁶¹ *Ibid.*

⁴⁶² L. Reytdams, ‘Belgium’s First Application of Universal Jurisdiction: The Butare Four Case’, 1 *Journal of International Criminal Justice* (2003) 428-436, at 434.

⁴⁶³ See Naqvi, *supra* note 459, at 34.

⁴⁶⁴ See T. Meron, ‘International Criminalization of Internal Atrocities’, 89(3) *The American Journal of International Law* (1995) 554-577, at 559; See International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, at 6; See also T. Graditzky, ‘Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed Conflicts’, *International Review of the Red Cross*.

⁴⁶⁵ See Dinstein, ‘The Universality Principle and War Crimes’, in M. N. Schmitt and L. C. Green (eds), *The Law of Armed Conflict: Into the Next Millennium* (Newport: Naval War College, 1998), at 21; International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, at 7; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press: Cambridge, 2005); Naqvi, *supra* note 459, at 34.

⁴⁶⁶ ICTY, Appeals Chamber, *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, § 98 ff, § 137.

conflicts.⁴⁶⁷ A number of states provide for universal jurisdiction over war crimes committed in non-international armed conflict.⁴⁶⁸ An obligation for states to establish universal jurisdiction on war crimes other than grave breaches does not however appear to be generally admitted.⁴⁶⁹

2. Genocide

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Originally, the first draft of the Genocide Convention, prepared by the UN Secretariat with the assistance of legal scholars provided at Article VII, under the title 'Universal Enforcement of Municipal Criminal Law' that "The High Contracting Parties pledge themselves to punish any offender under this Convention within any territory under their jurisdiction, irrespective of the nationality of the offender or the place where the offence has been committed".⁴⁷⁰ This provision was not adopted because the opposition of the strong powers.⁴⁷¹ The text of Article VI of the Genocide Convention that was finally adopted states as follows:

Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

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Article VI of the Genocide Convention thus only obliges the territorial state to bring to justice authors suspected of committing genocide.⁴⁷² In practice, this

⁴⁶⁷ See Commission on Human Rights, *Situation of human rights in Sierra Leone*, Resolution 1999/1: "Reminds all factions and forces in Sierra Leone that in any armed conflict, including an armed conflict not of an international character, the taking of hostages, wilful killing and torture or inhuman treatment of persons taking no active part in the hostilities constitute grave breaches of international humanitarian law, and that all countries are under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and to bring such persons, regardless of their nationality, before their own courts"; See Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses', 23(4) *Human Rights Quarterly* (November, 2001) 940-974, at 948.

⁴⁶⁸ See for instance Belgium, Canada, New Zealand and the Philippines (Section 4(b) of the Philippines Act Defining and Penalizing Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity).

⁴⁶⁹ See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005), at 606.

⁴⁷⁰ UN, *Economic and Social Council*, E/447, 26 June 1947, at 8. For the drafting history of Article 6 of the Genocide Convention, see Thalmann, *National Criminal Jurisdiction over Genocide*, at 233.

⁴⁷¹ See Thalmann, *National Criminal Jurisdiction over Genocide*, at 233.

⁴⁷² Article IV of the Genocide Convention provides that: "Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory

will rarely be the case, at least if the suspect is a national of the territorial state, because genocide is generally committed with the support, incentive or at least the consent of the territorial state. Therefore, it is only if there is a change in the regime that this obligation may have a chance of being respected in practice. This was the case for instance in Rwanda, where many genocide suspects were tried by Rwandan courts.⁴⁷³ It is also possible that nationals of third states (neighboring states for instance) commit genocide on the territory of another state; in this case, the territorial state will be likely to respect its obligation to prosecute the perpetrators.

It is generally agreed that, although Article VI only obliges the territorial state to prosecute and punish persons who committed genocide, it does not prevent other states from exercising their competence based on other jurisdictional bases, provided that the exercise of jurisdiction is in conformity with international law.⁴⁷⁴ It is also today widely accepted among scholars that customary international law allows any state (including state parties to the Convention) to exercise universal jurisdiction over genocide.⁴⁷⁵ Recent international decisions also go in this direction.⁴⁷⁶ Indeed, the International Criminal Tribunal for Rwanda (ICTR) has recognized the principle of universal jurisdiction over genocide.⁴⁷⁷ The Appeals Chamber of the International

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of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

⁴⁷³ See Thalmann, *Rwandan Genocide Cases*; and entries on Rwandan national cases in Cassese (ed.), *The Oxford Companion to International Criminal Justice*.

⁴⁷⁴ See Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses', 23(4) *Human Rights Quarterly* (November, 2001) 940-974, at 945; F. Malekian, *International Criminal Law: The Legal and Critical Analysis of International Crimes*, Vol. I (Uppsala: Malekian, 1991), at 301; Thalmann, 'National Criminal Jurisdiction over Genocide', in P. Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009) 231-258, at 233.

⁴⁷⁵ See Kamminga, *supra* note 473, at 945; F. Malekian, *International Criminal Law: The Legal and Critical Analysis of International Crimes*, Vol. I (Uppsala: Malekian, 1991), at 301; Steven, 'Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations?', 39 *Virginia Journal of Interantional Law Association* (1999) 425-465, at 440; O. Ben-Naftali, 'The Obligations to Prevent and to Punish Genocide (Art. I and Art. VI)', in Gaeta (ed.), *The Genocide Convention: A Commentary*, 27-57; Randall, 'Universal Jurisdiction under International Law', 66 *Texas Law Review* (1988) 785-851, at 821.

⁴⁷⁶ See for instance ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007.

⁴⁷⁷ The Trial Chamber stated: "the Tribunal wishes to emphasize, in line with the General Assembly and the Security Council of the United Nations, that it encourages all States, in application of the principle of universal jurisdiction, to prosecute and judge those responsible for serious crimes such as genocide,

Criminal Tribunal for the former Yugoslavia (ICTY) in *Blaskić* also held that “courts of any State are under a customary-law obligation to try or extradite persons who have allegedly committed grave breaches of international humanitarian law”.⁴⁷⁸ Similarly, in *Furundžija*, the Trial Chamber stated that “[i]t has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes.”⁴⁷⁹ Finally, as will be studied in Chapter II, recent national practice shows that many states have made use of this possibility.

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Universal jurisdiction over genocide was also recognized in a decision of the International Court of Justice, which held that “Article VI certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law”.⁴⁸⁰ Likewise, the European Court of Human Rights, following an appeal lodged by *Jorgić* who alleged that the German courts did not have jurisdiction to convict him of genocide, held:⁴⁸¹

[The Court] observes, ... that the Contracting Parties to the Genocide Convention, despite proposals in earlier drafts to that effect, had not agreed to codify the principle of universal jurisdiction over genocide for the domestic courts of all Contracting States in that Article ... However, pursuant to Article I of the Genocide Convention, the Contracting Parties were under an *erga omnes* obligation to prevent and punish genocide, the prohibition of which forms part of the *jus cogens*. In view of this, the national courts' reasoning that the purpose of the Genocide Convention, as expressed notably in that Article, did not exclude jurisdiction for the punishment of genocide by States whose laws establish extraterritoriality in this respect must be considered as reasonable (and indeed convincing).⁴⁸²

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A much more critical question is whether a duty of states to prosecute genocide under the universality principle exists. The existence of such a duty was expressly rejected by the drafters of the Genocide Convention⁴⁸³ and by the

crimes against humanity and other grave violations of international humanitarian law”, Decision on the Prosecutor’s Motion to Withdraw the Indictment, *Ntuyahaga*, Trial Chamber, 18 March 1999.

⁴⁷⁸ Judgment on The Request Of The Republic Of Croatia For Review Of The Decision Of Trial Chamber Of 18 July 1997, *Blaskić*, Appeals Chamber, 29 October 1997, § 29.

⁴⁷⁹ Judgment, *Furundžija*, Trial Chamber, 10 December 1998, § 156.

⁴⁸⁰ ICJ, *Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, § 442.

⁴⁸¹ ECtHR, *Jorgić v. Germany*, Judgment, 12 July 2007, Application no. 74613/01.

⁴⁸² *Ibid.*, § 68.

⁴⁸³ See Thalmann, ‘National Criminal Jurisdiction over Genocide’, in P. Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009) 231-258.

ICJ in its 2007 judgment.⁴⁸⁴ The obligation to exercise universal jurisdiction cannot be inferred from Article 6 of the Genocide Convention. Some authors however argue that such a duty can be constituted from a joint reading of other provisions of the Genocide Convention, namely Article 1 which provides that state parties have “an obligation to punish”, Article 4 which dictates that any person who committed genocide “shall be punished”, Article 5 which obliges states “to enact [...] the necessary legislation” and Article 7 which requires extradition.⁴⁸⁵ One author has even concluded that “when extradition is not possible, therefore, the Convention imposes an affirmative duty on its parties to exercise universal jurisdiction and prosecute individuals of genocide”.⁴⁸⁶ Other commentators seem to disagree.⁴⁸⁷ Generally speaking, there appears to be growing support for the view that exercise of universal jurisdiction over core crimes is not merely permissive but also obligatory.⁴⁸⁸ This issue will be discussed further below.⁴⁸⁹

3. *Crimes against humanity*

Unlike genocide and war crimes, crimes against humanity have not been addressed through a comparable global treaty requiring states to prevent and punish such crimes. The International Law Commission has recently stated that “a global convention on crimes against humanity appears to be a key missing piece in the current framework of international humanitarian law, international criminal law, and international human rights law”.⁴⁹⁰ The objective of the International Law Commission is to draft articles for what would become a Convention on the Prevention and Punishment of Crimes against Humanity (Crimes against Humanity Convention).⁴⁹¹

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⁴⁸⁴ See ICJ, *Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, § 442.

⁴⁸⁵ See Ben-Naftali, ‘The Obligations to Prevent and to Punish Genocide (Art. I and Art. VI)’, in P. Gaeta (ed.), *The Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009) 27-57, at 49.

⁴⁸⁶ Steven, ‘Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations?’, 39 *Virginia Journal of International Law* (1999) 425-466, at 461.

⁴⁸⁷ See for instance Roth, ‘The Extradition of Génocidaires’, in Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009) 278-309, at 49.

⁴⁸⁸ See Ben-Naftali, *supra* note 484, at 49.

⁴⁸⁹ See *infra* Subsection C. N 157 ff.

⁴⁹⁰ ‘Annexe B: Crimes against humanity’, in *Report of the International Law Commission, Sixty-fifth session, General Assembly Official Records Sixty-eighth session, Supplement No. 10 (A/68/10)*, 6 May-7 June and 8 July-9 August 2013, at 140 ff, § 3.

⁴⁹¹ *Ibid.*

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While there is yet to be a specific convention dealing with crimes against humanity, this crime was already contained in 11 relevant instruments from 1945 to 1998.⁴⁹² It was originally established in Article 6(c) of the Charter of the International Military Tribunal at Nuremberg. In its Resolution 95(I), the UN General Assembly affirmed the principles of international law recognized by the Nuremberg Charter and judgment. Principle VI codifies crimes against humanity.⁴⁹³ In addition, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by the General Assembly in 1968, called upon states to criminalize nationally “crimes against humanity” as defined in the Nuremberg Charter and to set aside statutory limitations on prosecuting the crime. However, this Convention focused on statutory limitations and does not expressly *oblige* a State party to exert jurisdiction over crimes against humanity.⁴⁹⁴

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Five years later, in 1973, the General Assembly adopted the Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, which provide that “crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment”.⁴⁹⁵ The Principles thus establish a duty to prosecute. Furthermore, the Draft Code of Crimes against Peace and Security of Mankind adopted by the International Law Commission in 1996 includes crimes against humanity.⁴⁹⁶ The Draft Code contains an obligation for states to try or extradite any individual found on their territory who is alleged to have committed a crime against humanity.⁴⁹⁷ These two instruments – although not binding upon

⁴⁹² Bassiouni, *Introduction to International Criminal Law*, (2nd ed., Leiden/Boston: Martinus Nijhoff Publishers, 2013), at 157.

⁴⁹³ Crimes against humanity are defined as “murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.”

⁴⁹⁴ ‘Annexe B: Crimes against humanity’, in *Report of the International Law Commission*, Sixty-fifth session, General Assembly Official Records Sixty-eighth session, Supplement No. 10 (A/68/10), 6 May-7 June and 8 July-9 August 2013, at 141.

⁴⁹⁵ General Assembly, *Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, 28th session, 3074 (XXVIII), 3 December 1973.

⁴⁹⁶ The crimes of rape and torture were added to the list of crimes.

⁴⁹⁷ See Art. 9 of the Draft Code.

states – contribute to establishing the customary nature of universal jurisdiction over crimes against humanity.⁴⁹⁸

Crimes against humanity were later incorporated into the ICTY and ICTR Statutes, as well as in the statutes of the Special Court for Sierra Leone and the ECCC. They finally acquired an authoritative definition with the adoption of the ICC Statute.⁴⁹⁹ It is widely recognized that a rule of customary international law has emerged allowing the exercise of universal jurisdiction over crimes against humanity. Indeed, it is undisputed among scholars that the exercise of universal jurisdiction over crimes against humanity is permitted under customary international law.⁵⁰⁰ In this respect, one can point to the numerous pieces of legislation, which embody this principle, as well as the successful prosecution before national courts of perpetrators of crimes against humanity, which we will come back to in Part III. In addition, the idea that crimes against humanity are subject to universal jurisdiction has attracted very broad support from international judicial authorities.⁵⁰¹

The question that arises is whether there exists an international obligation on states to establish and exercise universal jurisdiction over crimes against humanity. According to some scholars, there is little evidence of a universal repression obligation under the *lex lata*.⁵⁰² The International Law Commission in its report provides that one of the key elements in a convention on crimes against humanity would be to *require* the parties to criminalize the offence in their national legislation, not just with respect to acts on its territory or by its nationals, but also with respect to acts committed abroad by non-nationals who then turn up in that State party's territory".⁵⁰³ This issue will be discussed below

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⁴⁹⁸ Naqvi, *Impediments to Exercising Jurisdiction over International Crimes* (The Hague: T.M.C. Asser Press, 2009), at 43.

⁴⁹⁹ See Kamminga, *supra* note 473, at 940-974.

⁵⁰⁰ See Kamminga, *supra* note 472, at 940-974; P. Akhavan, 'The Universal Repression of Crimes Against Humanity before National Jurisdictions: The Need for a Treaty-Based Obligation to Prosecute', in Sadat (ed.), *Forging a Convention for Crimes against Humanity* (Cambridge: Cambridge University Press, 2011), at 29; M. Hlávková, 'Prosecution of High-Ranking State Officials for Crimes Under International Law before Domestic Courts on the Basis of the Universal Jurisdiction Principle', Diploma Thesis (2009/2010), at 42.

⁵⁰¹ ICJ, *Arrest Warrant*, Individual opinions by Judge Koroma (para. 9), Judge ad hoc Van der Wyngaert (para. 59) and the Joint Separate Opinion (para. 65); ICTY, *Prosecutor v. Tadić*; *Prosecutor v. Ntuyahaga*; *Polyukhovitch v. The Commonwealth*; *Bouterse* case.

⁵⁰² Akhavan, 'The Universal Repression of Crimes Against Humanity before National Jurisdictions: The Need for a Treaty-Based Obligation to Prosecute', in Sadat (ed.), *Forging a Convention for Crimes against Humanity* (Cambridge: Cambridge University Press, 2011), at 29.

⁵⁰³ 'Annexe B: Crimes against humanity', in *Report of the International Law Commission, Sixty-fifth session, General Assembly Official Records Sixty-eighth session, Supplement No. 10 (A/68/10)*, 6 May-7 June and 8 July-9 August 2013, at 140 ff.

in the section dedicated to the duty to prosecute core international crimes under the universality principle.⁵⁰⁴

4. Torture

181 Torture was first criminalized at the international level as a war crime and a crime against humanity.⁵⁰⁵ It was explicitly listed as a grave breach in the 1949 Geneva Conventions and subjected to universal repression.⁵⁰⁶ Although the ICTR and the ICTY as well as the ICC Statute include torture as a form of a crime against humanity and a war crime, they do not include the crime of torture as a discrete crime subject to their jurisdiction. Two hybrid tribunals – the Extraordinary Chambers in Cambodia⁵⁰⁷ and the Special Panels in East Timor – do however have jurisdiction over torture *per se*.⁵⁰⁸ In addition, all the international and regional human rights instruments, namely the ICCPR,⁵⁰⁹ the ECHR,⁵¹⁰ the ACHR,⁵¹¹ as well as by the African Charter of Human and People’s Rights,⁵¹² prohibit torture.

182 The Convention Against Torture, which was adopted in 1984 and entered into force on 26 June 1987, imposes an express duty on state parties⁵¹³ to ensure that all acts of torture are offences under [their] criminal law.⁵¹⁴ Article 5(2) of the Torture Convention requires state parties to establish jurisdiction over offences “in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him”. Article 6 then goes on to provide that if the circumstances so warrant, any state party in whose territory the suspect is present “shall take him into custody or take other legal measures to ensure his presence”.

183 Article 7(1) of the Torture Convention provides that “The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution”. It has been said that the language used in this provision is “weak” because it admits that charges can be submitted but

⁵⁰⁴ See *infra* subsection IV N 192 ff.

⁵⁰⁵ Naqvi, *supra* note 497, at 60.

⁵⁰⁶ *Ibid.*

⁵⁰⁷ See Art. 3 of the Law on the Establishment of the ECCC.

⁵⁰⁸ Naqvi, *supra* note 497, at 62.

⁵⁰⁹ Art. 7 ICCPR.

⁵¹⁰ Art. 3 ECHR.

⁵¹¹ Art. 5(2) ACHR.

⁵¹² Art. 5 of the African Charter.

⁵¹³ 146 states are party to the Convention.

⁵¹⁴ Art. 4 of the Torture Convention.

ultimately dismissed.⁵¹⁵ Indeed the obligation contained in Article 7 is not to prosecute but to “submit the case” to the competent authorities. In countries which have the so-called “principle of opportunity”, the authorities could then decide whether to prosecute the offence or not.⁵¹⁶

The Torture Convention also limits the obligation to exercise universal jurisdiction to cases where the alleged offender is found on the territory under the state’s jurisdiction. In this sense, the obligation under the Torture Convention is narrower than that contained in the Geneva Conventions; the latter includes a duty to search for persons even when they are situated outside the territories of state parties (so-called “universal jurisdiction *in absentia*”)⁵¹⁷. Of course, this does not mean that universal jurisdiction is only *permitted* if the alleged offender is present on state territory. Rather, it means that the treaty obliges states to exercise universal jurisdiction only if the offender is present on their territory. Indeed, it can be argued that it does not make much sense to impose a duty on all state parties to investigate and prosecute any suspect of torture everywhere in the world. It is however generally recognized that all states are authorized to investigate and prosecute an alleged torturer in his absence, irrespective of where the acts were perpetrated and of the author’s or victim’s nationality.⁵¹⁸

In its 2000 Report on universal jurisdiction, the International Law Commission recalled that “torture not amounting to a crime against humanity is a crime subject to universal jurisdiction pursuant to the UN Convention against Torture”.⁵¹⁹ It further considered that states not party to the Convention against Torture are entitled, but not obliged, to exercise universal jurisdiction in respect of torture on the basis of customary international law.⁵²⁰

With regard to international decisions, in 1998, the ICTY Trial Chamber in the case *Delalić and others* held that the prohibition on torture was a rule of international customary law as well as a “norm of *jus cogens*”.⁵²¹ Later that year, in the *Furundžija* case, it expressly stated that “every State is entitled to

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⁵¹⁵ E. Kontorovich, ‘The Inefficiency of Universal Jurisdiction’, *University of Illinois Law Review* (2008) 389-418, at 409.

⁵¹⁶ See Part III, Chapter 4 dedicated to the initiation of universal jurisdiction proceedings.

⁵¹⁷ International Law Commission, *Final Report on the Exercise of Universal Jurisdiction*, at 8.

⁵¹⁸ See Cassese et al., *Cassese’s International Law* (3rd ed., Oxford: Oxford University Press, 2013), at 134.

⁵¹⁹ International Law Commission, *Final Report on the Exercise of Universal Jurisdiction*, at 4-5.

⁵²⁰ *Ibid.*, at 8.

⁵²¹ ICTY, Trial Chamber, Judgement, *Prosecutor v. Delalić and others* (IT-96-21-T), 16 November 1998, § 156.

investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction".⁵²²

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The landmark ICJ judgment in the *Belgium v. Senegal* case⁵²³ contributed to reinforce universal jurisdiction over torture and international crimes.⁵²⁴ The Court provided that state parties to the Convention "have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity". It recalled that "the obligations of a State party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred". The Court defined these obligations as "*erga omnes partes* in the sense that each State party has an interest in compliance with them in any given case".⁵²⁵

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The Court found Senegal in breach of the obligation, pursuant to Article 6 § 2 of states on whose territory a person alleged to have committed acts of torture is present, to "make a preliminary inquiry into the facts".⁵²⁶ The Court noted that the "obligation to establish the universal jurisdiction of its courts over the crime of torture is a necessary condition for enabling a preliminary inquiry".⁵²⁷ The Court also found Senegal in breach of its obligations pursuant to Article 7 § 1 of the Convention. It stated that this article requires the state concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect.⁵²⁸ In other words, states must consider the prosecution of torture as an obligation, including on the basis of universality, and extradition as an option. Regrettably, the judgment does not answer the question of whether Belgium had jurisdiction to issue the warrant.

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With regard to Article 5 § 2 of the Convention against Torture, which requires a state party to the Convention to "take such measures as may be

⁵²² *Ibid.*

⁵²³ ICJ, Judgement, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, 20 July 2012.

⁵²⁴ Andenas and Weatherall, 'International Court of Justice: Questions Relating to the Obligation to Extradite or Prosecute (Belgium v Senegal) Judgment of 20 July 2012', 62 *International and Comparative Law Quarterly* (2013) 753-769.

⁵²⁵ For comments on this judgement, see G. Buys, 'Belgium v. Senegal: The International Court of Justice Affirms the Obligation to Prosecute or Extradite Hissène Habré Under the Convention Against Torture', in *ASIL Insights* (11 September 2012), available online at www.asil.org/insights.

⁵²⁶ ICJ, Judgment, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, 20 July 2012, § 88.

⁵²⁷ *Ibid.*, § 74.

⁵²⁸ *Ibid.*, § 94.

necessary to establish its jurisdiction” over acts of torture when the alleged offender is “present in any territory under its jurisdiction”, the Court found that it lacked jurisdiction because Senegal had complied with its obligations under Article 5 by the time the application was filed.⁵²⁹

It is generally agreed that States, which are not parties to the Convention against Torture, have the right – if not the obligation – to prosecute persons suspected of torture that are present in their territory.⁵³⁰

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5. Concluding remarks

The treaty basis for universal jurisdiction prosecution of core crimes clearly has gaps and weaknesses. There is no special convention on crimes against humanity;⁵³¹ the Genocide Convention does not explicitly establish universal jurisdiction and the ICC Statute does not clearly require or authorize state parties to establish universal jurisdiction over crimes under the jurisdiction of the Court.⁵³² Even the text of the Geneva Conventions is not entirely clear about establishing universal jurisdiction over war crimes. This is regrettable because it generates legal uncertainty.

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However, it is today generally accepted that these four crimes are subject to universal jurisdiction under customary international law. In other words, the establishment and exercise by states of universal jurisdiction over these crimes is fully authorized by customary international law. Consequently, if a state establishes and/or exercises universal jurisdiction over these crimes, it does not infringe the principle of non-interference. The question that remains concerns the existence of a duty of states to establish and exercise universal jurisdiction over these four crimes.

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IV. The duty to prosecute core international crimes under the universality principle

A. Introductory remarks

The question arises as to whether states not only have the right but also the obligation to exercise universal jurisdiction over core international crimes (the

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⁵²⁹ *Ibid.*, § 48.

⁵³⁰ See *Observations by Belgium on the scope and application of the principle of universal jurisdiction*, § 12.

⁵³¹ M. Langer, ‘The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes’, 105(1) *The American Journal of International Law* (2011) 1-49, at 48.

⁵³² *Ibid.*

so-called “mandatory universal jurisdiction”). Indeed, unlike “grave breaches” and torture, an obligation to establish and exercise universal jurisdiction over genocide and crimes against humanity cannot be directly inferred from any specific treaty. With regard to crimes against humanity, no treaty exists. As mentioned above, with regard to genocide, as the ICJ concluded in its 2007 judgment, an obligation to try perpetrators of genocide under the universality principle cannot be deduced from Article 6 of the Genocide Convention.⁵³³ Some authors have therefore concluded that “there is no general duty to prosecute offenders in respect of international crimes, at least as a matter of conventional law”.⁵³⁴ This issue is also relevant to the crimes of torture and war crimes with respect to states that are not party to the relevant convention.

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The question is therefore whether a customary duty of third states to prosecute core international crimes under the universality principle can be deduced from other sources. Several scholars appear to answer the question in the negative.⁵³⁵ However, some international instruments do indicate the existence of such a duty. The *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity* adopted by the General Assembly in 1973 establish a duty to prosecute war crimes and crimes against humanity “wherever they are committed”.⁵³⁶ Likewise, in its *Draft Code of Crimes against the Peace and Security of Mankind*, the

⁵³³ See ICJ, Judgment, *Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, § 442. One could argue however that such a duty can be inferred from other Articles of the Genocide Convention, namely Art. 1 and 5; See Ben-Naftali, ‘The Obligations to Prevent and to Punish Genocide (Art. I and Art. VI)’, in P. Gaeta (ed.), *The Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009) 27-57, at 49.

⁵³⁴ Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Oxford and Portland, Oregon: Hart Publishing, 2012), at 15; See A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford: Oxford University Press, 2009), at 278: “There is no comprehensive customary international obligation to prosecute serious human rights violations in general. Less is there mandatory universal jurisdiction for crimes against humanity beyond the scope of the Torture and the Genocide Conventions. If there is a customary international duty to prosecute specific crimes, it is territorially limited”.

⁵³⁵ See for instance Werle, *Principles of International Criminal Law* (2nd ed., TMC Asser Press: The Hague, 2009), at 71.

⁵³⁶ See *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*, General Assembly resolution 3074 (XXVIII), 3 December 1973. Principle 1 states that war crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.

International Law Commission provides for mandatory universal jurisdiction over genocide, crimes against humanity and war crimes.⁵³⁷

It is now generally recognized that there appears to be a tendency towards recognizing that universal jurisdiction over core international crimes is becoming obligatory rather than merely permissive.⁵³⁸

In this section, we will discuss four potential “sources” upon which such a duty to prosecute could potentially be inferred: *jus cogens* prohibitions (subsection B); human rights obligations (subsection C); the ICC Statute (subsection D); and the obligation to extradite or prosecute (subsection E).

B. *Jus cogens* prohibitions

The four crimes covered in this chapter can be considered *jus cogens* crimes. Indeed, the crime of genocide has been largely recognized as a *jus cogens* violation by scholars,⁵³⁹ judges,⁵⁴⁰ and international bodies.⁵⁴¹ The same status

⁵³⁷ Art. 8 of the Draft Code states that “Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17 [crimes of genocide], 18 [crimes against humanity], 19 [crimes against the United Nations and associated personnel] and 20 [war crimes], irrespective of where or by whom those crimes were committed”.

⁵³⁸ See Ben-Naftali, ‘The Obligations to Prevent and to Punish Genocide (Art. I and Art. VI)’, in P. Gaeta (ed.), *The Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009) 27-57, at 49.

⁵³⁹ See Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2010), at 203-204; Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge: Cambridge University Press, 2011), at 264.

⁵⁴⁰ See for instance the Declaration of Judge Lauterpact in the September 1993 provisional measures ruling, in *Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, at 440, cited by Bassiouni Cherif, *Crimes against Humanity: Historical Evolution and Contemporary Application*, at 264. Judge Lauterpact states that “the prohibition of genocide [...] has generally been accepted as having the status not of an ordinary rule of international law but of *jus cogens*. Indeed, the prohibition of genocide has long been regarded as one of the few undoubted examples of *jus cogens*”. See also Federal Court of Australia, *Nulyrimma v. Thompson* [1999] FCA 1192, § 18, where the Australian Federal Court states that the prohibition of genocide “is a peremptory norm of customary international law which giving rise to a non-derogatable obligation by each nation State to the entire international community”.

⁵⁴¹ See for instance, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935* (1994), UN Doc. S/1994/1405, 9 December 1994, § 152, in which the Commission of Experts states that “it is universally recognized by the international community that the prohibition of genocide has attained the status of *jus cogens*”.

has been attributed to torture.⁵⁴² The ICTY in the *Kupreskić* case held that “most norms of international humanitarian law, in particular those prohibiting war crime, crimes against humanity and genocide are also peremptory norms of *jus cogens* i.e. of a non-derogable and overriding character”.⁵⁴³ Domestic courts⁵⁴⁴ and states⁵⁴⁵ have also recognized this status.

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The relationship between *jus cogens* and universal jurisdiction has already been discussed in this chapter.⁵⁴⁶ As mentioned above, two questions arise. First, does the *jus cogens* nature of a crime automatically confer universal jurisdiction upon all states?⁵⁴⁷ Second, is it possible to affirm – as some legal scholars do – that the existence of a duty to prosecute under the universality principle is based on the fact that certain crimes, namely genocide, crimes against humanity and war crimes, are part of *jus cogens* and that every state has an obligation *erga omnes* to punish them?⁵⁴⁸ The answer to the first question appears to be a positive one although it is not unanimously agreed upon.⁵⁴⁹ With regard to the

⁵⁴² ICTY, Trial Chamber, Judgement, *Prosecutor v. Delalić and others* (IT-96-21-T), 16 November 1998, § 156; ICTY, Trial Chamber, Judgement, *Prosecutor v. Anto Furundžija* (IT-95-17/1-T), 10 December 1998, § 156; ICJ, Judgment, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, 20 July 2012; Lord Browne-Wilkinson, ‘United Kingdom House of Lords: *Regina V. Bartle And The Commissioner of Police For The Metropolis And Others Ex Parte Pinochet*’, in *International Law Materials* (24 March 1999) 581-663, at 589. See also Lord Hope of Craighead, *ibid.*, at 626.

⁵⁴³ ICTY, Judgement, *Kupreskić et al.* (IT-95-16), Trial Chamber, 14 January 2000, § 520.

⁵⁴⁴ See for instance Order of Belgian Judge in the *Pinochet* case which states that at the time “the prohibition on crimes against humanity was part of customary international law and of international *jus cogens*, and this norm imposes itself imperatively and *erga omnes* in our domestic order.” See also Judgement of the Hungarian Constitutional Court, cited by Cassese, *International Law*, at 203, footnote 9, according to which “the rules relative to the punishment of war crimes and crimes against humanity are *jus cogens* norms of international law, because they threaten mankind and international co-existence in their foundations. A State refusing to undertake this obligation may not participate in the international community”.

⁵⁴⁵ See for instance two messages of the Swiss Government to the Parliament, “*L’interdiction du génocide et des crimes contre l’humanité ainsi que l’obligation de respecter le noyau du droit international humanitaire font partie des règles du jus cogens*”, *Message relatif à la modification des lois fédérales en vue de la mise en œuvre du Statut de Rome de la Cour pénale internationale*, 23 avril 2008, FF 2008 3461, at 3474.

⁵⁴⁶ See *infra* Section I, N 90 ff.

⁵⁴⁷ Currie and Rikhof, *International & Transnational Criminal Law* (2nd ed., Irwin Law: Toronto, 2013), at 78.

⁵⁴⁸ L. Yang, ‘On the Principle of Complementarity in the Rome Statute of the International Criminal Court’, 4(1) *Chinese Journal of International Law* (2005) 121-132, at 125.

⁵⁴⁹ See Currie and Rikhof, *International & Transnational Criminal Law* (2nd ed., Irwin Law: Toronto, 2013), at 78; As underlined in the Report of the Secretary-General prepared on the basis of comments and observations of governments on the scope and application of the principle of universal jurisdiction:

second question, the position according to which the *jus cogens* or *erga omnes* status of a crime means that states have a duty to exercise universal jurisdiction over such crimes, does not have much legal support. As one scholar rightly points out, “inferring from the *jus cogens* prohibition of international crimes that States could, or even should, prosecute these crimes under the universality principle clearly requires a moral leap”.⁵⁵⁰

C. Human rights obligations

1. The duty to “respect and ensure”

It is sometimes argued that a state’s duty to prosecute international crimes can be derived from human rights treaties, namely from the state’s duty to “respect and ensure”.⁵⁵¹ Indeed, crimes of genocide, crimes against humanity and war crimes constitute grave violations and abuses of human rights, including the violation of the right to life, the right to physical and moral integrity, the right to be free from discrimination on the grounds of ethnic origin and to be protected from incitement to such discrimination. As for torture, it is expressly prohibited by international and regional human rights instruments, including the ICCPR,⁵⁵² the ECHR,⁵⁵³ the ACHR,⁵⁵⁴ and the African Charter of Human and People’s Rights.⁵⁵⁵

Human rights instruments do not explicitly impose an obligation upon states to prosecute or punish alleged offenders. The ICCPR, for instance, is silent

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“It was suggested that greater attention should be paid to the relationship between universal jurisdiction and acts concerning prohibitions or acts which had a *jus cogens* character. In particular, it was necessary to determine whether crimes whose prohibition rose to the level of *jus cogens* were subject to the exercise of universal jurisdiction, and whether such jurisdiction was optional or compulsory.”, *UNGA*, A/65/18129, July 2010, §26; See also the position of the UK House of Lords in *Pinochet (Regina v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet (No.3) [1999] 2 WLR 827*): “The concept of obligation *erga omnes* is used to widen the power of states to complain about the infringement of an obligation in international law but does not confer jurisdiction on international or national tribunals where it does not otherwise exist.”

⁵⁵⁰ Ryngaert, *Jurisdiction in International Law* (Oxford: Oxford University Press, 2008), at 113.

⁵⁵¹ See Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2010), at 70; Schabas argues that “the most compelling authority for a duty to prosecute now comes from international human rights law, where there is an obligation to punish not only international crimes but also all serious crimes against the person”, Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), at 45.

⁵⁵² Art. 7 ICCPR.

⁵⁵³ Art. 3 ECHR.

⁵⁵⁴ Art. 5(2) ACHR.

⁵⁵⁵ Art. 5 of the African Charter.

on the question of whether a duty to prosecute applies to violations of the Covenant. However, Article 2 § 1, requires each state party “to ensure to all individuals (...) the rights” recognized in the Covenant.⁵⁵⁶ Likewise, Article 1(1) of the American Convention on Human Rights states that “the States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms [...]”. Some legal commentators have argued that this “duty to ensure” implies a duty to prosecute the violators.⁵⁵⁷ In its General Comment 31 on the Nature of the General Legal Obligation on States Parties to the Covenant, the Human Rights Committee held:

8. The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However, the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.

[...]

10. States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh

⁵⁵⁶ J. Wouters, *The Obligation to Prosecute International Law Crimes* (2005), available online at <http://www.law.kuleuven.be/iir/nl/onderzoek/opinions/obligationtoprosecute.pdf>.

⁵⁵⁷ See for instance M. Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes', 59(4) *Law and Contemporary Problems* (1996) 41-61, at 48, and N. Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations', 78(2) *California Law Review* (1990) 449-513, and D. F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', 100(8) *The Yale Law Journal* (1991) 2537-2615, at 2568.

session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.⁵⁵⁸

This position may also be supported by some of the case law of the Inter-American Court of Human Rights.⁵⁵⁹ In the *Velasquez v. Honduras* case,⁵⁶⁰ the Court held that “the state has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”⁵⁶¹ In the more recent *Barrios Altos* case – a leading judgment on amnesties⁵⁶² – the Court held that there is an unconditional duty to investigate and punish those responsible for violations of non-derogable rights.⁵⁶³

As for the European Court of Human Rights, in the 2003 *MC v. Bulgaria* case,²⁰² it reiterated that “the obligation of the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals”.⁵⁶⁴ It held that “States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.”⁵⁶⁵ In the 2005 *Siliadin v. France* case, recalling *MC v. Bulgaria*, the Court held that it necessarily follows from Article 4 ECHR, prohibiting human trafficking, “that States have positive obligations, in the same way as under Article 3 for example, to adopt criminal-law

⁵⁵⁸ Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

⁵⁵⁹ Cryer et al., *supra* note 550, at 71.

⁵⁶⁰ The case concerned the arrest, torture and execution of a Honduran student activist by the Honduran military. The Inter-American Court found the Hugarian government guilty of violating the American Convention.

⁵⁶¹ Inter-American Court of Human Rights, Judgment, *Velasquez Rodriguez*, 29 July 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), § 174.

⁵⁶² Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, at 100.

⁵⁶³ See Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, at 101; Inter-American Court of Human Rights, Judgment, *Barrios Altos v. Peru*, 14 March 2001, § 41.

⁵⁶⁴ ECtHR, *M.C. v. Bulgaria*, Judgment, Application no. 39272/98, 4 December 2003, § 149.

⁵⁶⁵ *Ibid.*, § 153.

provisions which penalise the practices referred to in Article 4 and to apply them in.”⁵⁶⁶

2. *The right to a remedy*

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All international and regional human rights instruments provide for the right to a remedy.⁵⁶⁷ Article 2(3) of the International Covenant on Civil and Political Rights obligates states “(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy” and “(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities.” It has been argued that the obligation to provide a remedy includes an obligation to investigate and prosecute violations of the Convention. Human rights bodies have for instance held that the lack of investigation of acts of torture by state officials constitutes a violation of an individual’s right to an effective remedy.⁵⁶⁸ This obligation to investigate and prosecute serious human rights violators is not limited to state officials but also applies to private individuals.⁵⁶⁹ In its general comment on Article 7 (on the prohibition of torture and cruel, inhuman or degrading punishment), the Human Rights Committee stated:

14. Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant. In their reports, States parties should indicate how their legal system effectively guarantees the immediate termination of all the acts prohibited by article 7 as well as appropriate redress. The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective. The reports of States parties should provide specific information on the remedies available to victims of maltreatment and the procedure that complainants must follow, and statistics on the number of complaints and how they have been dealt with.

15. The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts.⁵⁷⁰

⁵⁶⁶ *Ibid.*, § 89.

⁵⁶⁷ See Art. 25 of the American Convention on Human Rights.

⁵⁶⁸ See Naqvi, *Impediments to Exercising Jurisdiction over International Crimes* (The Hague: T.M.C. Asser Press, 2009); See ECtHR, *Aksoy v. Turkey*, 18 December 1996.

⁵⁶⁹ See Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford: Oxford University Press, 2009), at 31-34.

⁵⁷⁰ Human Rights Committee, *General Comment 20, Article 7 (Forty-fourth session, 1992)*, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N.

Similarly, the Inter-American Court of Human Rights has interpreted the right to a remedy as including the obligation to investigate and prosecute.⁵⁷¹

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On 16 December 2005, the General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which state:

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In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.⁵⁷²

To conclude, the duty of a state to investigate and prosecute serious human rights violations committed within its jurisdiction derives from the duty of the state to “ensure and protect”, and from the right of victims to a remedy provided in human rights treaties. So far, it appears that both international and regional human rights case law has only dealt with the duty of the *territorial state* to investigate and prosecute. This has led some scholars to conclude that “all that can be derived from human rights treaties for serious violations of human rights is a duty to prosecute on the part of the state of commission”.⁵⁷³

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However, one could argue that this duty should extend to cases where a suspect is present in the territory of a state, even when the crime was committed outside its territory. If the custodial state neither prosecutes nor extradites him, it is convincingly arguable that the state is in breach of its duty to prosecute serious human violations under human rights treaties. The development of this argument might be the next step that human rights courts will be willing to take.

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Doc. HRI/GEN/1/Rev.1 (1994), at 30; See also *Rodriguez v. Uruguay*, where the Committee considered that a Uruguayan Law on Amnesty was incompatible with the obligation of state parties to provide effective remedies to the victims of human rights violations, cited in Seibert-Fohr.

⁵⁷¹ See Roht-Arriaza, ‘State Responsibility to Investigate and Prosecute Grave Human Rights Violations’, 78(2) *California Law Review* (1990) 449-513, at 478 and references.

⁵⁷² United Nations General Assembly, *Resolution 60/147 (A/RES/60/147)*, 16 December 2005.

⁵⁷³ Werle, *Principles of International Criminal Law* (2nd ed., TMC Asser Press: The Hague, 2009), at 72, § 202; see also F. Lafontaine, ‘The Unbearable Lightness of International Obligations: When and How to Exercise Jurisdiction under Canada’s *Crimes against Humanity and War Crimes Act*’, 23(2) *Revue québécoise de droit international*, (2011) 1-50, at 15-16, who says that “human rights treaties provide very limited extraterritorial obligations and certainly do not oblige states to repress violations that have occurred on other states’ territories.”

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At the national level, some constitutional courts have held that the refusal to exercise universal jurisdiction may in some cases constitute a violation of the complainants' constitutional right to an effective judicial remedy.⁵⁷⁴

D. The ICC Statute

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It has also been suggested, albeit rarely, that mandatory universal jurisdiction over core crimes could be deduced from the ICC Statute.⁵⁷⁵ It should be noted that the ICC does not explicitly impose a duty upon states to prosecute international crimes under the universality principle. There is no express provision in the Rome Statute that imposes universal jurisdiction upon states for crimes falling under the Statute. This has led some scholars to conclude that “the Rome Statute is neutral on the exercise of universal jurisdiction”, although it does not of course prohibit its use.⁵⁷⁶

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On the contrary, others have suggested that the Preamble to the ICC Statute contains not only permissive but also compulsory universal jurisdiction.⁵⁷⁷ In paragraph (5) of the Preamble, the contracting parties affirm that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”. In paragraph (6), the Preamble provides that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.⁵⁷⁸ This suggests that every state – not just the state party⁵⁷⁹ – has the duty to exercise its jurisdiction. In addition, the purpose of paragraph (6) is to

⁵⁷⁴ See N. Roht-Arriaza, ‘Guatemala Genocide Cases: Spanish Constitutional Tribunal decision on universal jurisdiction over genocide claims’, *American Journal of International Law* (2006) 207-213.

⁵⁷⁵ See C. Hall, *The Role of Universal Jurisdiction in the International Criminal Court Complementarity System*, at 210-211; Ben-Naftali, ‘The Obligations to Prevent and to Punish Genocide (Art. I and Art. VI)’, in P. Gaeta (ed.), *The Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009) 27-57, at 51.

⁵⁷⁶ See for instance Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), at 47, and J. Kleffner, ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law’, 1 *Journal of International Criminal Justice* (2003) 86-113, at 107; See *Observations by Belgium on the scope and application of the principle of universal jurisdiction*, § 11.

⁵⁷⁷ See Hall, ‘The Role of Universal Jurisdiction in the International Criminal Court Complementarity System’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 201-232, at 210-211.

⁵⁷⁸ ICC Statute, Preamble (5) and (6).

⁵⁷⁹ Yang, ‘On the Principle of Complementarity in the Rome Statute of the International Criminal Court’, 4(1) *Chinese Journal of International Law* (2005) 121-132, at 125.

recall that there is a category of international crimes in respect of which states have an obligation to prosecute, even if these crimes do not fall within the jurisdiction of the Court.⁵⁸⁰ Does this include universal jurisdiction? Some argue that the meaning of the phrase “its criminal jurisdiction” is that the jurisdiction is not restricted geographically.⁵⁸¹ It appears that since there was a dispute on whether there is an obligation to proceed on the basis of universal jurisdiction or merely on the basis of territorial and national jurisdiction, the paragraph was deliberately left ambiguous.⁵⁸² On the one hand, one could argue that the Preamble is not as such part of the Statute⁵⁸³ and therefore does not bind state parties, and on the other, that its text does not explicitly and clearly provide for universal jurisdiction.⁵⁸⁴ In our view, it is therefore difficult to deduce the existence of a duty upon states, which is not explicitly laid down, has not been agreed upon and is not legally binding.⁵⁸⁵

In relation to the ICC Statute, the duty of every state to exercise its jurisdiction can also be considered in relation to the principle of complementarity⁵⁸⁶, which is expressed in paragraph 10 of the Preamble and at Articles 1 and 17 of the Rome Statute. Both the preamble and Article 1 state that the ICC “shall be complementary to national criminal jurisdictions”. Article 17 (1)(a) and (b) of the ICC Statute reads as follows:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
 - (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
 - (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person

⁵⁸⁰ Bergsmo and Triffterer, ‘Preamble’, in Triffterer (ed.), *The Rome Statute of the International Criminal Code: Observers’ Notes, Article by Article* (Münich: Beck, 2008), at 11.

⁵⁸¹ See Hall, *supra* note 576, at 211.

⁵⁸² Bergsmo and Triffterer, *supra* note 579, at 11.

⁵⁸³ It should be noted that Art. 31(2) of the Vienna Convention does however state that “the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes”.

⁵⁸⁴ Werle, for instance, argues that this only reinforces the duty to punish crimes committed on a State’s territory. See Werle, *Principles of International Criminal Law*, at 71.

⁵⁸⁵ See C. Tomuschat, ‘The duty to prosecute international crimes committed by individuals’, in Cremer and Steinberger (eds.), *Tradition und Weltoffenheit des Rechts* (Springer, 2002) 315-349.

⁵⁸⁶ The issue of the relationship between the principle of complementarity and the exercise of universal jurisdiction was the subject of a book edited by the Forum for International Criminal and Humanitarian Law. See M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl, 2010).

concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

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Article 17 of the Statute does not make any differentiation between the different heads of jurisdiction, but merely refers to “a State which has jurisdiction over [a case]”. It appears clear to us that on the basis of this provision, when a state is investigating or has investigated, is prosecuting or has prosecuted a case, based on any form of jurisdiction – including universal jurisdiction – the case may be considered inadmissible before the International Criminal Court. Thus, as a result, a state with no connection over the crime would appear to have priority over the International Criminal Court, making this court a “court of last instance”.⁵⁸⁷ This does not however clarify whether the Rome Statute imposes, encourages or merely allows for the exercise of universal jurisdiction by state parties. It is generally recognized that under the complementarity principle, states are required to exercise national criminal jurisdiction,⁵⁸⁸ and if they do not, they will be considered unable or unwilling to do so. Indeed, the ICC is only meant to supplement national investigation and prosecution. The enforcement of criminal liability for violations of crimes under the Statute thus rests on state parties.⁵⁸⁹ Under the requirement of complementarity, state parties should therefore adopt legislation so as to allow their national courts to have jurisdiction over the crimes prohibited by the Statute.⁵⁹⁰

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However, in this respect, it is unclear what bases of jurisdiction are envisaged and in particular if these include universal jurisdiction.⁵⁹¹ The argument has been made by some scholars and in some judgments that the Rome Statute also places a duty on state parties to establish and exercise universal jurisdiction.⁵⁹² According to the radically opposite view, states should only exercise universal jurisdiction when the territorial state has not done so (subsidiarity or horizontal complementarity) and where the ICC does not exercise its jurisdiction (vertical complementarity).⁵⁹³ In other words, the

⁵⁸⁷ See N. Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia: University of Pennsylvania Press, 2006), at 201. The relationship between universal jurisdiction and ICC jurisdiction will be discussed in Part III, Chapter 3, *infra* N 777 ff.

⁵⁸⁸ See Yang, *supra* note 578; See also the discussion in B. L. Krings, ‘The Principles of ‘Complementarity’ and Universal Jurisdiction in International Criminal Law: Antagonists or Perfect Match?’, 4(3) *Goettingen Journal of International Law* (2012) 737-763.

⁵⁸⁹ See O. Triffterer (ed.), *The Rome Statute of the International Criminal Code: Observers’ Notes, Article by Article* (Münich: Beck, 2008), at 13; Yang, *supra* note 578, at 122.

⁵⁹⁰ Yang, *supra* note 578, at 123-124.

⁵⁹¹ See Kleffner, ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law’, 1 *Journal of International Criminal Justice* (2003) 86-113, at 106.

⁵⁹² See for instance France, *Cour d’appel de Paris, Chambre d’accusation*, 20 October 2000.

⁵⁹³ See Kleffner, *supra* note 590, at 109.

exercise of universal jurisdiction is subsidiary to the exercise of the jurisdiction of the ICC. It should be noted that several states do provide, in their national law, for courts to have universal jurisdiction if no international criminal court can prosecute the suspect.⁵⁹⁴

To conclude, it appears difficult to infer a duty to prosecute under the universality principle based on the ICC Statute. The best middle ground is probably that the ICC Statute allows for the exercise of universal jurisdiction and perhaps even encourages it. Indeed, the principle that the ICC assumes jurisdiction only when states fail to do so provides an incentive for states to assume jurisdiction for crimes committed abroad.⁵⁹⁵

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E. The duty of states to prosecute or extradite

The *aut dedere aut judicare* obligation, which can be found in many treaties, illustrates the existence of a consensus within the international community on the fact that perpetrators should not go unpunished irrespective of the place where they are located after the commission of their crime.⁵⁹⁶ The existence of such a duty to prosecute or extradite obliges states to establish and exercise universal jurisdiction if the suspect is present on its territory (“obligatory conditional custodial universal jurisdiction” as we referred to it above) and will not be extradited.⁵⁹⁷ In treaty law, such a duty to extradite and prosecute is only set out with respect to grave breaches of the Geneva Conventions, torture and enforced disappearances.⁵⁹⁸ With respect to genocide, one could infer such a duty from Article 5 of the Genocide Convention.⁵⁹⁹ As for crimes against humanity and war crimes other than grave breaches, “there is little to rely upon in treaty law”.⁶⁰⁰

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⁵⁹⁴ This is the case of France for instance. See Chapter III on double-subsidiarity *infra* N 6752 ff.

⁵⁹⁵ See Cassese et al., ‘The Rome Statute: a tentative assessment’, in Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: OUP, 2002) 1901 ff, at 1906.

⁵⁹⁶ See ‘Observations by Belgium on the scope and application of the principle of universal jurisdiction’, § 9.

⁵⁹⁷ On the duty of states to prosecute or extradite, see R. Roth ‘Extradition, Surrender, Transfer’, in Kolb and Scalia (eds), *Droit international penal* (2nd ed., Basel: Helbing Lichtenhahn, 2012) 573-578; P. Akhavan, ‘Whither National Courts? The Rome Statute’s Missing Half Towards an Express and Enforceable Obligation for the National Repression of International Crimes’, 8 *Journal of International Criminal Justice* (2010) 1245-1266, at 1258 ff.

⁵⁹⁸ Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), at 45.

⁵⁹⁹ *Ibid.*

⁶⁰⁰ *Ibid.* and see Roth, ‘The Extradition of Génocidaires’, in Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009) 278-309, at 308.

216 In legal commentary, it has been suggested that the duty to prosecute or extradite has become a rule of customary international law⁶⁰¹, although this remains somewhat controversial.⁶⁰² The precise content of this duty is similarly challenged. Even the proponents of the existence of such a duty, such as Bassiouni, admit that “it has not been expressed with sufficient specificity to indicate whether prosecution and extradition are alternative or coexistent duties”.⁶⁰³ He does nevertheless conclude that “the doctrine usually expressed is that the international obligation to extradite or prosecute would be construed as a co-existent duty provided that national law permits it”.⁶⁰⁴

217 If such a duty exists, it would bind states regardless of whether they are parties to a treaty and would thus constitute a source of mandatory universal jurisdiction. The *Draft Code of Crime against the Peace and Security of Mankind* envisaged such a duty.⁶⁰⁵ Likewise, in *Blaskić*, the ICTY Appeals Chamber held that “courts of any State are under a customary-law obligation to try or extradite persons who have allegedly committed grave breaches of international humanitarian law”, but did not develop the argument further.⁶⁰⁶ Support for the existence of such duty can also be found in the *Principles of Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity* which inter alia provide that “1. War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment”.

218 Bassiouni concludes that “the duty to prosecute or extradite is clearly established in convention and customary ICL and state practice with respect to [crimes against humanity]”. He supports this affirmation by claiming that the inclusion of crimes against humanity in the national laws of fifty-five states

⁶⁰¹ See Van Steenberghe, ‘The Obligation to Extradite or Prosecute Clarifying its Nature’, 9 *Journal of International Criminal Justice* (2011) 1089-1116, 1094-1107; Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Dordrecht, Boston, London: M. Nijhoff, 1992), 270-271; Bassiouni and Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dortrecht: Martinus Nijhoff, 1995), at 24.

⁶⁰² See Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford: Oxford University Press, 2009), at 259.

⁶⁰³ Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (1992), at 271.

⁶⁰⁴ *Ibid.*

⁶⁰⁵ Art. 8 of the Draft Code of Crimes Against the Peace and Security of Mankind (1996) states that “each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed.”

⁶⁰⁶ ICTY, *Blaskić*, Appeals Chamber, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber of 18 July 1997, 29 October 1997, § 29.

“clearly evidences that the international obligation finds a concomitant application in the internal law and practice of a large number of states”.⁶⁰⁷

In its 2011 report on the obligation to extradite or prosecute, the International Law Commission stated that “the obligation *aut dedere aut judicare* as a rule of customary international law, noting that its acceptance was *gaining prominence* at least in respect of certain crimes”.⁶⁰⁸

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F. Concluding remarks

At present, the existence of a general duty on the part of all states to prosecute all serious international crimes is not firmly established under international law, although such a duty does exist in the treaties in respect of war crimes and torture. Firstly, such a duty cannot be definitively inferred from *jus cogens* prohibitions because the legal consequences of such a qualification and their relationship with universal jurisdiction remain somewhat unclear, namely due to the position held by the ICJ according to which the consequence of the *jus cogens* prohibition was “an entitlement to prosecute”, not a duty to prosecute. Such a duty also appears difficult to infer both from the ICC Statute and from human rights instruments. This step might perhaps be the next one that international courts and bodies will be willing to make, especially regarding genocide and crimes against humanity. Indeed, it appears hard to justify – from a moral and logical point of view – that such a duty would exist for war crimes and torture, as well as for a number of other crimes such as enforced disappearances or piracy (for the concerned state parties), but not for genocide – “the crime of crimes”⁶⁰⁹ – and crimes against humanity.⁶¹⁰

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It is however arguable that a general *aut dedere aut judicare/prosequi* duty for certain crimes is crystallizing under customary international law. Indeed, although the obligation to prosecute is somewhat unclear outside of the treaty regime, one can argue that a principle of the law of extradition might, in certain circumstances, create an obligation on the part of the requested state, that refused to proceed with the extradition, to submit the case to its own

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⁶⁰⁷ Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (1992), at 276.

⁶⁰⁸ ILC, *Report of the 63rd session* (2011), A/66/10, chapter X, § 300; See Roth, *Extradition, Surrender, Transfer*, at 553-578.

⁶⁰⁹ W. A. Schabas, ‘National Courts Finally Begin to Prosecute Genocide, the ‘Crime of Crimes’’, 1(1) *Journal of International Criminal Justice* (2003) 39-63.

⁶¹⁰ See in this direction, Ben-Naftali, ‘The Obligations to Prevent and to Punish Genocide (Art. I and Art. VI)’, in P. Gaeta (ed.), *The Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009) 27-57, at 52.

prosecuting authorities.⁶¹¹ This was the case, for instance, when Finland refused extradition to Rwanda based on fair trial concerns.⁶¹² The district court thus considered that it was “obliged to deal with the charges brought against Bazaramba since Finland dismissed the request to extradite Bazaramba to Rwanda for a trial”.⁶¹³

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If this is the case, then, as a consequence, one can also affirm that one form of universal jurisdiction is becoming mandatory, namely conditional custodial universal jurisdiction. In other words, when the suspect is present on state territory, and unless they extradite them to another state, states have an obligation to establish or exercise universal jurisdiction over core crimes and torture.

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Turning now to international customary law,⁶¹⁴ in order to determine whether a right or an obligation exists at customary international law, per the ICJ, it is “axiomatic” that one must look “primarily in the actual practice and *opinio juris* of States”.⁶¹⁵ It is interesting to note that state practice has evolved in recent years and that many states appear to recognize their duty to prosecute core international crimes (see Part II), including under universal jurisdiction (*opinio juris*).⁶¹⁶ *Opinio juris* is also confirmed in a number of United Nations

⁶¹¹ Lafontaine, ‘Universal Jurisdiction – the Realistic Utopia’, 10 *Journal of International Criminal Justice* (2012) 1277-1302, at 1301.

⁶¹² The case couldn’t be transferred to the ICTR because it no longer admitted new cases due to its backlog of cases. It couldn’t be transferred to the ICC either because the ICC did not have jurisdiction over crimes which had occurred before the statute entered into force on 1 July 2002. See Press release of the District Court of Itä-Uusimaa, *Prosecutor v. Francois Bazaramba* (R 09/404), Judgment, 11 June 2010 at 2, available online at http://www.geneva-academy.ch/RULAC/pdf_state/Finland-decision.pdf (last visited 1 August 2017).

⁶¹³ See the cases, in particular the South African Case, mentioned in LaFontaine, *supra* note 610.

⁶¹⁴ International custom is made of general practice and “the conviction that such practice reflects the widely held view that such practice reflects, or amounts to, law (*opinio juris*) or is required by social, economic, or political exigencies (*opinio necessatis*)”; Cassese, *International Law* (2nd ed., Oxford: Oxford University Press, 2005), at 156.

⁶¹⁵ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, ICJ Reports, Judgment (1985) 13, at 29.

⁶¹⁶ See for instance Message of the Swiss *Conseil fédéral*, at 3488-3489; See also the Dutch Explanatory Memorandum on the substantive implementing legislation, quoted by Kleffner, ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law’, 1 *Journal of International Criminal Justice* (2003) 86-113, at 91, fn 18, which states that “[a]lthough not expressly provided for in the Statute, the majority of States – including the Kingdom – were always of the opinion that the principle of complementarity entails that States parties to the Statutes are *obliged* to criminalise the crimes that are subject to the International Criminal Court’s jurisdiction in their national laws and furthermore to *opinio necessatis*”; Cassese, *supra* note 613, at 156; See also *Observations by Belgium on the scope and application of the principle of universal jurisdiction*, § 5, which states that “certain crimes concern the international community because of their exceptional gravity [...] It

General Assembly resolutions⁶¹⁷ and in some national judgments.⁶¹⁸ Such a duty also appears to exist, as it is corroborated by state practice, at least by state legislation.⁶¹⁹ Before turning to the analysis of State practice, which will be the

is for this reason that all States must establish their jurisdiction with regard to these crimes so as to be able to bring the perpetrators to justice" and § 8, "Far from prohibiting States from exercising universal jurisdiction, international law requires the exercise of this jurisdiction in relation to certain crimes."; See Kenya, *The Scope and Application of the Principle of Universal Jurisdiction: The Report of the Sixth Committee*, A/64/452-RES 64/117, which states that "We are of the opinion that these serious crimes that attract the application of universal jurisdiction captured within the principle of jus cogens from which there can be no derogation by any State. We are all bound as members of the international community to punish under the due process of the law, persons alleged to have committed serious crimes."; See also Section 2 of the Philippines Act Defining and Penalizing Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity which states that "The most serious crimes of concern to the international community as a whole must not go unpunished and their effective prosecution must be ensured by taking measures at the national level, in order to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes, it being the duty of every State to exercise its criminal jurisdiction over those responsible for international crime."; See Permanent Mission of Slovakia to the United Nations, *The scope and application of the principle of Universal jurisdiction (Slovak Republic observations)*, 17 May 2010, at 4 which states: "[...] universal jurisdiction acts not only as a set of procedural rights of the national and international courts to prosecute and punish but also as a material legal obligation to prosecute and punish actors of erga omnes crimes. A State which does not fulfill its obligation to prosecute and punish offenders will bear the responsibility for an international wrongful act."

⁶¹⁷ See for instance the General Assembly Resolution on War Criminals of 15 December 1970, in which the General Assembly is "[c]onvinced that a thorough investigation of war crimes and crimes against humanity, as well as the arrest, extradition and punishment of persons guilty of such crimes – wherever they may have been committed" is an important element; See the *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*, adopted by General Assembly resolution 3074 (XXVIII) of 3 December 1973, which state inter alia that "1. War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment."

⁶¹⁸ In the 2012 South African judgment in the *SALC v. National Director of Public Prosecutions* case, the North Gauteng High Court held that South Africa was under an "international obligation to investigate and prosecute perpetrators of international crimes". See also Werle and Bornkamm, 'Torture in Zimbabwe under Scrutiny in South Africa: The Judgment of the North Gauteng High Court in SALC v. National Director of Public Prosecutions', 11 *Journal of International Criminal Justice* (2013) 659-675.

⁶¹⁹ There does not appear to be a consensus among states on the obligation to assert universal jurisdiction outside of treaty based obligations. See, for instance, Permanent Mission of the United Kingdom of Great Britain and Northern Ireland, *Scope and application of the principle of universal jurisdiction*, 15 April 2011, which considers that "Universal jurisdiction is permissive, unless a

object of Part II, let us briefly end this Part dedicated to universal jurisdiction under international law by presenting the crimes subject to universal jurisdiction according to international treaties.

V. Treaty-based universal jurisdiction

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Universal jurisdiction is provided for in a number of other international treaties, generally subject to the suspect's presence on the state's territory. These provisions correspond to the assertion of the representation principle, if one considers that the custodial state – the state on whose territory the offender is found – shall prosecute an offence on behalf of all the states party to the treaty and if there is no extradition.⁶²⁰ Some treaties oblige states to establish universal jurisdiction, if the suspect is on its territory and is not extradited. Such a provision is contained in the Torture Convention,⁶²¹ the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft,⁶²² the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,⁶²³ the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents⁶²⁴, the 1979 Convention against the Taking of Hostages,⁶²⁵ the 1988 Convention for the

mandatory treaty-based obligation exists to provide for the prosecution [of] these crimes, for example as provided by the Geneva Conventions in respect of grave breaches."

⁶²⁰ See supra N 85-86.

⁶²¹ Art. 5(2) states that "Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in Paragraph 1 of this article."

⁶²² The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, for instance, stipulates at its Art. 4(2) that "Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article."

⁶²³ Art. 5(2) of the Convention.

⁶²⁴ Art. 3(2) provides that "Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over these crimes in cases where the alleged offender is present in its territory and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article."

⁶²⁵ Art. 5(2) provides that "Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 1 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in paragraph 1 of this Article."

Suppression of Unlawful Acts against the Safety of Maritime Navigation,⁶²⁶ the 1998 International Convention for the Suppression of Terrorist Bombings⁶²⁷ and the 1999 International Convention for the Suppression of the Financing of Terrorism.⁶²⁸

Some international treaties contain provisions not only obliging states to establish universal jurisdiction, in cases where the suspect is present in their territory and is not extradited, but also expressly obliging them to *exercise* universal criminal jurisdiction.⁶²⁹ These are the so-called *aut dedere* clauses of category 2) described above in Section III. D. The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, in addition to obliging states to establish universal jurisdiction subject to the suspect's presence and his non-extradition, provides in its article 7 that "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State".

The following treaties contain similar provisions: the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,⁶³⁰

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⁶²⁶ Art. 6(4) provides that "Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 3 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this Article."

⁶²⁷ Art. 6(4) provides that "Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2 of the present article."

⁶²⁸ Art. 7(4) provides that "Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties that have established their jurisdiction in accordance with paragraphs 1 or 2."

⁶²⁹ On the different international rules on states' criminal jurisdiction, see Cassese et al., *Cassese's International Criminal Law* (3rd ed., Oxford: Oxford University Press, 2013), at 281-284.

⁶³⁰ Art. 5(2) provides that "Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraph 1(a), (b) and (c), and in Article 1, paragraph 2, in so far as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article." Art. 7 of the Convention states that "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those

the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,⁶³¹ the 1979 International Convention against the Taking of Hostages,⁶³² the 1988 Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation,⁶³³ the 1994 Convention on the Safety of United Nations and Associated Personnel,⁶³⁴ the 1997 International Convention for the Suppression of Terrorist Bombings⁶³⁵

authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.”

⁶³¹ Art. 7 provides that “The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.”

⁶³² Art. 8 (1) provides that “The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a grave nature under the law of that State.” Interestingly, (2) adds that “Any person regarding whom proceedings are being carried out in connexion with any of the offences set forth in Article 1 shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the law of the State in the territory of which he is present.”

⁶³³ Art. 10(1) provides that “1. The State Party in the territory of which the offender or the alleged offender is found shall, in cases to which Article 6 applies, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.”

⁶³⁴ Art. 10(4) provides that “Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 in cases where the alleged offender is present in its territory and it does not extradite such person pursuant to article 15 to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2.” Art. 14 states that “The State Party in whose territory the alleged offender is present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the law of that State. Those authorities shall take their decision in the same manner as in the case of an ordinary offence of a grave nature under the law of that State.”

⁶³⁵ Art. 8 (1) provides that “The State Party in the territory of which the alleged offender is present shall, in cases to which article 6 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.”

and the 1999 International Convention for the Suppression of the Financing of Terrorism.⁶³⁶

Other international treaties do not contain any reference to universal jurisdiction. This is the case for instance in the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft. However, its Article 3(3) stipulates that “This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.” This provision thus authorizes states to exercise jurisdiction on any legal ground provided for in their domestic law, including universal jurisdiction.⁶³⁷

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A similar provision is also found in treaties which expressly provide for universal jurisdiction. This is the case for the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft,⁶³⁸ the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation,⁶³⁹ the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,⁶⁴⁰ the 1979 International Convention against the Taking of Hostages,⁶⁴¹ and the 1988 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.⁶⁴² This means that state parties are obliged to establish (or exercise) universal jurisdiction if the suspect is present on their territory and is not extradited; these states also have the right to exercise universal jurisdiction subject to the conditions of their choice or to no conditions at all. However, it seems the same cannot be said with regard to the 1999 International Convention for the Suppression of the Financing of Terrorism, which has a similar provision with slightly different wording. It establishes “*Without prejudice to the norms of*

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⁶³⁶ Art. 10 (1) provides that “The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.”

⁶³⁷ See Cassese et al., *Cassese’s International Criminal Law* (3rd ed., Oxford: Oxford University Press, 2013), at 282-283.

⁶³⁸ Art. 4(3) of the Convention states that “This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.”

⁶³⁹ Art. 5(3) of the Convention states that “This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.”

⁶⁴⁰ Art. 3(3) of the Convention states that “This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.”

⁶⁴¹ Art. 5 (3) of the Convention states that “This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.”

⁶⁴² Art. 6(5) of the Convention states that “This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.”

general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.”⁶⁴³

⁶⁴³ Emphasis added.

Part II: Universal jurisdiction in national law

Chapter 1: A general overview of domestic legislation on universal jurisdiction

I. The universality principle in domestic legislation

A. The existence of the universality principle

A majority of states⁶⁴⁴ recognizes the principle of universal jurisdiction in one form or another in their domestic legislation.⁶⁴⁵ For some states, the principle has recently been introduced.⁶⁴⁶ While most states provide for a general provision in their Penal Code or their Code of Criminal Procedure⁶⁴⁷, others only provide for universal jurisdiction in special legislation.⁶⁴⁸

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⁶⁴⁴ We have attempted to analyse all state laws regarding universal jurisdiction. Many are available through the National Implementing Legislation Database of the International Criminal Court (online at <http://www.legal-tools.org/en/browse/national-implementing-legislation-database/>) or on the website of the ICRC, National Implementation of International Humanitarian law, online at <https://www.icrc.org/applic/ihl/ihl-nat.nsf/vwLawsByCountry.xsp> (last visited 1 August 2017). However, for reasons of language and accessibility, some pieces of legislation were not available. In some cases, we have only also used indirect sources, namely the comments and observations of the governments themselves, made at the request of the UN GA, on the "scope and application of the principle of universal jurisdiction" or scholarly writings. See *Resolution adopted by the General Assembly on 10 December 2014* [on the report of the Sixth Committee (A/69/503)], 69/124; *The scope and application of the principle of universal jurisdiction*, A/RES/69/124, 28 December 2014. See also Resolutions 64/117 of 16 December 2009, 65/33 of 6 December 2010, 66/103 of 9 December 2011, 67/98 of 14 December 2012 and 68/117 of 16 December 2013 and UN GA, *The scope and application of the principle of universal jurisdiction*, Report of the Secretary-General, A/69/174, 23 July 2014.

⁶⁴⁵ See also inter alia I. Blanco Cordero, 'Universal Jurisdiction: General Report', 79 *Revue internationale de droit pénal* (2008) 59-100, at 60.

⁶⁴⁶ This is the case, for instance, of Slovakia, which amended its Criminal Code in 2009 to insert Section 5(a) which introduces the principle of universal jurisdiction. See Permanent Mission of the Slovak Republic to the United Nations, *The scope and application of the principle of Universal jurisdiction (Slovak Republic observations)*, 17 May 2010, at 2; This principle has been incorporated into the Penal Code of El Salvador, in force since 1998; See UN GA, *The scope and application of the principle of universal jurisdiction*, Report of the Secretary-General, A/69/174, 23 July 2014, at 3.

⁶⁴⁷ See, for instance, Luxembourg.

⁶⁴⁸ In Tunisia, for instance, the universality principle is not provided for in the section of Code of Criminal Procedure entitled "*crimes et délits commis à l'étranger*" (Art. 305 to 307) along with the other jurisdictional principles. It is however provided for in the Tunisian Law No. 75 of 10 December 2003 concerning support for international efforts to counter terrorism and money laundering, available in

Some states however do not provide for the universality principle in their legislation at all. This is the case for instance of Afghanistan,⁶⁴⁹ Albania,⁶⁵⁰ Cambodia,⁶⁵¹ Colombia,⁶⁵² Indonesia,⁶⁵³ Lebanon,⁶⁵⁴ Mali,⁶⁵⁵ Qatar,⁶⁵⁶ Togo,⁶⁵⁷

French online at [http://www.jurisitetunisie.com/tunisie/codes/terror/ menu.html](http://www.jurisitetunisie.com/tunisie/codes/terror/menu.html) (last visited on 1 August 2017). This is also the case, for instance, of Mauritius, which provides for universal jurisdiction in its *International Criminal Court Act 2011*.

⁶⁴⁹ See Preliminary Provisions, Chapter Two, Applicability of the Law, Part One of the Afghanistan Penal Code entitled 'Applicability of the Law from the point of view of place and persons', available online at <http://www.legal-tools.org/en/browse/national-implementing-legislation-database> (last visited 1 August 2017). See Arts 14 (on territorial jurisdiction) and 15 and 17 (on the protective principle).

⁶⁵⁰ See Art. 7 of the Albania Criminal Code entitled 'The applicable law on criminal acts committed by foreign citizens', which states that "The criminal law of the Republic of Albania is also applicable to a foreign citizen who, outside of the Republic of Albania, commits one of the following offences against the interests of the Albanian State or an Albanian citizen: [...]".

⁶⁵¹ See Section 2 of the Penal Code of Cambodia, entitled 'Offences Committed Outside the Cambodian Territory', available in English at http://www.unodc.org/res/cld/document/khm/criminal_code_of_the_kingdom_of_cambodia_html/Cambodia_Criminal-Code-of-the-Kingdom-of-Cambodia-30-Nov-2009-Eng.pdf (last visited 1 August 2017).

⁶⁵² According to the Ministry of Foreign Affairs, "In the legislation of the Republic of Colombia there is no express provision concerning the application or existence of the principle of universal jurisdiction; however, Colombia is a State party to various treaties which, in principle, provide for the exercise of national jurisdiction over certain acts that are contrary to international law, generally on the basis of a treaty obligation and the observance of customary international law", in Ministry of Foreign Affairs, Legal considerations concerning the scope and application of the principle of universal jurisdiction, available online at: http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Colombia%20%28S%20to%20E%29.pdf; See also *Reply from Colombia: Scope and application of universal jurisdiction*, February 2013, at 7, available online at : http://www.un.org/en/ga/sixth/68/UnivJur/Colombia_E.pdf (last visited 1 August 2017).

⁶⁵³ See Chapter I of the Penal Code of Indonesia entitled 'Extent of operation of the statutory penal provisions'.

⁶⁵⁴ See Permanent Mission of Lebanon to the United Nations, *The scope and application of the principle of universal jurisdiction*, which states that "Lebanon is not party to any treaties or agreement on universal jurisdiction. Lebanese law contains no provisions that could be construed as establishing the principle of universal jurisdiction." and Permanent Mission of Lebanon to the United Nations, Ref. 766/10, 15 April 2010.

⁶⁵⁵ See Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World*, October 2012-Update, at 78-79.

⁶⁵⁶ See Permanent Mission of the State of Qatar to the United Nations, 10 June 2011, available online at http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Qatar.pdf (last visited 1 August 2017), which states that "National legislation of the State of Qatar does not provide for the principle of universal jurisdiction."

⁶⁵⁷ See UN GA, *The scope and application of the principle of universal jurisdiction*, Report of the Secretary-General, A/69/174, 23 July 2014. According to the information provided by the Togo government to

Venezuela,⁶⁵⁸ and Zambia.⁶⁵⁹ It is interesting to note however that some of the states, not expressly providing for universal jurisdiction, nevertheless consider that their courts may exercise universal jurisdiction, on the basis of international treaties and customary international law. Indeed, it should be noted that a number of states do not provide for the universality principle in their legislation but have ratified conventions, namely the Geneva Conventions, which provide for and accept the principle. This is the case for instance of Colombia,⁶⁶⁰ Indonesia⁶⁶¹ and Qatar.⁶⁶²

the UN GA, the concept of universal jurisdiction is defined by the Togolese Penal Code, in the context of the jurisdiction of courts (articles 5-7) and, subsidiarily, by the Code of Penal Procedure. However, a closer analysis of the legal provisions shows that this does not appear to be the case. Article 6 of the Togolese Penal provides for jurisdiction based on territoriality and Article 7 for jurisdiction based on the active and passive nationality principles, as well as the protective principle. As the report states, "By virtue of the articles cited above, the universal jurisdiction of the Togolese courts requires the offence, or at least part of the actus reus, to have been committed on Togolese territory, or else for the offence to have been committed by a Togolese national abroad and for the offence to be punishable under the law of the country A/69/174 8/21 14-58069 where it was committed. This jurisdiction is limited by international conventions and, in particular, by the principle of reciprocity."

⁶⁵⁸ Art. 4(9) of the Venezuelan Criminal Code provides for universal jurisdiction over crimes committed on the high seas. Art. 4 of the Criminal Code, available in Spanish online at http://iccdb.webfactional.com/documents/implementations/pdf/Codigo_Penal_Venezuela_SP_2005.pdf (last visited 1 August 2017) states that "*Están sujetos a enjuiciamiento en Venezuela y se castigarán de conformidad con la ley penal venezolana: [...] 9. Los venezolanos o extranjeros venidos a la República que, en alta mar, cometan actos de piratería u otros delitos de los que el Derecho Internacional califica de atroces y contra la humanidad; menos en el caso de que por ellos hubieran sido ya juzgados en otro país y cumplido la condena.* [The Venezuelans or foreigners who are present in the Republic, who committed, in the high seas, acts of piracy or other offences that international law qualifies as atrocious and against humanity; except in the case of those who have already been judged in another country and have served their sentence.]"

⁶⁵⁹ See Criminal Code of Zambia, available online at http://iccdb.webfactional.com/documents/implementations/pdf/Zambia-The_Penal_Code_Act.pdf (last visited 1 August 2017).

⁶⁶⁰ See *supra* note 548.

⁶⁶¹ According to the representative of Indonesia to the United Nations, "Indonesia had ratified a number of treaties that might supplement domestic provisions in the application of universal jurisdiction. However, because there was no international consensus to specify other serious crimes other than piracy, which would be covered under the scope of universal jurisdiction, the exercise of the principle should be treaty-based." See General Assembly, Sixth Committee, *Principle of 'Universal Jurisdiction' Again Divides Assembly's Legal Committee Delegates; Further Guidance Sought from International Law Commission Aim to Avoid Impunity for Gross Crimes Is Recalled; Concern Expressed That Broadened Scope May Bring Other Problems, Threaten State Sovereignty*, 12 October 2011.

⁶⁶² See Permanent Mission of the State of Qatar to the United Nations, 10 June 2011, available online at http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Qatar.pdf (last visited 1

Regarding the crimes covered by the universality principle, a number of states only provide for universal jurisdiction over serious violations of international humanitarian law.⁶⁶³ Other states limit its exercise to crimes in respect of which it is envisaged or rendered mandatory by international treaties to which they are party, without expressly providing for universal jurisdiction over any other crimes. This is for instance the case of Armenia,⁶⁶⁴ Bolivia,⁶⁶⁵ Iran,⁶⁶⁶ Ireland,⁶⁶⁷ Peru,⁶⁶⁸

August 2017), which states that “[...] in applying Article 6 of the Qatari Constitution, which reads ‘The State shall respect international pats and execute all international agreements, pacts and treaties to which it is a party’, Qatari criminal courts can have jurisdiction to hear cases outside Qatar’s territory, according to conventions to which the State of Qatar is party and which cover these crimes, provided the accused perpetrator is present in its territory.”

⁶⁶³ India, for instance, only provides for universal jurisdiction in its 1960 Geneva Conventions Act, English translation available online at [https://www.icrc.org/ihl-nat.nsf/0/aeae4d0de5332b64c12563aa004a6f27/\\$FILE/GENEVA%20CONVENTIONS%20ACT,%201960.pdf](https://www.icrc.org/ihl-nat.nsf/0/aeae4d0de5332b64c12563aa004a6f27/$FILE/GENEVA%20CONVENTIONS%20ACT,%201960.pdf) (last visited 1 August 2017).

⁶⁶⁴ See for instance Art- 15, para. 3 of the Criminal Code of the Republic of Armenia, available in English at <http://www.parliament.am/legislation.php?sel=show&ID=1349&lang=eng#3> (last visited 1 August 2017) which provides that “Foreign citizens and stateless persons not permanently residing in the Republic of Armenia, who committed a crime outside the territory of the Republic of Armenia, are subject to criminal liability under the Criminal Code of the Republic of Armenia, if they committed: 1) such crimes which are provided in an international treaty of the Republic of Armenia; [...]”.

⁶⁶⁵ See Art. 1, para. 7 of the Bolivian Penal Code, which states that: “This Code shall apply to: [...] Crimes that Bolivia is required by treaty or convention to punish, even if they were not committed in its territory.”; See Permanent Mission of the Plurinational State of Bolivia to the United Nations, *Information and Observations of the Plurinational State of Bolivia on General Assembly resolution 64/117*, ‘The scope and application of the principle of universal jurisdiction’, MBNU/ONU/055/2010 (New York), 10 May 2010, available online at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Bolivia_E.pdf (last visited 1 August 2017).

⁶⁶⁶ Art. 8 of the Islamic Penal Code of the Islamic Republic of Iran, available online at <http://www.iranhrdc.org/english/human-rights-documents/iranian-codes/3200-islamic-penal-code-of-the-islamic-republic-of-iran-book-one-and-book-two.html#2> (last visited 1 August 2017) states “Regarding the offences, which, according to a special law or international conventions, the offender shall be prosecuted in the country s/he is found, if the offender is arrested in Iran s/he shall be prosecuted and punished in accordance with the laws of the Islamic Republic of Iran.”

⁶⁶⁷ See Section 3 of the Irish Geneva Conventions Act 1962 (as amended by Geneva Conventions (Amendment) Act 1998), which provides for universal jurisdiction over grave breaches; Section 2 of the Irish Criminal Justice (United Nations Convention Against Torture) Act, 2000 provides for universal jurisdiction over torture. See also AU-EU Report, at § 22.

⁶⁶⁸ The Peruvian Penal Code only appears to provide for universal jurisdiction over offences committed abroad if “Peru is under an obligation to punish the offence pursuant to an international treaty”. See Permanent Mission of Peru to the United Nations, *The scope and application of the principle of universal jurisdiction*, 18 May 2010, § b, available online at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Peru_E.pdf (last visited 1 August 2017).

Romania,⁶⁶⁹ Russia,⁶⁷⁰ Ukraine,⁶⁷¹ and Vietnam⁶⁷². In the case of Romania, it is interesting to note that the new Penal Code, which entered into force on 1 February 2014 considerably changed the provision on universal jurisdiction taking into account the fact that the previous provision, while conferring an extremely broad competence on the Romanian authorities, had never been enforced in practice.⁶⁷³ In the same vein, the Bolivian Criminal Code merely applies the principle of universal jurisdiction for “crimes that Bolivia is required by treaty or convention to punish, even if they were not committed in its territory.”⁶⁷⁴ However, even if international instruments do not explicitly refer to the principle of universal jurisdiction, Bolivia infers this principle “in cases of

⁶⁶⁹ According to Art. 11(1), Romanian criminal law is applicable to the offences that Romanian authorities have committed themselves to suppress under an international convention. See Lascu, L. A., ‘The Principles of Territorial Application of the Romanian Criminal Law According to the Provisions of the New Criminal Code’, 1 *AGORA International Journal of Juridical Sciences* (2013) 79-88, at 85, and M. A. Hotca, ‘The New Romanian Criminal Code – Changes Suggested in The General Part’, 1(XIX) *Lex Et Scientia International Journal* (2012) 117-127, at 118.

⁶⁷⁰ Art. 12(3) of the Criminal Code of the Russian Republic, available online in English at http://iccdb.webfactional.com/documents/implementations/pdf/Russia-Criminal_Code_2012EN.pdf (last visited 1 August 2017).

⁶⁷¹ Art. 8 of the Criminal Code of Ukraine, available in English online at http://iccdb.webfactional.com/documents/implementations/pdf/Criminal_Code_Ukraine_EN_2010.pdf (last visited 1 August 2017) provides that “Foreign nationals or stateless persons not residing permanently in Ukraine, who have committed criminal offenses outside Ukraine, shall be criminally liable in Ukraine under this Code in such cases as provided for by the international treaties [...]”.

⁶⁷² See Art. 6(2) of the Penal Code of the Socialist Republic of Vietnam, available online in English at http://iccdb.webfactional.com/documents/implementations/pdf/Vietnam-Penal_Code.pdf (last visited 1 August 2017) provides that “Foreigners who commit offenses outside the territory of the Socialist Republic of Vietnam may be examined for penal liability according to the Penal Code of Vietnam in circumstances provided for in the international treaties which the Socialist Republic of Vietnam has signed or acceded to.”

⁶⁷³ See D. Deteşeanu, ‘Some Thoughts on the Principle of Universal Jurisdiction Under the New Romanian Criminal Code’, 81 *Revue internationale de droit pénal* (2010) 311-315, at 311. Former Art. 6 of the Romanian Penal Code provided that “The [Romanian] criminal law shall also apply to other crimes than those provided in art. 5 par. 1 [*those crimes to which the protective principle applies*], committed abroad, by a foreign citizen or by a stateless person who does not have domicile in Romania, if: (a) the act is also a crime under the criminal law of the country where the crime was committed; and (b) the offender is present in Romania.” As a result of the change in legislation, crimes against humanity for instance cannot be prosecuted or judged in Romania under the universality principle.

⁶⁷⁴ See Section 1(7) of the Bolivian Criminal Code, available online at http://iccdb.webfactional.com/documents/implementations/pdf/BoliviaCodigo_Penale_y_Procedimiento_Penal.pdf (last visited 1 August 2017), which provides that “*Este Código se aplicará: [...] 7) A los delitos que por tratado o convención de la República se haya obligado a reprimir, aún cuando no fueren cometidos en su territorio.*”

systematic and widespread practice of torture, forced disappearance of persons, genocide or apartheid".⁶⁷⁵ Finally, some states contain a very broad provision. This is the case, for instance, of El Salvador. Article 10 of the Penal Code of El Salvador, on the principle of universality, provides as follows: "Salvadoran penal law shall further apply to crimes committed by anyone in a place not subject to Salvadoran jurisdiction, where such crimes could affect rights protected by specific international agreements or rules of international law or seriously impair universally recognized human rights."⁶⁷⁶

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The recent amendments to the Spanish law on universal jurisdiction are worth mentioning. Until 2009, Spain had a very broad universal jurisdiction provision that gave Spanish courts jurisdiction over crimes committed by foreign citizens outside of Spain without requiring any link to Spain, namely the presence of the suspect on Spanish territory.⁶⁷⁷ Following the political pressure exerted on the Spanish government to change its legislation on universal jurisdiction, an amendment to Article 23(4) was adopted by the Spanish Senate on 15 October 2009 and entered into force on 5 November 2009, considerably limiting the exercise of universal jurisdiction in Spain by requiring a relevant link to the country. Proceedings based on this provision nevertheless continued to be brought namely against high-ranking Chinese officials. Further pressure ensued and the Organic Law was modified again in March 2014,⁶⁷⁸ limiting the exercise of Spanish jurisdiction over core crimes committed abroad by (i) Spanish nationals, (ii) foreigners residing in Spain and (iii) persons who are in Spain when Spain has received and denied an extradition request.⁶⁷⁹ Regarding

⁶⁷⁵ Permanent Mission of the Plurinational State of Bolivia to the United Nations, *Information and Observations of the Plurinational State of Bolivia on General Assembly resolution 64/117, The scope and application of the principle of universal jurisdiction*, MBNU/ONU/055/2010 (New York), 10 May 2010, available online at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Bolivia_E.pdf (last visited 1 August 2017).

⁶⁷⁶ See UN GA, *The scope and application of the principle of universal jurisdiction*, Report of the Secretary General, A/69/174, 23 July 2014, at 3.

⁶⁷⁷ *Ley Orgánica del Poder Judicial*, 6/1985, 1 July 1985.

⁶⁷⁸ See Art. 23 (4) of *Ley Orgánica 1/2014, de 13 de marzo, de modificación de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, relativa a la justicia universal*, available online at http://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-2709, which provides that "4. Igualmente, será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la ley española, como alguno de los siguientes delitos cuando se cumplan las condiciones expresadas: a) Genocidio, lesa humanidad o contra las personas y bienes protegidos en caso de conflicto armado, siempre que el procedimiento se dirija contra un español o contra un ciudadano extranjero que resida habitualmente en España, o contra un extranjero que se encontrara en España y cuya extradición hubiera sido denegada por las autoridades españolas."

⁶⁷⁹ This last clause is an *aut dedere* provision, which cannot be considered as universal jurisdiction.

torture and enforced disappearances committed abroad, jurisdiction is limited to crimes committed by Spanish nationals or against Spanish victims.⁶⁸⁰ If one considers that jurisdiction over residents is in fact an extension of active personality jurisdiction, it must then be concluded that Spain no longer provides for universal jurisdiction in its domestic law,⁶⁸¹ at least with respect to international crimes. In our view, this is still universal jurisdiction. However, subjecting universal jurisdiction to such a restrictive condition appears contrary to the obligation of states under international law to establish and exercise universal jurisdiction, at least when the suspect is present on their territory.⁶⁸²

B. Restrictions to the exercise of universal jurisdiction

Certain domestic laws provide for universal jurisdiction over a number of offences, without any restrictions. This is the case, for instance, of Sweden, which exercises universal criminal jurisdiction based on the nature of the crime, irrespective of the location or of the nationality of the alleged perpetrator or victim, and which does not require double criminality.⁶⁸³ Italian legislation also contains a broad provision, according to which a foreigner who commits a crime abroad is punished under Italian law “unconditionally”,⁶⁸⁴ whenever this is provided for by special legislation or by international conventions.⁶⁸⁵ This is also the case in the Czech Republic for a number of listed offences including torture and core crimes.⁶⁸⁶ Finally, South Africa has also recently introduced the

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⁶⁸⁰ See Art. 23 (4) of *Ley Orgánica* 1/2014.

⁶⁸¹ With the exception of the *aut dedere aut judicare* provision mentioned above.

⁶⁸² See Part III, Chapter 2 on the requirement of a link, *infra* N 601 ff.

⁶⁸³ See Chapter 2, section 3.6 of the Swedish Penal Code; See UN GA, *The scope and application of the principle of universal jurisdiction*, Report of the Secretary-General, A/69/174, 23 July 2014, at 6. However, in Sweden, prosecution of crimes against international law that have been committed outside of Sweden requires the authorization of the government of Sweden or a person designated by the Government; See UN GA, *The scope and application of the principle of universal jurisdiction*, Report of the Secretary-General, A/69/174, 23 July 2014.

⁶⁸⁴ See Reply of the Permanent Mission of Italy to the United Nations on the Scope and Application of the Principle of Universal Jurisdiction, *Note Verbale* n. 2410, 21 May 2010, available online at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Italy.pdf (last visited 1 August 2017).

⁶⁸⁵ See Art. 7, § 5 of the Italian Criminal Code. However, some Italian domestic provisions implementing international conventions, namely torture, provide for a number of restrictions like the presence of the defendant, his non-extradition and that a request is made by the Minister of Justice. See Law No. 498 of 3 November 1998.

⁶⁸⁶ See Section 7 of the Criminal Code of the Czech Republic entitled “Principle of Protection and Universality” which states as follows: “The Czech law shall apply when determining the liability to punishment of Torture and Other Inhuman and Cruel Treatment (section 149) [...] Terrorist Attack

principle of unlimited universal jurisdiction over grave breaches of the Geneva Conventions and Additional Protocol I.⁶⁸⁷

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Generally, however, when universal jurisdiction is provided for in domestic legislation, it is subject to a number of restrictions, in particular to the presence or arrest of the suspect on state territory.⁶⁸⁸ Some states go further and require

(Section 311) and Terror (Section 312) [...], Criminal Conspiracy (Section 361, Paragraph 2 and 2), Genocide (Section 402), Preparation of Aggressive War (Section 406), Using Prohibited Means of Combat and Unlawful Warfare (Section 411), War Cruelty (Section 412), Persecution of a Population (Section 413), Plundering in the War Area (Section 414), Misuse of Internationally Acknowledged Symbols and Signs and State coat of Arms (Section 415), Misuse of a Flag and Cease-Fire (Section 416) [...] even if such crime has been committed abroad by a foreign national or a stateless person with no permanent residence permit in the Czech Republic". It should be noted that the Criminal Code of the Czech Republic also contains a section entitled "Subsidiary Principle of Universality" which provides for universal jurisdiction for any crime committed abroad subject to the double-criminality requirement, the presence of the offender on the territory and his non-extradition. See Section 8 of the Criminal Code of the Czech Republic: "The Czech law shall be applied to determine the liability to punishment for an act committed abroad by a foreign national or a stateless person with no permanent residence permit on the territory of the Czech Republic, if: a) the act is also punishable under the law in force on the territory where it was committed; and b) the offender is apprehended on the territory of the Czech Republic and was not extradited or surrendered for criminal prosecution to a foreign State or other subject authorised to criminal prosecution."; In Permanent Mission of the Czech Republic to the United Nations, *Information of the Czech Republic on the Scope and Application of the Principle of Universal Jurisdiction*, 28 April 2010, available online at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Czech%20Republic.pdf (last visited 1 August 2017). The provision specifies that "such offender shall not be sentenced to a more severe punishment than that stipulated under the law of the State on whose territory the crime was committed." Section 8 (3) of the Criminal Code of the Czech Republic.

⁶⁸⁷ See Arts 5 (1) and (2) of the Implementation of the Geneva Conventions Act, 2012. The Act does not provide for universal jurisdiction over war crimes committed in non-international armed conflicts (Article 5(3)).

⁶⁸⁸ See for instance section 65 of the Austrian Penal Code; Section 11 of the Cameroon Penal Code; Art. 10(2) of the Croatian Law on the implementation of the Statute of the International Criminal Court and the prosecution of criminal offences against international law of war and humanitarian law (unofficial English translation available online at http://www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation__Implementation-Statute-International-CCPCI.pdf (last visited 1 August 2017)); Art. 19(1) (b) of the Ethiopian Criminal Code; Art. 119(2) of the Criminal Code of the Republic of Macedonia; Section 2 of the Netherlands International Crimes Act; Art. 8, para. 2 of the Paraguayan Criminal Code provides that "Paraguayan criminal law shall apply only when the perpetrator of such an offence has entered the national territory."; see also Section 7 (c) of the Philippine Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity; Art. 5(1)(e) of the Portuguese Criminal Code; Art. 5(1) of the Portuguese Law no. 31/2004; Art. 12(3) of the Criminal Code of the Russian Republic; Art. 13(2) of the Criminal Code of Slovenia; Section 4(3)(c) of

the residence of the suspect on their territory.⁶⁸⁹ As mentioned above, this is the approach adopted in the case of Spain.⁶⁹⁰ Likewise, the Cuban Penal Code, for instance, contains a provision according to which Cuban criminal law applies to non-Cuban nationals who are residents and have committed crimes abroad.⁶⁹¹ The Penal Code of Iceland also provides that it is applicable to offences committed outside Iceland if they are committed by residents of Iceland.⁶⁹² As mentioned above, there is some controversy about whether this last form of jurisdiction (residency in the prosecuting state) should be considered as active personality jurisdiction rather than universal jurisdiction.⁶⁹³

On the contrary, certain domestic laws on universal jurisdiction do not require any connecting link between the state and the suspect (not even the presence of the suspect on state territory). This is the case for instance for Finland,⁶⁹⁴ Hungary,⁶⁹⁵ New Zealand,⁶⁹⁶

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the South African Implementation of the Rome Statute of the International Criminal Court Act 2002 ; see Articles 5, 6, 7 and 264m of the Swiss Penal Code; see 18 U.S.C., § 2340 and 2340A (Extraterritorial Torture Statute); Section 17(1) of the Uganda International Criminal Court Bill, 2006; Art. 21 of the Penal Code of the United Arab Emirates.

⁶⁸⁹ See for instance Art. 689-11 of the French Code of Criminal Procedure with respect to genocide, crimes against humanity and war crimes committed abroad and Section 51 § (2)(a) of the United Kingdom International Criminal Court Act 2001.

⁶⁹⁰ *Supra* note 231.

⁶⁹¹ See Art. 5.1 of the Penal Code of Cuba (1987), available online in Spanish at http://www.geneva-academy.ch/RULAC/pdf_state/Law-N-62-of-29-December-1987-on-Penal-Code.pdf (last visited 1 August 2017). The provision also requires that the suspects be found in Cuba and not extradited.

⁶⁹² See Art. 5(2) of the Penal Code of Iceland, available online in English at http://www.geneva-academy.ch/RULAC/pdf_state/General-Penal-Code-No.-19-12-February-1940.pdf (last visited 1 August 2017). It also provides that the act should be punishable under the law of the territorial state.

⁶⁹³ The issue of the requirement of the residency of the suspect or the victim will be addressed in Part III, Chapter 2, *infra* note 601 ff.

⁶⁹⁴ See Section 7 of the Criminal Code of Finland and Decree on the application of Chapter 1, Section 7 of the Criminal Code of Finland, unofficial English translation available online at http://iccdb.webfactional.com/documents/implementations/pdf/Finland-_Criminal_Code_2012.pdf (last visited 1 August 2017).

⁶⁹⁵ See Section 3(2)(a) of the Criminal Code of Hungary 2012, available in English at http://www.academia.edu/4602286/Criminal_Code_of_Hungary_2012 (last visited 1 August 2017).

⁶⁹⁶ Section 8(1) of the International Crimes and International Criminal Court Act 2000 provides that "Proceedings may be brought for an offence (c) against section 9 [genocide] or section 10 [crimes against humanity] or section 11 [war crimes] regardless of - (i) the nationality or citizenship of the person accused; or (ii) whether or not any act forming part of the offence occurred in New Zealand; or (iii) whether or not the person accused was in New Zealand at the time that the act constituting the offence occurred or at the time a decision was made to charge the person with an offence."

Japan,⁶⁹⁷ Sweden⁶⁹⁸ and Turkey.⁶⁹⁹

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Other restrictions to the exercise of universal jurisdiction include the non-extradition of the suspect,⁷⁰⁰ his non-surrender to the ICC when core crimes are concerned,⁷⁰¹ and the consent of a judicial or administrative authority before universal jurisdiction proceedings can be initiated.⁷⁰²

⁶⁹⁷ See Art. 4-2 entitled 'Crimes Committed outside Japan Governed by a Treaty', which states "In addition to the provisions of Article 2 through the preceding Article, this Code shall also apply to anyone who commits outside the territory of Japan those crimes proscribed under Part II [special part of the Penal Code; Crimes] which are governed by a treaty even if committed outside the territory of Japan." A translation of the Japanese Penal Code is available online at http://iccdb.Webfactual.com/documents/implementations/pdf/Japan-Penal_Code.pdf (last visited 1 August 2017).

⁶⁹⁸ Section 3(6) of the Swedish Penal Code *a contrario*. See Chapter 2, on the requirement of a link, *infra* N 630. See also K. Takayama, 'Universal Jurisdiction (Japan)', 79 *International Review of Penal Law* (CD-ROM Annexe) (2008) 333-341.

⁶⁹⁹ See Art. 13 of the Turkish Penal Code, available online in English at http://iccdb.webfactual.com/documents/implementations/pdf/Criminal_Code_Turkey_EN_2005.pdf (last visited 1 August 2017).

⁷⁰⁰ See for instance Art. 10(2) of the Croatian Law on the implementation of the Statute of the International Criminal Court and the prosecution of criminal offences against international law of war and humanitarian law; Art. 19(1) (b) of the Ethiopian Criminal Code; Article 7-4 of the Code of Criminal Procedure of Luxembourg; Art. 119(2) of the Criminal Code of the Republic of Macedonia; Art. 5(1)(b) of the Portuguese Criminal Code and Art. 13(2) of the Criminal Code of Slovenia.

⁷⁰¹ For instance, Art. 5(1) of the Portuguese Law no. 31/2004 provides that "The provisions of this law shall also be applicable to acts committed outside the national territory in cases where the perpetrator is present in Portugal and cannot be extradited or where it has been decided not to surrender the perpetrator to the International Criminal Court". See also Art. 10(2) of the Croatian Law on the implementation of the Statute of the International Criminal Court and the prosecution of criminal offences against international law of war and humanitarian law.

⁷⁰² For instance, the consent of the Attorney-General is required in Australia (see Divisions 268 and 274 of the Australian Criminal Code Act 1965), in Ireland (see Section 3(3) of the Irish Geneva Conventions Act 1962 as amended by Geneva Conventions (Amendment) Act 1998), in Israel (see Section 9(b) of the Israeli Penal Law), in New Zealand (see Section 13 of the New Zealand ICC Act), in the United Kingdom (see Sections 53(3) and 60(3) of the United Kingdom International Criminal Court Act 2001 and Section 134 of the UK Criminal Justice Act 1988) and in Uganda (see Section 17(1) of the Uganda International Criminal Court Bill, 2006). Finnish law requires the consent of the Prosecutor-General (see Section 12 of the Criminal Code of Finland; unofficial translation provided by the Ministry of Justice, Finland, available online at http://iccdb.webfactual.com/documents/implementations/pdf/Finland-Criminal_Code_2012.pdf (last visited 1 August 2017); see sections 153(c) and 153(f) of the Code of Criminal Procedure). Section 120(4) of the Criminal Code of the Republic of Macedonia provides that "Only after approval from the Public Prosecutor of the Republic of Macedonia may prosecution be initiated in the Republic of Macedonia in the cases from article 119, item 2, regardless of the law of the country in which the crime was committed, if this concerns a crime which, at the

Many states provide that the exercise of universal jurisdiction over some crimes at least is subject to the double-criminality requirement. This is for instance the case of France,⁷⁰³ Macedonia,⁷⁰⁴

time it was perpetrated, was considered to be a crime according to the general legal principles, recognized by the international community." In South Africa, the consent of the the "National Director of Public Prosecutions" is required (see Section 61 of the South African Criminal Law Sexual Offences and Related Matters Amendment Act 2007, available online at: http://www.saflii.org/za/legis/consol_act/clsoarmaa2007509/ which provides that "(5) The institution of a prosecution in terms of this section must be authorised in writing by the National Director of Public Prosecutions"). French law subjects the exercise of universal jurisdiction proceedings to a request from the Public Minister (see Art. 689-11 of the French Code of Criminal Procedure which provides that "*La poursuite de ces crimes [relevant de la compétence de la CPI] ne peut être exercée qu'à la requête du ministère public si aucune juridiction internationale ou nationale ne demande la remise ou l'extradition de la personne.*"). This is also the case of Tunisia (see Article 57 of the Tunisian Law No. 75 of 10 December 2003 concerning support for international efforts to counter terrorism and money laundering [as revised and supplemented by law No. 95 of 12 August 2009]; a French version of this law is available online at: http://www.cmf.org.tn/pdf/textes_ref/reglementations/Version_FR/blanchis_argent_lutte_ter/loi_terrorisme_blanchiment.pdf [last visited 20 April 2016]) and of the United Arab Emirates (Art. 23 of the Penal Code of the United Arab Emirates, which provides that "Only the Public Prosecutor may institute a criminal action against an individual who has committed a crime abroad"). Section 19(3) of the Ethiopian Criminal Code provides that "The prosecution shall consult with the Minister of Justice before instituting proceedings", English translation available online at <http://iccdb.webfactional.com/documents/implementations/pdf/CriminalCode.pdf> (last visited 1 August 2017); Iraq provides that "No legal proceedings may be brought against any person who commits an offence outside Iraq except by permission of the Minister of Justice". See Art. 14(1) of the Penal Code of Iraq, available online in English at http://www.legal-tools.org/uploads/tx_ltpdb/iraq.penalcode.1969.eng.pdf (last visited 1 August 2017). In Sweden, the prosecution of crimes against international law that have been committed outside of Sweden requires the authorization of the government of Sweden or a person designated by the government; See UN GA, *The scope and application of the principle of universal jurisdiction*, Report of the Secretary-General, A/69/174, 23 July 2014.

⁷⁰³ See Art. 689-11 of the French Code of Criminal Procedure with respect to genocide, crimes against humanity and war crimes committed abroad by foreign residents, which provides "*Peut être poursuivie et jugée par les juridictions françaises toute personne qui réside habituellement sur le territoire de la République et qui s'est rendue coupable à l'étranger de l'un des crimes relevant de la compétence de la Cour pénale internationale en application de la convention portant statut de la Cour pénale internationale signée à Rome le 18 juillet 1998, si les faits sont punis par la législation de l'Etat où ils ont été commis ou si cet Etat ou l'Etat dont elle a la nationalité est partie à la convention précitée.*"

⁷⁰⁴ Section 120 (3) of the Criminal Code of the Republic of Macedonia, available in English online at <http://www.legislationline.org/documents/action/popup/id/16066/preview> (last visited 1 August 2017) provides that "In the cases from articles 118 [active nationality principle] and 119 [passive personality and universality principles], prosecution shall be initiated only when the crime is punishable according to the law of the country in which the crime was committed."

and Paraguay.⁷⁰⁵ On the contrary, some states like Iraq⁷⁰⁶ and Sweden⁷⁰⁷ do not require dual criminality as a condition for asserting universal jurisdiction. In other states, the dual criminality rule does not apply to certain crimes. A number of states do not require double criminality for core crimes. This is the case for instance of the Netherlands, Spain, and Switzerland.⁷⁰⁸ In Macedonia, double criminality is not required if “this concerns a crime which, at the time it was perpetrated, was considered to be a crime according to the general legal principles, recognized by the international community”.⁷⁰⁹ In Cameroon, double criminality is required when jurisdiction is asserted in relation to ordinary crimes committed abroad by Cameroon residents,⁷¹⁰ but does not apply with regard to the crime of torture.⁷¹¹ In Tunisia, it does not apply to financing of terrorism and money-laundering.⁷¹² Finally, it is interesting to note that while the Criminal Code of Slovenia provides that the exercise of universal jurisdiction is subject to double criminality, its section 14 specifies that if this

⁷⁰⁵ Art. 9(1)(a) of the Penal Code of Paraguay states that “Paraguayan criminal law shall only apply to other offences committed abroad where (a) The offence is criminalized in the place of commission”.

⁷⁰⁶ According to the report of the Permanent Mission of the Republic of Iraq to the United Nations, 23 April 2010, “Iraq does not require dual criminality in order to apply universal jurisdiction.”

⁷⁰⁷ See Chapter 2, Sections 3(6) and 5(2) *a contrario* of the Swedish Criminal Code, available in English online at <http://www.government.se/contentassets/5315d27076c942019828d6c36521696e/swedish-penal-code.pdf> (last visited 1 August 2017); See also UN GA, *The scope and application of the principle of universal jurisdiction*, Report of the Secretary-General, A/69/174, 23 July 2014, at 6.

⁷⁰⁸ See Article 264m of the Criminal Code. Double criminality is however required for other international crimes over which Switzerland has universal jurisdiction. See Article 7 of the Swiss Criminal Code.

⁷⁰⁹ In this case, however, the approval of the Public Prosecutor of the Republic of Macedonia is required. See Section 120(4) of the Criminal Code of the Republic of Macedonia.

⁷¹⁰ See Art. 10 of the Cameroon Penal Code, available online at http://www.vertic.org/media/National%20Legislation/Cameroon/CM_Code_Penal_Cameroon.pdf (last visited 1 August 2017), which provides that “(1) *La loi pénale de la république s'applique aux faits commis à l'étranger par un citoyen ou par un résident, à condition qu'ils soient punissables par la loi du lieu de leur commission et soient qualifiés crimes ou délits par les lois de la République.*”

⁷¹¹ See Section 132bis of the Cameroon Penal Code which states that “*Les conditions prévues à l'alinéa 1 de l'article 10 du présent Code ne sont pas applicables à la torture.*”; See also Permanent Mission of the Republic of Cameroon to the United Nations, 30 April 2010, available online at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Cameroon_E.pdf (last visited 1 August 2017).

⁷¹² See Art. 56 of the Tunisian Law No. 75 of 10 December 2003 concerning support for international efforts to counter terrorism and money-laundering (as revised and supplemented by law No. 95 of 12 August 2009), available online in French at http://www.cmf.org.tn/pdf/textes_ref/reglementations/Version_FR/blanchis_argent_lutte_ter/loi_terrorisme_blanchiment.pdf (last visited 1 August 2017), provides that “*Dans les cas prévus à l'article 55 de la présente loi, l'action publique n'est pas subordonnée à l'incrimination des faits objet des poursuites en vertu de la législation de l'État où ils ont été commis.*”

requirement is not satisfied, “the perpetrator may be prosecuted only by permission of the Minister of Justice and with the proviso that, according to the general principles of law recognised by the international community, the offence in question constituted a criminal act at the time it was committed”.⁷¹³

A number of domestic laws also expressly provide for the *ne bis in idem* principle in relation to universal jurisdiction cases. This is the case for instance of Armenia,⁷¹⁴ Ethiopia,⁷¹⁵ Iraq,⁷¹⁶ Israel,⁷¹⁷ Paraguay,⁷¹⁸ Russia,⁷¹⁹ Thailand,⁷²⁰

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⁷¹³ Section 14 of the Criminal Code of Slovenia, available online at http://iccdb.webfactional.com/documents/implementations/pdf/Slovenia_CriminalCode2009_English.pdf (last visited 1 August 2017), provides that “(4) In cases under Articles 12 and 13 the perpetrator shall be prosecuted only insofar as his conduct constitutes a criminal offence in the country where it was committed.” and “(5) If, in all other cases except the cases referred to in indent 2 of Article 11 and paragraph 4 of this Article of this Penal Code, the criminal offence is not punished in the country where it was committed, the perpetrator may be prosecuted only by permission of the Minister of Justice and with the proviso that, according to the general principles of law recognised by the international community, the offence in question constituted a criminal act at the time it was committed.”

⁷¹⁴ Art. 15(4) of Criminal Code of the Republic of Armenia, available online in English at <http://www.parliament.am/legislation.php?sel=show&ID=1349&lang=eng#3> (last visited 1 August 2017), provides that “The rules established in part 3 of this Article [on universal and protective jurisdiction] are applicable if the foreign citizens and stateless persons not permanently residing in the Republic of Armenia, have not been convicted for this crime in another state and are subjected to criminal liability in the territory of the Republic of Armenia.”

⁷¹⁵ Art. 20 of the Ethiopian Criminal Code provides that “(1) In all cases where Ethiopian courts have a subsidiary jurisdiction only (Arts.15(1), 17 and 18), the criminal cannot be tried and sentenced in Ethiopia if he was regularly acquitted or discharged for the same act in a foreign country.”

⁷¹⁶ See Art. 14(1) of the Penal Code of Iraq, available in English online at http://www.legal-tools.org/uploads/tx_ltpdb/iraq.penalcode.1969.eng.pdf.

⁷¹⁷ See Section 16 in relation to Section 14(b) (3) of Israel’s Penal Law.

⁷¹⁸ See Art. 8(3) of the Penal Code of Paraguay which provides that “Prosecution under Paraguayan criminal law is prohibited where a foreign court: (a) has acquitted the person in question or (b) has sentenced the person in question to a terms of imprisonment and the sentence has been served or suspended or the person has been pardoned.”

⁷¹⁹ Art. 12(3) of the Criminal Code of the Russian Republic, available online in English at http://www.legal-tools.org/uploads/tx_ltpdb/Criminal_Code_Russia_EN_2004_02.pdf (last visited 1 August 2017), states that “Foreign nationals and stateless persons who do not reside permanently in the Russian Federation and who have committed their crimes outside the boundaries of the Russian Federation shall be brought to criminal responsibility under this Code [...] in cases provided for by international agreement of the Russian Federation, and unless they have been convicted in a foreign state and are brought to criminal responsibility in the territory of the Russian Federation.”

⁷²⁰ Section 10 of the Thailand Penal Code, available in English online at <http://www.samuiorsale.com/law-texts/thailand-penal-code.html#2> (last visited 1 August 2017), provides that “Whoever to do an act outside the Kingdom, which is an offence according to various Sections as specified in Section 7

Tunisia,⁷²¹ and the United Arab Emirates.⁷²² However, in some countries, double jeopardy does not apply in certain cases. This is for instance the case in Finland where the Prosecutor-General may order that the charge be brought in Finland if the judgement rendered abroad was not based on a request from Finland or on a request for extradition granted by the Finnish authorities, and moreover if the offence is an “international offence”.⁷²³

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Some states also expressly provide that amnesties and pardons will block universal prosecutions. Ethiopia, for instance, expressly provides that extraterritorial jurisdiction can be exercised only if “the crime was not legally pardoned in the country of commission and that prosecution is not barred either under the law of the country where the crime was committed or under Ethiopian law”.⁷²⁴

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Certain states expressly provide for the non-application of their law to persons who enjoy immunity. Such a provision is for instance provided for in the Criminal Code of the United Arab Emirates.⁷²⁵ Likewise, the Netherlands

(2) and (3), Section 8 and Section 9 shall not be punished again in the Kingdom for the doing of such act, if: 1. There be a final judgment of a foreign Court acquitting such person; or 2. There be a judgment of a foreign Court convicting such person, and such person has already passed over the punishment. If the sentenced person has suffered the punishment for the doing of such act according to the judgment of the foreign Court, but such person has not yet passed over the punishment, the Court may inflict less punishment to any extent than that provided by the law for such offence, or may not inflict any punishment at all, by having regard to the punishment already suffered by such person.”

⁷²¹ Art. 58 the Tunisian Law No. 75 of 10 December 2003 concerning support for international efforts to counter terrorism and money laundering (as revised and supplemented by law No. 95 of 12 August 2009), available online in French at http://www.cmf.org.tn/pdf/textes_ref/reglementations/Version_FR/blanchis_argent_lutte_ter/loi_terrorisme_blanchiment.pdf (last visited 1 August 2017), provides that “*L'action publique ne peut être déclenchée contre les auteurs des infractions terroristes s'ils justifient qu'ils ont été jugés définitivement à l'étranger, et en cas de condamnation, qu'ils ont purgé toute leur peine, ou qu'elle est prescrite ou qu'elle a fait l'objet de mesures de grâce.*”

⁷²² Art. 23 of the Penal Code of the United Arab Emirates provides that criminal action “[...] may not be instituted against any person in whose favor a final acquittal or conviction has been passed by foreign courts, and it is proved that he has served the sentence, if a criminal action or penalty awarded against him has lawfully abated, or if authorities of competent jurisdiction in such a country have filed the investigations”.

⁷²³ Section 13(2) of the Finish Penal Code, available online at http://iccdb.webfactional.com/documents/implementations/pdf/Finland-_Criminal_Code_2012.pdf (last visited 1 August 2017).

⁷²⁴ See Art. 19(1) (c) of the Ethiopian Criminal Code.

⁷²⁵ Art. 25 of the Penal Code of the United Arab Emirates provides that “Without prejudice to the provision in the first paragraph of Article (1), this law shall not apply to persons who enjoy immunity in accordance with international conventions or international law or domestic laws, within the territory of the United Arab Emirates.”

International Crimes Act provides that “criminal prosecution for one of the crimes referred to in this Act is excluded with respect to: (a) foreign heads of state, heads of government and ministers of foreign affairs, as long as they are in office, and other persons in so far as their immunity is recognised under customary international law; (b) persons who have immunity under any Convention applicable within the Kingdom of the Netherlands”.⁷²⁶

Other pieces of domestic legislation provide for general restrictions based on international law. Danish law, for instance, contains a general provision providing that the exercise of jurisdiction, namely universal jurisdiction, is “limited by applicable international law”.⁷²⁷ According to the Ministry of Foreign Affairs of Denmark, this provision refers to all relevant rules of international law, including those concerning the immunity of state officials and diplomatic immunity.⁷²⁸ Likewise, the Criminal Code of Finland contains a provision, entitled “treaties and customary international law binding on Finland”, which provides that “[i]f an international treaty binding on Finland or another statute or regulation that is internationally binding on Finland in some event restricts the scope of application of the criminal law of Finland when compared with the provisions of this chapter, such a restriction applies as agreed. The provisions in this chapter notwithstanding, the restrictions on the scope of application of Finnish law based on generally recognised rules of international law also apply”.⁷²⁹ The Norwegian Penal Code of 2005 also contains a provision according to which “The criminal legislation applies subject to the limitations that follow from agreements with foreign States and from international law generally”.⁷³⁰

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⁷²⁶ See Section 6 of the Netherlands International Crimes Act, available online at http://iccdb.webfactional.com/documents/implementations/pdf/Netherlands_International_Crimes_Act_2003.pdf (last visited 1 August 2017).

⁷²⁷ See Section 12 of the Danish Criminal Code.

⁷²⁸ See Ministry of Foreign Affairs of Denmark, *The Scope and Application of the Principle of Universal Jurisdiction*, 30 April 2012, available online at http://www.un.org/en/ga/sixth/67/ScopeAppUniJuri/Finland_Eng.pdf (last visited 1 August 2017), at 2.

⁷²⁹ See Section 15 of the Criminal Code of Finland, unofficial translation provided by the Ministry of Justice, Finland, available online at http://iccdb.webfactional.com/documents/implementations/pdf/Finland-Criminal_Code_2012.pdf.

⁷³⁰ See Section 2 of the Norwegian Criminal Code 2005 (available online at http://lovdata.no/dokument/NL/lov/2005-05-20-28/KAPITTEL_1-1#KAPITTEL_1-1, last visited 1 August 2017), which provides that “Straffelovgivningen gjelder med de begrensninger som følger av overenskomster med fremmede stater eller av folkeretten for øvrig.” An English translation is provided by the Permanent Mission of Norway to the United Nations in its report on universal jurisdiction, available online at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Norway.pdf.

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Finally, it is interesting to note that, while many states contain a provision which obliges courts exercising universal jurisdiction not to impose a heavier sentence than that provided for by the law at the place of commission⁷³¹, the Penal Code of El Salvador contains a provision providing for the direct application of the foreign law of the territorial state “if its provisions are more favourable to the accused person than those contained in Salvadoran criminal law”.⁷³² A similar provision was provided for in the Swiss Penal Code, before its modification in 2007.⁷³³

C. Limited universal jurisdiction for specific situations or territories

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A number of states have adopted limited implementing legislation providing for universal jurisdiction only in respect of offences that occurred in certain places and during certain periods.⁷³⁴ This is for instance the case of the United Kingdom, which adopted the War Crimes Act in 1991, under which criminal proceedings could be brought against UK residents for crimes committed between 1 September 1939 and 5 June 1945, “in a place which at the time was part of Germany or under German occupation”.⁷³⁵ In the same vein, in 1995 and 1996, France adopted legislation giving its courts jurisdiction to prosecute any person found on French territory and alleged to have committed crimes covered by the ICTY Statute⁷³⁶ and the ICTR Statute.⁷³⁷ Likewise, the Israeli *Nazi and Nazi*

⁷³¹ See for instance Art. 6(2) and 7(3) of the Swiss Penal Code. However, such a clause is not provided for with regard to core crimes. See Art. 264m of the Swiss Penal Code. See also Art. 13(2) of the Criminal Code of Slovenia and Art. 10(1) of the Cameroon Penal Code.

⁷³² See Art. 11 of the Salvadoran Penal Code.

⁷³³ See former Art. 6bis of the Swiss Penal Code which provides that “*Le present code est applicable à quiconque aura commis un crime ou un délit que la Confédération, en vertu d’un traité international, s’est engagée à poursuivre, si l’acte est réprimé aussi dans l’Etat où il a été commis et si l’auteur se trouve en Suisse et n’est pas extradé à l’étranger. La loi étrangère sera toutefois applicable si elle est plus favorable à l’inculpé.*” (Emphasis added). The current provision (Art. 7(2)) states that “The court determines the sentence so that overall the person concerned is not treated more severely than would have been the case under the law at the place of commission.”

⁷³⁴ Kamminga, *Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses*, at 953.

⁷³⁵ See Section 1 of the United Kingdom War Crimes Act 1991.

⁷³⁶ See *Loi n° 95-1 du 2 janvier 1995 portant adaptation de la législation française aux dispositions de la résolution 827 du Conseil de sécurité des Nations Unies instituant un tribunal international en vue de juger les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l’ex-Yougoslavie depuis 1991.*

⁷³⁷ *Loi n° 96-432 du 22 mai 1996 portant adaptation de la législation française aux dispositions de la résolution 955 du Conseil de sécurité des Nations unies instituant un tribunal international en vue de*

Collaborators (Punishment) Law (1950) allows for the assertion of criminal jurisdiction with regard to war crimes committed during the Second World War and crimes against humanity committed during the Nazi Regime.⁷³⁸

Serbia provides for a law establishing the jurisdiction of Serbian prosecutors and courts over war crimes committed anywhere on the territory of the former Yugoslavia. According to Article 3 of the Serbian Law on Organization and Jurisdiction of State Organs in War Crimes Proceedings, "The government authorities of the Republic of Serbia set out under this Law shall have jurisdiction in proceedings for criminal offences specified in Article 2 hereof, committed on the territory of the former Socialist Federative Republic of Yugoslavia, regardless of the citizenship of the perpetrator or victim".⁷³⁹ Croatia has expressed deep concerns regarding the possibility for Serbia to exercise its jurisdiction over Croatian nationals.⁷⁴⁰ It has especially criticized the fact that the Serbian legislation was not "universal" but regional, since it applied only to a specifically defined number of neighbouring states, and was not subsidiary in its nature.⁷⁴¹

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D. A list of crimes subject to universal jurisdiction and/or a general provision?

Many states provide for a list of crimes subject to universal jurisdiction. Some of them even only contain a provision providing for an exhaustive list of crimes subject to universal jurisdiction. This is the case for instance of Iraq,⁷⁴²

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juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis en 1994 sur le territoire du Rwanda et, s'agissant des citoyens rwandais, sur le territoire d'États voisins.

⁷³⁸ See Permanent Mission of Israel to the United Nations, *Information and Observations on the Scope and Application of the Principle of Universal Jurisdiction*, 3 May 2010.

⁷³⁹ See the 2003 Law on the Organization and Competence of State Authorities in War Crime Proceedings.

⁷⁴⁰ R. Radović, 'A Comment on Croatia's Concerns over Serbia's So-Called 'Mini-Hague'', *EJIL Talk*, 22 April 2016.

⁷⁴¹ See Croatia, Permanent Mission to The United Nations, Agenda item 86, *The scope and application of the principle of universal jurisdiction*, 70th Session of the General Assembly Sixth Committee, 20 October 2015, available online at <https://papersmart.unmeetings.org/media2/7653455/croatia.pdf> (last visited 1 August 2017). It is noteworthy that this is one of the reasons why Croatia has blocked the opening of Chapters 23 and 24 of the accession negotiations between Serbia and the European Union (EU). See Radović, *supra* note 737.

⁷⁴² Under Section 4. "Universal jurisdiction", Art. 13 of the Penal Code of Iraq, available online at http://www.legal-tools.org/uploads/tx_ltpdb/iraq.penalcode.1969.eng.pdf, which provides that "In circumstances other than those stipulated in paragraphs 9, 10 and 11, the provisions of this Code are applicable to all those who enter Iraq subsequent to committing an offence abroad whether as

Lithuania,⁷⁴³ Thailand⁷⁴⁴ and the United Arab Emirates.⁷⁴⁵ In a similar vein, other states do not provide for a list of crimes but expressly contain a provision for the exercise of universal jurisdiction over specific crimes in the provisions relating to the crime in question. This is the case for instance for Korea,⁷⁴⁶ South Africa⁷⁴⁷ and the United States.⁷⁴⁸

principals or accessories to the following offences: Destroying or causing damage to international means of communications or trading in women, children, slaves or drugs." According to the Permanent Mission of the Republic of Iraq to the United Nations (23 April 2010), "The scope of universal jurisdiction is restricted to the aforementioned offences and does not extend to any other crimes."

⁷⁴³ See Art. 7 of the Criminal Code of the Republic of Lithuania, which states that "Persons shall be liable under this Code regardless of their citizenship and place of residence, also of the place of commission of a crime and whether the act committed is subject to punishment under laws of the place of commission of the crime where they commit the following crimes subject to liability under treaties: 1) crimes against humanity and war crimes (Articles 99-113); 2) trafficking in human beings (Article 147); 3) purchase or sale of a child (Article 157); 4) production, storage or handling of counterfeit currency or securities (Article 213); 5) money or property laundering (Article 216); 6) act of terrorism (Article 250);".

⁷⁴⁴ Section 7 of the Thai Penal Code, available in English online at <http://www.samuiforsale.com/law-texts/thailand-penal-code.html#2> (last visited 1 August 2017), which provides that "Whoever to commit the following offences outside the Kingdom shall be punished in the Kingdom, namely: (1) Offences relating to the Security of the Kingdom as provided in Sections 107 to 129; (1/1) The offence in respect of terrorization as prescribed by Section 135/1, Section 135/2, Section 135/3 and Section 135/4. (2) Offences Relating to Counterfeiting and Alteration as provided in Section 240 to Section 249, Section 254, Section 256, Section 257 and Section 266 (3) and (4); (2 bis) Offences Relating to Sexuality as provided in Section 282 and Section 283; (3) Offence Relating to Robbery as provided in Section 339, and Offence Relating to Gang-Robbery as provided in Section 340, which is committed on the high seas."

⁷⁴⁵ See Art. (21) of the Penal Code of the United Arabs Emirates, which states that "This law shall apply to any one who is found in the State, after being involved abroad as a principal offender or an accomplice in an act of sabotage or impairment of international communication systems, crimes of traffic in drugs, women, or children, slavery, acts of piracy or international terrorism."

⁷⁴⁶ See Art. 3(5) of the Korean ICC Act; Act on Punishment for Damaging Ships and Sea Structures and Act on Prevention of Procuring Money for the Purpose of Threatening the Public.

⁷⁴⁷ See Art. 5 (1) and (2) of the South African Implementation of the Geneva Conventions Act, 2012; Section 4(3)(c) of the South African International Criminal Court Act 27 of 2002; Section 6 of the South African Prevention of Combating and Torture of Persons Act, 2013; Section 15(1) of the South African Protection of Constitutional Democracy against Terrorist and Related Activities Act 2004; Section 61 of the South African Criminal Law Sexual Offences and Related Matters Amendment Act 2007.

⁷⁴⁸ 18 U.S. Code § 2340A [torture]; 18 U.S. Code § 1651 [Piracy under law of nations]; 18 U.S. Code § 2442(c) [Recruitment or use of child soldiers]; 18 U.S. Code § 1596 (a) in relation to sections 1581, 1583, 1584, 1589, 1590, or 1591 [Peonage, Slavery, And Trafficking In Persons]; 18 U.S. Code § 32

On the contrary, other states do not establish a list of crimes. Firstly, some states merely contain a general clause for treaty crimes in general, that is, a provision not referring to specific conventions or crimes (see *infra* subsection II. B.). Secondly, other states contain a very broad provision that does not refer to international conventions or specific crimes. For instance, unlike the legislation of other countries, Salvadoran law “does not specifically enumerate crimes in respect of which universal jurisdiction might be applied; rather, such application would depend on whether the acts committed were sufficiently harmful to the international community as a whole”.⁷⁴⁹ Likewise, the Dominican Republic provides for a general provision, without establishing a specific list of crimes subject to universal jurisdiction.⁷⁵⁰ The Supreme Court of the Dominican Republic has ruled that Article 62 of the Dominican Criminal Code provides that “Dominican courts may investigate offences committed outside of the national territory – which thus fall into the category of universal jurisdiction – and although [this] provision does not specify the offences in question, it is clear that these [offences] are very serious crimes such as genocide, crimes against humanity, money-laundering, international drug trafficking, etc.”.⁷⁵¹ The report submitted by the Dominican Republic to the United Nations on the scope and application of the universal jurisdiction principle concludes by stating that “the

[Destruction of aircraft or aircraft facilities]; 18 U.S. Code § 37 [Violence at international airports]; 18 U.S. Code § 112 [Protection of foreign officials, official guests, and internationally protected persons], 878 Threats and extortion against foreign officials, official guests, or internationally protected persons], 1116 Murder or manslaughter of foreign officials, official guests, or internationally protected persons]; 18 U.S. Code § 831 [Prohibited transactions involving nuclear materials]; 18 U.S. Code § 1203 [Hostage taking]; 18 U.S. Code § 2280 [Violence against maritime navigation]; 18 U.S. Code § 2332f [Bombings of places of public use, government facilities, public transportation systems and infrastructure facilities]; 49 U.S. Code § 46502 [Aircraft piracy].

⁷⁴⁹ UN GA, *The scope and application of the principle of universal jurisdiction*, Report of the Secretary-General, A/69/174, 23 July 2014; Art. 10 of the Penal Code of El Salvador; See Report of the Republic of El Salvador pursuant to United Nations General Assembly resolution 66/103: *The scope and application of the principle of universal jurisdiction*. According to commentators on the Penal Code, the principle applies to crimes against human rights protected by international treaties ratified by El Salvador; See Permanent Mission of El Salvador to the United Nations, *Report under resolution 64/117 adopted by the General Assembly of the United Nations on 15 January 2010*, 3 May 2010, available online at: http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/El%20Salvador_E.pdf (last visited on 1 August 2017).

⁷⁵⁰ See Art. 62 of the Code of Criminal Procedure, mentioned in Permanent Mission of the Dominican Republic to the United Nations (3 August 2011), provides that “The Santo Domingo court of first instance shall have competence for cases in which a national court must investigate offences committed outside the national territory.”

⁷⁵¹ English translation provided by the Permanent Mission of the Dominican Republic to the United Nations, 3 August 2011, available online at [http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Dominican%20Rep%20\(S%20to%20E\).pdf](http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Dominican%20Rep%20(S%20to%20E).pdf) (last visited 1 August 2017).

judiciary of the Dominican Republic therefore applies and considers universal jurisdiction on a case-by-case basis”.⁷⁵²

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Thirdly, some states only provide for a general provision, allowing for universal jurisdiction over ordinary crimes subject to a minimum sentence. The Criminal Code of Bosnia and Herzegovina, for instance, provides that “The criminal legislation of Bosnia and Herzegovina shall apply to an alien who, outside the territory of Bosnia and Herzegovina, perpetrates a criminal offence against a foreign state or a foreign national which under this legislation carries a punishment of imprisonment for a term of five years or a more severe punishment”.⁷⁵³ Thus it limits the exercise of universal jurisdiction (subject to a number of conditions) to serious criminal offences. The Criminal Code of Macedonia also only contains a general provision for ordinary crimes subject to five years’ imprisonment or more.⁷⁵⁴

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Fourthly, some states only contain a general provision providing for universal jurisdiction over offences committed abroad by their residents. This is for instance the case of Cameroon, if such offences are punishable by the law of the territorial state.⁷⁵⁵

⁷⁵² Permanent Mission of the Dominican Republic to the United Nations, 3 August 2011, available online at [http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Dominican%20Rep%20\(S%20to%20E\).pdf](http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Dominican%20Rep%20(S%20to%20E).pdf) (last visited 1 August 2017).

⁷⁵³ Art. 9(4) of the Criminal Code of Bosnia and Herzegovina, English version available online at http://www.tuzilastvobih.gov.ba/files/docs/izmjene_krivcnog_zakona_8_10_-_eng.pdf (last visited 1 August 2017). See also Permanent Mission of Bosnia and Herzegovina to the UN, *Information provided following General Assembly resolution 65/33*, 11 March 2011, available online at http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Bosnia%20and%20Herzegovina.pdf (last visited on 1 August 2017).

⁷⁵⁴ Art. 119 (2) of the Criminal Code of the Republic of Macedonia provides that “The criminal legislature is also applicable to a foreigner who commits a crime abroad, against a foreign country or a foreigner, who according to that legislature may be sentenced to five years of imprisonment or to a more severe punishment, when he finds himself on the territory of the Republic of Macedonia, and when he is not extradited to the foreign country. If not otherwise determined by this Code, in such a case the court may not pronounce a punishment more severe than the punishment that is prescribed by law of the country in which the crime was committed.”

⁷⁵⁵ See Section 10 of the Cameroon Penal Code, which provides that “*La loi pénale de la république s’applique aux faits commis à l’étranger par un citoyen ou par un résident, à condition qu’ils soient punissables par la loi du lieu de leur commission et soient qualifiés crimes ou délits par les lois de la République.*” A French version of the Penal Code of Cameroon is available online in French at http://www.vertic.org/media/National%20Legislation/Cameroon/CM_Code_Penal_Cameroun.pdf (last visited 1 August 2017). See also Permanent Mission of the Republic of Cameroon to the United Nations, 30 April 2010, available online at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Cameroon_E.pdf (last visited 1 August 2017).

Finally, it should be noted that some systems are mixed, in the sense that they provide for universal jurisdiction over specific crimes and contain a general provision on universal jurisdiction. This is for instance the case of Switzerland, which expressly provides for universal jurisdiction over genocide, crimes against humanity and war crimes in the special part of the Criminal Code,⁷⁵⁶ but also contains a general clause for treaty crimes,⁷⁵⁷ as well as a general provision in its Penal Code providing for universal jurisdiction if “the offender has committed a particularly serious felony that is proscribed by the international community”⁷⁵⁸ and one which stipulates that the Swiss Criminal Code is applicable to offences committed abroad on minors.⁷⁵⁹ Likewise, Norwegian legislation contains a provision, which states that “the criminal legislation also applies to acts that Norway has a right or an obligation to prosecute under agreements with foreign States or under international law generally”.⁷⁶⁰ It also provides for universal jurisdiction over specific crimes, including war crimes, crimes against humanity and genocide.⁷⁶¹ In the same vein, the Penal Code of Ethiopia contains a general provision which provides for universal jurisdiction

⁷⁵⁶ Art. 264m of the Swiss Penal Code.

⁷⁵⁷ Art. 6 of the Swiss Penal Code.

⁷⁵⁸ Art. 7(2) of the Swiss Penal Code. The provision clearly does not apply to crimes where Switzerland is obliged to prosecute according to an international convention because these are covered by Art. 6 (*supra* note 9). One could then consider that it is therefore crimes under customary international law that are covered here, or at least *jus cogens* crimes, such as aggression, and torture. Another approach would be to consider that crimes proscribed by the international community are those defined in the Statutes of the ICTs and the ICC. In addition, crimes such as terrorism and torture (when the Torture Convention is not applicable) could fall under this provision, although they are not defined in the Swiss Penal Code. Finally, this provision could apply to crimes for which international conventions do not prescribe universal jurisdiction, as long as these prohibit “serious” crimes.

⁷⁵⁹ See Art. 5 of the Swiss Penal Code, which provides that “Le présent code est applicable à quiconque se trouve en Suisse et n'est pas extradé, et a commis à l'étranger l'un des actes suivants : a. traite d'êtres humains (art. 182), contrainte sexuelle (art. 189), viol (art. 190), acte d'ordre sexuel commis sur une personne incapable de discernement ou de résistance (art. 191) ou encouragement à la prostitution (art. 195), si la victime avait moins de 18 ans; a^{bis} actes d'ordre sexuel avec des personnes dépendantes (art. 188) et actes d'ordre sexuel avec des mineurs contre rémunération (art. 196); b. acte d'ordre sexuel avec un enfant (art. 187), si la victime avait moins de 14 ans; c. pornographie qualifiée (art. 197, al. 3 et 4), si les objets ou les représentations avaient comme contenu des actes d'ordre sexuel avec des mineurs.”

⁷⁶⁰ See Section 6 of the Norwegian General Civil Penal Code.

⁷⁶¹ See Section 5 c) 2. of the Norwegian General Penal Code, which states that “the criminal legislation applies where the acts 2. Are regarded as a war crime, genocide or a crime against humanity”, English translation available in FIFDH and Redress, *Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union*, December 2010, available online at http://www.redress.org/downloads/publications/Extraterritorial_Jurisdiction_In_the_27_Member_States_of_the_EU_FR.pdf, at 205-209.

over “any person who has committed outside Ethiopia: (a) a crime against international law or an international crime specified in Ethiopian legislation, or an international treaty or a convention to which Ethiopia has adhered”.⁷⁶² It also has a provision that lists a number of crimes subject to universal jurisdiction.⁷⁶³

II. The crimes subject to universal jurisdiction in domestic law

A. Genocide, crimes against humanity and war crimes

1. *The impact of the Rome Statute on domestic legislation*

250 In adapting their legislation to the ICC Statute and reviewing their legislative framework applicable to international crimes, state parties to the ICC⁷⁶⁴ have often reviewed their legislation regarding universal jurisdiction over these crimes.

251 The ICC is governed by the principle of complementarity,⁷⁶⁵ according to which national criminal jurisdictions have primary responsibility for the enforcement of the prohibitions of genocide, crimes against humanity and war crimes.⁷⁶⁶ The Court can step in only if the state is “unwilling” or “unable” to act. It is the ICC that determines whether a case is admissible or not on this basis and, in this sense, exercises supervisory functions over the adequacy of national criminal jurisdictions.⁷⁶⁷ However, it should be noted that the Statute does not provide for an explicit obligation for states to implement its substantive law or to amend domestic law.⁷⁶⁸ There is no equivalent in the Rome Statute to Article V of the Genocide Convention.⁷⁶⁹ Article 86 of the Rome Statute does however place state parties under a general obligation to cooperate with the Court in its

⁷⁶² Art. 17(1)(a) of the Penal Code of Ethiopia.

⁷⁶³ Art. 17(2) of the Penal Code of Ethiopia.

⁷⁶⁴ 122 States are party to the ICC Statute.

⁷⁶⁵ Art. 1 of the ICC Statute states that the International Criminal Court is “complementary to national criminal jurisdictions”.

⁷⁶⁶ Kleffner, ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law’, 1 *Journal of International Criminal Justice* (2003) 86-113, at 87.

⁷⁶⁷ *Ibid.*

⁷⁶⁸ Art. 70(4) of the Rome Statute does place an obligation on each state party to “extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice” of the Court committed on the state’s territory or by one of its nationals.

⁷⁶⁹ See B. Saul, ‘The Implementation of the Genocide Convention at the National Level’, in Gaeta (ed.), *The Genocide Convention: A Commentary* (Oxford: OUP, 2009) 58-83, at 81-82.

investigation and prosecution of crimes within the jurisdiction of the Court. Article 88 further provides that “States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation [...]”. The obligation set out in Article 88 only applies to state cooperation and thus only obliges states to implement legislation enabling them to comply with their obligations of cooperation.⁷⁷⁰

The ratification of the Rome Statute has nevertheless also prompted states to incorporate international crimes and general principles in their domestic law. As noted by one commentator, the ICC Statute assists in providing “a source of norms and legal standards that would provide states the basis to effectively investigate and prosecute the most serious crimes under international law themselves”.⁷⁷¹ Indeed, after ratifying the Rome Statute, a number of states had to adapt their national legislation in order to allow for the domestic prosecution of international crimes according to the complementarity principle and to enable cooperation with the ICC. For instance, until the implementation of the Rome Statute, and in the absence of treaty provisions, most states did not regulate crimes against humanity.⁷⁷² Some states, like Australia for instance, notwithstanding that it had been a party to the Genocide Convention since 1949, did not criminalize genocide in its domestic law until 2002 when it adopted legislation implementing the Rome Statute.⁷⁷³ Moreover, only since 2010 have war crimes been established in the Swiss Criminal Code; crimes against humanity were criminalized for the first time in Switzerland on 1 January 2011.⁷⁷⁴

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The coming into force of the Rome Statute has also provided an important impetus for many countries to introduce changes into their law with regard to

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⁷⁷⁰ See Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, at 989.

⁷⁷¹ Werle, *Principles of International Criminal Law*, at 17.

⁷⁷² Belgium, for instance, adopted a law on international humanitarian in 1993, but it was only in 1999 that the law was amended to include crimes against humanity and genocide. Likewise, Costa Rica did not define crimes against humanity or war crimes until 2002.

⁷⁷³ See B. Saul, ‘The International Crime of Genocide in Australian Law’, 22 *Sydney Law Review* (December 2000) 527-559; B. Saul, *The Implementation of the Genocide Convention at the National Level*, at 82.

⁷⁷⁴ See Swiss Federal Government, *Message relatif à la modification de lois fédérales en vue de la mise en oeuvre du Statut de Rome de la Cour pénale internationale*, FF 2008 3461, 23 April 2008, available in French online at <https://www.admin.ch/opc/fr/federal-gazette/2008/3461.pdf> (last visited 1 August 2017). On 18 June 2010, a new Law was adopted, entitled “*Loi fédérale portant modification de lois fédérales en vue de la mise en oeuvre du Statut de Rome de la Cour pénale internationale du 18 juin 2010*”. Since 1 January 2011, crimes against humanity have been punishable under Swiss law per Art. 264a of the Criminal Code. The issue of the absence of domestic criminalization of international crimes in universal jurisdiction cases will be addressed in detail in Part III, Chapter 1, Section III.

the universal jurisdiction principle.⁷⁷⁵ Even though the Rome Statute does not as such require the exercise of universal jurisdiction,⁷⁷⁶ the ICC and its complementarity regime have – at least to some extent – served as an incentive for states to establish universal jurisdiction.⁷⁷⁷ For instance, before the implementation of the Rome Statute, a number of states did not provide for universal jurisdiction over genocide, because the Genocide Convention does not specifically require state parties to do so.⁷⁷⁸

2. *Universal jurisdiction legislation over core crimes*

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With respect to implementing legislation, having ratified the Rome Statute, certain states have also enacted special legislation, while others have modified their criminal codes. The first option was adopted in most common law countries, namely in Canada,⁷⁷⁹ New Zealand,⁷⁸⁰ South Africa,⁷⁸¹ Switzerland,⁷⁸² the United Kingdom,⁷⁸³ Cyprus,⁷⁸⁴ and Kenya⁷⁸⁵ and in some civil law countries, namely Germany,⁷⁸⁶ Korea,⁷⁸⁷ and Portugal.⁷⁸⁸ These pieces of legislation generally incorporate the ICC's definition of crimes and provide for general

⁷⁷⁵ See J. Rikhof, 'Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity', in Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (2010) 7-81, at 21.

⁷⁷⁶ For a discussion on the relationship between the ICC's jurisdiction and universal jurisdiction, see Part I.

⁷⁷⁷ Kleffner, *supra* note 763, at 107.

⁷⁷⁸ Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses', 23(4) *Human Rights Quarterly* (November, 2001) 940-974, at 953.

⁷⁷⁹ Crimes Against Humanity and War Crimes Act, June 24 2000.

⁷⁸⁰ International Crimes and International Criminal Court Act, 6 September 2000. Sections 9, 10 and 11 define the crimes. Section 12 provides for "General principles of criminal law". Section 8 provides *inter alia* for universal jurisdiction.

⁷⁸¹ International Criminal Court Act 27 of 2002.

⁷⁸² See Art. 264m of the Swiss Penal Code.

⁷⁸³ International Criminal Court Act 2001, 11 May 2001.

⁷⁸⁴ See Permanent Mission of the Republic of Cyprus to the United Nations, *The scope and application of the principle of universal jurisdiction by the Republic of Cyprus*, 8 April 2011, available online at http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Cyprus.pdf (last visited 1 August 2017).

⁷⁸⁵ See The Kenyan International Crimes Act 2008.

⁷⁸⁶ Act to Introduce the German Code of Crimes Against International Law (CCAIL).

⁷⁸⁷ See Act on Punishment of Crimes under the Jurisdiction of the ICC, promulgated its implementing legislation of the Rome Statute on 21 December 2007 as Law No. 8719.

⁷⁸⁸ See Law n° 31/2004 adapting Portuguese criminal legislation to the Statute of the International Criminal Court, available online at http://www.legal-tools.org/uploads/tx_tpd/Portugal_Adaptation_of_Criminal_Legislation_to_ICC_Statute_2004_06.pdf (last visited 1 August 2017).

principles of law. Many of these legislations also provide for universal jurisdiction over ICC crimes, subject to a number of conditions, in particular the presence of the suspect on the territory of the state. This is for instance the case of Argentina,⁷⁸⁹ Canada,⁷⁹⁰ Croatia,⁷⁹¹ Germany,⁷⁹² Kenya,⁷⁹³ Korea,⁷⁹⁴ Mauritius,⁷⁹⁵ the Netherlands,⁷⁹⁶ the Philippines,⁷⁹⁷

⁷⁸⁹ See Art. 3 d) of the Argentinean Rome Statute Implementation Law of 2007 which states that Argentine courts shall exercise jurisdiction over those who commit crimes abroad, as long as it is so provided for in treaties and international conventions to which Argentina is a party. Argentina is party to the Geneva Conventions and Additional Protocols; See also Art. 4 of the Argentinean Implementation of the Rome Statute Act 2007, which provides for universal jurisdiction over genocide, crimes against humanity and war crimes, if the suspect is found on the territory of Argentina and is not extradited or surrendered to the ICC.

⁷⁹⁰ See Crimes Against Humanity and War Crimes Act on June 24, 2000, which inter alia officially criminalizes genocide, crimes against humanity and war crimes and which allows Canada to exercise universal jurisdiction if the suspect is present in Canada.

⁷⁹¹ Art. 10(2) of the Law on the implementation of the Statute of the International Criminal Court and the prosecution of criminal offences against international law of war and humanitarian law, 24 October 2003, available online at http://iccdb.webfactional.com/documents/implementations/pdf/Croatia-Law_on_implementation_of_the_Rome_Statute_updated_2004.pdf (last visited 1 August 2017).

⁷⁹² See Section 1 of the German Code of Crimes Against International Law.

⁷⁹³ Section 6(1) of the Kenyan International Crimes Act 2008 provides that "A person who, in Kenya or elsewhere, commits (a) genocide; (b) a crime against humanity; or (c) a war crime, is guilty of an offence." Section 8 (c) further states that "A person who is alleged to have committed an offence under section 6 may be tried and punished in Kenya for that offence if— [...] (c) the person is, after commission of the offence, present in Kenya."

⁷⁹⁴ Art. 3(5) of the Korean ICC Act provides for universal jurisdiction over ICC crimes committed outside Korea, provided that the foreign perpetrator is present in the territories of the Republic of Korea after having committed the crime. See K. Young Sok, 'The Korean Implementing Legislation on the ICC Statute', 10(1) *Chinese Journal of International Law* (2011) 161-170.

⁷⁹⁵ According to Art. 4(3) of the *International Criminal Court Act* 2011, "Where a person commits an international crime outside Mauritius, he shall be deemed to have committed the crime in Mauritius if he – [...] (b) is not a citizen of Mauritius but is ordinarily resident in Mauritius; [or] (c) is present in Mauritius after the commission of the crime; [...]"

⁷⁹⁶ Under Section 2 of the Netherlands Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law (International Crimes Act), "1. Without prejudice to the relevant provisions of the Criminal Code and the Code of Military Law, Dutch criminal law shall apply to: (a) anyone who commits any of the crimes defined in this Act outside the Netherlands, if the suspect is present in the Netherlands."

⁷⁹⁷ The Philippine Act on Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity was signed into law on 11 December 2009. According to Section 7 of this Act, "The State shall exercise jurisdiction over persons whether military or civilian suspected or accused of a crime defined and penalized in this Act, regardless of where the crime is committed, provided, any

Portugal,⁷⁹⁸ South Africa,⁷⁹⁹ Uganda⁸⁰⁰ and Uruguay.⁸⁰¹ It is interesting to note that the Netherlands International Criminal Courts Act does not only provide for universal jurisdiction over core crimes, but also over the crime of torture committed by a public servant or other person working in the service of the authorities in the course of his duties.⁸⁰² Furthermore, in most states, the

one of the following conditions is met: [...] The accused, regardless of citizenship or residence, is present in the Philippines.”

⁷⁹⁸ See Art. 5 of the Portuguese Law no. 31/2004 which provides that “The provisions of this law shall also be applicable to acts committed outside the national territory in cases where the perpetrator is present in Portugal and cannot be extradited or where it has been decided not to surrender the perpetrator to the International Criminal Court.”

⁷⁹⁹ South Africa adopted the International Criminal Court Act 27 of 2002, which provides for universal jurisdiction over genocide, crimes against humanity and war crimes. See Section 4(3) of the International Criminal Court Act 27 of 2002 and M. du Plessis, ‘South Africa’s Implementation of the ICC Statute: An African Example’, 5 *JICJ* (2007) 460-479, at 462. The South African Act also incorporated the ICC Statute’s definitions of the core crimes directly into South African law, following the wording of the ICC Statute.

⁸⁰⁰ See Section 18 of the Uganda International Criminal Court Bill 2006 (adopted in 2010), available online at http://www.iccnw.org/documents/Uganda-ICC_Bill_2006.pdf (last visited 1 August 2017), which states that “For the purpose of jurisdiction where an alleged offence against sections 7 to 16 [on genocide, crimes against humanity, war crimes and offences against the administration of justice] was committed outside the territory of Uganda, proceedings may be brought against a person, if [...] (d) the person is, after the commission of the offence, present in Uganda.”

⁸⁰¹ See Art. 4.2 of the *Ley Nº 18.026 Cooperación Con La Corte Penal Internacional En Materia De Lucha Contra El Genocidio, Los Crímenes De Guerra Y De Lesa Humanidad*, available in Spanish online at <http://iccdb.webfactional.com/documents/implementations/pdf/UruguayImplementation.pdf> (last visited 1 August 2017), which states that “4.2. Cuando se encontrare en territorio de la República o en lugares sometidos a su jurisdicción, una persona sospechada de haber cometido un crimen de los tipificados en los Títulos I a IV de la Parte II de la presente ley, el Estado uruguayo está obligado a tomar las medidas necesarias para ejercer su jurisdicción respecto de dicho crimen o delito, si no recibiera solicitud de entrega a la Corte Penal Internacional o pedidos de extradición, debiendo proceder a su enjuiciamiento como si el crimen o delito se hubiese cometido en territorio de la República, independientemente del lugar de su comisión, la nacionalidad del sospechado o de las víctimas. La sospecha referida en la primera parte de este párrafo debe estar basada en la existencia de la semiplena prueba.” [When a person is found on the territory of the Republic or in places subject to its jurisdiction, who is suspected of having committed a crime provided under Titles I and IV of the Part II of this law, the Uruguayan State is obligated to take the necessary measures in order to exercise its jurisdiction on the crime or offense, if it doesn’t get a request to hand it over to the International Criminal Court or an extradition request, it should proceed to prosecute as if the crime or offense had been committed in the territory of the Republic, regardless of the place of its commission, the nationality of the suspect or of the victims.]

⁸⁰² See Section 8 of the Netherlands International Crimes Act, available online at <http://www.iccnw.org/documents/NL.IntCrAct.pdf> (last visited 1 August 2017).

principle of universal jurisdiction over core crimes is provided for in the Criminal Code, while the offences are defined in a special statute.

According to the second option, core crimes are incorporated into the criminal code. The following states expressly provide for universal jurisdiction over genocide, crimes against humanity and war crimes in their criminal code or in another piece of domestic law: Australia,⁸⁰³ Burundi,⁸⁰⁴ the Democratic Republic of Congo,⁸⁰⁵ Denmark,⁸⁰⁶ Finland,⁸⁰⁷ France,⁸⁰⁸ Hungary,⁸⁰⁹

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⁸⁰³ See International Criminal Court (Consequential Amendments) Act 2002 du 27 June 2002, which amended the Australian Criminal Code Act.

⁸⁰⁴ Art. 10 of the Criminal Code of Burundi provides for universal jurisdiction over genocide, crimes against humanity and war crimes "subject to extradition conventions".

⁸⁰⁵ See *Loi modifiant et complétant certaines dispositions du Code pénal, du code de l'organisation et de la compétence judiciaires, du code pénal militaire et du code judiciaire militaire, en application du Statut de la Cour pénale internationale*, available in French online at http://iccdb.webfactional.com/documents/implementations/pdf/DRCongo_LoiDApplication_2005.pdf (last visited 1 August 2017). This law introduced genocide, crimes against humanity and war crimes into the Criminal Code of the Democratic Republic of Congo. In addition, it modified Art. 3 of the Criminal Code of the Democratic Republic of Congo, which now provides at its paragraphs 6 and 7 that "*Toute personne qui, hors du territoire national, est présumé avoir commis l'un des crimes visés aux articles 221 à 224 du présent Code, peut être poursuivie et jugée par les juridictions nationales. Dans ce cas, les poursuites ne peuvent avoir lieu que si l'inculpé ou l'un des inculpés est trouvé sur le territoire national au moment de l'ouverture de l'enquête.*"

⁸⁰⁶ See Art. 8a of the Danish Criminal Code, which states that "An act committed outside the territory of the Danish state is subject to Danish criminal jurisdiction where an act of the nature concerned is covered by the Statute of the International Criminal court, provided that the act has been committed by a person: 1) who is a Danish national or has his abode or other residence in Denmark; or 2) who is present in Denmark at the time when the charge is raised."

⁸⁰⁷ See 'Decree on the application of chapter 1, section 7 of the Criminal Code, (2), (3) and (9)', available in Permanent Mission of Finland to the United Nations, *Verbal Note*.

⁸⁰⁸ France modified its Code of Criminal Procedure in 2010 so as to include a specific provision allowing the prosecution and trial of alleged suspects of genocide, crimes against humanity and war crimes committed abroad. See Art. 689-11 of the French Code of Criminal Procedure.

⁸⁰⁹ See Section 3(2) of the Criminal Code of Hungary 2012, available in English at http://www.academia.edu/4602286/Criminal_Code_of_Hungary_2012, which provides that "Hungarian criminal law shall, furthermore, apply [...] a) to any act committed by non-Hungarian citizens abroad, if [...] ac) it constitutes a criminal act under Chapter XIII [on genocide, crimes against humanity, apartheid] or XIV [on war crimes], or any other criminal offenses which are to be prosecuted under international treaty ratified by an act of Parliament."; See also Permanent Mission of Hungary to the United Nations, 22 May 2013, available online at <http://www.un.org/en/ga/sixth/68/UnivJur/Hungary.pdf> (last visited 1 August 2017).

Lesotho,⁸¹⁰ Lithuania,⁸¹¹ Luxembourg,⁸¹² Malta,⁸¹³ Moldova,⁸¹⁴ Niger,⁸¹⁵ Norway,⁸¹⁶ Senegal,⁸¹⁷ Slovakia,⁸¹⁸ Switzerland⁸¹⁹ and Timor-Leste.⁸²⁰ It is

⁸¹⁰ See Section 92(2) of the Penal Code of Lesotho provides that “the Court shall have jurisdiction in respect of offences under this Part [genocide, crimes against humanity and war crimes] whether committed by a Lesotho citizen or a citizen of another state against a Lesotho citizen or a citizen of another state outside Lesotho.” The Penal Code of 9 March 2012 is available online at http://iccdb.webfactional.com/documents/implementations/pdf/Lesotho_-_Penal_Code_Act_2010_En_english.pdf.

⁸¹¹ Art. 7 of the Criminal Code of the Republic of Lithuania provides that “Persons shall be liable under this Code regardless of their citizenship and place of residence, also of the place of commission of a crime and whether the act committed is subject to punishment under laws of the place of commission of the crime where they commit the following crimes subject to liability under treaties: 1) crimes against humanity and war crimes (Articles 99-113).”

⁸¹² See Art. 7-4 of the Code of Criminal Procedure of Luxembourg, available online in French at <http://www.mj.public.lu>, which states that “*Lorsqu’une personne qui se sera rendue coupable à l’étranger d’une des infractions prévues par les articles 112-1, 135-1 à 135-6, 135-9, 135-11 à 135-13, 136bis à 136quinquies, 260-1 à 260-4, 379, 382-1, 382-2, 384 et 385-2 du Code pénal, n’est pas extradée, l’affaire sera soumise aux autorités compétentes aux fins de poursuites en application des règles prévues.*”

⁸¹³ See Sections 5(1)(d) and 54A of the Criminal Code of Malta, available online at http://iccdb.webfactional.com/documents/implementations/pdf/Malta_-_Criminal_Code_amended_2013_English.pdf.

⁸¹⁴ Art. 11(3) of the Criminal Code of the Republic of Moldova, available online at http://iccdb.webfactional.com/documents/implementations/pdf/Moldova_-_Criminal_Code_EN_2009.pdf (last visited 1 August 2017), provides that “If not convicted in a foreign state, foreign citizens and stateless persons without permanent domiciles in the territory of the Republic of Moldova who commit crimes outside the territory of the Republic of Moldova shall be criminally liable under this Code and shall be subject to criminal liability in the territory of the Republic of Moldova provided that the crimes committed are adverse [...] to the peace and security of humanity, or constitute war crimes including crimes set forth in the international treaties to which the Republic of Moldova is a party.” The provisions referred to in this provision are contained in Chapter 1 entitled “Crimes Against the Peace and Security of Humanity, War Crimes” (Arts 135 ff.). It should be noted that this Chapter of the Criminal Code of Moldova was modified on 4 April 2013 by the Law no. 45 amending the Penal Code and now includes genocide, crimes against humanity and war crimes. See Republic of Moldova, Permanent Mission to the United Nations, *The application of the principle of universal jurisdiction in the Republic of Moldova*, 8 May 2013, available online at <http://www.un.org/en/ga/sixth/68/UnivJur/Moldova.pdf> (last visited 1 August 2017).

⁸¹⁵ See Arts 208-1 [genocide], 208-2 [crimes against humanity], 208-3 [war crimes] and 208-8 of the Penal Code of Niger of 2003 as amended by the law no. 2008-18, available in French online at [http://www.icrc.org/applic/ihl/ihl-nat.nsf/0/3e747f82e6028e32c1257084002f7245/\\$FILE/Niger%20-%20Criminal%20Code%202008%20fr.pdf](http://www.icrc.org/applic/ihl/ihl-nat.nsf/0/3e747f82e6028e32c1257084002f7245/$FILE/Niger%20-%20Criminal%20Code%202008%20fr.pdf) (last visited 1 August 2017). Art. 208-8 states that “*Les juridictions nigériennes sont compétentes pour connaître des infractions prévues au présent Chapitre, indépendamment du lieu où celles-ci auront été commises.*”

interesting to note that the Finnish Criminal Code contains a provision on universal jurisdiction, which refers to a Decree providing inter alia that genocide, crimes against humanity and war crimes are subject to the provision.⁸²¹

⁸¹⁶ See Act of 20 May 2005 No. 28, which introduced a new chapter 16 entitled "Genocide, Crimes Against Humanity and War Crimes" into the Norwegian Penal Code (Sections 101 ff. of the Norwegian Penal Code). See also Section 5, 3rd paragraph of the Norwegian Penal Code, which states that criminal legislation of Norway also applies to war crimes, genocide and crimes against humanity "when the person is staying in Norway, and the maximum penalty for the act is imprisonment for a term exceeding one year."

⁸¹⁷ In 2007, Senegal modified its criminal code to incorporate the crimes of genocide, crimes against humanity and war crimes (Articles 431-1 [genocide]; 431-2 [crimes against humanity] and 431-3 [war crimes]). See Loi n° 2007-02 du 12 février 2007 modifiant le Code pénal, available in French online at http://www.geneva-academy.ch/RULAC/pdf_state/Law-of-31-January-2007-modifying-the-Penal-Code.pdf (last visited 1 August 2017). Art. 431-6 of the Penal Code of Senegal provides that "Nonobstant les dispositions de l'article 4 du présent code, tout individu peut être jugé ou condamné en raison d'actes ou d'omissions visés au présent chapitre et à l'article 295-1 du Code pénal, qui au moment et au lieu où ils étaient commis étaient tenus pour une infraction pénale d'après les principes généraux de droit reconnus par l'ensemble des nations, qu'ils aient ou non constitué une transgression du droit en vigueur à ce moment et dans ce lieu."

⁸¹⁸ See Section 5(a) of the Criminal Code of Slovakia, available online at http://iccdb.webfactional.com/documents/implementations/pdf/Criminal_Code_Slovakia_EN_Slovak_2010.pdf, in relation to Sections 418 (genocide), 425 (crimes against humanity) and 426 ff. (war crimes) of the Criminal Code.

⁸¹⁹ Section 264m of the Swiss Criminal Code provides that "A person who carries out an act under Title Twelve^{bis} [on genocide and crimes against humanity], Title Twelve^{ter} [on war crimes] or Article 264k while abroad is guilty of an offence if he is in Switzerland and is not extradited to another State or delivered to an international criminal court whose jurisdiction is recognised by Switzerland."

⁸²⁰ Art. 8 of the Penal Code of the Democratic Republic of Timor Leste, available in English online at http://iccdb.webfactional.com/documents/implementations/pdf/Criminal_Code_-_Law_19-2009_Timor_Leste_EN_2009.pdf (last visited 1 August 2017), provides that "Except as otherwise provided in treaties and conventions, Timorese criminal law is applicable to acts committed outside of the national territory of Timor-Leste in the following cases:[...] b) They constitute crimes described in articles 123 to 135, 161 to 169 and 175 to 178, as long as the perpetrator is found in Timor-Leste and cannot be extradited or a decision has been made not to do so;". Genocide, crimes against humanity and war crimes are criminalized at Articles 123 to 130 of the Penal Code.

⁸²¹ See *Decree on the application of chapter 1, section 7 of the Criminal Code (627/1996)*, Section 1: "[1] In the application of chapter 1, section 7 of the Criminal Code, the following offences are deemed international offences: [...]

(2) a crime against humanity, aggravated crime against humanity, war crime and aggravated war crime defined in the Charter of Rome of the International Criminal Court (Treaties of Finland 56/2002) or other corresponding punishable criminal act which should be deemed a grave breach of the Geneva

It should be noted that some states have incorporated core crimes into their domestic legislation but provide for jurisdiction over core crimes committed abroad by foreigners, only if they are resident of the state. This is the case for instance of Belgium,⁸²² France,⁸²³ Spain⁸²⁴ and the United Kingdom.⁸²⁵ In

Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Relative to the Treatment of Prisoners of War, and Relative to the Protection of Civilian Persons in Time of War (Treaties of Finland 8/1955), as well as the Protocol Additional to the Geneva Conventions, and relating to the protection of victims of international armed conflicts (Treaties of Finland 82/1980), (286/2008)

(3) genocide and the preparation of genocide referred to in the Convention on the Prevention and Punishment of the Crime of Genocide (Treaties of Finland 5/1960), [...]

[2] Also a punishable attempt of and punishable participation in an offence referred to in subsection 1 is deemed an international offence."

⁸²² See Art. 6 of the *Titre préliminaire du Code de procédure pénale*, which provides that "*Pourra être poursuivie en Belgique tout Belge ou toute personne ayant sa résidence principale sur le territoire du Royaume qui, hors du territoire du royaume, se sera rendu coupable : [...] (1°bis. d'une violation grave du droit international humanitaire définie dans le livre II, titre Ibis, du Code pénal);*". Title Ibis of the Criminal Code of Belgium is entitled "Serious violations of international humanitarian law" and criminalizes genocide (Article 136bis), crimes against humanity (Article 136ter), and war crimes (Article 136quater).

⁸²³ See Art. 689-11 of the French Code of Criminal Procedure, which provides that "*Peut être poursuivie et jugée par les juridictions françaises toute personne qui réside habituellement sur le territoire de la République et qui s'est rendue coupable à l'étranger de l'un des crimes relevant de la compétence de la Cour pénale internationale en application de la convention portant statut de la Cour pénale internationale signée à Rome le 18 juillet 1998, si les faits sont punis par la législation de l'Etat où ils ont été commis ou si cet Etat ou l'Etat dont elle a la nationalité est partie à la convention précitée.*" It should be noted that a new Art. 689-11, which was adopted by the French Senate on 26 February 2013, proposed to delete the requirement of residence of the suspect in France and merely provide for the presence of the suspect in France.

⁸²⁴ See Art. 23 (4) of *Ley Orgánica 1/2014, de 13 de marzo, de modificación de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, relativa a la justicia universal*, available online in Spanish at http://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-2709 (last visited 1 August 2017), which provides that "*4. Igualmente, será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la ley española, como alguno de los siguientes delitos cuando se cumplan las condiciones expresadas: a) Genocidio, lesa humanidad o contra las personas y bienes protegidos en caso de conflicto armado, siempre que el procedimiento se dirija contra un español o contra un ciudadano extranjero que resida habitualmente en España, o contra un extranjero que se encontrara en España y cuya extradición hubiera sido denegada por las autoridades españolas.*"

⁸²⁵ According to Section 51 § (2)(a) of the International Criminal Court Act 2001, available online at http://iccdb.webfactional.com/documents/implementations/pdf/UK_-_International_Criminal_Court_Act_2001_2007_.pdf (last visited 1 August 2017), genocide, crimes against humanity and war crimes

particular, in Belgium, jurisdiction can also be exercised against foreigners who committed core crimes abroad, if the victim of the crime is a person who has legally resided in Belgium for three years.⁸²⁶

Other states do not expressly provide for universal jurisdiction over core crimes but have provisions defining these crimes and contain a general clause for the exercise of universal jurisdiction over ordinary crimes that, *a fortiori*, include genocide, crimes against humanity and war crimes. This is for instance the case of Macedonia.⁸²⁷

However, it should be noted that not all states provide for universal jurisdiction over core crimes even if they are party to the Rome Statute. Greece, for instance, at Article 2 of the “Adjustment of domestic law provisions to the provisions of the Statute of the International Criminal Court ratified by Law 3003/2002” does not provide for universal jurisdiction over the crimes subject to the ICC Statute.⁸²⁸ The Estonian Criminal Code, while containing provisions on crimes against humanity,⁸²⁹ genocide,⁸³⁰ offences against peace⁸³¹ and war

committed outside the United Kingdom can be prosecuted in the United Kingdom if they are committed by a UK resident. However, it should be noted that the Geneva Conventions Act 1957, available online at <http://www.legislation.gov.uk/ukpga/Eliz2/5-6/52>, gives the United Kingdom courts jurisdiction over grave breaches of the four Geneva Conventions and the Additional Protocol I and III.

⁸²⁶ See Art. 10 of the *Titre préliminaire du Code de procédure pénale*, which provides that “(Hormis dans les cas visés aux articles 6 et 7, § 1er, pourra être poursuivi en Belgique l'étranger qui aura commis hors du territoire du Royaume :) : [...] (1^obis. une violation grave du droit international humanitaire visée au livre II, titre Ibis du Code pénal, commise contre une personne qui, au moment des faits, est un ressortissant belge (ou un réfugié reconnu en Belgique et y ayant sa résidence habituelle, au sens de la Convention de Genève de 1951 relative au statut des réfugiés et son Protocole additionnel,) ou une personne qui, depuis au moins trois ans, séjourne effectivement, habituellement et légalement en Belgique.”

⁸²⁷ See Art. 119(2) of the Criminal Code of Macedonia, which provides that “The criminal legislature is also applicable to a foreigner who commits a crime abroad, against a foreign country or a foreigner, who according to that legislature may be sentenced to five years of imprisonment or to a more severe punishment, when he finds himself on the territory of the Republic of Macedonia, and when he is not extradited to the foreign country.” Genocide, crimes against humanity and war crimes are criminalized in Section 34 entitled “Crimes Against Humanity and International Law” at Arts 403 and ff. of the Criminal Code of Macedonia.

⁸²⁸ See Permanent Mission of Greece to the United Nations, *Verbal Note*, 30 April 2013, available online at: <http://www.un.org/en/ga/sixth/68/UnivJur/Greece.pdf> (last visited 1 August 2017).

⁸²⁹ See § 89 of the Estonian Penal Code. An English translation of the Code is available online at <https://www.icrc.org/ihl-nat> (last visited 1 August 2017).

⁸³⁰ See § 90 of the Estonian Penal Code.

⁸³¹ See § 91 ff. of the Estonian Penal Code.

crimes,⁸³² only establishes universal jurisdiction over crimes “if the punishability of respective act arises from an international agreement binding on Estonia”,⁸³³

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Some states, including state parties to the Rome Statute, expressly provide for universal jurisdiction only over certain of the core crimes. Paraguay, for instance, only expressly provides for universal jurisdiction over genocide, but does not do so for war crimes and crimes against humanity, notwithstanding that it ratified the Rome Statute in 2001.⁸³⁴ Andorra provides for universal jurisdiction over genocide and war crimes but not over crimes against humanity.⁸³⁵ This is also the case for Costa Rica⁸³⁶. Likewise, until 1 July 2014, the Swedish Criminal Code provided for universal jurisdiction over crimes

⁸³² See § 94 ff. of the Estonian Penal Code.

⁸³³ § 8 of the Estonian Penal Code. See also Permanent Mission of the Republic of Estonia to the United Nations, 26 April 2010, available online at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Estonia.pdf (last visited 1 August 2017).

⁸³⁴ Art. 8 of the Paraguayan Criminal Code states as follows: “Article 8. Offences committed abroad in respect of legal assets enjoying universal protection 1. Paraguayan criminal law shall also apply to the following offences committed abroad: (1) Offences involving explosives, as set out in article 203, subparagraph 1 (2); (2) Attacks against civil aviation and maritime traffic, as set out in article 213; (3) Human trafficking, as set out in article 129; (4) Illicit trafficking in narcotics and dangerous drugs, as set out in articles 37 to 45 of Act No. 1.340/88; (5) Offences involving the authenticity of currency and securities, as set out in articles 264 to 268; (6) Genocide, as provided for in article 319; (7) Offences that Paraguay is required to prosecute under an international treaty currently in force, even when committed abroad.” See Article 8 of the Penal Code of Paraguay. Moreover, see UN GA, *The scope and application of the principle of universal jurisdiction*, Report of the Secretary-General, A/69/174, 23 July 2014, at 4. After ratifying the Rome Statute in 2001, “on 10 December 2002, through Decree No. 19.685, an executive branch inter-agency committee, whose members were appointed by the relevant ministries and other government entities, was established to consider and assess the adoption of legislation to ensure the proper functioning of the system and compliance with the obligations under the Rome Statute, with subsequent input from the Supreme Court of Justice and the Office of the Public Prosecutor.” “The efforts of that inter-agency committee resulted in the draft bill for the implementation of the Rome Statute, which was submitted to the legislature by the executive branch, under note No. 938 of 7 January 2013.” See UN GA, *The scope and application of the principle of universal jurisdiction*, Report of the Secretary-General, A/69/174, 23 July 2014, at 5.

⁸³⁵ See Art. 8(8) of the 2005 Criminal Code of Andorra, available in French at http://iccdb.webfactional.com/documents/implementations/pdf/Andorra-Penal_code.pdf (last visited 1 August 2017).

⁸³⁶ See Criminal Prosecution to Punish War Crimes and Crimes Against Humanity No. 8272, which amended the Penal Code of Costa Rica, available in English online in Spanish at http://iccdb.webfactional.com/documents/implementations/pdf/Costa_Rica_Codigo_penal.pdf (last visited 1 August 2017). Article 7 of the Penal Code provides for universal jurisdiction over genocide and war crimes.

against international law, which per Swedish legislation was understood to include war crimes⁸³⁷ and genocide⁸³⁸ but not crimes against humanity.⁸³⁹ Azerbaijan does not provide for universal jurisdiction over crimes against humanity as such.⁸⁴⁰ In a similar vein, the Bulgarian Criminal Code provides that “The Criminal Code shall also apply to foreign citizens who have committed abroad crimes against peace and humanity, whereby the interests of another state or foreign citizens have been affected”.⁸⁴¹ “Crimes against peace and humanity” include crimes against the laws and customs of war,⁸⁴²

⁸³⁷ See Chapter 2, Section 3(6) in relation to Chapter 22, Section 6 of the Swedish Criminal Code, available in English online at <http://www.government.se/contentassets/5315d27076c942019828d6c36521696e/swedish-penal-code.pdf> (last visited 1 August 2017), which provides that “Even in cases other than those listed in Section 2, crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court: [...] 6. if the crime is hijacking, maritime or aircraft sabotage, airport sabotage, an attempt to commit such crimes, a crime against international law, unlawful dealings with chemical weapons, unlawful dealings with mines or false or careless statement before an international court.”

⁸³⁸ See 1964 Genocide Act. According to the information provided by the Permanent Mission of Sweden to the United Nations (7 May 2012), “Sweden also exercises universal jurisdiction, inter alia, over the crime of genocide, by virtue of the 1964 Genocide Act.”. The Genocide Act was replaced on 1 July 2014 by the new Swedish Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes.

⁸³⁹ See M. Klamberg, ‘International Criminal Law in Swedish Courts: The Principle of Legality in the *Arklöv* Case’, 9 *International Criminal Law Review* (2009) 395–409, at 398. The new Swedish Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes entered into force on 1 July 2014. The Act replaces the Genocide Act and the provision on international crime in the Penal Code that will cease to apply. It “strengthens the protection against war crimes committed in non-international armed conflicts, since the predominant part of the regulation concerning war crimes is applicable in international as well as non-international armed conflicts. The Act also introduces crimes against humanity as a new crime in Swedish legislation. Swedish courts have universal jurisdiction for the crimes covered by the Act.”; See UN GA, *The scope and application of the principle of universal jurisdiction*, Report of the Secretary-General, A/69/174, 23 July 2014.

⁸⁴⁰ See Art. 12.3 of the Criminal Code of Azerbaijan, English translation available online at <http://www.legislationline.org/documents/section/criminal-codes> (last visited 1 August 2017), which provides for universal jurisdiction over crimes against the peace and security including acts deemed part of crimes against humanity such as extermination, deportation, gender violation, persecution, enforced disappearance; See Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, at 663; It should be noted that Azerbaijan is not a State party to the ICC Statute.

⁸⁴¹ Art. 6(1) of the Bulgarian Criminal Code.

⁸⁴² See Arts 410 ff. of the Bulgarian Criminal Code.

genocide and apartheid.⁸⁴³ The Code does not define crimes against humanity as such.

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The United States is not party to the Rome Statute. Until 2007, genocide was subject to US jurisdiction only if it was committed within the United States or by American citizens. Genocide is now subject to universal jurisdiction if the suspect is present in the United States.⁸⁴⁴ War crimes committed abroad, however, are punishable only if the alleged perpetrator or the victim is a United States national or a member of the US armed forces.⁸⁴⁵ The United States does not provide for universal jurisdiction over crimes against humanity.⁸⁴⁶

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A number of states only provide for universal jurisdiction over war crimes. This is for instance the case of Barbados,⁸⁴⁷ Botswana,⁸⁴⁸ Malawi,⁸⁴⁹ Namibia,⁸⁵⁰

⁸⁴³ See Art. 416 of the Bulgarian Criminal Code. According to the information provided by Bulgaria to the United Nations on the scope and application of the principle of universal jurisdiction, "the penal law applies to aliens who have committed abroad crimes against peace and humanity, including crimes against the laws and customs of war, genocide and apartheid, thereby affecting the interest of another State or of foreign nationals." See Bulgaria, *Information from the Republic of Bulgaria in implementation of Operative Paragraph 1 of Resolution 64/117 of 16 December 2009 of the UN GA entitled "The Scope and Application of the Principle of Universal Jurisdiction*, available online at [http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Bulgaria .pdf](http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Bulgaria.pdf) (last visited 1 August 2017).

⁸⁴⁴ See 18 U.S.C. § 1091 (e)(2)(D): (e) "There is jurisdiction over the offenses described in subsections (a), (c), and (d) if— [...] (2) regardless of where the offense is committed, the alleged offender is— [...] (D) present in the United States."

⁸⁴⁵ 18 U.S.C. § 2441 (2006).

⁸⁴⁶ See Mary Kate Whalen, 'U.S. Role in the Prevention and Prosecution of and Response to Crimes Against Humanity', in M. Bergsmo and T. SONG (eds), *On the Proposed Crimes Against Humanity Convention* (Brussels: Torkel Opsahl Academic EPublisher, 2014) 303 ff.

⁸⁴⁷ See Section 3(2) of the Geneva Conventions Act, 1980.

⁸⁴⁸ See Section 3(1) of the Geneva Conventions Act 1970, available online at http://iccdb.webfactional.com/documents/implementations/pdf/Botswana-Geneva_Convention_Act.pdf. See also Permanent Mission of the Republic of Botswana to the United Nations, *Scope and Application of the Principle of Universal Jurisdiction – Information and Observations of the Republic of Botswana*, 31 May 2011, available online at http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Bostwana.pdf (last visited 1 August 2017).

⁸⁴⁹ Section 4(1) of the Geneva Conventions Act 1967.

⁸⁵⁰ See Section 2 of the Geneva Conventions Act 2003 of Namibia, available online at [http://iccdb.webfactional.com/documents/implementations/pdf/Namibia-Geneva_Conventions_Act_English .pdf](http://iccdb.webfactional.com/documents/implementations/pdf/Namibia-Geneva_Conventions_Act_English.pdf) (last visited 26 April 2016).

Nigeria,⁸⁵¹ the Seychelles⁸⁵² and Zimbabwe.⁸⁵³ In addition, according to the 2009 *AU-EU Expert Report on the Principle of Universal Jurisdiction*,⁸⁵⁴ the following states have ratified the Geneva Conventions and accept universal jurisdiction on this basis, without however having implemented legislation: Algeria, Angola, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Côte d'Ivoire, the Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Gabon, Libya, the Republic of Congo and Tunisia.

However, it should be noted that a number of state parties have draft laws on implementation of the Rome Statute that have not yet been adopted. Bolivia, for instance, in its draft law on the implementation of the Rome Statute of the ICC, provides for universal jurisdiction over genocide, crimes against humanity and violations of international humanitarian law.⁸⁵⁵

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B. A general clause for treaty-based crimes

Most state legislations contain a general clause providing for universal jurisdiction over crimes contained in international treaties to which the state is party. This is generally universal jurisdiction based on the obligations arising from international treaties. This is for instance the case of Armenia,⁸⁵⁶

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⁸⁵¹ See Section 3 of the Geneva Conventions Act 1960, available online in English at [https://www.icrc.org/ihl-nat.nsf/0/c458f16c39f42631412565b80052809d/\\$FILE/Geneva%20Conventions%20Act,%201960.pdf](https://www.icrc.org/ihl-nat.nsf/0/c458f16c39f42631412565b80052809d/$FILE/Geneva%20Conventions%20Act,%201960.pdf) (last visited 1 August 2017).

⁸⁵² Section 3(1) of the Geneva Convention Act 1985, available online in English at http://www.icrc.org/customary-ihl/eng/docs/v2_cou_sc_rule129 (last visited 26 April 2016).

⁸⁵³ Section 3(1) of the Geneva Conventions Act 2001, available online at http://www.geneva-academy.ch/RULAC/pdf_state/GENEVA-CONVENTIONS-ACT-11-06.pdf (last visited 1 August 2017).

⁸⁵⁴ See Council of the European Union, *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, Brussels, 16 April 2009, at 13.

⁸⁵⁵ Article 5 reads as follows "This Act shall apply (...) to genocide, crimes against humanity and violations of international humanitarian law as described in this Act, even if they were not committed in Bolivian territory or by Bolivian citizens or national interests or have any other relation to the Bolivian State except in so far as they are offences that affect the international as a whole." See Permanent Mission of the Plurinational State of Bolivia to the United Nations, Information and Observations of the Plurinational State of Bolivia on General Assembly resolution 64/117 "The scope and application of the principle of universal jurisdiction", MBNU/ONU/055/2010, New York, 10 May 2010, available online at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Bolivia_E.pdf (last visited 1 August 2017).

⁸⁵⁶ See Section 15(3) of the Criminal Code of the Republic of Andorra, which provides that "Foreign citizens and stateless persons not permanently residing in the Republic of Armenia, who committed a crime outside the territory of the Republic of Armenia, are subject to criminal liability under the

Andorra,⁸⁵⁷ Austria,⁸⁵⁸ Azerbaijan,⁸⁵⁹ Belarus,⁸⁶⁰ Belgium,⁸⁶¹ Bolivia,⁸⁶²
Bosnia and Herzegovina,⁸⁶³ Brazil,⁸⁶⁴ Bulgaria,⁸⁶⁵

Criminal Code of the Republic of Armenia, if they committed: 1) such crimes which are provided in an international treaty of the Republic of Armenia”.

⁸⁵⁷ See Art. 8(8) of the 2005 Criminal Code of Andorra, available in French at http://iccdb.webfactional.com/documents/implementations/pdf/Andorra-Penal_code.pdf (last visited 1 August 2017). It states that “*La loi pénale andorrane est appliquée aux délits essayés ou consommés hors du territoire de la Principauté d’Andorre auxquels il est prévu, conformément à la loi andorrane, une peine dont la limite maximale soit supérieure à six ans d’emprisonnement et pouvant être qualifiés comme génocide, tortures, terrorisme, trafic de drogues, trafic d’armes, falsification de monnaie, blanchiment d’argent et de valeurs, piraterie, appropriation illicite d’aéronefs, esclavage, trafic d’enfants, délits sexuels contre des mineurs et les autres délits où un traité international en vigueur dans la Principauté le prévoirait ainsi, pourvu que le responsable n’ait pas été acquitté, gracié ou condamné pour l’infraction ou, dans ce dernier cas, il n’ait pas purgé la peine.*”

⁸⁵⁸ See Art. 64 § 6 of the Austrian Penal Code, which states that the criminal laws of Austria are also applicable to offences committed in a foreign country without consideration for the law in force in the place where they were committed when Austria is under the obligation to prosecute them.

⁸⁵⁹ See Art. 12.3 of the Criminal Code of Azerbaijan, English translation available online at <http://www.legislationline.org/documents/section/criminal-codes> (last visited 1 August 2017). See also “Information on the scope and application of the principle of universal jurisdiction”, available online at: [http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Azerbaijan%20\(R%20to%20E\).pdf](http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Azerbaijan%20(R%20to%20E).pdf) (last visited 1 August 2017).

⁸⁶⁰ According to the “Information from the Republic of Belarus on the scope and application of the principle of universal jurisdiction” (available online at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Belarus_E.pdf (last visited 1 August 2017)); See Art. 6, para. 3 of the Criminal Code which sets out the universality principle for a number of offences including “offences committed outside Belarus which are prosecutable on the basis of an international treaty by which Belarus is bound.”

⁸⁶¹ Preliminary chapter of the Code of Criminal Procedure, art. 10, 1 bis and art. 12 bis.

⁸⁶² See Section 1(7) of the Bolivian Penal Code, available online at: http://iccdb.webfactional.com/documents/implementations/pdf/Bolivia-Codigo_Penale_y_Procedimento_Penal.pdf (last visited on 1 August 2017), which states that “This Code shall apply to [...] 7. Crimes that Bolivia is required by treaty or convention to punish even if they were not committed on its territory.” According to the treaties to which Bulgaria is party, these crimes are torture, unlawful seizure of aircraft, taking of hostages and terrorism.

⁸⁶³ See Art. 12(1)(c) of the Criminal Code of Bosnia and Herzegovina.

⁸⁶⁴ See Brazil, General Assembly, Sixth Committee, Item 84: ‘The Scope and Application of the Principle of Universal Jurisdiction’, 18 October 2013, “Under our system, universal jurisdiction can be exerted by the national tribunals in relation to the crime of genocide and the crimes to which Brazil has obliged itself to repress through treaties or conventions, such as torture.”

⁸⁶⁵ See Art. 6(2) of the Bulgarian Penal Code, which states “The Criminal Code shall also apply to other crimes committed by foreign citizens abroad, where this is stipulated in an international agreement, to which the Republic of Bulgaria is a party.”

China,⁸⁶⁶ Costa Rica,⁸⁶⁷ Croatia,⁸⁶⁸ Cyprus,⁸⁶⁹ the Czech Republic,⁸⁷⁰
Denmark,⁸⁷¹ Estonia,⁸⁷² Ethiopia,⁸⁷³ Germany,⁸⁷⁴

- ⁸⁶⁶ Art. 9 of the Penal Code of China provides that "This law is applicable to the crimes specified in international treaties to which the PRC is a signatory state or with which it is a member and the PRC exercises criminal jurisdiction over such crimes within its treaty obligations." The Criminal Law of the People's Republic of China of 1979 as amended in 1997 is available in English online at http://iccdb.webfactual.com/documents/implementations/pdf/China-Criminal_code.pdf (last visited 1 August 2017); See also Li and Guo, 'China', in Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford: OUP, 2011).
- ⁸⁶⁷ See Art. 7 of the Penal Code of Costa Rica which states that "Independently of the legislation in force in the territory on which the punishable crime is committed, and independently of the perpetrator's nationality, those who commit acts of piracy or genocide; falsify coins, credit instruments, bank notes or any other bearer papers; are involved in the slave trade or in trafficking women or children; are involved in trafficking drugs or obscene material; or who commit any other punishable acts in violation of human rights and international humanitarian law as recognised in the treaties to which Costa Rica is party or in this Code, shall be prosecuted under Costa Rican law."
- ⁸⁶⁸ Art. 14(1) of the Criminal Code of Croatia provides that "(1) The criminal legislation of the Republic of Croatia shall apply to anyone who, outside its territory, commits: [...] - a criminal offence which the Republic of Croatia is bound to punish according to the provisions of international law and international treaties or intergovernmental agreements; [...]"
- ⁸⁶⁹ See Section 5(e), 5th paragraph "Offences for which the Republic's laws are applicable by virtue of any binding international convention or treaty."
- ⁸⁷⁰ See Section 9 of Criminal Code of the Czech Republic entitled "Jurisdiction under International Treaty Obligation" which states as follows: "(1) The liability to punishment for an act shall also be considered under the Czech law in cases stipulated in a promulgated international treaty which is part of the legal order."
- ⁸⁷¹ See section 8(5) of the Danish Criminal Code, which states as follows: "The following acts committed outside the territory of the Danish state, shall also come within Danish criminal jurisdiction, irrespective of the nationality of the perpetrator [...] 5) where the act is covered by an international convention in pursuance of which Denmark is under an obligation to start legal proceedings."
- ⁸⁷² See § 8 of the Estonian Penal Code which provides that "Regardless of the law of the place of commission of an act, the penal law of Estonia shall apply to an act committed outside the territory of Estonia if the punishability of the act arises from an international agreement binding on Estonia."
- ⁸⁷³ Art. 17(1) of the Ethiopian Criminal Code provides that "any person who has committed outside Ethiopia (a) a crime against international law or an international crime specified in Ethiopian legislation, or an international treaty or convention to which Ethiopia has adhered [...] shall be liable to trial, in Ethiopia in accordance with the provisions of this Code and subject to the general conditions mentioned hereinafter (Arts. 19 and 20(2)) unless a final judgment has been given after being prosecuted in the foreign country". An English translation of the Code is available online at <http://iccdb.webfactual.com/documents/implementations/pdf/CriminalCode.pdf>.
- ⁸⁷⁴ Section 6(9) of the German Criminal Code, available online in English at http://iccdb.webfactual.com/documents/implementations/pdf/German_-_Criminal_Code_amend_Oct_2009.pdf (last visited 1 August 2017), states that "German criminal law shall further apply, regardless of

Ghana,⁸⁷⁵ Greece,⁸⁷⁶ Guatemala,⁸⁷⁷ Hungary,⁸⁷⁸ Israel,⁸⁷⁹ Japan,⁸⁸⁰ Latvia,⁸⁸¹

the law of the locality where they are committed, to the following offences committed abroad: [...] offences which on the basis of an international agreement binding on the Federal Republic of Germany must be prosecuted even though committed abroad”.

⁸⁷⁵ See Section 56(4)(n) of the Ghana Courts Act 1993, available online in English at <http://ghanalegal.com/?id=3&law=116&t=ghana-laws> (last visited 1 August 2017).

⁸⁷⁶ See Art. 8 k) of the Greek Penal Code, which provides that “Greek penal laws apply for Greeks and aliens, irrespective of the laws of the place where the crime was committed, for the following acts committed abroad: [...] (k) Any other crime covered by special provisions or international conventions that are signed and ratified by the Greek state, providing for the application of the penal laws of Greece.”; See Permanent Mission of Greece to the United Nations, 30 April 2013; Excerpts of the Greek Penal Code are also available in English online at http://www.unodc.org/res/cld/document/grc/penal_code_excerpts_html/Greece_Criminal_Code_Excerpts.pdf (last visited 1 August 2017).

⁸⁷⁷ See Section 5 of the Penal Code of Guatemala which provides that “*Este Código también se aplicará: [...] 5o. Por delito que, por tratado o convención, deba sancionarse en Guatemala, aun cuando no hubiere sido cometido en su territorio.*”, available online in Spanish at http://iccdb.webfactional.com/documents/implementations/pdf/Guatemala-Penal_Code.pdf (last visited 1 August 2017).

⁸⁷⁸ See Section 3(2)(a) of the Criminal Code of Hungary 2012 (which entered into force in July 2013), available in English at http://www.academia.edu/4602286/Criminal_Code_of_Hungary_2012. See also Permanent Mission of Hungary to the United Nations, 22 May 2013, available online at <http://www.un.org/en/ga/sixth/68/UnivJur/Hungary.pdf> (last visited 1 August 2017).

⁸⁷⁹ Art. 17 of Israel’s Penal Law (1977) provides for the application of Israeli penal laws to those extraterritorial offences, which Israel has undertaken to punish in accordance with multilateral conventions open to accession, even if the person committing the offence is not an Israeli citizen and irrespective of where the offence was committed.

⁸⁸⁰ According to Art. 4-2 entitled ‘Crimes Committed outside Japan Governed by a Treaty’, “In addition to the provisions of Art. 2 through the preceding Article, this Code shall also apply to anyone who commits outside the territory of Japan those crimes proscribed under Part II [special part of the Penal Code; Crimes] which are governed by a treaty even if committed outside the territory of Japan”. A translation of the Japanese Penal Code is available online at http://iccdb.webfactional.com/documents/implementations/pdf/Japan-Penal_Code.pdf (last visited 1 August 2017). See also Takayama, *Universal Jurisdiction (Japan)*.

⁸⁸¹ Section 4 (4) of the Criminal Code of Latvia, available in English online at http://iccdb.webfactional.com/documents/implementations/pdf/Latvia_-_The_Criminal_Law_04.2013.pdf (last visited 1 August 2017), provides that “Foreigners who do not have a permanent residence permit for the Republic of Latvia and who have committed a criminal offence in the territory of another state, in the cases provided for in international agreements binding upon the Republic of Latvia, irrespective of the laws of the state in which the offence has been committed, shall be held liable in accordance with this Law if they have not been held criminally liable for such offence or committed to stand trial in the territory of another state.”

Lesotho,⁸⁸² Norway,⁸⁸³ Paraguay,⁸⁸⁴ Peru,⁸⁸⁵ Poland,⁸⁸⁶ Portugal,⁸⁸⁷
Russia,⁸⁸⁸ Slovakia,⁸⁸⁹ Spain,⁸⁹⁰

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- ⁸⁸² Section 4(2) of the Penal Code of Lesotho provides that "A person who, while outside Lesotho, commits an act or makes an omission where such an act or omission [...] is an offence in respect of which Lesotho is enjoined to punish under international law, may, on coming into Lesotho, be tried and punished for such an offence as if the act or omission had been committed within Lesotho." The Penal Code of 9 March 2012 is available online at http://iccdb.webfactional.com/documents/implementations/pdf/Lesotho-Penal_Code_Act_2010_English.pdf (last visited 1 August 2017).
- ⁸⁸³ Section 6 of the Norwegian General Civil Penal Code which states that "the criminal legislation also applies to acts that Norway has a right or an obligation to prosecute [...] under international law generally".
- ⁸⁸⁴ Art. 8 of the Penal Code of Paraguay provides that "Paraguayan criminal law shall also apply to [...] (g) offences that the Republic is required to prosecute under an international treaty currently in force, even when committed abroad."
- ⁸⁸⁵ See Art. 2(5) of the Peruvian Penal Code provides that "Peruvian criminal legislation shall apply to an offence committed abroad if [...] Peru is under an obligation to punish the offence pursuant to an international treaty."
- ⁸⁸⁶ Art. 113 of the 1997 Penal Code of Poland provides that "Notwithstanding regulations in force in the place of commission of the offence, the Polish penal law shall be applied to a Polish citizen or an alien, with respect to whom no decision on extradition has been taken, in the case of the commission abroad of an offence which the Republic of Poland is obligated to prosecute under international agreements."
- ⁸⁸⁷ Art. 5(2) of the Portuguese Criminal Code provides that "Portuguese penal law is as well applicable to acts committed abroad, which the Portuguese State has bound itself to try, by international treaty or convention
- ⁸⁸⁸ Art. 12(3) of the Criminal Code of the Russian Republic, available online in English at http://www.legal-tools.org/uploads/tx_itpdb/Criminal_Code_Russia_EN_2004_02.pdf (last visited 1 August 2017) states that "Foreign nationals and stateless persons who do not reside permanently in the Russian Federation and who have committed their crimes outside the boundaries of the Russian Federation shall be brought to criminal responsibility under this Code [...] in cases provided for by international agreement of the Russian Federation, and unless they have been convicted in a foreign state and are brought to criminal responsibility in the territory of the Russian Federation."
- ⁸⁸⁹ Section 7(1) of the Criminal Code of Slovakia provides that "This Act shall be applied to determine the criminal liability also when it is prescribed by an international treaty ratified and promulgated in a manner defined by law, which is binding for the Slovak Republic."
- ⁸⁹⁰ According to Art. 23 of *Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (Vigente hasta el 22 de Julio de 2014)*, "4. Igualmente, será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la ley española, como alguno de los siguientes delitos cuando se cumplan las condiciones expresadas: p) Cualquier otro delito cuya persecución se imponga con carácter obligatorio por un Tratado vigente para España o por otros actos normativos de una Organización Internacional de la que España sea miembro, en los supuestos y condiciones que se determine en los mismos."

Switzerland,⁸⁹¹ Timor-Leste,⁸⁹² Ukraine,⁸⁹³ Uruguay⁸⁹⁴ and Vietnam.⁸⁹⁵ The clause does not necessarily mention the list of crimes in question or the treaties to which reference is made.

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On the contrary, some states do not provide for such a general clause. For instance, Australia, Ghana,⁸⁹⁶ Iraq,⁸⁹⁷ Lithuania⁸⁹⁸ and the United Arab

⁸⁹¹ See Art. 6(1) of the Swiss Penal Code, which states that "Any person who commits a felony or misdemeanour abroad that Switzerland is obliged to prosecute in terms of an international convention is subject to this Code provided: a. the act is also liable to prosecution at the place of commission or no criminal law jurisdiction applies at the place of commission; and b. the person concerned remains in Switzerland and is not extradited to the foreign country."

⁸⁹² Art. 8 of the Penal Code of the Democratic Republic of Timor Leste, available in English online at http://iccdb.webfactual.com/documents/implementations/pdf/Criminal_Code_-_Law_19-2009_Timor_Leste_EN_2009.pdf (last visited 1 August 2017), provides that "Except as otherwise provided in treaties and conventions, Timorese criminal law is applicable to acts committed outside of the national territory of Timor-Leste in the following cases: [...] e) They refer to crimes that the Timorese State has an obligation to try pursuant to any international convention or treaty."

⁸⁹³ Art. 8 of the Criminal Code of Ukraine, available in English online at http://iccdb.webfactual.com/documents/implementations/pdf/Criminal_Code_Ukraine_EN_2010.pdf (last visited 1 August 2017) provides that "Foreign nationals or stateless persons not residing permanently in Ukraine, who have committed criminal offenses outside Ukraine, shall be criminally liable in Ukraine under this Code in such cases as provided for by the international treaties [...]"

⁸⁹⁴ Art. 10 of the Criminal Code of Uruguay, available in Spanish at http://www.legal-tools.org/uploads/tx_ltpdb/Codigo_Penal_Uruguay_SP_2010_02.pdf, provides that "*Se sustraen a la aplicación de la ley uruguaya, los delitos cometidos por nacional es o extranjeros en territorio extranjero, con las siguientes excepciones: [...] 7. Todos los demás delitos sometidos a la ley uruguaya en virtud de disposiciones especiales de orden interno, o de convenios internacionales.*"

⁸⁹⁵ See Art. 2 of the Penal Code of the Socialist Republic of Vietnam, available online in English at http://iccdb.webfactual.com/documents/implementations/pdf/Vietnam-Penal_Code.pdf (last visited 1 August 2017), which provides that "Foreigners who commit offenses outside the territory of the Socialist Republic of Vietnam may be examined for penal liability according to the Penal Code of Vietnam in circumstances provided for in the international treaties which the Socialist Republic of Vietnam has signed or acceded to."

⁸⁹⁶ See section 56 of the Ghana Courts Act - 1993, entitled 'Criminal Jurisdiction of Courts of Ghana', available online in English at <http://ghanalegal.com/?id=3&law=116&t=ghana-laws> (last visited 1 August 2017).

⁸⁹⁷ See Art. 13 of the Penal Code of Iraq, available in English online at http://www.legal-tools.org/uploads/tx_ltpdb/iraq.penalcode.1969.eng.pdf.

⁸⁹⁸ See Art. 7 of the Criminal Code of the Republic of Lithuania, which provides that "Persons shall be liable under this Code regardless of their citizenship and place of residence, also of the place of commission of a crime and whether the act committed is subject to punishment under laws of the place of commission of the crime where they commit the following crimes subject to liability under treaties: 1) crimes against humanity and war crimes (Articles 99-113); 2) trafficking in human beings

Emirates⁸⁹⁹ have established an exhaustive list of the treaty crimes subject to universal jurisdiction, generally in their criminal codes. Other states like Korea⁹⁰⁰ and South Africa⁹⁰¹ do not have a general treaty clause either, but rather provide for universal jurisdiction over treaty-based crimes in their implementing legislation specific to each treaty crime. It is interesting to note that the French Code of Criminal Procedure contains a provision which states that “in accordance with the international Conventions quoted in the following articles, a person guilty of committing any of the offences listed by these provisions outside the territory of the Republic and who happens to be in France may be prosecuted and tried by French courts”⁹⁰² and then lists the international conventions⁹⁰³ allowing France to exercise extraterritorial jurisdiction simply

(Article 147); 3) purchase or sale of a child (Article 157); 4) production, storage or handling of counterfeit currency or securities (Article 213); 5) money or property laundering (Article 216); 6) act of terrorism (Article 250).”

⁸⁹⁹ Art. 21 of the Penal Code of the United Arab Emirates provides that “This law shall apply to any one who is found in the State, after being involved abroad as a principal offender or an accomplice in an act of sabotage or impairment of international communication systems, crimes of traffic in drugs, women, or children, slavery, acts of piracy or international terrorism.”

⁹⁰⁰ Korea, for instance, in its Act on Punishment for Damaging Ships and Sea Structures and its Act on Prevention of Procuring Money for the Purpose of Threatening the Public, provides for jurisdiction over foreign nationals who committed crimes abroad, if they are present in Korea territory. See Korea, *Universal Jurisdiction in the Republic of Korea, Information on the scope and application of the principle of universal jurisdiction*, at 3.

⁹⁰¹ Universal jurisdiction over torture is provided for at Section 6 of the South African Prevention of Combating and Torture of Persons Act, 2013.

⁹⁰² Art. 689-1 of the French Code of Criminal Procedure.

⁹⁰³ See Art. 689-2 to 689-10 of the French Code of Criminal Procedure. The Geneva Conventions are not in the list. The ten Conventions are: Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (Art. 689-2); the European Convention on the Suppression of Terrorism, of 27 January 1977, and the Dublin agreement of 4 December 1979 (Art. 689-3); the Convention on the Physical Protection of Nuclear Material of 3 March 1980 (Art. 689-4); the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf of 10 March 1988 (Art. 689-5); the Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970, and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971 (Art. 689-6); the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation of 24 February 1988 (Art. 689-7); the Protocol to the Convention on the Protection of the Communities' Financial Interests of 27 September 1996 and the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union of 26 May 1997 (Art. 689-8); the International Convention for the Suppression of Terrorist Bombings of 12 January 1998 (Art. 689-9) and the International Convention for the Suppression of the Financing of Terrorism of 10 January 2000 (Art. 689-10).

because the person is in France.⁹⁰⁴ Section 7(1) of the Finnish Criminal Code entitled “International offences” provides that “Finnish law applies to an offence committed outside of Finland where the punishability of the act, regardless of the law of the place of commission, is based on an international agreement binding on Finland or on another statute or regulation internationally binding on Finland (international offence). Further provisions on the application of this section shall be issued by Decree”.⁹⁰⁵ The relevant decree sets out a detailed list of crimes subject to universal jurisdiction as well as a list of the relevant international conventions.⁹⁰⁶

⁹⁰⁴ The Torture Convention is included in this list but the Genocide Convention is not. Unlike the former, the latter does not expressly provide for an obligation for states to exercise universal jurisdiction.

⁹⁰⁵ Section 7 of the Finnish Criminal Code, unofficial translation available online at <http://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf> (last visited 1 August 2017).

⁹⁰⁶ See Decree on the application of chapter 1, section 7 of the Criminal Code (627/1996) Section 1: “[1] In the application of chapter 1, section 7 of the Criminal Code, the following offences are deemed international offences:

(1) counterfeiting currency, the preparation of the counterfeiting of currency, or the use of counterfeited currency, referred to in the International Convention for the Suppression of Counterfeiting Currency (Treaties of Finland 47/1936) and counterfeiting of the euro referred to in article 7, paragraph 2 of the Council framework decision of 29 May 2000, on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (Official Journal L 140, 14 June 2000), (370/2001)

[...]

(4) a narcotics offence, aggravated narcotics offence, preparation of a narcotics offence, promotion of a narcotics offences, promotion of an aggravated narcotics offence, and concealment offence as referred to in the Single Convention on Narcotic Drugs of 1961 (Treaties of Finland 43/1965), the Protocol amending the Single Convention on Narcotic Drugs of 1961 (Treaties of Finland 42/1975), the Convention on psychotropic substances (Treaties of Finland 60/1976), and the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances (Treaties of Finland 44/1994), (1014/2006)

(5) such seizure of aircraft or other punishable act by which the perpetrator unlawfully, by force or threat thereof, seizes or exercises control of an aircraft, that is to be deemed an offence referred to in the Convention for the suppression of unlawful seizure of aircraft (Treaties of Finland 62/1971),

(6) such criminal traffic mischief or aggravated criminal mischief, preparation of an endangerment offence or other punishable act that is to be deemed an offence referred to in the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Treaties of Finland 56/1973),

(7) murder, assault or deprivation of liberty directed against the person of an internationally protected person, or violent attack upon the official premises, the private accommodation or the means of transport of such a person, or a threat thereof, referred to in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (Treaties of Finland 63/1978),

(8) taking of a hostage or other deprivation of liberty referred to in the International Convention

With respect to the new Spanish legislation on universal jurisdiction, it is noteworthy that in addition to a general treaty clause, Article 24 LOPJ also contains a paragraph on treaty crimes providing for the universal jurisdiction of

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- against the Taking of Hostages (Treaties of Finland 38/1983),
- (9) such torture for the purpose of obtaining a confession, assault, aggravated assault or other punishable act that is to be deemed torture referred to in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Treaties of Finland 60/1989),
- (10) such nuclear device offence, endangerment of health, nuclear energy use offence or other punishable act directed at or committed by using nuclear material that is to be deemed an offence referred to in the Convention on the Physical Protection of Nuclear Material (Treaties of Finland 72/1989),
- (11) such deprivation of liberty, aggravated deprivation of liberty, abduction, sabotage, endangerment or other punishable act that is to be deemed an offence referred to in the European Convention on the Suppression of Terrorism (Treaties of Finland 16/1990), (353/1997) homicide, assault, deprivation of liberty or robbery directed at a person on board a vessel or aircraft, or seizure, theft or damage of a vessel, aircraft or property on board a vessel or aircraft that is to be deemed piracy as referred to in the United Nations Convention on the Law of the Seas (Treaties of Finland 50/1996), (118/1999)
- (12) such violation of the prohibition of chemical weapons referred to in the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Treaties of Finland 19/1997), (118/1999)
- (13) such unlawful act directed against the safety of maritime navigation that is referred to in the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Treaties of Finland 11/1999), (537/2000)
- (13a) such violation of the prohibition of biological weapons referred to in the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare (Treaties of Finland 23/1929) and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (Treaties of Finland 15/1975), (286/2008)
- (14) such unlawful act that is directed against the safety of fixed platforms located on the continental shelf as is referred to in the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (Treaties of Finland 44/2000), (739/2001)
- (15) such crime against United Nations and associated personnel as is referred to in the Convention on the Safety of United Nations and Associated Personnel (Treaties of Finland 2-3/2001), (510/2002)
- (16) such offence against a place of public use, state or government facility, a public transportation system or an infrastructure facility as is referred to in the International Convention for the Suppression of Terrorist Bombings (Treaties of Finland 60/2002),
- (17) such financing of terrorism as is referred to in the International Convention for the Suppression of the Financing of Terrorism (Treaties of Finland 74/2002), (859/2003)
- (18) such willful killing or causing of serious injury to civilians as is referred to in the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and other Devices as amended on 3 May 1996 (Treaties of Finland 91/1998). (859/2003)
- (2) Also a punishable attempt of and punishable participation in an offence referred to in subsection 1 is deemed an international offence."

Spanish courts over offences of piracy, terrorism, illegal drugs, narcotics or psychotropic substances, trafficking in human beings, and crimes against safety of maritime navigation committed in marine areas, in the cases provided for in treaties ratified by Spain, or normative acts of an international organization to which Spain is a party.⁹⁰⁷

C. Other crimes subject to universal jurisdiction

1. *Treaty-based crimes and other international or transnational crimes*

266 In addition to core crimes, some states provide for a list of crimes subject to universal jurisdiction. Andorra, for instance, provides for universal jurisdiction over torture, terrorism, drug trafficking, traffic of weapons, counterfeiting money, money laundering, piracy, unlawful seizure of aircrafts, piracy, slavery, child trafficking and sexual offences against minors.⁹⁰⁸ Australia provides for universal jurisdiction over slavery.⁹⁰⁹ However, for slavery-like offences, namely servitude, forced labour and forced marriage, trafficking in persons and debt bondage,⁹¹⁰ the perpetrator must be an Australian resident.⁹¹¹

267 The Austrian Criminal Code provides for universal jurisdiction over a significant number of offences including torture and organized crime “if the perpetrator cannot be extradited”,⁹¹² as well as genital mutilation, extortionate

⁹⁰⁷ According to Art. 23 of Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (Vigente hasta el 22 de Julio de 2014), “4. Igualmente, será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la ley española, como alguno de los siguientes delitos cuando se cumplan las condiciones expresadas: [...] d) *Delitos de piratería, terrorismo, tráfico ilegal de drogas tóxicas, estupefacientes o sustancias psicotrópicas, trata de seres humanos, contra los derechos de los ciudadanos extranjeros y delitos contra la seguridad de la navegación marítima que se cometan en los espacios marinos, en los supuestos previstos en los tratados ratificados por España o en actos normativos de una Organización Internacional de la que España sea parte.*”

⁹⁰⁸ See Art. 8(8) of the 2005 Criminal Code of Andorra, available in French at http://iccdb.webfactional.com/documents/implementations/pdf/Andorra-Penal_code.pdf (last visited 1 August 2017).

⁹⁰⁹ See Division 270 of the Australian Criminal Code.

⁹¹⁰ See Division 271 of the Australian Criminal Code.

⁹¹¹ Sections 270.9 and 271.10 of the Australian Criminal Code.

⁹¹² See Section 64(4) of the Austrian Criminal Code, available in German online at <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002296> (last visited 1 August 2017). According to Section 64(4), “Die österreichischen Strafgesetze gelten unabhängig von den Strafgesetzen des Tatorts für folgende im Ausland begangene Taten: [...] 4. Geldfälschung (§ 232), Weitergabe und Besitz nachgemachten oder verfälschten Geldes (§ 233), die

abduction, slave trade, human trafficking, rape, sexual offences against minors or incapacitated persons and other sexual related offences on minors, if the perpetrator is in Austria and could not be extradited.⁹¹³ Austrian penal laws are also applicable to hijacking, terrorism, terrorism-related offences and the financing of terrorism if the perpetrator is in Austria and cannot be extradited.⁹¹⁴

Azerbaijan provides for jurisdiction over foreign nationals, irrespective of where the crime was committed, if they have committed one of the following crimes: crimes against peace and mankind, war crimes, terrorism, financing of terrorism, stealing of an air ship, capture of hostages, torture, sea piracy, illegal

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nach § 232 strafbare Fälschung besonders geschützter Wertpapiere (§ 237), kriminelle Organisation (§ 278a) und die nach den § 28a, 31a sowie 32 Abs. 3 des Suchtmittelgesetzes strafbaren Handlungen, wenn durch die Tat österreichische Interessen verletzt worden sind oder der Täter nicht ausgeliefert werden kann;“

⁹¹³ See Section 64(1)(4a) of the Austrian Criminal Code, available in German online at <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002296> (last visited 1 August 2017). According to Section 64(1), “*Die österreichischen Strafgesetze gelten unabhängig von den Strafgesetzen des Tatorts für folgende im Ausland begangene Taten: [...] 4a. Genitalverstümmelung im Sinne von § 90 Abs. 3, erpresserische Entführung (§ 102), Überlieferung an eine ausländische Macht (§ 103), Sklavenhandel (§ 104), Menschenhandel (§ 104a), schwere Nötigung nach § 106 Abs. 1 Z 3, verbotene Adoptionsvermittlung (§ 194), Vergewaltigung (§ 201), geschlechtliche Nötigung (§ 202), sexueller Missbrauch einer wehrlosen oder psychisch beeinträchtigten Person (§ 205), schwerer sexueller Missbrauch von Unmündigen (§ 206), sexueller Missbrauch von Unmündigen (§ 207), pornographische Darstellungen Minderjähriger nach § 207a Abs. 1 und 2, sexueller Missbrauch von Jugendlichen (§ 207b), Missbrauch eines Autoritätsverhältnisses nach § 212 Abs. 1, Förderung der Prostitution und pornographischer Darbietungen Minderjähriger (§ 215a), grenzüberschreitender Prostitutionshandel (§ 217), wenn a) der Täter oder das Opfer Österreicher ist oder seinen gewöhnlichen Aufenthalt im Inland hat, b) durch die Tat sonstige österreichische Interessen verletzt worden sind oder c) der Täter zur Zeit der Tat Ausländer war, sich in Österreich aufhält und nicht ausgeliefert werden kann.*”

⁹¹⁴ See Section 64(1) of the Austrian Criminal Code, available in German online at <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002296> (last visited 1 August 2017). According to Section 64(1), “*Die österreichischen Strafgesetze gelten unabhängig von den Strafgesetzen des Tatorts für folgende im Ausland begangene Taten: [...] 5. Luftpiraterie (§ 185), damit im Zusammenhang begangene strafbare Handlungen gegen Leib und Leben oder gegen die Freiheit und vorsätzliche Gefährdung der Sicherheit der Luftfahrt (§ 186), wenn [...] d) sich der Täter in Österreich aufhält und nicht ausgeliefert werden kann; [...] 9. terroristische Vereinigung (§ 278b) und terroristische Straftaten (§ 278c) sowie damit im Zusammenhang begangene strafbare Handlungen nach den § 128 bis 131, 144 und 145 sowie 223 und 224, ferner Ausbildung für terroristische Zwecke (§ 278e) und Anleitung zur Begehung einer terroristischen Straftat (§ 278f) wenn [...] f) der Täter zur Zeit der Tat Ausländer war, sich in Österreich aufhält und nicht ausgeliefert werden kann; [...] 10. Terrorismusfinanzierung (§ 278d), wenn [...] b) der Täter zur Zeit der Tat Ausländer war, sich in Österreich aufhält und nicht ausgeliefert werden kann.*”

circulation of narcotics and psychotropic substances, the manufacturing or sale of false money, attack on persons or organizations using international protection, and crimes connected to radioactive materials.⁹¹⁵

269 Belgium expressly provides for universal jurisdiction over sexual offences perpetrated against minors, procurement, trafficking in persons,⁹¹⁶ sexual mutilation of females,⁹¹⁷ acts of corruption⁹¹⁸ and acts of terrorism.⁹¹⁹ As mentioned above,⁹²⁰ it also provides for universal jurisdiction over “any offence in respect of which international treaty or customary law require that it should regardless of the country in which it was committed and of the nationality of the perpetrator(s)”.⁹²¹ Cameroon provides for universal jurisdiction over piracy, human trafficking, slave trade and drug trafficking.⁹²²

270 In addition to core crimes, the Penal Code of Costa Rica expressly provides for universal jurisdiction over acts of piracy, falsifying coins, credit instruments, bank notes or any other bearer papers, slave trade, women or children trafficking, as well as the trafficking of drugs or obscene material.⁹²³

⁹¹⁵ Art. 12.3 of the Criminal Code of Azerbaijan, English translation available online at <http://www.legislationline.org/documents/section/criminal-codes> (last visited 1 August 2017). See also Information on the scope and application of the principle of universal jurisdiction, *Information on the scope and application of the principle of universal jurisdiction*, available online at [http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Azerbaijan%20\(R%20to%20E\).pdf](http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Azerbaijan%20(R%20to%20E).pdf) (last visited 1 August 2017).

⁹¹⁶ Preliminary Chapter of the Code of Criminal Procedure, art. 10ter, 1 referring to arts 379, 380 and 381 of the Criminal Code.

⁹¹⁷ Preliminary Chapter of the Code of Criminal Procedure, art. 10ter, 2 referring to art. 409 of the Criminal Code.

⁹¹⁸ Preliminary Chapter of the Code of Criminal Procedure, art. 10ter, 3 referring to art. 409 of the Criminal Code.

⁹¹⁹ Preliminary Chapter of the Code of Criminal Procedure, art. 10, 6.

⁹²⁰ See *supra* note 34.

⁹²¹ Preliminary chapter of the Code of Criminal Procedure, art. 10, 1 bis and art. 12 bis.

⁹²² Section 11 of the Cameroon Penal Code provides that “The criminal law of the Republic shall apply to piracy, human trafficking, even when committed outside the territory of the Republic. However, no foreign national may be tried in the territory of the Republic for offences referred in the present section, committed abroad, unless the foreign national was arrested in the territory of the Republic and was not extradited and provided that the prosecution is undertaken by the Public Prosecutor’s Office.”

⁹²³ See Art. 7 of the Penal Code of Costa Rica, available online at http://iccdb.webfactional.com/documents/implementations/pdf/Costa_Rica_Criminal_Prosecution_to_Punish_WC_and_CaH_2002.pdf (last visited 26 April 2016), which provides that “[i]ndependently of the legislation in force in the territory on which the punishable crime is committed, and independently of the perpetrator’s nationality, those who commit acts of piracy or genocide; falsify coins, credit instruments, bank notes or any other bearer papers; are involved in the slave trade or in trafficking

Besides core crimes, Cyprus also provides for universal jurisdiction over two offences, namely piracy and “offences related to illicit trafficking of dangerous drugs”.⁹²⁴ According to the information submitted to the United Nations, Cyprus does not appear to provide for universal jurisdiction over torture.⁹²⁵

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In addition to ICC crimes, the Criminal Code of Denmark expressly provides for universal jurisdiction over one offence: the unlawful takeover of an aircraft or a ship.⁹²⁶

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The Ethiopian Criminal Code⁹²⁷ expressly provides for universal jurisdiction over drug trafficking,⁹²⁸ participation of illegal associations and juridical persons in slave trade,⁹²⁹ traffic in women and minors,⁹³⁰ and obscene or indecent publications or performances.⁹³¹

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In addition to core crimes, for which universal jurisdiction is established in the German Code of Crimes against International Law, and to treaty-crimes,⁹³²

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women or children; are involved in trafficking drugs or obscene material; or who commit any other punishable acts in violation of human rights and international humanitarian law as recognised in the treaties to which Costa Rica is party or in this Code, shall be prosecuted under Costa Rican law.”

⁹²⁴ Section 5(e) of the Criminal Code. See Permanent Mission of the Republic of Cyprus to the United Nations, mentioned in ‘The scope and application of the principle of universal jurisdiction by the Republic of Cyprus’, 8 April 2011, available online at http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Cyprus.pdf (last visited 1 August 2017).

⁹²⁵ See Permanent Mission of the Republic of Cyprus to the United Nations, mentioned in ‘The scope and application of the principle of universal jurisdiction by the Republic of Cyprus’, 8 April 2011, available online at http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Cyprus.pdf (last visited 1 August 2017).

⁹²⁶ Section 8b of the Danish Criminal Code: “An act committed outside the territory of the Danish state is subject to Danish criminal jurisdiction, where the act is covered by section 183a of this Act where the act has been committed by a person 1) who is a Danish national or has his abode or residence in Denmark; or 2) who is present in Denmark, at the time when the charge is raised. (2) The prosecution of acts covered by subsection (1) above may also include violations of sections 237 and 244-248 of this Act, when they are committed in conjunction with violation of section 183a of this Act.”

⁹²⁷ Art. 17 entitled “Crimes Committed Outside Ethiopia Against International Law or Universal Order” provides that “(1) Any person who has committed outside Ethiopia: [...] (b) a crime against public health or, morals specified in Articles 525, 599, 635, 636, 640 or 641 of this Code; shall be liable to trial, in Ethiopia in accordance with the provisions of this Code and subject to the general conditions mentioned hereinafter (Arts. 19 and 20(2)) unless a final judgment has been given after being prosecuted in the foreign country.”

⁹²⁸ Art. 525 of the Ethiopian Penal Code.

⁹²⁹ Art. 599 of the Ethiopian Penal Code.

⁹³⁰ Arts 635 and 636 of the Ethiopian Penal Code.

⁹³¹ Arts 640 and 641 of the Ethiopian Penal Code.

⁹³² Section 6(9) of the German Criminal Code, *supra* note 228.

the German Criminal Code provides for universal jurisdiction over a number of other offences:⁹³³ offences involving nuclear energy, explosives and radiation,⁹³⁴ attacks on air and maritime traffic,⁹³⁵ human trafficking for the purpose of sexual exploitation, for the purpose of work exploitation and assisting human trafficking,⁹³⁶ unlawful drug dealing, distribution of pornography,⁹³⁷ counterfeiting money and securities,⁹³⁸ credit cards, etc., and blank eurocheque forms,⁹³⁹ as well as the relevant preparatory acts⁹⁴⁰ and subsidy fraud.⁹⁴¹

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In Ghana, in addition to the clause related to treaty crimes, legislation provides for universal jurisdiction in respect to the following offences: (a) slave trade or traffic in slave; (b) piracy; (c) traffic in women and children; (d) falsification or counterfeiting; (e) genocide; (f) offences against the property of the Republic; (g) any offence against the security, territorial integrity or political independence of the Republic; (h) hijacking; (i) unlawful traffic in narcotics; (j) attacks on any international communications system, canal or submarine cable; (k) unauthorised disclosure of an official secret of the Republic; (l) an offence by or against a person in the employment of the Republic or a statutory corporation while acting in the course of the duties of such employment; and (m) traffic in publications.⁹⁴²

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Greece also provides for a list of crimes subject to universal jurisdiction, which include piracy, slave-trading, human trafficking or lewd conduct with a minor for pay, illegal trafficking of narcotic drugs and the illegal circulation and trading of obscene publications.⁹⁴³ In addition to core crimes and treaty crimes,

⁹³³ Section 6 of the German Criminal Code, available online in English at http://iccdb.webfactional.com/documents/implementations/pdf/German_-_Criminal_Code_amend_Oct_2009.pdf (last visited 1 August 2017).

⁹³⁴ See Sections 307 and section 308(1) to (4), section 309(2) and section 310 of the German Criminal Code.

⁹³⁵ See Section 316c of the German Criminal Code.

⁹³⁶ See Sections 232 to 233a of the German Criminal Code.

⁹³⁷ See Sections 184a, 184b (1) to (3) and section 184c (1) to (3), in conjunction with section 184d, 1st sentence; 7 of the German Criminal Code.

⁹³⁸ See Section 146, section 151 and section 152) of the German Criminal Code.

⁹³⁹ See Section 152b (1) to (4) of the German Criminal Code.

⁹⁴⁰ See Sections 149, 151, 152 and 152b (5) of the German Criminal Code.

⁹⁴¹ Section 264.

⁹⁴² See Section 56(4) of the Ghana Courts Act, entitled 'Criminal Jurisdiction of Courts of Ghana', available online in English at <http://ghanalegal.com/?id=3&law=116&t=ghana-laws> (last visited 1 August 2017).

⁹⁴³ See Art. 8 of the Greek Penal Code; See Permanent Mission of Greece to the United Nations, 30 April 2013. Excerpts of the Greek Penal Code are also available in English online at http://www.unodc.org/res/cld/document/grc/penal_code_excerpts_html/Greece_Criminal_Code_Excerpts.pdf (last visited 1 August 2017).

the Criminal Code of Hungary expressly provides for universal jurisdiction over apartheid.⁹⁴⁴ Iraq provides for universal jurisdiction over sabotage or the disruption of international means of communication and transportation, and the trafficking in women, children, slaves or drugs.⁹⁴⁵

Aside from core crimes, the Criminal Code of the Republic of Lithuania provides for universal jurisdiction over the following offences, “subject to liability under treaties”: trafficking in human beings (Article 147), the purchase or sale of a child, the production, storage or handling of counterfeit currency or securities (Article 213); money or property laundering (Article 216); acts of terrorism (Article 250); hijacking of an aircraft, ship or fixed platform on a continental shelf (Article 251); hostage-taking (Article 252); unlawful handling of nuclear or radioactive materials or other sources of ionising radiation (Articles 256, 256(1) and 257); crimes related to possession of narcotic or psychotropic, toxic or highly-active substances (Articles 259-269); and crimes against the environment (Articles 270, 270(1), 271, 272, 274).⁹⁴⁶

Besides genocide, crimes against humanity and war crimes, Luxembourg provides that the following crimes committed abroad by a foreigner shall be submitted to the competent authorities for prosecution, if the person is not extradited: attacks against internationally-protected persons, acts of terrorism, aggression, torture, procuring (pimping), human trafficking, child pornography, and certain sexual offences against minors.⁹⁴⁷

⁹⁴⁴ See Section 3(2) of the Criminal Code of Hungary 2012, available in English at http://www.academia.edu/4602286/Criminal_Code_of_Hungary_2012, which provides that “Hungarian criminal law shall, furthermore, apply [...] a) to any act committed by non-Hungarian citizens abroad, if [...] ac) it constitutes a criminal act under Chapter XIII [on genocide, crimes against humanity, apartheid] or XIV [on war crimes], or any other criminal offenses which are to be prosecuted under international treaty ratified by an act of Parliament.”; See also Permanent Mission of Hungary to the United Nations, 22 May 2013, available online at <http://www.un.org/en/ga/sixth/68/UnivJur/Hungary.pdf> (last visited 1 August 2017).

⁹⁴⁵ See Art. 13 of the Penal Code of Iraq, available online in English at http://www.legal-tools.org/uploads/tx_ltpdb/iraq.penalcode.1969.eng.pdf (last visited 1 August 2017). See also Permanent Mission of the Republic of Iraq to the United Nations, 23 April 2010, which states that “the scope of universal jurisdiction is restricted to the aforementioned offences and does not extend to any other crimes”.

⁹⁴⁶ Art. 7 §§ 2-11 of the Criminal Code of the Republic of Lithuania, available online at http://iccdb.webfactional.com/documents/implementations/pdf/Lithuania_-_Penal_Code_as_amended_2010.pdf. See also Permanent Mission of Lithuania to the United Nations, *The scope and application of the principle of universal jurisdiction*, 3 May 2011.

⁹⁴⁷ See Art. 7-4 of the Code of Criminal Procedure of Luxembourg, which states that “Lorsqu’une personne qui se sera rendue coupable à l’étranger d’une des infractions prévues par les articles 112-1, 135-1 à 135-6, 135-9, 135-11 à 135-13, 136 bis à 136 quinquies, 260-1 à 260-4, 379, 382-1, 382-2, 384 et

279 In addition to core crimes, over which Mauritius has universal jurisdiction under the International Criminal Court Act 2011, other laws provide for universal jurisdiction over shipping offences,⁹⁴⁸ terrorism-related offences,⁹⁴⁹ as well as crimes relating to drugs and narcotic and psychotropic substances.⁹⁵⁰

280 In addition to core crimes and torture that are provided for in the International Crimes Act, the Netherlands provides for universal jurisdiction over a number of offences including piracy, counterfeiting currency, and terrorist-related offences.⁹⁵¹ Likewise, in addition to core crimes, New Zealand provides for universal jurisdiction over piracy,⁹⁵² torture⁹⁵³ as well as offences defined in the Terrorism Suppression Act 2002, sexual and labour exploitation of minors, organized crime, smuggling of migrants, human trafficking, bribery or corruption of the judiciary and public officials, money laundering, and the contamination of water or agriculture.⁹⁵⁴

281 In addition to genocide and treaty crimes, Paraguay expressly provides for universal jurisdiction over “offences involving explosives”, attacks on civilian air and sea traffic, “trafficking in persons”, “illicit trafficking in narcotics and hazardous drugs” and “counterfeiting of currency or shares”.⁹⁵⁵

282 In addition to core crimes, the Revised Penal Code of the Philippines provides for universal jurisdiction over the crimes of “provoking war and disloyalty in case of war” and “piracy and mutiny on the high seas”.⁹⁵⁶

385-2 du Code pénal, n'est pas extradée, l'affaire sera soumise aux autorités compétentes aux fins de poursuites en application des règles prévues.”

⁹⁴⁸ See Section 218 of the Merchant Shipping Act.

⁹⁴⁹ See Section 30 of the Prevention of Terrorism Act.

⁹⁵⁰ See Section 29 of the Dangerous Drugs Act.

⁹⁵¹ See Art. 4(5) of the Netherlands Criminal Code.

⁹⁵² See Section 92 of the Crimes Act 1961, available online at <http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM328572.html> (last visited 1 August 2017).

⁹⁵³ See Section 4 of the New Zealand Crimes of Torture Act 1989, available online at http://www.nzlii.org/nz/legis/consol_act/cota1989211/ (last visited 26 August 2017).

⁹⁵⁴ Section 7A of the Crimes Act 1961 provides that “Even if the acts or omissions alleged to constitute the offence occurred wholly outside New Zealand, proceedings may be brought for any offence against this Act committed in the course of carrying out a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002) or an offence against section 98AA, section 98A, section 98C, section 98D, any of sections 100 to 104, section 105(2), section 116, section 117, section 243, section 298A, or section 298B —(a) if the person to be charged—or [...] (ii) is ordinarily resident in New Zealand; or (iii) has been found in New Zealand and has not been extradited [...]”.

⁹⁵⁵ See Art. 8 of the Penal Code of Paraguay.

⁹⁵⁶ Art. 1 of the Revised Penal Code of the Philippines provides that “[...] the provisions of the Code shall be enforced [...] also outside its jurisdiction, against those who: [...] 5. Should commit any of the crimes against national security and the law of nations, defined in Title One, Book Two of the Code.”

It is interesting to note that Portuguese law establishes “absolute universal jurisdiction”,⁹⁵⁷ i.e. universal jurisdiction which does not require any connecting link at all or any other condition⁹⁵⁸ – over a number of crimes, namely crimes of computer and communications fraud, forgery and alteration of money, the sale or uttering of counterfeited money, credit certificates and sealed value currency and securities, the manufacturing and possession of forgery tools, weights and equivalent objects, offences against the course of the rule of law, electoral crimes, the crime of terrorism and certain crimes committed by terrorist organizations.⁹⁵⁹ However, it establishes conditional universal jurisdiction over core crimes and a number of other crimes, namely slavery, human trafficking, pimping, and various sexual offences against minors.⁹⁶⁰

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According to its report to the UN, Rwanda has universal jurisdiction over any crime falling within the category of international or cross-border crimes such as genocide, war crimes, crimes against humanity, torture, money laundering, piracy, drug trafficking, etc.⁹⁶¹

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In addition to core crimes, the Penal Code of Senegal also provides for universal jurisdiction over the crime of torture,⁹⁶² as well as over violations of the 1954 Hague Convention, the 1976 Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques and the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects.⁹⁶³

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In addition to core crimes, Slovakia provides for universal jurisdiction over a very wide range of offences including “endangering peace”, “cruelty”, narcotic drugs and psychotropic substances and drug-related crimes, the illicit manufacturing and possession of nuclear materials, radioactive substances,

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⁹⁵⁷ *Information by Portugal concerning the topic 'The Scope and Application of the Principle of Universal Jurisdiction'*, at 2, available online at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Portugal.pdf (last visited 1 August 2017); See Art. 5(1)(a) of the Portuguese Criminal Code.

⁹⁵⁸ See *supra* Part I N 64 ff.

⁹⁵⁹ See Art. 5(1)(a) of the Portuguese Criminal Code.

⁹⁶⁰ Art. 5 (1) (b) of the Portuguese Criminal Code.

⁹⁶¹ Republic of Rwanda, Ministry of Justice, *The Government of Rwanda's report on information and observations on the scope and application of the principle of universal jurisdiction*, at 2.

⁹⁶² See Art. 431-6 in relation to Art. 295-1 of the Criminal Code of Senegal.

⁹⁶³ See Art. 431-5 of the Criminal Code of Senegal, French version available online at http://www.geneva-academy.ch/RULAC/pdf_state/Law-21-July-1965-on-Penal-Code.pdf (last visited 1 August 2017).

hazardous chemicals and hazardous biological agents and toxins, and terrorism-related offences.⁹⁶⁴

287 In South Africa, aside from core crimes, universal jurisdiction is provided for over other crimes including torture,⁹⁶⁵ offences of terrorism and related or connected offences,⁹⁶⁶ and sexual offences and related matters.⁹⁶⁷

288 In Spain, following the recent amendments to its law, extraterritorial jurisdiction over crimes of torture and enforced disappearances is possible only if the perpetrator is Spanish or if the victim was a Spanish national at the time of commission of the crimes.⁹⁶⁸ Article 23.4 of the LOPJ does however expressly provide for jurisdiction over some crimes committed abroad by foreigners

⁹⁶⁴ See Section 5(a) of the Criminal Code of Slovakia, available online at http://iccdb.webfactional.com/documents/implementations/pdf/Criminal_Code_Slovakia_EN_Slovak_2010.pdf (last visited 1 August 2017).

⁹⁶⁵ Section 6 of the South African Prevention of Combating and Torture of Persons Act, 2013.

⁹⁶⁶ Section 15(1) of the South African Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004.

⁹⁶⁷ See Section 61 of the South African Criminal Law Sexual Offences and Related Matters Amendment Act 2007, which provides that "(1) Even if the act alleged to constitute a sexual offence or other offence under this Act occurred outside the Republic, a court of the Republic, whether or not the act constitutes an offence at the place of its commission, has, subject to subsections (4) and (5), jurisdiction in respect of that offence if the person to be charged – [...] (c) was arrested in the territory of the Republic."

⁹⁶⁸ According to Art. 23. 4 of the Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (Vigente hasta el 22 de Julio de 2014), "4. Igualmente, será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la ley española, como alguno de los siguientes delitos cuando se cumplan las condiciones expresadas: [...] b) Delitos de tortura y contra la integridad moral de los artículos 174 a 177 del Código Penal, cuando: 1.º el procedimiento se dirija contra un español; o, 2.º la víctima tuviera nacionalidad española en el momento de comisión de los hechos y la persona a la que se impute la comisión del delito se encuentre en territorio español. c) Delitos de desaparición forzada incluidos en la Convención internacional para la protección de todas las personas contra las desapariciones forzadas, hecha en Nueva York el 20 de diciembre de 2006, cuando: 1.º el procedimiento se dirija contra un español; o, 2.º la víctima tuviera nacionalidad española en el momento de comisión de los hechos y la persona a la que se impute la comisión del delito se encuentre en territorio español."

residing in Spain, including terrorism,⁹⁶⁹ sexual offences against minors,⁹⁷⁰ human trafficking,⁹⁷¹ and corruption.⁹⁷²

In addition to “crimes against international law”, the list of crimes over which Swedish courts have universal jurisdiction includes hijacking, maritime or aircraft sabotage, airport sabotage, an attempt to commit such crimes, unlawful dealings with chemical weapons, unlawful dealings with mines, and false or careless statements made before an international court.⁹⁷³

In addition to core crimes and treaty crimes, Article 5 of the Swiss Criminal Code expressly provides for the exercise of universal jurisdiction over a number of offences committed against minors, namely a) human trafficking, indecent assault, rape, sexual acts with a person incapable of proper judgment or resistance (Art. 191), encouraging prostitution (Art. 195) if the victim was less than 18 years of age; b) sexual acts with children (Art. 187) if the victim was less than 14 years of age; and c) aggravated pornography if the articles or representations depict sexual acts with children d) hostage taking (Art. 185 § 5)

⁹⁶⁹ According to Art. 23. 4 of *Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (Vigente hasta el 22 de Julio de 2014)*, “4. Igualmente, será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la ley española, como alguno de los siguientes delitos cuando se cumplan las condiciones expresadas : [...] e) Terrorismo, siempre que concurra alguno de los siguientes supuestos : [...] 2.º el procedimiento se dirija contra un extranjero que resida habitualmente en España.”

⁹⁷⁰ According to Art. 23. 4 of *Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (Vigente hasta el 22 de Julio de 2014)*, “4. Igualmente, será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la ley española, como alguno de los siguientes delitos cuando se cumplan las condiciones expresadas : [...] k) Delitos contra la libertad e indemnidad sexual cometidos sobre víctimas menores de edad, siempre que : [...] 2.º el procedimiento se dirija contra ciudadano extranjero que resida habitualmente en España”.

⁹⁷¹ According to Art. 23. 4 of *Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (Vigente hasta el 22 de Julio de 2014)*, “4. Igualmente, será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la ley española, como alguno de los siguientes delitos cuando se cumplan las condiciones expresadas : [...] m) Trata de seres humanos, siempre que : [...] 2.º el procedimiento se dirija contra un ciudadano extranjero que resida habitualmente en España”.

⁹⁷² According to Art. 23. 4 of *Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (Vigente hasta el 22 de Julio de 2014)*, “4. Igualmente, será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la ley española, como alguno de los siguientes delitos cuando se cumplan las condiciones expresadas : [...] n) Delitos de corrupción entre particulares o en las transacciones económicas internacionales, siempre que : 2.º el procedimiento se dirija contra un ciudadano extranjero que resida habitualmente en España”.

⁹⁷³ Section 3(6) of Chapter 2 of the Swedish Penal Code.

and enforced disappearance (Art. 185bis § 2).⁹⁷⁴ Universal jurisdiction is also expressly provided for in respect of hostage-taking,⁹⁷⁵ human trafficking⁹⁷⁶ and forced marriage or forced partnership.⁹⁷⁷

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In addition to core crimes and treaty crimes, the Penal Code of Timor-Leste provides for universal jurisdiction over the following crimes, subject to the presence of the perpetrator in Timor-Leste and his non-extradition: terrorist organisations, terrorism, funding of terrorism, incitement to war, abduction, enslavement, human trafficking, trafficking in human organs, sale of persons, torture or other cruel, degrading or inhuman treatment, child prostitution, child pornography, and sexual abuse of a minor.⁹⁷⁸ Tunisia provides for universal jurisdiction over terrorist crimes,⁹⁷⁹ as well as maritime piracy and air piracy.⁹⁸⁰ Thailand provides for universal jurisdiction over acts of terror, certain sexual offences, and robbery and gang robbery committed on the high seas.⁹⁸¹

⁹⁷⁴ See Art. 5(1) of the Swiss Penal Code, available in English online at <http://www.admin.ch/opc/en/classified-compilation/19370083/index.html> (last visited 1 August 2017). The suspect must be in Switzerland and not be extradited. See U. Cassani, in *Commentaire romand*, at 52-61.

⁹⁷⁵ See Art. 185(5) of the Swiss Criminal Code, which provides that "Any person who commits the offence abroad is also liable to the foregoing penalties provided he is arrested in Switzerland and not extradited. Article 7 paragraphs 4 and 5 apply".

⁹⁷⁶ See Art. 182(4) of the Swiss Criminal Code, which states "Any person who commits the act abroad is also guilty of an offence. Articles 5 and 6 apply".

⁹⁷⁷ See Art. 181a of the Swiss Criminal Code, which states "Any person who commits forced marriage or forced registered partnership abroad but is now in Switzerland and is not being extradited is liable to the same penalty".

⁹⁷⁸ Art. 8 of the Penal Code of the Democratic Republic of Timor Leste, available in English online at http://iccdb.webfactional.com/documents/implementations/pdf/Criminal_Code_-_Law_19-2009_Timor_Leste_EN_2009.pdf (last visited 1 August 2017), provides that "Except as otherwise provided in treaties and conventions, Timorese criminal law is applicable to acts committed outside of the national territory of Timor-Leste in the following cases: [...] b) They constitute crimes described in articles 123 to 135, 161 to 169 and 175 to 178, as long as the perpetrator is found in Timor-Leste and cannot be extradited or a decision has been made not to do so".

⁹⁷⁹ See Art. 55 of the Tunisian Law No. 75 of 10 December 2003 concerning support for international efforts to counter terrorism and money laundering (as revised and supplemented by law No. 65 of 12 August 2009). A French version of this law is available online at http://www.cmf.org.tn/pdf/textes_ref/reglementations/Version_FR/blanchis_argent_lutte_ter/loi_terrorisme_blanchiment.pdf (last visited 1 August 2017).

⁹⁸⁰ See Art. 129 of the Code of Criminal Procedure of Tunisia amended by Law No. 85 of 15 February 2005.

⁹⁸¹ Section 7 of the Thailand Penal Code, available in English online at <http://www.samuiforsale.com/law-texts/thailand-penal-code.html#2> (last visited 1 August 2017), provides that "Whoever to commit the following offences outside the Kingdom shall be punished in the Kingdom, namely: (1) Offences

The United Arab Emirates provide for universal jurisdiction over “an act of sabotage or impairment of international communication systems, crimes of traffic in drugs, women, or children, slavery, acts of piracy or international terrorism”.⁹⁸²

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In the United Kingdom, the following crimes are subject to universal jurisdiction: piracy,⁹⁸³ torture,⁹⁸⁴ terrorist bombing and finance offences,⁹⁸⁵

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relating to the Security of the Kingdom as provided in Sections 107 to 129; (1/1) The offence in respect of terrorization as prescribed by Section 135/1, Section 135/2, Section 135/3 and Section 135/4. (2) Offences Relating to Counterfeiting and Alteration as provided in Section 240 to Section 249, Section 254, Section 256, Section 257 and Section 266 (3) and (4); (2bis) Offences Relating to Sexuality as provided in Section 282 and Section 283; (3) Offence Relating to Robbery as provided in Section 339, and Offence Relating to Gang-Robbery as provided in Section 340, which is committed on the high seas”.

⁹⁸² Art. 21 of the Penal Code of the United Arab Emirates, provides that “This law shall apply to any one who is found in the State, after being involved abroad as a principal offender or an accomplice in an act of sabotage or impairment of international communication systems, crimes of traffic in drugs, women, or children, slavery, acts of piracy or international terrorism”.

⁹⁸³ See United Kingdom Mission to the United Nations, ‘Scope and application of the principle of universal jurisdiction’, 15 April 2011 (available online at http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/UK&Northern%20Ireland.pdf [last visited 1 August 2017]), which states that “piracy is a criminal offence at common law throughout the United Kingdom” and that “a prosecution for piracy can take place in the United Kingdom regardless of any national nexus.” The definition of piracy has been incorporated in section 26 and schedule 5 to the UK Merchant Shipping and Maritime Security Act 1997, available online at <http://www.legislation.gov.uk/ukpga/1997/28> (last visited 1 August 2017).

⁹⁸⁴ See Section 134 of the UK Criminal Justice Act 1988, available online at <http://www.legislation.gov.uk/ukpga/1988/33/section/134> (last visited 1 August 2017). See United Kingdom Mission to the United Nations, “Scope and application of the principle of universal jurisdiction”, 15 April 2011.

⁹⁸⁵ See Part VI of the Terrorism Act 2000, available online at <http://www.legislation.gov.uk/ukpga/2000/11/part/VI> (last visited 1 August 2017). Section 62 entitled ‘Terrorist bombing: jurisdiction’ provides that “(1) If— (a) a person does anything outside the United Kingdom as an act of terrorism or for the purposes of terrorism, and (b) his action would have constituted the commission of one of the offences listed in subsection (2) if it had been done in the United Kingdom, he shall be guilty of the offence. (2) The offences referred to in subsection (1)(b) are— (a) an offence under section 2, 3 or 5 of the Explosive Substances Act 1883, (b) an offence under section 1 of the Biological Weapons Act 1974 (biological weapons), and (c) an offence under section 2 of the Chemical Weapons Act 1996 (chemical weapons).” Section 63 entitled ‘Terrorist finance: jurisdiction’ provides that “(1) If— (a) a person does anything outside the United Kingdom, and (b) his action would have constituted the commission of an offence under any of sections 15 to 18 if it had been done in the United Kingdom, he shall be guilty of the offence”.

hijacking,⁹⁸⁶ endangering the safety of an aircraft,⁹⁸⁷ offences against the safety of ships and fixed platforms,⁹⁸⁸ hostage-taking,⁹⁸⁹ misuse of nuclear material,⁹⁹⁰ and attacks and threats of attacks on protected persons.⁹⁹¹ With the exception of piracy, all other offences require the consent of the Attorney General for a prosecution to proceed.

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According to some federal statutes, the United States has universal jurisdiction over torture,⁹⁹² piracy,⁹⁹³ recruitment or use of child soldiers,⁹⁹⁴ as well as slavery, forced labour, human trafficking and sex trafficking.⁹⁹⁵ It also expressly provides for universal jurisdiction over crimes covered by US treaty obligations, namely destruction of aircraft or aircraft facilities,⁹⁹⁶ violations at

⁹⁸⁶ See Parts 1 and 2 of the UK Aviation Security Act 1982, available online at <http://www.legislation.gov.uk/ukpga/1982/36/contents> (last visited 1 August 2017).

⁹⁸⁷ See Section 1 of the UK Aviation and Maritime Security Act 1990, available online at <http://www.legislation.gov.uk/ukpga/1990/31/contents> (last visited 1 August 2017).

⁹⁸⁸ See Section 9 of the UK Aviation and Maritime Security Act 1990.

⁹⁸⁹ Section 1 of the UK Taking of Hostages Act 1982, available online at <http://www.legislation.gov.uk/ukpga/1982/28/section/1> (last visited 1 August 2017).

⁹⁹⁰ See Section 1 of the UK Nuclear Materials (Offences) Act 1983, available online at <http://www.legislation.gov.uk/ukpga/1983/18/contents> and Part 6 of the UK Anti-terrorism, Crime and Security Act 2000, available online at: <http://www.legislation.gov.uk/ukpga/2001/24/contents> (last visited 1 August 2017).

⁹⁹¹ See Section 1 of the Internationally Protected Persons Act 1978, available online at <http://www.legislation.gov.uk/ukpga/1978/17/contents> (last visited 1 August 2017).

⁹⁹² 18 U.S. Code § 2340A: "(a) Offense. — Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life. (b) Jurisdiction — There is jurisdiction over the activity prohibited in subsection (a) if— [...] (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender."

⁹⁹³ According to 18 U.S. Code § 1651 - Piracy under law of nations, "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life".

⁹⁹⁴ See 18 U.S. Code § 2442(c): "There is jurisdiction over an offense described in subsection (a) [Recruitment or use of child soldiers], and any attempt or conspiracy to commit such offense, if— [...] (3) the alleged offender is present in the United States, irrespective of the nationality of the alleged offender".

⁹⁹⁵ 18 U.S. Code § 1596 (a): "In addition to any domestic or extra-territorial jurisdiction otherwise provided by law, the courts of the United States have extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense) under section 1581, 1583, 1584, 1589, 1590, or 1591 if— [...] (2) an alleged offender is present in the United States, irrespective of the nationality of the alleged offender".

⁹⁹⁶ 18 U.S. Code § 32.

international airports,⁹⁹⁷ protection of foreign officials, official guests, and internationally-protected persons,⁹⁹⁸ prohibited transactions involving nuclear materials,⁹⁹⁹ hostage-taking,¹⁰⁰⁰ violence against maritime navigation or maritime fixed platforms,¹⁰⁰¹ bombings of places of public use, government facilities, public transportation systems and infrastructure facilities,¹⁰⁰² aircraft piracy,¹⁰⁰³ as well as numerous terrorist offences provided in counterterrorism conventions to which the United States is a party.¹⁰⁰⁴

2. *A general provision for universal jurisdiction over ordinary crimes*

It is worth noting that some state legislation contains a general provision establishing universal jurisdiction over ordinary crimes. In a similar way to the provisions that provide for universal jurisdiction over specific crimes, the provisions establishing universal jurisdiction over ordinary crimes are generally subject to two requirements: the presence of the offender on the state territory and his non-extradition. Such a provision is, for instance, provided for in the Slovenian Criminal Code. According to Article 13(2) of the Criminal Code of Slovenia, “The Penal Code of the Republic of Slovenia shall also be applicable to any foreign citizen who has, in a foreign country, committed a criminal offence against a third country or any of its citizens if he has been apprehended in the territory of the Republic of Slovenia, but was not extradited to the foreign country”.¹⁰⁰⁵ The principle is subject to the double criminality requirement.¹⁰⁰⁶ Likewise, Section 6 of the Criminal Code of Slovakia provides for universal jurisdiction over any act committed abroad by a foreign national who does not have a permanent residency status, subject to the double-criminality

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⁹⁹⁷ 18 U.S. Code § 37.

⁹⁹⁸ 18 U.S. Code § 112, 878, 1116.

⁹⁹⁹ 18 U.S. Code § 831.

¹⁰⁰⁰ 18 U.S. Code § 1203.

¹⁰⁰¹ 18 U.S. Code § 2280.

¹⁰⁰² 18 U.S. Code § 2332f.

¹⁰⁰³ 49 U.S. Code § 46502.

¹⁰⁰⁴ See *United States Submission: Information and Observations on the Scope and Application of the Principle of Universal Jurisdiction*, at 2, available online at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/United%20States.pdf (last visited 1 August 2017).

¹⁰⁰⁵ See Art. 13(2) of the Criminal Code of Slovenia, available online in English at <http://www.policija.si/eng/images/stories/Legislation/pdf/CriminalCode2009.pdf> (last visited 1 August 2017).

¹⁰⁰⁶ See Slovenia, *Universal Jurisdiction – reply by the Republic of Slovenia*. See also Section 14 3) of the Criminal Code of Slovenia, available online at <http://www.policija.si/eng/images/stories/Legislation/pdf/CriminalCode2009.pdf> (last visited 1 August 2017), which states that “In cases under Articles 12 and 13 the perpetrator shall be prosecuted only insofar as his conduct constitutes a criminal offence in the country where it was committed”.

requirement, if the suspect was apprehended or arrested on the territory of the Slovak Republic, and “was not extradited to a foreign State for criminal prosecution purposes”.¹⁰⁰⁷

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However, such legal provisions generally provide that the offence must be of a certain level of gravity. The Croatian Criminal Code, for instance, is applicable to foreigners who have committed an offence outside of Croatia “for which, under the law in force in the place of crime, a punishment of five years of imprisonment or a more severe penalty may be applied”.¹⁰⁰⁸ The suspect must have been found in Croatia and not extradited to another state.¹⁰⁰⁹ The Criminal Code of Macedonia contains a similar provision according to which the Code is applicable to crimes committed abroad by a foreigner if the crime, “according to that legislature, may be sentenced to five years of imprisonment or to a more severe punishment” and if the suspect is found on the territory of the Republic of Macedonia, and not extradited.¹⁰¹⁰ Likewise, Article 10 of the Italian Criminal Code states that Italian law applies to offences committed abroad against

¹⁰⁰⁷ See Section 6 of the Criminal Code of Slovakia, available in English online at http://iccdb.webfactional.com/documents/implementations/pdf/Criminal_Code_Slovakia_EN_Slovak_2010.pdf (last visited 1 August 2017), which provides that “(1) This Act shall be applied to determine the criminal liability for an act committed outside of the territory of the Slovak Republic by a foreign national who does not have a permanent residency status in the Slovak Republic also where a) the act gives rise to criminal liability under the legislation effective on the territory where it was committed, b) the offender was apprehended or arrested on the territory of the Slovak Republic, and c) was not extradited to a foreign State for criminal prosecution purposes”.

¹⁰⁰⁸ Art. 14(4) of the Criminal Code of Croatia provides that “The criminal legislation of the Republic of Croatia shall be applied to an alien who, outside the territory of the Republic of Croatia, commits against a foreign state or another alien a criminal offence for which, under the law in force in the place of crime, a punishment of five years of imprisonment or a more severe penalty may be applied”.

¹⁰⁰⁹ See Section 14(5) of the Criminal Code of Croatia, available online at http://iccdb.webfactional.com/documents/implementations/pdf/Croatie-Criminal_Code_updated_2008.pdf, which provides that “[...] the criminal legislation of the Republic of Croatia shall be applied [...] in the case referred to in paragraph 4 of this Article [universal jurisdiction over ordinary offences], only if the perpetrator is found within the territory of the Republic of Croatia and is not extradited to another state”.

¹⁰¹⁰ Art. 119 (2) of the Criminal Code of the Republic of Macedonia, available in English online at <http://www.legislationline.org/documents/action/popup/id/16066/preview> (last visited 1 August 2017), provides that: “(2) The criminal legislature is also applicable to a foreigner who commits a crime abroad, against a foreign country or a foreigner, who according to that legislature may be sentenced to five years of imprisonment or to a more severe punishment, when he finds himself on the territory of the Republic of Macedonia, and when he is not extradited to the foreign country. If not otherwise determined by this Code, in such a case the court may not pronounce a punishment more severe than the punishment that is prescribed by law of the country in which the crime was committed.”

foreigners if the offence is one for which a minimum sentence of three years is established, if the suspect is present in Italy and if extradition has not been requested.¹⁰¹¹ The Swedish Penal Code also provides for universal jurisdiction over ordinary crimes punishable of four or more years' imprisonment.¹⁰¹² The presence of the suspect and his non-extradition do not appear to be required. However, prosecution based on this provision requires the authorization of the Swedish Government.¹⁰¹³

Section 7(2)(2) of the German Criminal Code¹⁰¹⁴ provides that "German criminal law shall apply to other offences committed abroad if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal law jurisdiction, and if the offender: [...] 2. was a foreigner at the time of the offence, is discovered in Germany and, although the Extradition Act would permit extradition for such an offence, is not extradited either because a request for extradition within a reasonable period of time is not made, is rejected, or the extradition is not feasible". This provision is generally considered in German scholarship to incorporate the principle of "vicarious administration of justice" or the representation principle, rather than the universality principle.¹⁰¹⁵ It is however arguable that when jurisdiction is exercised under this provision, and as an extradition request has not been made, states are in fact exercising universal jurisdiction.

In general, a distinction must be made between the aforementioned provisions providing for universal jurisdiction and the *aut dedere* provisions present in some pieces of domestic legislation. Indeed, the criminal laws of some

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¹⁰¹¹ See Italy, *Information on the scope and application of universal jurisdiction*, available online at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Italy.pdf (last visited 1 August 2017). See also Art. 10 of the Italian Criminal Code.

¹⁰¹² Section 3(7) of Chapter 2 of the Swedish Criminal Code, available online in English at <http://www.government.se/contentassets/5315d27076c942019828d6c36521696e/swedish-penal-code.pdf> (last visited 1 August 2017), provides that "crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court [...] if the least severe punishment prescribed for the crime in Swedish law is imprisonment for four years or more".

¹⁰¹³ Chapter 2, Section 5(2) of the Swedish Criminal Code, available online at <http://www.government.se/contentassets/5315d27076c942019828d6c36521696e/swedish-penal-code.pdf> (last visited 1 August 2017).

¹⁰¹⁴ An English translation of the German Criminal Code is available online at http://iccdb.webfactional.com/documents/implementations/pdf/German_-_Criminal_Code_amend_Oct_2009.pdf (last visited 1 August 2017).

¹⁰¹⁵ See F. Jessberger, 'Germany', 79(1-2) *RIDP/IRPL* (CD-ROM Annexe) (2008) 259-302, at 254. Representational jurisdiction has been defined as jurisdiction under which states prosecute an offence as representative of other states, if the act is also an offence in the territorial state and extradition is impossible for reasons not relating to the nature of the crime. See Ryngaert, *Jurisdiction in International Law*, at 102.

states, mostly European states, include a provision, establishing that the laws of the state are applicable when the extradition of a person to another country has been denied. For instance, section 8(6) of the Danish Criminal Code provides for universal jurisdiction over any crime which may be sanctioned with a sentence of more than one year's imprisonment, where the crime is also a crime in the territorial state and the extradition to another country is rejected.¹⁰¹⁶ A similar provision can be found for instance the French Penal Code,¹⁰¹⁷ the Penal Code of Paraguay,¹⁰¹⁸ the Portuguese Criminal Code,¹⁰¹⁹ and the Swiss Penal Code.¹⁰²⁰ Such a provision is sometimes called the "vicarious administration of justice", the representative principle, or the domestic provision of *aut dedere aut judicare/prosequi*, where extradition prevails. These provisions in fact contain the representation principle, rather than the universality principle. Indeed, under this principle, the custodial state prosecutes an offence on behalf of another state, that is, the state whose request for extradition was denied.¹⁰²¹ In our view, as soon as a provision establishes that jurisdiction is subject to the submission

¹⁰¹⁶ See Section 8(6) of the Danish Criminal Code.

¹⁰¹⁷ See Art. 113-8-1 of the French Penal Code, which provides that "*Sans préjudice de l'application des articles 113-6 à 113-8, la loi pénale française est également applicable à tout crime ou à tout délit puni d'au moins cinq ans d'emprisonnement commis hors du territoire de la République par un étranger dont l'extradition ou la remise a été refusée à l'Etat requérant par les autorités françaises aux motifs, soit que le fait à raison duquel l'extradition avait été demandée est puni d'une peine ou d'une mesure de sûreté contraire à l'ordre public français, soit que la personne réclamée aurait été jugée dans ledit Etat par un tribunal n'assurant pas les garanties fondamentales de procédure et de protection des droits de la défense, soit que le fait considéré revêt le caractère d'infraction politique, soit que l'extradition ou la remise serait susceptible d'avoir, pour la personne réclamée, des conséquences d'une gravité exceptionnelle en raison, notamment, de son âge ou de son état de santé.*"

¹⁰¹⁸ See Art. 9 of the Penal Code of Paraguay, available online at http://www.geneva-academy.ch/RULAC/pdf_state/Penal-Code-Amend-Paraguay-Law-3440-2008.pdf (last visited 1 August 2017), which provides that "*1º.- Se aplicará la ley penal paraguaya a los demás hechos realizados en el extranjero sólo cuando: 1. en el lugar de su realización, el hecho se halle penalmente sancionado; y, 2. el autor o partícipe, al tiempo de la realización del hecho [...] b) careciendo de nacionalidad, se encontrara en el territorio nacional y su extradición hubiera sido rechazada, a pesar de que ella, en virtud de la naturaleza del hecho, hubiera sido legalmente admisible.*"

¹⁰¹⁹ Art. 5(1)(e) of the Portuguese Criminal Code provides that "1- Except when it is contrary to international treaties or conventions, Portuguese penal law is still applicable to acts committed abroad: [...] e) By foreigners, when found in Portugal, whose extradition has been requested, when considered as crimes admitting extradition and this cannot be conceded."

¹⁰²⁰ See for instance Art. 7 § 2 a) of the Swiss Penal Code according to which "If the person concerned is not Swiss and if the felony or misdemeanour was not committed against a Swiss person, paragraph 1 is applicable only if: a. the request for extradition was refused for a reason unrelated to the nature of the offence."

¹⁰²¹ See *supra* Part I N 85 ff.

by another state of an extradition request, it is in fact a form of vicarious administration of justice. However, in the case where no explicit extradition request needs to be made, the provision can be considered as a form of universal jurisdiction.

Chapter 2: State practice

I. A general overview

The foregoing information shows that the universality principle as such – subject to a number of restrictions – is provided for in many pieces of domestic legislation and for crimes of a very different nature and gravity.¹⁰²² However, it has been rarely used in practice. In their reports on the scope and application of the principle of universal jurisdiction, most states report that no universal jurisdiction case has ever been tried or prosecuted in their country.¹⁰²³ In some

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¹⁰²² Amnesty International reports that, in total, 163 of the 193 UN Member States “can exercise universal jurisdiction over one or more crimes under international law, either as such crimes or as ordinary crimes under national law”. See Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World – 2012 Update* (2012), at 2.

¹⁰²³ See, for instance, Information submitted by the Azerbaijani Republic on the scope and application of the principle of universal jurisdiction, ‘Information on the scope and application of the principle of universal jurisdiction’, available online at [http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Azerbaijan%20\(R%20to%20E\).pdf](http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Azerbaijan%20(R%20to%20E).pdf) (last visited 1 August 2017); Permanent Mission El Salvador to the United Nations, 3 May 2010; Permanent Mission of the Republic of Estonia to the United Nations, 26 April 2010, available online at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Estonia.pdf (last visited 1 August 2017), which states that the principle of universal jurisdiction has not been applied in Estonian practice yet; See Malta, *Observations on the scope and application of the principle of universal jurisdiction*, at 3, which states that “To date there were no instances where the principle of universal jurisdiction as provided to by national legislation was applied in judicial practice.”; See Permanent Mission of the Republic of Moldova to the United Nations, *The application of the principle of universal jurisdiction in the Republic of Moldova*, 8 May 2013, which states that “Regarding the application of the principle of universal jurisdiction, according to existing data, currently there is no domestic practice in this respect”; See New Zealand Permanent Mission to the United Nations, *Comments by New Zealand on the scope and application of the principle of universal jurisdiction*, 28 April 2010; See Permanent Mission of Peru to the United Nations, *The scope and application of the principle of universal jurisdiction*, 18 May 2010, § (c), which states that “there have been no cases in which universal jurisdiction has been exercised by national courts in Peru.”; Permanent Mission of the Slovak Republic to the United Nations, *The scope and application of the principle of Universal jurisdiction (Slovak Republic observations)*, 17 May 2011, available online at http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Slovak%20Rep.pdf (last visited 1 August 2017), at 7, which concludes that “the Slovak Republic has no practical experience with an application of universal jurisdiction principle.”; See Slovenia, *Universal Jurisdiction – reply by the Republic of Slovenia*, available online at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Slovenia.pdf (last visited 1 August 2017), which states that “No case has yet been tried before the Slovenian courts under the principle of universal jurisdiction.”; See also UN GA, *The scope and application of the principle of universal jurisdiction*, Report of the

countries, the principle of universal jurisdiction has only been applied in practice in respect to treaty-based crimes and other crimes, but not to core crimes.¹⁰²⁴ In its report to the United Nations, the United States noted that it was “aware of few examples of U.S. prosecutions based solely on the principle of universal jurisdiction, where there is no other link between the United States and the offense charged except that the alleged offender is present before the court”.¹⁰²⁵

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In his 2011 study, Langer identified “1051 complaints or cases considered by public authorities on their own motion”.¹⁰²⁶ When attempts to exercise universal jurisdiction have been made, these have generally failed. In the Czech Republic, for instance, all attempts failed either because of a lack of sufficient evidence or for reason of the application of statutes of limitations.¹⁰²⁷ In a 1998 case, a group of Chilean citizens, who were residents in Denmark, reported former president of Chile Augusto Pinochet for arrest, torture and degrading treatment in Chile between 1973 and 1998.¹⁰²⁸ The Danish Prosecutor General concluded that Denmark lacked criminal jurisdiction on the basis of section 8(5),

Secretary-General, A/69/174, 23 July 2014, at 8 and *Report of the Secretary-General prepared on the basis of comments and observations of Governments on the scope and application of the principle of universal jurisdiction*, UNGA, A/65/18129, July 2010, § 26.

¹⁰²⁴ See for instance, Panama, Ministry of Foreign Affairs, *Information and observations on the scope and application of universal jurisdiction*, 23 April 2012, available online at http://www.un.org/en/ga/sixth/67/ScopeAppUniJuri/Panama%20_Eng.pdf (last visited 1 August 2017), which states that “In Panama, the principle of universal jurisdiction has only been applied in respect of crimes with implications for the international community, including inter alia, drug trafficking, money laundering, trafficking in persons and terrorism; however, there have been no prosecutions for crimes against humanity (genocide).”

¹⁰²⁵ *United States Submission: Information and Observations on the Scope and Application of the Principle of Universal Jurisdiction*, available online at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/United%20States.pdf (last visited 1 August 2017).

¹⁰²⁶ Langer, ‘The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes’, 105(1) *The American Journal of International Law* (January 2011) 1-49.

¹⁰²⁷ See Permanent Mission of the Czech Republic to the United Nations, *Information of the Czech Republic on the Scope and Application of the Principle of Universal Jurisdiction*, 28 April 2010, available online at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Czech%20Republic.pdf (last visited 1 August 2017).

¹⁰²⁸ See Ministry of Foreign Affairs, *The Scope and Application of the Principle of Universal Jurisdiction*, available online at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Denmark.pdf (last visited 1 August 2017).

that is, due to the fact that Pinochet was not present in Denmark.¹⁰²⁹ In 2006, the Danish Prosecutor also opened an investigation against Sylvère Ahorugeze, a Rwandan national, former head of the Rwandan Civil Aviation Authority.¹⁰³⁰ He had taken up residence in Denmark in 2001, having been granted refugee status. The Danish police made several visits to Rwanda and other countries and questioned numerous witnesses but finally, in September 2007, the preliminary investigation was discontinued because the prosecutor found that the evidence against the applicant was not sufficient for a conviction.¹⁰³¹ It is interesting to note that Ahorugeze was later found in Sweden. Following an extradition request from Rwanda, on 7 July 2009, the Swedish Government decided to extradite the suspect to Rwanda to stand trial on charges of genocide and crimes against humanity.¹⁰³² Another Rwandan genocide suspect, who had been granted asylum in Denmark under a false name, was charged with genocide. Danish courts held that Denmark lacked universal jurisdiction over the crimes of genocide. However, on 29 April 2012, the Supreme Court of Denmark overruled the previous decisions.¹⁰³³ The Danish courts finally decided that he could be extradited to Rwanda.¹⁰³⁴

Moreover, an attempt was made under section 8(1) of the New Zealand ICC Act to bring a prosecution against a former Israeli general who was visiting New Zealand.¹⁰³⁵ An arrest warrant for General Ya'alon was issued by a District Court judge.¹⁰³⁶ However, pursuant to section 13 of the ICC Act, the consent of the Attorney General was necessary in order to proceed with the prosecution. The Attorney General declined to give his consent because he considered that

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¹⁰²⁹ See Ministry of Foreign Affairs, *The Scope and Application of the Principle of Universal Jurisdiction*, available online at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Denmark.pdf (last visited 1 August 2017).

¹⁰³⁰ See the facts in ECtHR, Judgment, *Ahorugeze v. Sweden* (37075/09), 27 October 2011.

¹⁰³¹ ECtHR, Judgment, *Ahorugeze v. Sweden* (37075/09), 27 October 2011, § 10.

¹⁰³² *Ibid.*, § 21.

¹⁰³³ See Order of the Supreme Court, 26 April 2012, English translation available online at <http://www.asser.nl/upload/documents/20120614T104012-120426%20Danish%20Supreme%20Court%20on%20%20application%20of%20the%20Danish%20Act%20on%20Genocide%20EN.pdf> (last visited 1 August 2017).

¹⁰³⁴ Decision of The Supreme Court, 6 November 2013, available online at http://www.internationalcrimesdatabase.org/upload/ICD/Upload1215/200131106_Danish_Supreme_Court_decision_on_extradition_to_Rwanda.pdf (last visited 1 August 2017).

¹⁰³⁵ See New Zealand Permanent Mission to the United Nations, *Comments by New Zealand on the scope and application of the principle of universal jurisdiction*, 28 April 2010, at 3.

¹⁰³⁶ *Ex Parte Application for Issue of Warrant to Arrest Lieutenant General Moshe Ya'alon of Israel* (District Court, Auckland, Civ-2006-004, 27 November 2006).

the evidence against General Ya'alon was insufficient; as a result, the case was permanently stayed.¹⁰³⁷

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Since 2009, Kenya has applied the principle of universal jurisdiction to the prosecution of piracy cases on the high seas. The first trial was conducted against 10 Somali nationals captured by the United States of America on the high seas. In May 2009, the High Court of Kenya dismissed the appeal of the accused and found that the provisions of section 69 (1) of the Penal Code – which, until they were repealed by the Merchant Shipping Act, provided that any person on the high seas could be found guilty of the offence of piracy – were broad enough to cover the prosecution of non-national suspects captured on the high seas of the Indian Ocean, off the coast of Somalia.¹⁰³⁸

II. A regional overview

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A considerable majority of the universal jurisdiction cases have taken place in Europe. A study of the state practice of universal jurisdiction in Europe until 2008 revealed “more than fifty relevant court proceedings and investigations”, and a dozen convictions in several European countries.¹⁰³⁹ Most of the universal jurisdiction cases have been prosecuted and tried in Western Europe. According to another study, in March 2010, 13 countries in Europe had initiated criminal investigations and prosecutions for international crimes committed elsewhere between 1994 and 2010, resulting in over 50 indictments and arrest warrants.¹⁰⁴⁰

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In Europe, a majority of the cases in which universal jurisdiction has been exercised have taken place in Belgium and Spain. A number of such cases have also been heard in Germany,¹⁰⁴¹ the Netherlands, France, and the United

¹⁰³⁷ See New Zealand Permanent Mission to the United Nations, *Comments by New Zealand on the scope and application of the principle of universal jurisdiction*, 28 April 2010, at 3.

¹⁰³⁸ See UN GA, *The scope and application of the principle of universal jurisdiction*, Report of the Secretary-General, A/69/174, 23 July 2014.

¹⁰³⁹ W. Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008', 30 *Michigan Journal of International Law* (2008-2009) 927-980.

¹⁰⁴⁰ Rikhof, 'Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity', 20(1) *Criminal Law Forum* (March 2009), at 45-46.

¹⁰⁴¹ In the early 1990s, German prosecutors were eager to prosecute war crimes suspects from the former Yugoslavia. The first German judgment against Rwandan *génocidaires* who fled to Germany was rendered in 2014. See OLG Frankfurt am Main, judgment of 18 February 2014 (5 – 3 StE 4/10 – 4 – 3/10), with commentary by G. Werle and B. Burghardt, 'Der Völkermord in Ruanda und die deutsche Strafrecht', 10 *Zeitschrift für Internationale Strafrechtsdogmatik (ZIS)* (2015) 46-56.

Kingdom. A few have occurred in Austria,¹⁰⁴² Italy¹⁰⁴³ and Switzerland. Countries of Northern Europe have also been faced with universal jurisdiction cases. Denmark exercised universal jurisdiction in the *Sarić* case.¹⁰⁴⁴ Sarić, who was arrested in Denmark, was convicted for war crimes under the third and fourth Geneva Conventions on the basis of Article 8(5) of the Danish Criminal Code, which provides for universal jurisdiction over crimes committed abroad in violation of international treaties ratified by Denmark.¹⁰⁴⁵ The first case tried by Finland under the principle of universal jurisdiction was the *Bazaramba* case. The Finnish Ministry of Justice refused to extradite him to Rwanda on fair trial concerns, based on prior decisions of the ICTR, in which the tribunal refused to refer cases to Rwanda. In June 2010, Bazaramba was found guilty of committing genocide as provided for in the Finnish Criminal Code and sentenced to life imprisonment.¹⁰⁴⁶ On 30 March 2012, the Court of Appeal upheld the District Court's decision.¹⁰⁴⁷ Bazaramba's appeal to the Supreme Court was rejected. In Norway, on 13 April 2010, a Court of Appeal confirmed the conviction of Mirsad Repak for the unlawful deprivation of the liberty of civilians in Bosnia and Herzegovina.¹⁰⁴⁸ In February 2013, an Oslo court sentenced Sadi Bugingo to 21 years in prison for his role in the massacres of more than 1,000 Tutsis in three "bestly" attacks during the genocide.¹⁰⁴⁹ In Sweden, on 18 December 2006, Jackie Arklöv was found guilty of wrongful imprisonment, torture, war crimes, and assault of Bosnian Muslim prisoners of war and civilians.¹⁰⁵⁰

¹⁰⁴² See *Cvjetkovic*, Part III, Chapter 2, Section III.

¹⁰⁴³ *C. Guillermo Suárez Mason*, Rome Second Criminal Court, 6 December 2000, sentenced to life imprisonment *in absentia*. See Redress/FIDH, *Universal Jurisdiction Trial Strategies, Focus on victims and witnesses: A report on the Conference held in Brussels, 9-11 November 2009*, available online at http://www.redress.org/Universal_Jurisdiction_Nov2010.pdf (last visited 1 August 2017), at 5.

¹⁰⁴⁴ On this case, see *supra* Part III, Section 1 notes 69 ff.

¹⁰⁴⁵ Art. 8(5) of the Danish Criminal Code. See Ministry of Foreign Affairs of Denmark, *The Scope and Application of the Principle of Universal Jurisdiction*, at 3.

¹⁰⁴⁶ See Finland, District Court of Itä-Uusimaa, Judgment, *Bazaramba*, R 09/404, 11 June 2010, English translation available online at <http://www.internationalcrimesdatabase.org/upload/ICD/Upload973/Bazaramba%20Judgment%20-%20part%20B.pdf> (last visited 1 August 2017).

¹⁰⁴⁷ See Permanent Mission of Finland to the United Nations, 20 April 2012, available online at http://www.un.org/en/ga/sixth/67/ScopeAppUniJuri/Finland_Eng.pdf (last visited 1 August 2017).

¹⁰⁴⁸ M. Repak was acquitted of torture on appeal and his sentence was reduced to four and half years' imprisonment. Court of Appeal, 13 April 2010. See Redress/FIDH, *Universal Jurisdiction Trial Strategies Focus On Victims and Witnesses: A Report on the Conference Held in Brussels, 9-11 November 2009*, available online at http://www.redress.org/Universal_Jurisdiction_Nov2010.pdf (last visited 1 August 2017), at 5

¹⁰⁴⁹ See 'The world prosecutes Rwanda's genocide', *The Global Post*, 21 June 2013.

¹⁰⁵⁰ Sweden, Stockholm District Court, Judgment (B4084-04), 18 December 2006. The court did not impose a jail sentence because Arklöv was already serving a life term sentence that had been imposed

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As mentioned above, Serbian law provides its authorities with the scope to exercise jurisdiction over war crimes committed anywhere on the territory of the former Yugoslavia. To this day, this basis for universal jurisdiction has not been used extensively to prosecute foreign nationals for war crimes allegedly perpetrated in the Yugoslav conflict; reported cases include both an acquittal of a Bosnian national and the rejection by a British judge of a request for the extradition of former Bosnian president Ejup Ganić (for the reason of an allegedly politically-motivated process).¹⁰⁵¹ In 2015, a Croatian national sentenced in Serbia for war crimes was transferred to serve his sentence in Croatia.¹⁰⁵²

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In contrast to the United States, Canada has prosecuted a number of cases on the basis of universal jurisdiction. Désiré Munyaneza was convicted on 22 May 2009 for genocide, war crimes and crimes against humanity, for his involvement in Butare during the Rwandan genocide. He was sentenced to life imprisonment.¹⁰⁵³ In addition, a number of Latin American cases have been heard, beginning with those in Argentina in 1995.

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Few universal jurisdiction cases have taken place on the African continent, with the exception of Senegal in the context of the *Hissène Habré* case, South Africa in the recent case against 17 Zimbabweans for acts of torture as a crime against humanity committed in Zimbabwe, and the Kenyan piracy cases. This is partly due to the fact that while 34 African states are now parties to the ICC, only six have adopted legislation implementing provisions on the core crimes.¹⁰⁵⁴ This may also be due to a lack of resources or a lack of political will.

in 1999. See Redress/FIFDH, *Universal Jurisdiction Trial Strategies Focus on Victims and Witnesses: A Report on the Conference Held in Brussels, 9-11 November 2009*, available online at http://www.redress.org/Universal_Jurisdiction_Nov2010.pdf (last visited 1 August 2017), at 5.

¹⁰⁵¹ Radović, 'A Comment on Croatia's Concerns over Serbia's So-Called 'Mini-Hague'', *EJIL Talk*, 22 April 2016.

¹⁰⁵² *Ibid.*

¹⁰⁵³ See for a comment, F. Lafontaine, 'Canada's Crimes against Humanity and War Crimes Act on Trial: An Analysis of the *Munyaneza* Case', 8(1) *JICJ* (2010) 269-288.

¹⁰⁵⁴ This is the case inter alia of Senegal, Burkina Faso, Comoros, the Central African Republic and Mauritius. See Wilfrid S. Araba, 'Infractions pénales internationales et actualité du principe de la compétence universelle', *Centre international de formation en Afrique des avocats francophones, Session C. I. F. A. F. 2014*, at 30 ff. According to Art. 2 of the 2007 Senegalese law n° 2007-05 modifying the Penal Code, "Tout étranger qui, hors du territoire de la République s'est vu reprocher d'être l'auteur ou le complice d'un des crimes visés aux articles 431-1 à 431-5 du code pénal [crimes du statut de Rome], [...] peut être poursuivi et jugé d'après les dispositions des lois sénégalaises ou applicables au Sénégal, s'il se trouve sous la juridiction du Sénégal ou si une victime réside sur le territoire de la République du Sénégal, ou si le gouvernement obtient son extradition". Art. 15 of the 2009 Law n° 052-2009/AN of Burkina Faso "portant détermination des compétences et de la procédure de mise en œuvre du statut de Rome relatif à la Cour pénale internationale par les

It has been said however that in light of the South African judgment, this state is now a “likely forum for trials under universal jurisdiction in the future”.¹⁰⁵⁵

Similarly, few universal jurisdiction cases have been heard in Asia. Korea exercised universal jurisdiction in a 1983 case against a group of Chinese nationals who had hijacked a Chinese domestic aircraft in flight and forced the plane to land at a regional Korean airport. The Korean courts considered that while China held primary jurisdiction, they had jurisdiction on the basis of the Convention for the Suppression of the Unlawful Seizure of Aircraft.¹⁰⁵⁶ China has exercised universal jurisdiction over piracy¹⁰⁵⁷ but never over core international crimes.¹⁰⁵⁸

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juridictions burkinabé, « Les juridictions burkinabé sont compétentes pour connaître des crimes visés par la présente loi, indépendamment du lieu où ceux-ci auront été commis, de la nationalité de leur auteur ou de celle de la victime, lorsque la personne poursuivie est présente sur le territoire national. La condition de présence sur le territoire du Burkina Faso ne s'applique pas aux nationaux. ». A similar provision is provided for at Art. 15 of the Comoros Law n° 11-022 of 13 December 2011 and at Arts 321 et 335 of the law of the Central African Republic n° 10.002 of 6 January 2010; Art. 4 – 3 – (b) et (c) of the Mauritius Law n° 27 of 26 July states that “Where a person commits an international crime outside Mauritius, he shall be deemed to have committed the crime in Mauritius if he (...) b) is not a citizen of Mauritius but is ordinarily resident in Mauritius; (c) is present in Mauritius after the commission of the crime”.

¹⁰⁵⁵ Werle and Bornkamm, ‘Torture in Zimbabwe under Scrutiny in South Africa: The Judgment of the North Gauteng High Court in *SALC v. National Director of Public Prosecutions*’, 11 *Journal of International Criminal Justice* (2013) 659-675.

¹⁰⁵⁶ Korea, Universal Jurisdiction in the Republic of Korea, *Information on the scope and application of the principle of universal jurisdiction*, available online at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/RepublicofKorea.pdf (last visited 1 August 2017), at 2.

¹⁰⁵⁷ “In February 2003, a piracy case was tried in the Shantou Municipal Intermediate People’s Court in China. During the trial, the Court ascertained that 10 Indonesians had hijacked a Thai oil tanker off Malaysia and had been apprehended by Chinese police while disposing of the stolen goods in Chinese territorial waters. In accordance with article 9 of the Criminal Law of China, the Court exercised the jurisdiction prescribed for the aforementioned crime on the basis of the United Nations Convention on the Law of the Sea and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, both ratified by China, and convicted and sentenced the accused in accordance with the provisions of Chinese criminal law.” *Report of the Secretary-General prepared on the basis of comments and observations of Governments on the scope and application of the principle of universal jurisdiction*, UNGA, A/65/18129, July 2010, § 26.

¹⁰⁵⁸ See Chengyuan, ‘The Connotation of Universal Jurisdiction and its Application in the Criminal Law of China’, in Bergsmo/Ling (eds), *State Sovereignty and International Criminal Law* (Torkel Opsahl: Beijing, 2012) 149-164, at 149-164.

Part III: Conditions to exercise of universal jurisdiction

Chapter 1: The principle of legality

I. Introductory remarks

Firstly, and above all, the exercise of universal jurisdiction over international crimes presupposes that domestic authorities (1) can identify the applicable criminal law, that is, that they are able to rely on definitions of the international crimes corresponding to the acts in question and (2) are able to exercise universal jurisdiction. As will be shown in this chapter, generally, and despite what might be said in international law,¹⁰⁵⁹ national judges are reluctant to assert universal jurisdiction: (i) if the underlining international crimes have not been incorporated and defined in domestic law,¹⁰⁶⁰ (ii) if a corresponding penalty has not been prescribed and (iii) if a domestic statute does not expressly provide for universal jurisdiction over the crime.¹⁰⁶¹ This is mainly due to the fact that the exercise of universal jurisdiction in the absence of these three elements is highly controversial under the domestic legality principle.

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Even though most states have ratified the relevant conventions as well as the Rome Statute, many national laws are still incomplete, failing either to include all international crimes or to define them.¹⁰⁶² In addition, as has been shown in Part II, a minority of states have expressly provided for the universality principle in respect of all three core crimes and torture, at least until

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¹⁰⁵⁹ As will be discussed in this chapter, from an international viewpoint, it is generally admitted that if a crime is directly criminalized in international law, states are entitled to exercise universal jurisdiction over that crime.

¹⁰⁶⁰ See also G. Botrini, 'Universal Jurisdiction after the Creation of the International Criminal Court', 36 *N.Y.U. Journal of International Law and Politics* (2003-2004) 503-562, at 514; See Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (1988), at 285, § 21, which defines an "international crime" as "a grave offence against international law which the international community of States recognises as a crime and for the committing of which the responsible individuals can be punished under international law even if the domestic law of a particular State does not declare it to be punishable."; See Principle 3 of the Princeton Principles, entitled 'Reliance on Universal Jurisdiction in the Absence of National Legislation', which provides: "With respect to serious crimes under international law as specified in Principle 2(1), national judicial organs may rely on universal jurisdiction even if their national legislation does not specifically provide for it".

¹⁰⁶¹ See, for instance, *South African Observations on the Application of Universal Jurisdiction*, at 2.

¹⁰⁶² In a report published in 2011, Amnesty International showed that most states' legislations were seriously flawed, failing to include all international crimes. Furthermore, a number of national laws diverge from international law in their formulation of international crimes.

recently.¹⁰⁶³ Thus, it is submitted that one of the main reasons universal jurisdiction has rarely been used in practice is the absence of domestic provisions.

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The issue of the implementation of international criminal law at a national level and the question of the direct application of international law are naturally not limited to universal jurisdiction cases. The question of whether a person can be convicted for an international crime directly on the basis of international law, in the absence of a domestic provision prohibiting the crime in question, has been raised in cases where the courts exercised other jurisdictional bases than universal jurisdiction.¹⁰⁶⁴ However, the issue acquires a particular dimension in the context of universal jurisdiction, because unlike other traditional jurisdictional bases, universal jurisdiction can generally not be exercised over ordinary crimes.¹⁰⁶⁵ Consequently, in a number of cases, where courts have exercised traditional bases of jurisdiction, core crimes have been prosecuted as ordinary crimes such as murder or assault; as a result, the perpetrators were therefore not left unpunished.¹⁰⁶⁶ The case of universal jurisdiction is different. Put simply, if domestic legislation provides for universal jurisdiction but does not contain provisions implementing the international crime, according to a strict application of the legality principle, the accused cannot be convicted and will therefore be left unpunished.

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In order to avoid this impunity and notwithstanding the absence of domestic legislation incriminating international crimes, some domestic judges

¹⁰⁶³ It should be noted that most European states provide for universal jurisdiction over core crimes and torture. See FIFDH and Redress, *Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union*, at 21-22.

¹⁰⁶⁴ See for instance the *Touvier* case, V. Thalmann, 'Touvier', in Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009) 956-958; See also *Papon* case, V. Thalmann, 'Papon', in Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009) 871-872.

¹⁰⁶⁵ In most states, universal jurisdiction is the only jurisdictional basis which is not possible for ordinary crimes. This is not the case in every state. In some states, jurisdiction over criminal conduct (ordinary crimes) is based on the territoriality principle. This is the case for instance in Canada, where courts can only assert extraterritorial jurisdiction over international crimes. In the *Finta* case, for instance, in order for the Canadian courts to assert jurisdiction over the suspect, Imre Finta, a Canadian national, the acts of the accused had to be established as constituting a war crime or a crime against humanity. See K. Gustafson, 'Finta', in Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009) 673-675, at 673.

¹⁰⁶⁶ In the *US v. Calley* case, for instance, a US soldier was found guilty of premeditated murder of at least 22 people and assault, for his involvement in the My Lai massacre in the Vietnam War, although he could have been charged with war crimes. On this case, see G. D. Solis, 'Calley', in Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009) 629-630. See also, W. N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (The Hague: TMC Asser Press, 2006), at 19.

have nevertheless convicted (or attempted to convict – because their judgments were reversed on appeal) perpetrators of genocide, crimes against humanity, war crimes, torture and other international crimes directly on the basis of international treaty provisions, customary international law or the *jus cogens* nature of a crime. Some have asserted universal jurisdiction directly on the basis of international law, even when their national legislation did not specifically provide for it. In those cases, where state legislation has implemented some but not all international crimes, certain courts have “requalified” the crime as an international crime over which they had universal jurisdiction. In all of these cases, the defendant invoked a violation of the *nulla poena nullum crimen sine lege* principle or due process rights. The issue of the direct applicability of international criminal law was also raised.

Furthermore, it should be noted that in states where international crimes have been incorporated into domestic law and universal jurisdiction over such crimes is expressly stipulated in domestic law, these provisions have often only been recently adopted, generally in the context of the adaptation of state legislation after the ratification of the Rome Statute.¹⁰⁶⁷ France, for instance, an early signatory of the Rome Statute, only adopted implementation legislation in 2002.¹⁰⁶⁸ In fact, in the conclusions of the study conducted by A. Cassese and M. Delmas-Marty, it was found that, in 2002, Russia appeared to be the only state that had incorporated all core crimes, including aggression, into its domestic legislation.¹⁰⁶⁹ Until recently, many states only included definitions of the crime of genocide¹⁰⁷⁰ or of war crimes in general.¹⁰⁷¹ Crimes against humanity, in particular, were – until recently, and the implementation of the Rome Statute – not established as such at the domestic level because of the absence of other treaty provisions containing an authoritative definition.¹⁰⁷² Today, many states have enacted legislation empowering their courts to prosecute core crimes as defined in accordance with the Rome Statute.¹⁰⁷³

However, the fact that these provisions have been adopted recently gives rise to the question of whether these new provisions can apply to acts committed

¹⁰⁶⁷ See Part II. Indeed, the adoption of legislation implementing the ICC has improved numerous national laws on international crimes.

¹⁰⁶⁸ See Commission nationale consultative des droits de l'homme, *Avis sur la mise en œuvre du statut de la CPI*, 19 December 2002, which insists on “la nécessité de combler le vide juridique actuel, en particulier sur les crimes de guerre.” ; see M. Delmas-Marty, *Les interdits fondateurs*, at 57.

¹⁰⁶⁹ See Swart, *La place des critères traditionnels de compétence dans la poursuite des crimes internationaux*, at 569.

¹⁰⁷⁰ This was the case of Austria and Germany for instance.

¹⁰⁷¹ See Part II.

¹⁰⁷² According to recent research conducted by Bassiouni, only 55 states have legislation criminalizing crimes against humanity, most of which was adopted after 2002.

¹⁰⁷³ See Part II.

prior to their entry into force, that is, without violating the fundamental principle of non-retroactivity of criminal law as provided for in most domestic legal systems. A distinction must be made here between the retroactivity of the provisions that implement international crimes and the retroactivity of the provisions providing for universal jurisdiction. The latter issue has, for instance, been discussed in relation to acts of genocide. After ratifying the 1948 Genocide Convention, many states incorporated the definition of genocide into their national law. However, because Article 6 of the Genocide Convention only expressly recognizes territorial jurisdiction, states generally did not provide for universal jurisdiction. This gave rise to the issue of whether the states that had recently introduced the principle of universal jurisdiction over genocide could apply it retroactively to acts committed prior to the entry into force of the domestic provisions.

315 Finally, even in those cases where domestic law provides for universal jurisdiction over international crimes and where these provisions were applicable at the commission of the events, the legality principle may still not be respected under the “foreseeability” and “accessibility” criteria set out in international human rights law. Indeed, when exercising universal jurisdiction – or any other jurisdictional basis – domestic courts apply their own criminal law, namely the law of the *locus fori*. This gives rise to the question of whether the application of the law of the *locus fori* and its penalties fulfils the requirements of “foreseeability” and “accessibility” in universal jurisdiction cases. In order to better fulfil these requirements, should the law of the territorial state be taken into account when a state is asserting universal jurisdiction in order to ensure the better respect of *nullum crimen sine lege*? As will be shown in this chapter, notwithstanding that the full application of the foreign penal law of the *locus commissi* is hardly ever an option to be considered by the domestic legislature or by the domestic courts, some state legislatures do take the law of the territory into account, in at least two ways. Firstly, certain national legislations provide that universal jurisdiction over international crimes is subject to the double criminality requirement.¹⁰⁷⁴ Secondly, as has been seen in Part II, a number of states provide for national legislation which contains a provision obliging those courts exercising universal jurisdiction to not impose a heavier sentence than that provided for by the law of the place of commission.

316 **Section II** of this chapter will briefly present the principle of legality in international human rights law and in national law (subsection A). It will also provide an overview of some of the deficiencies of national legislation and explain why, despite the argument that international criminal law is directly applicable in national courts, implementation at the domestic level remains necessary, both in monist and dualist states (subsection B).

¹⁰⁷⁴ See Part II.

Section III focuses on substantive law, i.e. the law establishing the relevant international crimes. Through the examination of some of the judgments rendered by domestic courts applying universal jurisdiction, it will address the consequences of the absence of implementation legislation at the time of the commission of the crimes and the tension between the legality principle and the direct applicability of international law establishing those crimes before national courts.¹⁰⁷⁵ It will show that solutions proposed by domestic courts, when confronted with the principle of legality, are relatively sparse but surprisingly varied.¹⁰⁷⁶ In some cases, the principle of legality is considered to be an obstacle to the direct application of international criminal law, while in others it is not understood as such. Furthermore, even in cases where courts directly apply provisions of international law, the issue of what the applicable penalty is arises, since international provisions do not provide for penalties. This section will therefore also address the various solutions found in domestic courts with regard to penalties and the problems that these solutions may create. Finally, the section deals with certain problems encountered when domestic courts clearly depart from international definitions of crimes.¹⁰⁷⁷ It should be noted that the cases examined in this section are not representative because, for the sake of the debate, the section focuses predominantly on the few universal jurisdiction prosecutions for international crimes that have actually succeeded in national courts, despite the absence of domestic legislation incorporating such crimes.

Section IV will address the issue of the absence of domestic provisions providing for universal jurisdiction at the time of the commission of the crime and the two main questions arising therefrom.¹⁰⁷⁸ Firstly, in the absence of domestic legislation empowering it to do so, can a domestic court exercise universal jurisdiction directly on the basis of international law? Or put differently, does the failure of a state to modify its criminal legislation constitute

¹⁰⁷⁵ The issue of direct applicability of international crimes in national courts is not limited to universal jurisdiction. On this general issue, see the comprehensive study of W. N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (The Hague: TMC Asser Press, 2006).

¹⁰⁷⁶ See *ibid.*, at 3.

¹⁰⁷⁷ It is impossible in the context of this research to address all of the cases in which it was alleged that domestic definitions of international crimes did not correspond to the international definitions. This issue – which is not limited to universal jurisdiction but concerns all cases of national prosecution of international crimes – has been the subject of numerous writings. We will focus on certain cases where a court claiming universal jurisdiction has clearly departed from the international definitions of international crimes in order to assert universal jurisdiction. See Colangelo, 'Universal Jurisdiction as an International False Conflict of Laws', 30(3) *Michigan Journal of International Law* (2009) 881-926, at 905.

¹⁰⁷⁸ Again, the section is not representative, in the sense that it does not address the numerous cases in which cases have been dismissed for lack of jurisdiction.

a valid basis not to exercise jurisdiction?¹⁰⁷⁹ Secondly, can domestic rules on universal jurisdiction be applied retroactively to crimes committed before their entry into force?

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At this stage, it is worth explaining why the issue of jurisdiction is treated separately from the question of whether the international crime existed at the time of its commission. Indeed, as we will see in this chapter, some courts have directly linked the two concepts, arguing that the crime finds its foundations in customary law and as such allows for the exercise of universal jurisdiction.¹⁰⁸⁰ One scholar has underlined that the “notion of universal jurisdiction implies a connection between the substance of certain norms and the procedural availability of all domestic courts for their enforcement”.¹⁰⁸¹ However, in our view, these two issues – while linked – are distinct. Firstly, the source of the international crime may be a treaty, as is the case with the Genocide Convention. Here, the issue of the direct application of the substantive provisions of the Genocide Convention is independent from the issue of whether a state may exercise universal jurisdiction.¹⁰⁸² Indeed, a treaty – the Genocide Convention for instance – does not necessarily provide for universal jurisdiction. Moreover, for treaties that do provide for universal jurisdiction – namely the Geneva Conventions and the Torture Convention – a state may have incorporated an international crime into its legislation, without providing for universal jurisdiction. In this regard, the international provisions providing for universal jurisdiction can hardly be considered to be self-executing and are – at least according to their wording – only addressed to states.¹⁰⁸³ The question is more controversial when the crime finds its foundations purely in customary international law, as in this context one could argue that the crime is therefore automatically subject to universal jurisdiction. However, two points arise: firstly, in practice, many domestic courts are reluctant to opt for this direct consequence; secondly and more importantly, even if one considers that a crime

¹⁰⁷⁹ See S. P. Marks, ‘The Hissène Habré Case: The Law and Politics of Universal Jurisdiction’, in Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, at 155.

¹⁰⁸⁰ See for instance the *Polyukhovich* case in Australia, *ILR* 91 (1993) 1, at 121: “If such acts amounted, then, to customary international crimes, their very nature leads to the conclusion that they were the subject of universal jurisdiction.”

¹⁰⁸¹ L. Bastin, ‘Case Note: International Law and the International Court of Justice’s Decision in *Jurisdictional Immunities of the State*’, *Melbourne Journal of International Law*, at 16.

¹⁰⁸² See Judge Toohey, in *Polyukhovich v. The Commonwealth of Australia and Another* (1991), 172 CLR 501 F.C. 91/026, 14 August 1991, § 33.

¹⁰⁸³ See Art. 5(2) of the Torture Convention: “Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in Paragraph 1 of this article.”

that has its source in an international customary rule is a crime subject to universal jurisdiction, this does not mean that a court can exercise universal jurisdiction in the absence of a specific domestic provision allowing it to do so.¹⁰⁸⁴ In our view, the recognition that a state may apply universal jurisdiction on the basis of international customary law or as a consequence of the *ius cogens* nature of the crime, without any provision or case law allowing it to do, is highly controversial under the (domestic) legality principle. One could argue that in some cases there is in fact a “provision of domestic law” that can be found in a constitutional provision recognizing international customary law as part of national law.¹⁰⁸⁵ However, as we will see in this chapter, even common law jurisdictions appear to reject this approach but rather require express incorporation into domestic law.¹⁰⁸⁶

Finally, **Section V** addresses some of the other ways in which a better respect for the legality principle in universal jurisdiction cases can be ensured. Firstly, it addresses the issue of whether double criminality – which is required in a number of states to assert universal jurisdiction¹⁰⁸⁷ – is necessary in universal jurisdiction cases in order to respect the legality principle. Secondly, it addresses the more global issue of the requirement of foreseeability of penalties in the context of universal jurisdiction; this would include the issue of whether the *nullum poena sine lege* principle allows states exercising universal jurisdiction to apply the penalties provided for in their own domestic legislation. In this context, it analyses the provision adopted in a number of domestic legislations, obliging domestic courts to not impose a heavier sentence than that provided for by the law at the place of commission. Finally, this section briefly addresses the issue of whether the application of foreign law of the territorial state – or another state – is needed in order to fulfil the legality principle.

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¹⁰⁸⁴ It only means that a state is allowed – or obliged – to assert universal jurisdiction. See Part I.

¹⁰⁸⁵ See Marks, *supra* note 1077, at 159.

¹⁰⁸⁶ See *infra* Nulyrimma: Judge Whitlam J, § 52: “Even if it be accepted that customary international law is part of the common law, no one has identified a rule of customary international law to this effect: that courts in common law countries have jurisdiction in respect of those international crimes over which States may exercise universal jurisdiction. That is hardly surprising.”; See *Polyukhovich v Commonwealth* (1991), 172 CLR 501, Brennan J pointed out (at 563) that a municipal law may provide for the exercise of universal jurisdiction recognized by international law, and said (at 576) that “a statutory vesting of the jurisdiction would be essential to its exercise by an Australian court”.

¹⁰⁸⁷ See Part II.

II. The legality principle and the implementation of international law

A. The principle of legality

1. *Introductory remarks*

321 In the criminal law context, the principle of legality is generally considered to be an equivalent to the *nullum crimen/nulla poena sine lege* principle, according to which no crime or punishment can exist without legal ground.¹⁰⁸⁸ However, more broadly, *nullum crimen/nulla poena sine lege* is part of the general requirement of the rule of law (*principe de l'Etat de droit*),¹⁰⁸⁹ which also includes the principle according to which “general rules of procedure”, as well as legislation on the establishment and competence of judicial organs, must be laid down by law.¹⁰⁹⁰

322 This section will essentially focus on *nullum crimen/nulla poena sine lege* (subsection 3). However, it will firstly briefly address the principle of the rule of law (subsection 2) in the context of domestic criminal law.

2. *The principle of the rule of law*

323 The constitutions of a number of states explicitly stipulate that public authorities must act within the rule of law. The Swiss Constitution for instance provides that “[a]ll activities of the state are based on and limited by law”.¹⁰⁹¹ This means inter alia that a number of rules must be clearly defined by law, such as the rules relating to jurisdiction.¹⁰⁹²

324 Article 6, § 1 ECHR requires that a tribunal be “established by law”. According to the ECtHR, “the expression ‘a tribunal established by law’ reflects the principle of the rule of law, which is inherent to the system of protection

¹⁰⁸⁸ See K. Gallant, *The Principle of Legality in International and Comparative Law Criminal Law* (Cambridge: Cambridge University Press, 2009).

¹⁰⁸⁹ See ECtHR, *Kasymakhunov and Saybatalov v. Russia*, § 76; *Oao Neftyanaya Kompaniya Yukos v. Russia*, 20/09/2011, § 567: “The Court reiterates the principle, contained primarily in Article 7 of the Convention but also implicitly in the notion of the rule of law and the requirement of lawfulness of Article 1 of Protocol No. 1, that only law can define a crime and prescribe a penalty.”

¹⁰⁹⁰ See ECtHR, Judgment, *Coëme and others v. Belgium*, Applications Nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, 22 June 2000, § 102; *Jorgić v. Germany*, § 65.

¹⁰⁹¹ See Art. 5 of the Swiss Constitution entitled “Rule of Law” (in French: “Principes de l’activité de l’Etat régi par le droit”) provides that all activities of the state are based on and limited by the rule of law.

¹⁰⁹² See Piquerez and Macaluso, *Procédure Pénale Suisse*, at 13.

established by the [European] Convention and its Protocols".¹⁰⁹³ The term "law", within the meaning of Article 6 § 1, "comprises in particular the legislation on the establishment and competence of judicial organs".¹⁰⁹⁴ Accordingly, "if a tribunal does not have jurisdiction to try a defendant in accordance with the provisions applicable under domestic law, it is not 'established by law' within the meaning of Article 6 § 1 [ECHR]".¹⁰⁹⁵

In *Jorgić v. Germany*, the Court had already held that "if a tribunal does not have jurisdiction to try a defendant in accordance with the provisions applicable under domestic law, it is not "established by law" within the meaning of Article 6(1) [ECHR]".¹⁰⁹⁶ The Court further reiterated that "in principle, a violation of the said domestic legal provisions on the establishment and competence of judicial organs by a tribunal gives rise to a violation of Article 6(1)".¹⁰⁹⁷ With respect to procedural rules, in the *Coëme and others v. Belgium* case, the ECtHR recalled "the principle that the rules of criminal procedure must be laid down by law is a general principle of law. It stands side by side with the requirement that the rules of substantive criminal law must likewise be established by law and is enshrined in the maxim '*nullum iudicium sine lege*'".¹⁰⁹⁸ The Court further noted that "the primary purpose of procedural rules is to protect the defendant against any abuse of authority and it is therefore the defence which is the most likely to suffer from omissions and lack of clarity in such rules".¹⁰⁹⁹ The ECtHR deducts the principle according to which rules of criminal procedure must be laid down in law from Article 6, § 2 ECHR on the right to a fair trial and the "principle of equality of arms".

This brief introduction allows us to understand the (justified) reluctance of states to exercise universal jurisdiction in the absence of domestic provisions expressly allowing them to do so. This issue will be examined in detail in section IV of this chapter.

¹⁰⁹³ ECtHR, Judgment, *Richert v. Poland*, Application no. 54809/07, 25 October 2011, § 41.

¹⁰⁹⁴ *Ibid.*; See also ECtHR, Judgment, *Lavents v. Latvia*, Application no. 58442/00, 28 November 2002, § 114.

¹⁰⁹⁵ ECtHR, *Richert v. Poland*, § 41.

¹⁰⁹⁶ ECtHR, *Jorgić v. Germany*, § 64.

¹⁰⁹⁷ *Ibid.*, § 65; See also ECtHR, *Richert v. Poland*, § 41 (emphasis added).

¹⁰⁹⁸ ECtHR, Judgment, *Coëme and others v. Belgium*, Applications Nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, 22 June 2000, § 102.

¹⁰⁹⁹ *Ibid.*

3. *Nullum crimen/nulla poena sine lege*

a. *The concept*

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The principle of legality or *nullum crimen sine lege* is a fundamental concept in criminal law, which was already recognized in the Universal Declaration of Human Rights and has come to be widely recognized in domestic legislation. It reflects the idea that a person may only be convicted and punished for acts that constituted a crime under the law applicable at the time of the conduct.¹¹⁰⁰ It also requires that the law be sufficiently clear and precise in order for individuals to know in advance whether their behavior is criminal at the time it is committed and what the legal consequences to this behavior are.¹¹⁰¹ Its purposes are mainly to protect the individuals from state arbitrariness and to guarantee fairness in criminal law.¹¹⁰² Moreover, it not only prevents the legislator from punishing past acts with new legislation but also prevents the judge from creating new crimes, thus obliging him to apply the laws enacted by the legislator, thereby preventing any possible judicial arbitrariness and activism.¹¹⁰³ The principle *nullum crimen, nulla poena sine lege* covers both prohibited criminal conduct and its penalties. With regard to penalties, it is widely agreed that, in the context of criminal law and in respect of the imposition of penal sanctions, the applicable penalties should be defined precisely.¹¹⁰⁴ We will deal specifically with the issue of penalties under the legality principle in Section V of this chapter, because, in our view, it is one of the key issues in the analysis of the compatibility of universal jurisdiction over international crimes with the legality principle.

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The legality principle also encompasses: (1) the principle of certainty (*nullum crimen, nulla poena sine lege certa*), which embodies the idea that the prohibitions must be sufficiently precise to give notice regarding what is criminalized;¹¹⁰⁵ (2) the principle of non-retroactivity, which prohibits the retrospective application of criminal law where it is to an accused's disadvantage;¹¹⁰⁶ and (3) the prohibition against analogy, which embodies the principle that courts can punish conduct similar or approximate to that already

¹¹⁰⁰ See Cassese et al., *International Criminal Law: Cases and Commentary* (OUP, Oxford, 2011), at 53.

¹¹⁰¹ See Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, at 222.

¹¹⁰² See C. Kress, 'Nulla poena nullum crimen sine lege', *Max Planck Encyclopedia of Public International Law*, §5.

¹¹⁰³ See Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, at 222 and Kress, 'Nulla poena nullum crimen sine lege', *Max Planck Encyclopedia of Public International Law*.

¹¹⁰⁴ See Shelton, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion*.

¹¹⁰⁵ Cassese et al., *International Criminal Law: Cases and Commentary*, at 53.

¹¹⁰⁶ See ECtHR, Judgment, *Ould Dah v. France*, 17 March 2009, citing inter alia ECtHR, *Kokkinakis v. Greece* (Series A no. 260-A), 25 May 1993, § 52.

prohibited by extending the scope of existing criminal provisions.¹¹⁰⁷ It also generally requires that the law on which the prosecution is based should be of a certain quality, be accessible and foreseeable.¹¹⁰⁸

The principle of legality is expressly recognized in domestic legislation. While some states provide for it in their constitutions, others only provide it in their criminal codes.¹¹⁰⁹ Depending on states, the legality principle also encompasses the prohibition against uncodified law, i.e. unwritten or judge-made criminal provisions (*nullum crimen, nulla poena sine lege scripta*). Indeed, many states, especially those of civil law tradition, contain a constitutional provision prohibiting customary criminal provisions and requiring that the criminalization result from written legislation.¹¹¹⁰ On the contrary, historically, common law countries, where judge-made law prevails, do not contain such a strict requirement since they allow judge-made law in the form of common-law crimes. It should be noted that, in the interest of legality, even common-law jurisdictions like the USA have moved to establish provisions for crimes in statutory form and have thus largely abolished the notion of common-law crimes.¹¹¹¹ In fact, it has been said that the United States, as well as most common law countries, “follow a continental law approach to *lex scripta*”, as evidenced by the practice of relying on statutory law in the application of criminal penalties.¹¹¹²

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b. The legality principle in human rights law

The fundamental principle of legality is affirmed in all human rights instruments. According to Article 15 of the International Covenant on Civil and Political Rights:

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¹¹⁰⁷ See Cassese et al., *Cassese's International Criminal Law*, at 24. See also Kress 'Nulla poena nullum crimen sine lege', *Max Planck Encyclopedia of Public International Law*, P. Eden, 'The Role of the Rome Statute in the Criminalization of Apartheid', *JICJ* (2014) 171-191, at 187.

¹¹⁰⁸ See below the case law of the ECtHR.

¹¹⁰⁹ See for instance, Art. 2 of the Belgian Penal Code and Art. 16 of the Constitution of the Netherlands which states that “any offence is punishable only if it was a punishable offence under the law at the time it was committed”.

¹¹¹⁰ See Kress, 'Nulla poena nullum crimen sine lege', *Max Planck Encyclopedia of Public International Law*.

¹¹¹¹ See Cassese et al., *International Criminal Law: Cases & Commentary*, at 53, who note that “in the interest of legality, even common-law jurisdictions like the USA have moved to mainly statutory crimes and have largely abolished the notion of common-law crimes or have frozen cognizable common-law crimes to those recognized in early colonial history”.

¹¹¹² D. Shahram, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 99 *Journal of Criminal Law and Criminology*, (2008-2009) 857-927, at 865.

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

331 A similar provision is established in Article 7 of the European Convention of Human Rights, entitled “No punishment without law”, which is generally directly applicable in most domestic legal orders:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

332 According to the case law of the ECtHR, Article 7 of the Convention embodies, in general terms, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and prohibits in particular the retrospective application of criminal law where it is to an accused’s disadvantage.¹¹¹³ It follows that offences and relevant penalties must be clearly defined by the law so that “the individual can know from the wording of the relevant provision, and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him criminally liable”.¹¹¹⁴

333 The ECtHR considers that the concept of “law” comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability.¹¹¹⁵ It recognizes however that “In any system of law, including criminal law, however clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation. [...] Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen”.¹¹¹⁶ For instance, in some UK cases, where domestic courts had ruled that marriage was no longer a common law defence to a

¹¹¹³ See ECtHR, *Ould Dah v. France*, citing inter alia ECtHR, *Kokkinakis v. Greece* (Series A no. 260-A), 25 May 1993, § 52.

¹¹¹⁴ ECtHR, *Ould Dah v. France*, at 13-14.

¹¹¹⁵ ECtHR, *Jorgić v. Germany*, § 100. See e.g. ECtHR, *The Sunday Times v. United Kingdom* (Series A no. 30), 1979, at § 49.

¹¹¹⁶ See, inter alia, ECtHR, Judgment, *S.W. v. the United Kingdom*, Application no. 20166/92, 22 November 1995, § 36; *C.R. v. the United Kingdom*, § 34; *Streletz, Kessler and Krenz*, § 50; ECtHR, *K.-H.W. v. Germany* [GC], Application no. 37201/97, 2001-II, § 45.

husband's rape of his wife, the ECtHR has held that there had been no violation of Article 7(1) ECHR.¹¹¹⁷ Some scholars have argued that in its application of Article 7(1), the ECtHR has often seemed inspired by the same approach adopted by the International Military Tribunal and endorsed by Kelsen, namely the doctrine of substantive justice as opposed to that of strict liability.¹¹¹⁸ One result of this is its rejection of pure legal positivism, in favour of the "reasonably foreseeable" and "accessible" tests.¹¹¹⁹

The UN Human Rights Committee has stressed that the principle of legality entails "the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty".¹¹²⁰

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c. *Non-retroactivity or the ban on ex post facto laws*

The principle of non-retroactivity prohibits the imposition of criminal responsibility for conduct that took place before the entry into force of the rule establishing such conduct as an offence.¹¹²¹ The same applies to penalties. A

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¹¹¹⁷ See, inter alia, ECtHR, *S.W. v. the United Kingdom*, Judgment, Application no. 20166/92, 22 November 1995, § 41 and 42, where the ECtHR states: "The decisions of the Court of Appeal and then the House of Lords did no more than continue a perceptible line of case-law development dismantling the immunity of a husband from prosecution for rape upon his wife [...]. There was no doubt under the law as it stood on 12 November 1989 that a husband who forcibly had sexual intercourse with his wife could, in various circumstances, be found guilty of rape. Moreover, there was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law [...]. 42. *The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords - that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim - cannot be said to be at variance with the object and purpose of Article 7 (art. 7) of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment [...]. What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.*" (emphasis added).

¹¹¹⁸ See V. Spiga, 'Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga', 9 *JICJ*, (2011) 5-23, at 11.

¹¹¹⁹ W. Schabas, 'Synergy or Fragmentation?: International Criminal Law and the European Convention on Human Rights', 9(3) *JICJ* (2011) 609-625, at 615.

¹¹²⁰ UN Human Rights Committee, General Comment 29, CCPR/C/21/Rev.1/Add.11, § 7.

¹¹²¹ See S. Manacorda, 'Non-retroactivity', in Cassese (ed.), *The Oxford Companion to International Criminal Justice*, at 437.

criminal provision containing a more severe punishment cannot be applied to acts committed before its entry into force. As underlined by the ECtHR, the Court must “verify that *at the time when an accused person performed the act* which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that *the punishment imposed did not exceed the limits fixed by that provision*”.¹¹²² In civil law countries, the principle of non-retroactivity is a corollary of the legality principle,¹¹²³ while in common law systems, it is a prerequisite of due process.¹¹²⁴ The principle of non-retroactivity is provided for in Article 15 of the ICCPR, Article 7 of the ECHR, Article 9 of the American Convention on Human Rights,¹¹²⁵ and Article 6 of the African Charter on Human Rights.

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The non-retroactivity principle is expressly provided for in most domestic systems.¹¹²⁶ A distinction is generally made between substantive and procedural provisions, non-retroactivity applying to the former but not the latter. However, the distinction between substantive and procedural rules may vary from one state to another. While it is largely admitted that rules defining crimes are not retroactive, there is some controversy as to whether a provision providing for extraterritorial jurisdiction is a substantive rule or a procedural rule.¹¹²⁷ The question of whether a new provision providing for universal jurisdiction is applicable to acts committed before its entry into force will be addressed below in Section IV.

d. The legality principle and international crimes

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In some circumstances, an individual may be prosecuted for an act that was criminal under international law, at the time of its commission, even if it was not criminal under national law. This situation is envisaged by both Articles 15(1) ICCPR and 7(1) ECHR, which provide that conduct be previously

¹¹²² ECtHR, *Ould Dah v. France*, p. 15 (emphasis added).

¹¹²³ This is also the case in the ICC Statute.

¹¹²⁴ See Manacorda, ‘Non-retroactivity’, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) 437-438, at 436.

¹¹²⁵ Art. 9 ACHR entitled ‘Freedom from Ex Post Facto Laws’ states that “No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom”.

¹¹²⁶ For instance, Art. I, Section 10 of the US Constitution provides that no state shall pass an ex post facto law. Art. I, section 9, clause 3 imposes the same prohibition upon the federal government.

¹¹²⁷ Indeed, more than 80% of states recognize the non-retroactivity of criminal definitions in their constitutions, most of which also apply the principle of non-retroactivity of increased punishment. See Gallant, *The principle of legality in international and comparative criminal law*, at 243-244. It is noteworthy that a similar debate exists with respect to statute of limitations and to immunities.

criminalized “either under national or international law”. According to the case law, the term “international law” should be understood as encompassing both written international law and customary international law.¹¹²⁸ The *travaux préparatoires* of Article 15(1) indicate that by adding this reference to international law, the drafters intended to prevent a person escaping punishment for an international crime because that crime was not punishable under the national law of the state trying the person. In other words, if an act was lawful under national law but criminal under an international treaty or customary law, this act could be prosecuted before a domestic court.¹¹²⁹ Consequently, it can be argued that Article 15(1) ICCPR allows national courts to prosecute an individual for an act that had not been established as criminal under national legislation at the time it was committed, but was criminal according to international law, so long as the courts have jurisdiction over the crimes at the time of prosecution.¹¹³⁰

While the principle of legality cannot be derogated from according to Articles 4(2) ICCPR and 15(2) ECHR, an exception is provided in Articles 15(2) ICCPR and 7(2) ECHR for “any act or omission which, at the time it was committed, was criminal according to the principles of recognized by the community of nations”.¹¹³¹ The relationship between paragraphs 1 and 2 of Article 15, and paragraphs 1 and 2 of Article 7 respectively, is not entirely clear.

Indeed, from the wording of the text, Article 7(2) ECHR appears to be a repetition of Article 7(1) which already refers to acts under international law. However, according to the case of law the ECtHR: “Article 7 § 1 can be considered to contain the general rule of non-retroactivity and [...] Article 7 § 2 is only a contextual clarification of the liability limb of that rule, included so as to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of the crimes committed during that war. It is thus clear that the drafters of the Convention did not intend to allow for any general

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¹¹²⁸ L. Zegveld, ‘The Bouterse Case’, *Netherlands Yearbook of International Law*, Vol. XXXII (2001) 97-118, at 103 and references.

¹¹²⁹ If this court has jurisdiction; See Spiga, ‘Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga’, 9 *Journal of International Criminal Justice* (2011) 5-23, at 12.

¹¹³⁰ See in this sense, Spiga, ‘Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga’, 9 *Journal of International Criminal Justice* (2011) 5-23, at 14 and 22.

¹¹³¹ Art. 15(2) ICCPR provides that “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations”. Art. 7(2) ECHR states that “this Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations”.

exception to the rule of non-retroactivity".¹¹³² Indeed, the Court has held in a number of cases that the two paragraphs of Article 7 are interlinked and are to be interpreted in a concordant manner.¹¹³³ In other words, to be compatible with Article 7, a sufficiently clear and foreseeable legal basis at the time of the commission of the crime is needed.¹¹³⁴

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With regard to Article 15 ICCPR, it has been argued that Article 15(2) legitimizes the prospect of trying and punishing conduct, which is criminal "according to the general principles of law recognized by the community of nations".¹¹³⁵ It has been considered that Article 15(2) is "a sort of fallback option, or a subsidiary means of interpretation, to be relied upon when neither national law nor treaty or customary international law rules criminalize certain conduct trying and punishing conduct which is criminal."¹¹³⁶

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In any event, it is worth recalling that above all, Articles 7 and 15 are framed as a right held by the accused.¹¹³⁷ These provisions only state that the prohibition of retroactive criminal law does not prejudice the trial of criminal acts according to international law or general principles of law. In other words, a state party may try a perpetrator for crimes under international law in the absence of domestic legislation, without violating the principle of legality set out in Articles 15 ICCPR and 7 ECHR. However, it is quite clear that these provisions are purely permissive and do not create any legal obligation upon states to prosecute.¹¹³⁸ Nothing in the texts appears to prevent states from regarding this as a minimum standard for legality and providing for a stricter national legality principle, which requires a national criminal statute and thus offers the suspect wider protection, unless this violates their obligation to prosecute international crimes under other provisions of the Conventions.¹¹³⁹ As we have seen in Part I,

¹¹³² See ECtHR, Grand Chamber, *Maktouf and Damjanovic v. Bosnia and Herzegovina*, 18 July 2013, § 72; See also *Kononov v. Latvia*, 36376/04, 17 May 2010, § 186: "the Court considers it relevant to observe that the *travaux préparatoires* to the Convention indicate that the purpose of the second paragraph of Article 7 was to specify that Article 7 did not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish, inter alia, war crimes so that Article 7 does not in any way aim to pass legal or moral judgment on those laws."

¹¹³³ ECtHR, Judgment, Grand Chamber, *Case of Maktouf and Damjanović v. Bosnia and Herzegovina*, 2312/08 and 34179/08, 8 July 2013, § 72; *Tess v. Latvia*, 34854/02, 12 December 2002; ECtHR *Kononov v. Latvia*, 36376/04, 17 May 2010, § 186.

¹¹³⁴ See ECtHR, *Kononov v. Latvia*, Judgment, n° 36376/04, 17 May 2010.

¹¹³⁵ Spiga, *supra* note 1128, at 13.

¹¹³⁶ *Ibid.*, at 13-14, who also convincingly argues that "the principle of legality is hardly reconcilable with the criminalization of conduct based solely on a general principle of law".

¹¹³⁷ See in this direction the *Bouterse* case, Zegveld, *The Bouterse Case*, at 103.

¹¹³⁸ See Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, at 19-20.

¹¹³⁹ See in this sense M. Henzelin, 'La compétence universelle et l'application du droit international pénal en matière de conflits armés – la situation en Suisse', in *La répression internationale du génocide*

such an obligation has not yet been recognized in human rights law when the jurisdictional basis is the universality principle.¹¹⁴⁰

Accordingly, at the domestic level, many national states do not provide for exceptions to the legality principle with regard to international crimes.¹¹⁴¹ In fact, the issue of legality and international crimes varies from one state to another. Thus, some states have enshrined a provision in their constitution or national law that allows for the retroactive punishment of crimes if they were punishable under international law at the time of their commission. This is the case for instance in Albania, Bangladesh, Bosnia and Herzegovina,¹¹⁴² Canada,¹¹⁴³ New Zealand, Poland,¹¹⁴⁴ Rwanda, Seychelles, and South Africa. In Switzerland, two legislative proposals were advanced to add an exception allowing for the retroactivity of the Swiss Criminal Code in cases of international crimes.¹¹⁴⁵ Despite the fact that such a provision would be compatible with the ECtHR case law,¹¹⁴⁶ both proposals were rejected by the Parliament.¹¹⁴⁷ Moreover, an increasing number of states have introduced such an exception in their constitution in recent years. This was the case for instance of Senegal¹¹⁴⁸ and Kenya, both in 2008.

rwandais Actes du colloque de Rouen des 7 et 8 mars 2002 (Bruylant : Brussels, 2003) 155-174, at 165; See also Zegveld, 'The Bouterse Case', , 32 *Netherlands Yearbook of International Law* (2001) 97-118, at 103.

¹¹⁴⁰ See Part I.

¹¹⁴¹ See Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, at 228

¹¹⁴² Art. 3 (2) of the Criminal Code of Bosnia and Herzegovina states: "No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which a punishment has not been prescribed by law."

¹¹⁴³ According to Art. 11(g) of the Canadian Constitution "Any person charged with an offence has the right [...] (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations." See also sections 4(4), 6(4) and (5) and 7 of Canada's Crimes Against Humanity and War Crimes Act 2000.

¹¹⁴⁴ According to Art. 42(1) of the Polish Constitution, "Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. *This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law.*" (Emphasis added).

¹¹⁴⁵ See Jacob and Maleh, 'Introduction aux articles 264 à 264n (titres 12^{bis}, 12^{ter} et 12^{quater})', *Commentaire Romand du Code pénal*, N 37; See also Swiss Federal Council, *Message 2008*, at 3506 f.

¹¹⁴⁶ See especially ECtHR, *Kononov v. Latvia*, 36376/04, 17 May 2010, § 185 ff., at N 228 ff.

¹¹⁴⁷ See Jacob and Maleh, *supra* note 1144. See also Swiss Federal Council, *Message 2008*, 3506 f.

¹¹⁴⁸ Loi constitutionnelle n. 2008-33 du 7 août 2008 modifiant les articles 9 et 25 et complétant les articles 562 et 92 de la Constitution (Constitutional Law no. 2008-33 of 7 August 2008 amending Articles 9

Other states do not expressly provide for such an exception, but have – as we will see below in Section III – developed it via their case law. For example, such exceptions to the domestic legality principle was recognized by the Slovenian Constitutional Court in the 1990s,¹¹⁴⁹ by the Hungarian Constitutional Court in 1993¹¹⁵⁰ and by the French courts in the *Barbie* case.¹¹⁵¹ However, as we will see in section III of this chapter, some states appear to reject this exception, considering that there is no reason to treat international crimes differently than ordinary crimes with respect to the legality principle.¹¹⁵² This issue also depends on how international criminal law is implemented at the national level, that is,

and 25 and supplementing Arts 562 and 92 of the Constitution), *Journal Officiel de la République du Sénégal no. 6420*, 8 August 2008, available online at <http://www.jo.gouv.sn/spip.php?article7026> (last visited 1 August 2017). Art. 9 reads as follows : “*Toute atteinte aux libertés et toute entrave volontaire à l'exercice d'une liberté sont punies par la loi. Nul ne peut être condamné si ce n'est en vertu la rentrée (sic) en vigueur avant l'acte commis.*

Toutefois, les dispositions de l'alinéa précédent ne s'opposent pas à la poursuite, au jugement et à la condamnation de tout individu en raison d'actes ou omission qui, au moment où ils ont été commis, étaient tenus pour criminels d'après les règles du droit international relatives aux faits de génocide, crimes contre l'humanité, crime de guerres”. It has been said that the “The Constitutional amendment led to three very significant changes. The first was to lift the prohibition of the extunc application of the criminal legislation for the commission of certain crimes. In accordance with the new Article 9, the principle *nulla crimen nulla poene sine lege* is no bar to the criminal prosecution of acts, which at the time they were perpetrated constituted criminally punishable acts pursuant to the rules of international law, namely genocide, crimes against humanity and war crimes.” K. D., Magliveras, ‘Fighting Impunity Unsuccessfully in Africa: The African Union and the Habré Case’, *Paper for Albany Law School* (New York), 12-14 April 2012.

¹¹⁴⁹ See Slovenia, Constitutional Court, U-I-6/93, 13 January 1994, § 50 and Constitutional Court U-I-248/96, 30 September 1998, § 14, cited in Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, at 226.

¹¹⁵⁰ See Hungary, Constitutional Court, Decision No. 53/1993, On War Crimes and Crimes against Humanity, 13 October 1993 cited Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, at 227.

¹¹⁵¹ See France, Court of Cassation, *Barbie*, 26 January 1984, N° 83-94425, available online at <http://www.asser.nl/upload/documents/20120329T113000-Barbie%20Klaus%20-%20Arret%20-%202026-01-1984%20-%20Cour%20de%20Cassation%20Francais.pdf> (last visited 1 August 2017), which states: “Qu'en définitive, l'incrimination de crimes contre l'humanité est conforme aux principes généraux de droit reconnus par les nations civilisées, qu'à ce titre ces crimes échappent au principe de la non-rétroactivité des lois de répression [...]”.

¹¹⁵² See for instance the French *Javor* case, the *Habré* case in Senegal and the *Bouterse* case in the Netherlands.

on the relationship between international law and national law, and on whether the international rules prescribing international crimes are self-executing.¹¹⁵³

e. Foreseeability in cases of extraterritorial jurisdiction

One question that appears to be unclear is what is meant by “national law” in the context of prosecutions whereby the reprehensible conduct and the law applied does not arise in the same forum. Indeed, in cases where states exercise extraterritorial jurisdiction, they apply their own law and their own penalties. In our view, the question thus arises as to whether the “foreseeable” requirement is fulfilled by the application of the law of the forum state, and the penalties attached to it.

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This issue was raised before the European Court of Human Rights in the *Ould Dah versus France* case. The applicant, who had been prosecuted and convicted in France for offences committed in Mauritania in 1990 and 1991, argued that he could not have foreseen that French law would prevail over Mauritanian law. He argued that “his case was the first one of its kind in France and the possible jurisdiction of the French courts under the United Nations Convention against Torture did not mean that French law was applicable. Such an approach was, moreover, liable to render the law unforeseeable if all countries applied their own rules”.¹¹⁵⁴ In its reasoning, the Court recalled that Article 7 ECHR required that at the time when an accused person performed the act which led to his being prosecuted and convicted, a legal provision was in force which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision.¹¹⁵⁵ Regretfully, the Court did not directly address the issue of the foreseeability of the application of French law. However, its reasoning seems to suggest that when states exercise universal jurisdiction, the “foreseeability” requirement according to Article 7 is analyzed only in relation to the criminal law of the state exercising universal jurisdiction. The Court held:

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[...] the absolute necessity of prohibiting torture and prosecuting anyone who violates that universal rule, and the exercise by a signatory State of the universal jurisdiction provided for in the United Nations Convention against Torture, *would be deprived of their very essence if States could exercise only their jurisdictional competence and not apply their legislation.* There is no doubt that were the law of the State exercising its universal jurisdiction to be deemed inapplicable in favour of decisions or special Acts passed by the State of the place in which the offence was committed, in an effort to protect its own

¹¹⁵³ According to Gaeta, “As is well-known, the international rules on international crimes are far from being self-executing”.

¹¹⁵⁴ See ECtHR, *Ould Dah v. France*, at 13.

¹¹⁵⁵ *Ibid.*

citizens or, where applicable, under the direct or indirect influence of the perpetrators of such an offence with a view to exonerating them, this would have the effect of paralysing any exercise of universal jurisdiction and defeat the aim pursued by the United Nations Convention against Torture.¹¹⁵⁶

346 It did state however that “it can reasonably be concluded (as did the Nîmes Court of Appeal) from Articles 4 and 7, read together, of the United Nations Convention against Torture, which provide for an obligation on States to ensure that acts of torture are offences under their own law and that the authorities take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State, that not only did the French courts have jurisdiction but that French law was also applicable”.¹¹⁵⁷

347 The Court unanimously declared the complaint inadmissible. It is noteworthy that, besides a reference to the amnesty law, the judgment does not refer to Mauritanian law at all. The Court concluded:

Having regard to the foregoing, the Court considers that at the time when the offences were committed, the applicant’s actions constituted offences that were defined with sufficient accessibility and foreseeability under French law and international law, and that the applicant could reasonably, if need be with the help of informed legal advice, have foreseen the risk of being prosecuted and convicted for acts of torture committed by him between 1990 and 1991.¹¹⁵⁸

348 The Court’s reasoning and conclusion seems to suggest that the term “national law”, when states are exercising universal jurisdiction, necessarily implies the law of the forum state. In our view, this reasoning is questionable and should have at least been the subject of debate. The “foreseeability” of the application of French criminal substantive provisions and penalties to a Mauritanian citizen at the time of the commission of the crime in Mauritania is not self-evident. This issue is all the more questionable in cases where the provisions of the territorial state and its applicable penalties are more favourable to the accused than the law of the forum state. In such a case, should the more favourable law and penalties of the territorial state be applied?

349 One could argue that the court’s reasoning, according to which the national authorities can take their decision “in the same manner as in the case of any ordinary offence of a serious nature under the law of that State” finds some

¹¹⁵⁶ *Ibid.*, at 16 (emphasis added).

¹¹⁵⁷ ECHR, *Ould Dah v. France*, at 17.

¹¹⁵⁸ *Ibid.*, at 19.

confirmation in Article 7(2) of the Torture Convention as well as in Article 7 of the 1970 Hague Convention.¹¹⁵⁹

However, interestingly, some national legislatures have provided for the application of foreign criminal law in cases of universal jurisdiction. This was the case for instance with the Swiss Penal Code. However, it is worth noting that this provision was removed because of the practical difficulties that it implied.¹¹⁶⁰ A similar provision remains in existence in respect of at least one state, El Salvador. Furthermore, as mentioned above, most states take the law of the territorial state into account when fixing the penalty. In this regard, it is also noteworthy that many states have expressed the opinion that the penalty provided for before international courts should be derived from the norms that were applicable in the territorial state.¹¹⁶¹ This appears to confirm the argument according to which customary international law on *nulla poena sine lege* contains stricter requirements regarding the application of penalties than is reflected in treaty provisions of positive international law.¹¹⁶²

¹¹⁵⁹ Art. 7 of the Torture Convention states as follows: "1. The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution. 2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State". According to Art. 7 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision *in the same manner* as in the case of any ordinary offence of a serious nature under the law of that State" (emphasis added).

¹¹⁶⁰ See Message of the Swiss Federal Council, FF 1998, at 1804 : "*Le tribunal suisse [...] n'a plus l'obligation - souvent impossible à respecter dans la pratique - d'appliquer le droit étranger.*" This argument is not entirely convincing, considering that this is common practice in other areas of law, such as private international law.

¹¹⁶¹ See Shelton, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion*, at 874, who refers to a Letter from Italy to the U.N. Secretary General, which states that "the *need to respect* the principle *nullum crimen, nulla poena sine lege*, the basis of fundamental human rights, *has induced* the Italian Commission to decide in favor of the penalties set forth by the criminal law of the State of the *locus commissi delicti*"; Letter from the Permanent Representative of Italy to the Secretary-General, United Nations, at 1, art. 7 § 1-2, U.N. Doc. S/25300 (Feb. 17, 1993).

¹¹⁶² Shelton, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion*, at 879.

B. The legality principle and the need for implementation at the domestic level

1. *Direct application of international criminal law in domestic courts*

351 It could be argued that national courts should apply international criminal law directly in their domestic law.¹¹⁶³ There is much support for a move in this direction by international lawyers. However, at the moment, each state remains free to determine the manner in which international criminal law is implemented in its domestic legislation, according to its conception of the relationship between international and national law.¹¹⁶⁴ Thus, in reality, international rules generally need to be implemented at the domestic level in order to be operative, either because they are not self-executing or because domestic legislation requires the step of implementation. In addition, whether dualist or monist, domestic criminal courts are generally reluctant to directly apply international criminal law provisions for a number of reasons; the main concern arises from the legality principle.¹¹⁶⁵

352 Thus, from the international viewpoint, customary and treaty rules generally impose an obligation of result, which leaves the state free to determine how international law should be implemented.¹¹⁶⁶ Thus, for example, the treaty rules oblige states to enact legislation to implement the rules of the four Geneva

¹¹⁶³ See generally Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, who presents arguments in favour of the direct applicability of international core crimes by national courts.

¹¹⁶⁴ See Swiss Federal Council, 'Message relatif à la modification de lois fédérales en vue de la mise en œuvre du Statut de Rome de la Cour pénale internationale du 23 avril 2008', FF 2008 3461, 3549, 3473.

¹¹⁶⁵ De La Pradelle describes this "general phenomenon" as follows: "*une fois compétent, plutôt que d'appliquer directement de telles dispositions [internationales], [le juge pénal] se rabat sur celles des règles existantes de son propre droit pénal qui peuvent correspondre aux faits dont on l'a saisi. Lorsque de telles règles lui font défaut, de deux choses l'une : ou bien les dispositions internationales sont insuffisamment développées et, dans ce cas, le principe de légalité des délits et des peines lui interdit de juger tant que le législateur du for n'a pas édicté les dispositions nécessaires ; ou bien, les dispositions internationales sont techniquement suffisantes – ce qui est exceptionnel – mais le juge refuse de les appliquer sans l'ordre de ce même législateur*". G. de la Pradelle, 'La compétence universelle', in Ascensio et al. (eds), *Droit international pénal* (2nd ed., Paris: Pedone, 2012) 1007 ff., at 2019.

¹¹⁶⁶ See P. Xavier, 'The Principles of Universal Jurisdiction and Complementarity: How do the Two Principles Intermesh?', 88 (No 862) *International Review of the Red Cross* (June 2006) 375-398, at 386; see Cassese, *International Law*, at 219.

Conventions,¹¹⁶⁷ the Genocide Convention,¹¹⁶⁸ and the Torture Convention.¹¹⁶⁹ Likewise, when customary international law is the source of universal jurisdiction over international crimes, it generally simply provides for the principle itself without necessarily giving any precise instructions or guidance to the state in terms of the implementation of the principle of universal jurisdiction.¹¹⁷⁰ This has led some scholars to conclude that the principle of universal jurisdiction provided for by virtue of international treaty law or in customary law is generally not “self-sufficient enough to be implemented”.¹¹⁷¹ States therefore have a duty to organize and amend their domestic legal system in order to enable the exercise of universal jurisdiction by national courts over international crimes. This generally implies two steps: (1) a sufficiently clear definition of the crime and its constitutive elements in domestic legislation, including the identification of a penalty, and (2) the existence of a specific ground for universal jurisdiction over the offence.

It can be said that implementation is all the more necessary in so-called “dualist states”, where rights and obligations contained in international law need to be incorporated into domestic law to have any effect. The United Kingdom is typically considered as a dualist country. In fact, almost all the states of the British Commonwealth follow a dualist approach to treaty law. Australia, for instance, is described as strictly dualist.¹¹⁷² Scandinavian states are also generally dualistic legal systems.¹¹⁷³ In principle, dualism provides that international law has no effect in the domestic legal system unless it is given

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¹¹⁶⁷ See Arts 49.1, 50.1, 129.1 and 146.1 of the 1949 Geneva Conventions.

¹¹⁶⁸ See Art. 5 of the 1948 Genocide Convention which states that “The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.”

¹¹⁶⁹ Art. 4 of the 1984 Torture Convention states that “1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.” See also Art. 5 of the 1984 Torture Convention.

¹¹⁷⁰ See Xavier, *supra* note 1164, at 386. See for instance Art. 5(2) of the 1984 Torture Convention, which provides that “Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in Paragraph 1 of this article.”

¹¹⁷¹ See Xavier, *supra* note 1164, at 387.

¹¹⁷² See A. de Jonge, ‘Australia’, in Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford: OUP, 2011) 407-428, at 420.

¹¹⁷³ See for instance Denmark.

effect by domestic legislation.¹¹⁷⁴ Consequently, Australia, for example, has no jurisdiction over an international crime, whether established by treaty or in customary law, unless and until legislation has been implemented in order to apply the crime or the right in domestic law.¹¹⁷⁵ The same can be said for many dualist states. The problem that is posed in practice is that many dualist states have ratified treaties but have not provided for them in national legislation.¹¹⁷⁶ This is a necessary step; thus, for example, in a genocide case, the Australian courts have rejected the argument that the ratification of the Genocide Convention or of customary law can provide a basis for a domestic common law crime of genocide, in the absence of any implementing legislation adopted by the parliament.¹¹⁷⁷

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With regard to customary international law, it should be noted that, in the common law tradition, prohibitive rules of international custom could be incorporated directly into domestic law through the common law, without the need for legislative action. This has for instance been true for the United Kingdom.¹¹⁷⁸ Likewise, in the United States, it is an unwritten rule that all international law, including customary law and general principles, is incorporated into national law.¹¹⁷⁹ However, state practice shows that this is not always deemed to be the case, especially in relation to crimes under customary international law.¹¹⁸⁰ As has been shown above, the Australian courts have rejected this automatic assimilation in a genocide case.¹¹⁸¹

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On the contrary, in states that follow the monist approach, a treaty may become part of domestic law once it has been concluded in accordance with the constitution and once it has entered into force.¹¹⁸² Therefore, the act of ratifying a treaty immediately incorporates international law into national law. Typically,

¹¹⁷⁴ See De Jonge, *supra* note 1170, at 26.

¹¹⁷⁵ See De Jonge, *supra* note 1170, at 26-27. See Federal Court of Australia, *Nulyarimma v. Thompson* [1999] FCA 1192, § 20.

¹¹⁷⁶ See for instance Permanent Mission of the Republic of Botswana to the United Nations, *Scope and Application of the Principle of Universal Jurisdiction – Information and Observations of the Republic of Botswana*, 31 May 2011.

¹¹⁷⁷ See Saul, 'The Implementation of the Genocide Convention at the National Level', in Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009) 58-83, at 61, footnote 6 and the *Nulyarimma v. Thompson* case.

¹¹⁷⁸ See Dixon et al., *Cases and Materials on International Law* (5th ed., Oxford: OUP, 2011), at 111.

¹¹⁷⁹ See Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, at 49 and references.

¹¹⁸⁰ See extracts of the *R v Jones case*, United Kingdom House of Lords (2006), in Dixon et al., *Cases and Materials on International Law* (2011), at 112 ff.

¹¹⁸¹ See *infra*, *Nulyarimma v. Thompson*.

¹¹⁸² Aust, *Handbook of International Law*, at 76.

Germany,¹¹⁸³ the Netherlands,¹¹⁸⁴ France, Senegal,¹¹⁸⁵ and Switzerland¹¹⁸⁶ are considered monist countries. Other states also considered as monist include Chile, China, Columbia, Egypt, Germany, Japan, Mexico, Poland, Russia, South Africa,¹¹⁸⁷ and Thailand.¹¹⁸⁸ However, even in so-called monist states, domestic legislation may be required if the treaty rule is not self-executing.¹¹⁸⁹ For example, despite the fact that Senegal is a monist state, Senegalese courts have rightly refused to apply Article 5(2) of the Torture Convention, because it did not consider it self-executing.¹¹⁹⁰ Consequently, because most international provisions are not self-executing and because of the *nullum crimen nullum poena sine lege* principle, national legislation is necessary in order to provide for the establishment of the crime, as well as penalties, in domestic law, and for a domestic rule providing that courts may exercise universal jurisdiction.¹¹⁹¹

However, the question of whether an international provision is “self-executing” or not often depends on the interpretation made by the states themselves, on a case-by-case basis.¹¹⁹² For instance, Switzerland, a traditionally monist state, considers that it is possible to directly invoke provisions from an international treaty before Swiss tribunals as long as they are directly applicable. According to Swiss case law, provisions considered to be directly applicable are

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¹¹⁸³ See H.-P. Folz, ‘Germany’, in Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford: OUP, 2011) 240-248.

¹¹⁸⁴ It should be noted that in the Netherlands, for instance, only some provisions of international law have a direct effect, namely “provisions of treaties and resolutions by international institutions which may be binding on all persons by their contents”. See Arts 90ff of the Constitution of the Netherlands. See also E. A. Alkermas, ‘Netherlands’, in Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford: OUP, 2011) 407-428.

¹¹⁸⁵ See Art. 98 (formerly 79) of the Senegalese Constitution, available online at <http://www.au-senegal.com/IMG/pdf/Constitution-senegal-2008.pdf>, which states that : “*Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie.*”

¹¹⁸⁶ According to Aust (*Handbook of International Law*, at 75), “Switzerland [has] perhaps the most developed form of monism”.

¹¹⁸⁷ See Section 232 of the Constitution, “customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”.

¹¹⁸⁸ See D. Sloss, *Domestic Application of Treaties* (2011), available online at <http://digitalcommons.law.scu.edu/facpubs/635> (last visited on 1 August 2017), at 7.

¹¹⁸⁹ Aust, *Handbook of International Law*, at 76.

¹¹⁹⁰ With regard to international crimes, generally speaking, it is considered that Art. 5 § 2 of the Torture Convention on universal jurisdiction is not self-executing.

¹¹⁹¹ D. Vandermeersch, ‘Droit belge’, in Cassese/Delmas-Marty, *Crimes internationaux et juridictions internationales* (Paris: Presses universitaires de France, 2002) 69-119, at 70.

¹¹⁹² Henzelin, *Le principe de l'universalité en droit pénal international : Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité*, § 1341.

those which are, “in general, and in light of the object and purpose of the treaty are sufficiently precise to be applied to a specific case and serve as a basis for a decision”.¹¹⁹³ In its Message relating to the implementation of the Genocide Convention, the Federal Council thus considered that Articles 2 and 3 of the Genocide Convention were sufficiently precise but did not contain a specific penalty and therefore were not directly applicable.¹¹⁹⁴ Articles 4, 5 and 6 – the “formal provisions” – were however directly applicable.¹¹⁹⁵ In the Netherlands, for instance, the criteria that the courts have taken into account to determine whether a provision is self-executing “are a mixture of international and domestic law”.¹¹⁹⁶ Thus, as will be seen in this chapter, even in a monist system like France, the direct application of a treaty is not automatic.¹¹⁹⁷ Indeed, the principle according to which conventions are in general made part of domestic law and can thus be invoked by individuals is subject to two (large) exceptions, which in fact cover numerous cases: (1) the convention contains recommendations or obligations addressed only to states; and/or (2) the rules that the convention contains are not applicable in the absence of measures that serve to define its modalities of execution.¹¹⁹⁸

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Finally, even in so-called monist states, and even if international rules are self-executing, their direct application is particularly complicated in criminal law, especially if the national legality principle is *lex previa, stricta, scripta and certa*¹¹⁹⁹ that is, a thorough written description and definition of the prescribed conduct, adopted before the conduct takes place, and if domestic legislation does not provide for an exception in respect of international crimes. This reluctance was for instance expressed by the Swiss Government in its Message relating to the implementation of the Genocide Convention as well as in its

¹¹⁹³ My translation. See *Message relatif à la Convention pour la prévention et la répression du crime de génocide, et révision correspondante du droit pénal du 31 mars 1999*, FF 1999 4911, at 4927, referring to a decision of the Swiss Federal Court ATF 112 IB 184 : “*Sont considérées comme directement applicables les dispositions qui, en général et au vu de l’objet et du but du traité, sont suffisamment précises pour pouvoir être appliquées à un cas concret et servir de base à une décision.*”

¹¹⁹⁴ See *Message relatif à la Convention pour la prévention et la répression du crime de génocide, et révision correspondante du droit pénal du 31 mars 1999*, FF 1999, 4911 ff., at 4927.

¹¹⁹⁵ *Ibid.*, at 4927 and 4936.

¹¹⁹⁶ See also E. A. Alkerma, ‘Netherlands’, in Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford: OUP, 2011) 417-419.

¹¹⁹⁷ E. Decaux, “France” in Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford: OUP, 2011), at 228.

¹¹⁹⁸ *Ibid.*, at 229.

¹¹⁹⁹ See Henzelin, *Le principe de l’universalité en droit pénal international : Droit et obligation pour les Etats de poursuivre et juger selon le principe de l’universalité*, at 426.

Message relating to the implementation of the Rome Statute.¹²⁰⁰ The Swiss Federal Government stated that despite the fact that Switzerland remained attached to the monistic concept of law and even in cases where international rules were self-executing, “due to the necessary democratic legitimacy on which criminal rules must be able to be based, but also because of the principle of legality, which derives from art. 4 of the Federal Constitution, those provisions [of the Genocide Convention] must first be materialized by an internal normative act, even if it is in no way creating new crimes compared to international law”.¹²⁰¹ Furthermore, in criminal law, the problem of penalties is generally a concern because they are not established in international law. A number of states consider that if an international criminal rule merely provides for reprehensible criminal conduct without defining a penalty, it cannot be directly applied in domestic criminal proceedings.¹²⁰² Indeed, as we will see in section III of this

¹²⁰⁰ *Message relatif à la modification des lois fédérales en vue de la mise en œuvre du Statut de Rome de la Cour pénale internationale, du 23 avril 2008*, FF 2008 3461, at 3475 : “Pour servir de base directe à une accusation et à une condamnation dans une procédure pénale, une norme de droit international doit satisfaire à des critères de précision très stricts afin que l’individu puisse prévoir le caractère pénalement répréhensible de son acte et les conséquences de son comportement.”

¹²⁰¹ My translation. According to the original French version : “En application de la conception moniste des rapports entre le droit international et le droit national, dominante dans notre ordre juridique, la Suisse peut reprendre des dispositions répressives découlant en l’occurrence de la Convention contre le génocide si elles présentent un caractère self-executing. Il n’en demeure pas moins que, en raison de la nécessaire légitimité démocratique sur laquelle les normes pénales doivent pouvoir s’appuyer, mais aussi en raison du principe de la légalité, qui découle de l’art. 4 de la constitution fédérale, ces dispositions doivent préalablement être matérialisées par un acte normatif interne, même si celui-ci ne constitue en aucune manière une création nouvelle par rapport à la norme de droit international.” See *Message relatif à la Convention pour la prévention et la répression du crime de génocide, et révision correspondante du droit pénal du 31 mars 1999*, FF 1999 4911, at 4924-25 and Henzlin, *Le principe de l’universalité en droit pénal international : Droit et obligation pour les Etats de poursuivre et juger selon le principe de l’universalité*, at 429. It is noteworthy that in addition to the principle *nullum crimen sine lege*, the issue of direct application of international crimes at the domestic level has sometimes led to concerns related to democratic legitimacy or separation of powers. On these issues, see Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, at 100-101.

¹²⁰² See for instance, Swiss Federal Council, *Message relatif à la modification de lois fédérales en vue de la mise en œuvre du Statut de Rome de la Cour pénale internationale du 23 avril 2008*, FF 2008 3461, 3549, 3473: “Conformément à la conception moniste du rapport entre droit international et droit national qui prévaut en Suisse, notre pays assume l’obligation de sanctionner les infractions réprimées par les normes internationales sans reprendre celles-ci dans sa propre législation. Cette approche présente l’avantage que les infractions au droit international sont traitées comme telles par le système juridique suisse. Si toutefois une norme pénale internationale se limite à la description d’un comportement pénalement répréhensible sans fixer concrètement la peine, elle ne pourra pas être appliquée directement dans une procédure pénale régie par le droit suisse.”

chapter, if a court applies international criminal rules directly, the question arises before domestic courts of what penalty will be applied. Generally, courts apply the penalties for the underlying domestic crimes, that is, those provided in their own domestic code at the time of the crime. This approach can however lead to penalties which are very light in comparison to the gravity of the international crime committed.¹²⁰³

358 With regard to customary international law, most state constitutions or criminal codes are silent. This is the case for instance of the Netherlands¹²⁰⁴ or Spain.¹²⁰⁵ However, it is generally considered that incorporation or implementation is necessary in order to enable the courts to provide for any effect. Switzerland, for instance, considers – in theory – that customary international criminal rules are directly applicable to individuals and thus that implementing legislation is not necessary. However, without a concrete definition of the applicable penalty, such rules cannot serve as a direct basis for a criminal conviction.¹²⁰⁶

359 On the contrary, some states expressly provide in their constitutions that customary international law is part of domestic law; this is the case for instance of South Africa¹²⁰⁷ and Slovakia.¹²⁰⁸

360 Finally, the role of *jus cogens* at the national level is far from clear. So far, to our knowledge, Switzerland is one of the few states that has proclaimed respect for *jus cogens* at the constitutional level.¹²⁰⁹ The absence of this approach can be

¹²⁰³ See for instance the Danish *Sarić* case, *infra* note 93 ff.

¹²⁰⁴ See Arts 93 and 94 of the Netherlands Constitution. See also Evert A. Alkerma, 'Netherlands', in Shelton, Dinah, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford: OUP, 2011) 407-428, at 419.

¹²⁰⁵ See Pinzauti, 'An Instance of Reasonable Universality: The Scilingo Case', 3 *Journal of International Criminal Justice* (2005) 1092-1105, at 1092-1105.

¹²⁰⁶ See Swiss Federal Council, *Message relatif à la modification de lois fédérales en vue de la mise en œuvre du Statut de Rome de la Cour pénale internationale du 23 avril 2008*, FF 2008 3461, 3549, 3474. It is interesting in this regard to note that in addition to a number of specific war crimes precisely defined in the Code, Article 264jj of the Swiss Criminal Code also criminalizes other violations of international humanitarian law where such a violation is declared to be an offence under customary international law.

¹²⁰⁷ See Section 232 of the Constitution of South Africa, "customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament".

¹²⁰⁸ Art. 1 § 2 of the Constitution of Slovakia states that "The Slovak Republic acknowledges and adheres to general rules of international law, international treaties by which it is bound, and its other international obligations". Customary international laws are covered by the term of general rules of international law; See D. Lantajova, 'Slovakia', in Shelton (ed.) *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford: OUP, 2011), at 562.

¹²⁰⁹ See A. Cassese, 'For an Enhanced Role of Jus Cogens', in Cassese (ed.), *Realizing Utopia: The Future of International Law*, at 168; See Arts 139(2) and 194(2) of the Swiss Constitution.

explained by the uncertain content and consequences of *jus cogens* norms. Nevertheless, some domestic authorities¹²¹⁰ and courts¹²¹¹ have officially referred to *jus cogens* norms, recognizing inter alia the *jus cogens* nature of some international crimes.¹²¹² However, as will be seen in this chapter, there is often some confusion about this notion and its consequences. For instance, it has often appeared that international customary law and *jus cogens* have been considered as equivalent. Moreover, it also seems that domestic courts are confronted with arguments presented by the victims based on the *jus cogens* nature of a norm in a growing number of cases. While a number of courts have dismissed such arguments, some have considered that the *jus cogens* nature of a crime operates to overcome the absence of provisions in international treaty law or in national law at the time of the commission of the crimes,¹²¹³ or have considered that it provides domestic courts with universal jurisdiction in the absence of domestic provisions.

¹²¹⁰ In a 1993 case, Ruling No. 53/1993, the Hungarian Constitutional Court of Hungary held that "The rules relative to the punishment of war crimes and crimes against humanity are *jus cogens* norms of international law, because these crimes threaten mankind and international coexistence in their foundations. A State refusing to undertake this obligation may not be a member of the international community. The rules on war crimes and crimes against humanity undoubtedly form part of customary international law, and of the general principles recognized by the community of nations, or, in the terminology of the Hungarian Constitution, of 'the generally recognized rules of international law'". See also the *Ferrini v. Repubblica federale di Germania*, Italy, Civil Plenary Session of the Italian Court of Cassation, No. 5044/200, 11 March 2004. See A. Gattini, 'Ferrini', in Cassese (ed.), *The Oxford Companion to International Criminal Justice*, at 668-670.

¹²¹¹ See for instance the Swiss Federal Council, *Message relatif à la modification de lois fédérales en vue de la mise en œuvre du Statut de Rome de la Cour pénale internationale du 23 avril 2008*, FF 2008 3461, 3549, 3474. "Il est cependant généralement reconnu que l'interdiction du génocide, des crimes contre l'humanité et des crimes de guerre a un caractère coutumier. Les Etats sont tenus de faire respecter cette interdiction indépendamment de l'existence de règles conventionnelles et de leur validité. Ce devoir vise à préserver les valeurs fondamentales de l'humanité et doit être accompli indépendamment de l'attitude des autres Etats (portée *erga omnes*). Lorsque ces règles relèvent du droit impératif (*jus cogens*), toute injonction de l'Etat qui légitimerait, voire encouragerait ce genre de crimes serait nulle et non avenue. L'interdiction du génocide et des crimes contre l'humanité ainsi que l'obligation de respecter le noyau du droit international humanitaire font partie des règles du *jus cogens*, qu'il est impossible de répertorier de manière exhaustive."; Many references were made to *jus cogens* in the UK *Pinochet* case as well as in a number of Canadian cases; See J. Brunnée, 'The Prohibition on Torture: Driving *Jus Cogens* Home?', 104 *Proceedings of the Annual Meeting (American Society of International Law)* (March 24-27, 2010) 454-457.

¹²¹² See the cases *infra*.

¹²¹³ See *Scilingo* case, *infra*.

2. Modes of implementation

361 States implement substantive provisions of international criminal law in different ways. Thus, some use ordinary domestic crimes such as murder, torture, grievous bodily harm, etc.; this is the case for instance of Denmark. This approach gives rise to a number of issues, including the application of the statute of limitations and amnesties. It also poses the question of whether the ICC Statute accepts prosecution by states for offences classified as “ordinary” crimes rather than those classified in the same way as specific international crimes within the ICC jurisdiction.¹²¹⁴ Finally and most importantly, legislation for ordinary crimes does not generally provide for universal jurisdiction.

362 As has been seen in Part II, other states provide for a general reference to treaties to which the state is party,¹²¹⁵ to international law in general,¹²¹⁶ or to the “laws and customs of war”.¹²¹⁷ However, as we will see in this chapter, this method of implementation may prove to be insufficient for the prosecution of crimes, depending on the interpretation given by the state to the legality principle; this is notably true if the state adopts the *nullum crimen sine lege scripta and certa* requirement.¹²¹⁸

363 Some states repeat the definitions set out in international treaties, namely those contained in Articles 6, 7 and 8 of the Rome Statute. This is the approach, for example, of the United Kingdom,¹²¹⁹ Malta and Jordan. Australia not only reproduces the Rome Statute but also the ICC Elements of Crimes. In a similar vein, some states refer to articles of the Rome Statute or to articles of specific conventions. This is the case for instance of Argentina,¹²²⁰ Kenya,¹²²¹ New

¹²¹⁴ Kleffner, ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law’, 1 *Journal of International Criminal Justice* (2003), at 95.

¹²¹⁵ See Part II.

¹²¹⁶ See Part II.

¹²¹⁷ See for instance Art. 109 of Swiss Military Code, discussed below in the *Niyonteze* case.

¹²¹⁸ See A. La Rosa and G. Chavez Tafur, ‘Implementing International Humanitarian Law through the Rome Statute’, in Bellelli (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (Farnham: Ashgate, 2010) 473-487.

¹²¹⁹ See United Kingdom, International Criminal Court Act 2001, Part 5, Arts 50 and 51.

¹²²⁰ Law 26200 of December 13, 2006, available online at <http://www.infoleg.gov.ar/infolegInternet/anexos/120000-124999/123921/norma.htm> (last visited 1 August 2017)

¹²²¹ Section 6(4) of the Kenyan International Crimes Act 2008 states that “In this section— “crime against humanity” has the meaning ascribed to it in Article 7 of the Rome Statute and includes an act defined as a crime against humanity in conventional international law or customary international law that is not otherwise dealt with in the Rome Statute or in this Act; “genocide” has the meaning ascribed to it in article 6 of the Rome statute; “war crime” has the meaning ascribed to it in paragraph 2 of article 8 of the Rome Statute”.

Zealand,¹²²² South Africa,¹²²³ and Uganda.¹²²⁴ The disadvantage of this approach is that it does not take into account the remaining international treaty and customary law to which states are bound.

Finally, in many other states, the prohibited conduct is redrafted in domestic legislation; it is reorganized and amended in order to fit national context. This is the case for instance of Belgium, Germany, Finland, France, the Netherlands, Portugal, Spain and Switzerland. This modality of implementation has the advantage of granting states the possibility to establish a better connection to existing criminal offences, as well as to clarify some of the concepts of the Rome Statute when these are vague or imprecise.¹²²⁵ Germany, for instance, included in its Code of Crimes against International Law not only ICC crimes but also crimes clearly established and defined by international humanitarian law and customary rules.¹²²⁶ Furthermore, the German Code "moved away from the ICC definitions of crimes when deemed necessary to fully respect the domestic criminal law principle of specificity or certainty that is one of [the] corollaries of the principle of legality".¹²²⁷ In a similar vein, several domestic laws have included war crimes acts that are not present in Article 8 of the ICC Statute.¹²²⁸ States are naturally free to include broader definitions of international crimes than those of the ICC crimes. One can even encourage an approach following the definition of crimes that the international community has adopted, by including in national law international conventions other than the ICC and customary international law.¹²²⁹ A state may go even further and criminalize conduct beyond the international crimes established in the

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¹²²² See Sections 9 to 12 of the New Zealand's International Crimes and International Criminal Court Act 2000.

¹²²³ See Du Plessis, 'South Africa's Implementation of the ICC Statute: An African Example', 5(2) *Journal of International Criminal Justice* (2007) 460-479, at 462.

¹²²⁴ See J. Rikhof, 'Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity', 20(1) *Criminal Law Forum* (March 2009) 21-26.

¹²²⁵ J. Rikhof, 'Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity', 20(1) *Criminal Law Forum* (March 2009), at 24.

¹²²⁶ See Langer, 'Universal Jurisdiction as Janus-Faced: The Dual Nature of the German International Criminal Code', 11(4) *JICJ* (2013) 737-762, at 752; See Part 2 of the German Code of Crimes against International Law.

¹²²⁷ See Langer, *supra* note 1224, at 752.

¹²²⁸ See J. Bacio Terracino, 'National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC', 5(2) *JICJ* (2007) 421-440, at 424, who gives the examples of Bosnia and Herzovina, Germany, Ecuador, and the Netherlands.

¹²²⁹ See Bacio Terracino, 'National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC', 5(2) *Journal of International Criminal Justice* (2007), at 425, who gives the examples of Bosnia and Herzovina, Germany, Ecuador, and the Netherlands and Langer, *supra* note 1224, at 737-762.

international community.¹²³⁰ In fact, a state is, in principle, free to criminalize whatever conduct it wishes to criminalize, as long as it exercises territorial jurisdiction. However, if it is “acting on behalf of the international community” and thus asserting universal jurisdiction, it must limit itself to those crimes established by the international community and follow those definitions.¹²³¹ If this approach is not followed, one can consider that a state is exercising “unilateral universal jurisdiction”,¹²³² violating international law and, in particular, the legality principle and the principle of state sovereignty of other states. The issue of the definition of international crimes in universal jurisdiction cases will be discussed below in relation to genocide.

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It should be noted that, generally speaking, civil law jurisdictions tend towards codification, while common law jurisdictions prefer the reference model.¹²³³ It is said that one reason for this development probably resides in the stricter interpretation given to the principle of *nullum crimen sine lege* in civil law jurisdictions.¹²³⁴ Canada, however, in its Crimes Against Humanity Act, makes a dynamic reference to international law, thus covering all conduct recognized as falling within the category of international crimes under international customary and treaty law.¹²³⁵ Some states combine the different approaches, as is the case, for example, with Switzerland.¹²³⁶

III. The absence of domestic criminalization of international crimes in universal jurisdiction cases

A. Introductory remarks

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The absence of domestic national legislation implementing international crimes is not limited to universal jurisdiction cases and has posed problems in many

¹²³⁰ See Langer, *supra* note 1224, at 737-762.

¹²³¹ In this sense, see Langer, *supra* note 1224, at 751 and Bacio Terracino, *supra* note 1226, at 426.

¹²³² See Part I.

¹²³³ F. Jessberger, 'National Legislation on International Crimes', in Cassese (ed.), *The Oxford Companion to International Criminal Justice*, at 428-429.

¹²³⁴ *Ibid.*, at 428.

¹²³⁵ *Ibid.*

¹²³⁶ The definition of the crime of genocide corresponds to the definition found in the 1948 Genocide Convention. See Art. 264 of the Swiss Criminal Code. With regard to crimes against humanity, since no definition exists, the Swiss Code takes its definition from Art. 7 of the Rome Statute. Finally, with regard to war crimes, Art. 109 of the Military Code contains a rule of reference. In addition to this reference however, war crimes as defined by the Rome Statute have also been included.

cases in which domestic courts have exercised other jurisdictional bases.¹²³⁷ Nevertheless, this absence still constitutes a significant impediment in the exercise of universal jurisdiction, as it can generally only be applied to international crimes; as such, the absence of domestic provisions transposing and defining them may lead to impunity.

Generally speaking, the analysis of domestic cases regarding the absence of domestic legislation defining crimes raises a number of legal issues in relation to the interpretation of the *nullum crimen, nulla poena sine lege* principle. Does “lege” only include national laws or does it also include international rules? If it includes international rules, does it also include international customary rules? What happens if the international rules do not contain penalties?

In practice, states have often been reluctant to rely directly on international law. In some universal jurisdiction cases, national courts have attempted to characterize offences as ordinary crimes, but they have then been faced with the problem that ordinary crimes are not subject to universal jurisdiction.¹²³⁸ In other cases, in order to address this issue and avoid impunity, when only certain international crimes had been defined in national legislation, national authorities have used the international crimes that were available in their domestic legislation and for which they had explicit universal jurisdiction under domestic law, even if this meant that the acts had to be “re-qualified”. For example, many Rwandan genocide suspects were convicted of war crimes or crimes against humanity, rather than genocide, because states did not provide for legislation criminalizing genocide.¹²³⁹ In other cases, courts have also provided for very broad interpretations of certain provisions in order to assert universal jurisdiction.¹²⁴⁰

Some courts have been less reluctant to apply international law directly and have therefore directly applied international treaty provisions, which incriminate core crimes, notably the Geneva Conventions.

Finally – as a sort of last resort – when neither domestic nor international treaty provisions have been applicable, courts have referred to crimes under customary international law or *jus cogens* crimes in order to allow for the prosecution.

¹²³⁷ See for instance, Federal Court of Australia, *Nulyarimma v. Thompson*, 1999, *International Law Reports*, 353-417, available online at [http://www.icrc.org/applic/ihl/ihl-nat.nsf/0/5f7290d6b2452b57c12576560041b861/\\$FILE/48929658.pdf/Australia%20-%20Nulyarimma%20Case%201999.pdf](http://www.icrc.org/applic/ihl/ihl-nat.nsf/0/5f7290d6b2452b57c12576560041b861/$FILE/48929658.pdf/Australia%20-%20Nulyarimma%20Case%201999.pdf) (last visited 1 August 2017), which raised the issue of the crime of genocide under Australian law in relation to acts committed by Australian Parliamentarians; See G. McIntyre, ‘Nulyarimma v. Thompson’, in Cassese (ed.), *The Oxford Companion to International Criminal Justice*, at 858-859.

¹²³⁸ See for instance *infra* Niyonteze.

¹²³⁹ See *infra* the Rwandan genocide cases in Belgium; see also *infra* the *Niyonteze* case in Switzerland.

¹²⁴⁰ See *infra* the Spanish Pinochet case.

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This section will firstly analyse those universal jurisdiction cases in which defendants were prosecuted or convicted of war crimes (subsection B). It will then turn to prosecutions and convictions for crimes against humanity (subsection C) and thereafter to genocide (subsection D). Finally, subsection E will evaluate torture as a discrete crime.¹²⁴¹

B. War crimes and absence or insufficient implementation provisions

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Until recently, a number of states did not provide for legislation defining war crimes. French law, for instance, did not provide for specific provisions on war crimes until 2010. Moreover, the only international crime defined in Germany before 2002 was genocide.

1. *The French Javor case*

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French judges have discussed the issue of the direct applicability of the Geneva Conventions, in the absence of implementing legislation. Indeed, until the adoption of the *Loi n° 2010-930 portant adaptation du droit pénal à l'institution de la Cour pénale internationale* on 9 August 2010 (hereafter "2010 Statute"),¹²⁴² French law did not contain any specific provisions defining war crimes. In addition, French courts systematically refused to apply the Geneva Conventions directly, considering that they were not applicable in national law because no implementing legislation had been introduced, despite the fact that Article 55 of the French Constitution confirms the superiority of treaties duly ratified over national law.¹²⁴³ War crimes could therefore only be prosecuted under the ordinary provisions of the criminal code, such as murder, rape, etc.¹²⁴⁴ Article 689 of the French Code of Criminal Procedure states that perpetrators can be prosecuted by French authorities for acts committed outside the French territory if French law is applicable according to the French Penal Code or any other national statute, or if an international convention gives France jurisdiction to

¹²⁴¹ In each section, in order to show the various approaches taken by domestic courts during the same periods of time, the different cases are generally presented in chronological order.

¹²⁴² As will be discussed *infra* N 192, the 2010 Statute introduced a new Art. 689-11 which expands French jurisdiction in order to allow the prosecution and trial of alleged suspects of genocide, crimes against humanity and war crimes committed abroad, subject to a number of conditions.

¹²⁴³ See for instance Paris Court of Appeal (*Cour d'appel de Paris, Chambre d'accusation*), Judgment of 24 November 1994.

¹²⁴⁴ See J. Sulzer, 'Implementing the Principle of Universal Jurisdiction in France', in Kaleck et al. (eds), *International Prosecution of Human Rights Crimes* (New York: Springer, 2007) 125-137, at 128; and P. Baudouin, 'Les lacunes de la législation française', 64 *Confluences Méditerranée* (2008/1) 43-49.

prosecute the offence.¹²⁴⁵ Article 689-1 states that “in accordance with the international Conventions quoted in the following articles, a person guilty of committing any of the offences listed by these provisions outside the territory of the Republic and who happens to be in France may be prosecuted and tried by French courts”.¹²⁴⁶ The Code then lists the international conventions¹²⁴⁷ which allow France to exercise extraterritorial jurisdiction simply because the person is in France. As mentioned in Part II,¹²⁴⁸ while the Torture Convention is included in this list, neither the Geneva Conventions, nor the Genocide Convention are included. It should be noted that in 1995 and 1996, France adapted its legislation to include universal jurisdiction for crimes incorporated in UN Security Resolution 827 creating the International Tribunal for the former Yugoslavia and UN Security Resolution 955 creating the International Tribunal for Rwanda.¹²⁴⁹ These two bills – which only have a temporary application¹²⁵⁰ –

¹²⁴⁵ According to the original French version of Art. 689, “*Les auteurs ou complices d'infractions commises hors du territoire de la République peuvent être poursuivis et jugés par les juridictions françaises soit lorsque, conformément aux dispositions du livre Ier du code pénal ou d'un autre texte législatif, la loi française est applicable, soit lorsqu'une convention internationale ou un acte pris en application du traité instituant les Communautés européennes donne compétence aux juridictions françaises pour connaître de l'infraction*”.

¹²⁴⁶ Modified by French Law n°99-515 of 23 June 1999. English Translation provided online at <http://legislationline.org/documents/section/criminal-codes>.

¹²⁴⁷ See Arts 689-2 to 689-10 of the of the *Code de procédure pénale*. The ten Conventions are: Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (Art. 689-2); the European Convention on the Suppression of Terrorism, of 27 January 1977, and the Dublin agreement of 4 December 1979 (Art. 689-3); the Convention on the Physical Protection of Nuclear Material of 3 March 1980 (Art. 689-4); the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf of 10 March 1988 (Art. 689-5); the Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970, and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971 (Art. 689-6); the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation of 24 February 1988 (Art. 689-7); the Protocol to the Convention on the Protection of the Communities' Financial Interests of 27 September 1996 and the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union of 26 May 1997 (Art. 689-8); the International Convention for the Suppression of Terrorist Bombings of 12 January 1998 (Art. 689-9); and the International Convention for the Suppression of the Financing of Terrorism of 10 January 2000 (Art. 689-10).

¹²⁴⁸ See Part II.

¹²⁴⁹ See *Loi no 95-1 du 2 janvier 1995* and *Loi no 96-432 du 22 mai 1996*, available online at <http://www.legifrance.com>.

¹²⁵⁰ A. Huet and R. Koering-Joulin, *Droit pénal international* (Paris : Presses universitaires de France, 2001), at 211.

provide that French courts have jurisdiction over crimes under the ICTY and ICTR statutes, so long as the perpetrator is on French territory.¹²⁵¹

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In the 1994 *Javor* case, some Bosnian victims, who were refugees in France, filed criminal complaints against Serbian perpetrators for torture, war crimes, genocide and crimes against humanity. The French courts refused to recognize universal jurisdiction with respect to war crimes, because they considered that the Geneva Conventions were not directly applicable in national law and because no implementing legislation had been introduced.¹²⁵² The Paris Court of Appeal essentially considered that the lack of internal legislation implementing the Geneva Conventions prevented France from exercising universal jurisdiction. It considered *inter alia* that the four Geneva Conventions established obligations on states but were not directly applicable in domestic law. Furthermore, the relevant international rules were considered to be too general ("*revêtent un caractère trop général*") and were not sufficiently detailed and precise. Article 689 of the French Code of Criminal Procedure was therefore not applicable and the French courts were therefore not competent.¹²⁵³

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The Court of Cassation rejected the appeal of the civil parties, who had argued *inter alia* that the provisions of the Geneva Conventions imposing universal jurisdiction had become part of the domestic French internal order and were therefore directly applicable.¹²⁵⁴ In this case, the French courts provided for a restrictive interpretation of Article 689 of the French Code of Criminal Procedure, holding that it cannot be applied to the Geneva Conventions because of the absence of their direct effect and the absence of

¹²⁵¹ Art. 1 states that "*Les dispositions qui suivent sont applicables à toute personne poursuivie à raison des actes qui constituent, au sens des articles 2 à 5 du statut du tribunal international, des infractions graves aux conventions de Genève du 12 août 1949, des violations des lois ou coutumes de la guerre, un génocide ou des crimes contre l'humanité. Article 2 states that « Les auteurs ou complices des infractions mentionnées à l'article 1er peuvent être poursuivis et jugés par les juridictions françaises en application de la loi française, s'ils sont trouvés en France. Ces dispositions sont applicables à la tentative de ces infractions, chaque fois que celle-ci est punissable. Toute personne qui se prétend lésée par l'une de ces infractions peut, en portant plainte, se constituer partie civile dans les conditions prévues par les articles 85 et suivants du code de procédure pénale, dès lors que les juridictions françaises sont compétentes en application des dispositions de l'alinéa précédent. Le tribunal international et le mécanisme résiduel sont informés de toute procédure en cours portant sur des faits qui pourraient relever de leur compétence ».*

¹²⁵² Paris Court of Appeal, *Appel d'une Ordonnance d'incompétence partielle et de recevabilité de constitution de parties civiles*, Dossier No. A 94/02071, 24 November 1994.

¹²⁵³ *Ibid.* The Court concluded : "*Il s'ensuit qu'en l'absence d'effet direct des dispositions précitées des quatre conventions de Genève et à défaut d'un texte de droit interne, les juridictions françaises sont incompétentes pour connaître des infractions prévues par les quatre conventions de Genève – lorsqu'elles sont commises à l'étranger, par des auteurs étrangers, sur des victimes étrangères.*"

¹²⁵⁴ French Court of Cassation, Judgment, No. 95-81527, 26 March 1996.

domestic implementing legislation. One could argue that the French courts could have instead considered the Geneva Conventions as “international treaties which give France jurisdiction to prosecute” according to Article 689 of the French Code of Criminal Procedure, even though they are not listed in the Articles 689-1 ff. This decision was widely criticized by scholars, including French scholars, who argued *inter alia* that the court’s statement, that the Geneva Conventions are not self-executing, was contrary to French doctrine, which had considered them to be directly applicable since their ratification in 1951. It has been said that “positivism and dualism prevailed over the radical cosmopolitan view on international criminal justice that had emerged in the Barbie case”.¹²⁵⁵

It is noteworthy that a few years later, in the *Ould Dah* case, the French courts considered that Articles 689 ff. of the Code of Criminal Procedure as well as Article 7(2) of the Torture Convention gave France jurisdiction over crimes of torture committed abroad.¹²⁵⁶ However, in the *Ould Dah* case, unlike the *Javor* case, the acts of torture and barbarity were expressly provided for in the Criminal Code as constituting aggravating circumstances, unlike war crimes which were only introduced in French legislation in 2010.

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2. *The Danish Sarić case*

Interestingly, at the same time, in the *Sarić* case, the Danish courts arrived at a different conclusion than the French Court of Appeal. Sarić, a Bosnian Muslim civilian, was charged with committing war crimes in 1993 against fellow Bosnian inmates in a Croatian prison camp located in Bosnia. The Eastern High Court in Denmark convicted him in November 1994 for “grievous bodily harm under particularly aggravated circumstances” in violation of Sections 245 and 246 of the Danish Penal Code and the third and fourth Geneva Conventions.¹²⁵⁷ He was sentenced to eight years’ imprisonment - the maximum penalty - and prohibited for life from entering Danish territory.¹²⁵⁸ The Danish Supreme Court confirmed the High Court’s judgment on 15 August 1995. The courts applied Article 8(5) of the Danish Criminal Code, which provides for universal jurisdiction over crimes committed abroad in violation of international treaties

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¹²⁵⁵ Reydams, ‘Universal Jurisdiction: International and Municipal Perspectives’, 11 *Criminal Law Forum* (2000) 183-216, at 137.

¹²⁵⁶ See *Ould Dah* case *infra*.

¹²⁵⁷ See Eastern Division of High Court, *Prosecutor v. Refik Sarić*, 25 November 1994, available online at <http://www.icrc.org/ihl-nat> (last visited 1 August 2017); See F. Harhoff, ‘Sarić’, in Cassese (ed.), *The Oxford Companion to International Criminal Justice*, at 900-902.

¹²⁵⁸ Cited in FIDH and Redress, ‘Universal Jurisdiction Trial Strategies, Focus on victims and witnesses’, *A report on the Conference held in Brussels, 9-11 November 2009*, at 5, footnote 4.

ratified by Denmark.¹²⁵⁹ Sarić appealed his conviction, arguing that the acts did not amount to grave breaches as required by the Geneva Conventions and therefore did not fall within the scope of Denmark's jurisdiction. The Danish Supreme Court dismissed his appeal on 15 August 1995.

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This decision is interesting in that it combines international and national law: the penalty was determined by provisions of the Danish Penal Code on ordinary crimes but it is the direct application of the Geneva Conventions that allowed the judge to exercise universal jurisdiction per Article 8(5) of the Danish Penal Code. The case therefore shows that some courts consider that in order to exercise universal jurisdiction, it is not necessary for a national rule implementing substantive provisions with a penalty to exist.¹²⁶⁰

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The light sentence given to Sarić was widely criticized.¹²⁶¹ However, in our view, the courts were bound by the maximum penalty provided for in the relevant domestic provisions and therefore could not impose a sentence higher than eight years.¹²⁶² This case thus shows that characterizing an international crime as an ordinary crime under domestic law and thereby applying the related penalty gives rise to the problem that the sentence imposed does not match the gravity of the conduct that constituted the international core crime.¹²⁶³ Indeed, in respect of this case, one can really wonder whether a sentence of eight years' imprisonment adequately reflects the gravity of a grave breach of the Geneva Conventions.

3. *The Belgian Pinochet case*

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A few years later, in 1998, six Chilean victims residing in Belgium filed a complaint against the former Chilean dictator, Augusto Pinochet, who had been detained in London following an extradition request from Spain for crimes committed in the 1970s.¹²⁶⁴ They based their claim on crimes as defined by the

¹²⁵⁹ Art. 8(5) of the Danish Criminal Code; See Ministry of Foreign Affairs of Denmark, *The Scope and Application of the Principle of Universal Jurisdiction*, at 3.

¹²⁶⁰ R. Maison, 'Les premiers cas d'application des dispositions pénales des Conventions de Genève par les juridictions internes', 6 *EJIL* (1995) 260-273, at 273.

¹²⁶¹ L. Benavides, 'The Universal Jurisdiction Principle: Nature and Scope', 1 *Anuario Mexicano de Derecho Internacional* (2001) 19-96, at 66.

¹²⁶² At the time, Section 246 of the Danish Penal Code provided that if an assault covered by Section 245 had been of such a gross character or had caused such serious consequences, or death, that the circumstances were extremely aggravating, the penalty could be increased to imprisonment of eight years' maximum. See Harhoff, 'Sarić', in Cassese (ed.), *The Oxford Companion to International Criminal Justice*, at 901-902.

¹²⁶³ On this issue see Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law', 1 *Journal of International Criminal Justice* (2003), at 97.

¹²⁶⁴ The *Pinochet* case will be discussed in further detail below. See *infra* N 94 ff.

1993 Act implementing the Geneva Conventions. They could not rely on the Torture Convention, because Belgium had not yet ratified it.¹²⁶⁵ Moreover, at the time of the decision, neither genocide, nor crimes against humanity had been defined in Belgian law.¹²⁶⁶ Genocide, crimes against humanity and war crimes were only incorporated into the Belgian Penal Code in 2003. While the Belgian Investigating Judge Damien Vandermeersch concluded that that the situation in Pinochet's Chile could not be considered to be an internal armed conflict to which Common Article 3 of the Geneva Conventions or Protocol II applied, and that the crimes constituted in fact crimes against humanity,¹²⁶⁷ he addressed the question of whether the material provisions of the 1993 Law were applicable, even though the acts had occurred before its entry into force. It is interesting to note that the magistrate concluded that the application of the 1993 Act would not have violated the principle of legality:

[T]o the extent that the acts defined in the law of 16 June 1993 were already punishable in the Belgian legal order as common crimes such as murder, manslaughter, assault, hostage taking, torture . . . , the legality principle as embodied in article 2 of the Belgian Penal Code does not seem to oppose the initiation of criminal proceedings regarding such acts as crimes under international law as long as the sanctions are those which were applicable to the underlying common offense at the time of commission, or possibly the milder current sanctions (principles of legality of sanctions and of retroactivity of the milder criminal law).¹²⁶⁸

4. *The Swiss cases: a specific rule of reference to international conventions and customary law*

The issue of direct applicability of laws establishing international offences for the prosecution of core crimes was raised in the Swiss *Niyonteze* case, the very first conviction to be rendered by a municipal court exercising universal jurisdiction under Common Article 3 to the Geneva Conventions and

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¹²⁶⁵ See Reydams, 'Universal Criminal Jurisdiction: The Belgian State of Affairs', 11 *Criminal Law Forum* (2000), at 206; Belgium ratified the Torture Convention on 25 June 1999.

¹²⁶⁶ *Loi relative à la répression des violations graves de droit international humanitaire*, 10 February 1999. Since there is no international convention on the prevention and punishment of crimes against humanity, the Belgian parliament adopted the definition contained in the ICC Statute. Genocide, crimes against humanity and war crimes were later incorporated at Arts 136bis, 136ter and 136quater of the Belgian Penal Code. See *Loi relative aux violations graves du droit international humanitaire* of 5 August 2003.

¹²⁶⁷ 'Juge d'instruction au Tribunal de première instance de Bruxelles, 6 November 1998', reproduced in *Revue de droit pénal et de criminologie* (February 1999) 278-291, at 283.

¹²⁶⁸ Translation provided by Reydams, *supra* note 1263, at 209.

Additional Protocol II.¹²⁶⁹ Unlike in the French *Javor* case, war crimes were punishable under the Swiss Military Code, by a specific rule that made reference to international humanitarian law.¹²⁷⁰ Only since 2010 have war crimes been established in the Swiss Criminal Code.¹²⁷¹

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Fulgence Niyonteze was a former Rwandan *bourgmestre* (mayor) of the Mushubati Commune, suspected of participating in the 1994 Rwandan genocide; he fled with his family to Switzerland after the genocide, where they obtained asylum in May 1995.¹²⁷² On 3 July 1998, the Swiss Military Attorney General charged him under the Swiss Military Code with murder, incitement to commit murder and serious violations of the laws of war, as provided for by Article 109 of the Swiss Military Code in relation to Article 3 of the Geneva Conventions and Additional Protocol II. A request to add genocide and crimes against humanity to the indictment was rejected. Genocide has only been punishable in the Swiss Criminal Code since 2000 and crimes against humanity since 2010.¹²⁷³ On 30 April 1999, Niyonteze was sentenced to life imprisonment by the Military Divisional Chamber 2.

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The defendant appealed to the Military Appeal Tribunal and then to the Military Tribunal of Cassation. He argued that his acts could not be considered as war crimes because they were not linked to the armed conflict. It is interesting to note that the Military Tribunal of Cassation referred to the case law of the

¹²⁶⁹ The issue had already been raised before Swiss Military courts in the *G.* case. The Swiss courts found that they had jurisdiction for breaches of the Geneva Conventions on the basis of Art. 109 of the Swiss Military Code. However, *G.* was finally acquitted for lack of evidence. For an English translation of this case, see Sassòli and Bouvier, *How Does Law Protect in War?*, Vol. III, *Cases and Documents* (Geneva: International Committee of the Red Cross, 2006) 2063-2070.

¹²⁷⁰ Art. 109 of the Military Criminal Code. Since 2010, war crimes are defined in detail at Arts 264b to 264j of the Swiss Criminal Code. The jurisdiction of the military justice system is limited to cases in which members of the Swiss armed forces are the perpetrators or the victims.

¹²⁷¹ See Swiss Federal Government, *Message relatif à la modification de lois fédérales en vue de la mise en oeuvre du Statut de Rome de la Cour pénale internationale*, 23 April 2008, FF 2008 3461, available in French online at <https://www.admin.ch/opc/fr/federal-gazette/2008/3461.pdf> (last visited 1 August 2017).

¹²⁷² Military Appeal Tribunal 1A, Judgment, *Fulgence Niyonteze*, 26 May 2000, at 9, available online at <http://www.vbs.admin.ch/internet/vbs/fr/home/documentation/oa009.html> (last visited 28 March 2016). An investigation was opened against him and he was arrested on 28 August 1996. The ICTR did not take over the proceedings. Rwanda reportedly requested the defendant's extradition but the request was denied by Switzerland. On this case, see L. Reydams, 'Niyonteze v. Public Prosecutor', 96(1) *The American Journal of International Law* (2002) 231-236.

¹²⁷³ See former Art. 264 of the Swiss Criminal Code; See also Swiss Federal Government, *Message relatif à la modification de lois fédérales en vue de la mise en oeuvre du Statut de Rome de la Cour pénale internationale*, 23 April 2008, FF 2008 3461, available in French online at <https://www.admin.ch/opc/fr/federal-gazette/2008/3461.pdf> (last visited 1 August 2017).

ICTR in order to qualify the conflict as an internal armed conflict.¹²⁷⁴ It is also interesting to note that, in respect of the issue of the nexus requirement, the Military Appeal Tribunal considered that, while a link was required, the strict nexus requirement set out by the ICTR in the *Musema* and *Akayesu* judgments was not applicable.¹²⁷⁵ On this issue, the Military Tribunal of Cassation, affirming that the judgments of the ICTR were not binding, made considerable references to them and held that there was no reason not to apply the “public agent or government representative test”.¹²⁷⁶ Nevertheless, and in spite of the strong factual similarities with the *Akayesu* case, the Federal Court reached a different conclusion than the ICTR Trial Chamber,¹²⁷⁷ finding that there did exist

¹²⁷⁴ See Military Tribunal of Cassation, Judgment, *Fulgence Niyonteze*, 27 avril 2001, § 3.

¹²⁷⁵ Military Appeal Tribunal 1A, Judgment, *Fulgence Niyonteze*, 26 May 2000, at 36. “*Le Tribunal d’appel s’écarte ainsi des jugements du TPIR qui exigent un lien de connexité étroit entre les infractions et le conflit armé et limitent l’application des Conventions de Genève aux personnes occupant des fonctions soit au sein des forces armées soit au sein du gouvernement civil.*”; See ICTR, Trial Chamber, *Akayesu*, § 631, “Due to the overall protective and humanitarian purpose of these international legal instruments, however, the delimitation of this category of persons bound by the provisions in Common Article 3 and Additional Protocol II should not be too restricted. The duties and responsibilities of the Geneva Conventions and the Additional Protocols, hence, will normally apply only to individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or de facto representing the Government, to support or fulfil the war efforts. The objective of this approach, thus, would be to apply the provisions of the Statute in a fashion which corresponds best with the underlying protective purpose of the Conventions and the Protocols”.

¹²⁷⁶ See Military Tribunal of Cassation, Judgment, *Fulgence Niyonteze*, 27 avril 2001, § 9 d), “*Les critères utilisés par les Chambres de première instance du TPIR pour déterminer si l’art. 3 commun et le Protocole II ont été violés ne doivent pas nécessairement être repris dans la jurisprudence nationale suisse. Cependant, on ne voit pas pour quel motif il faudrait s’en écarter, d’autant qu’ils ont été définis de façon relativement large. Ainsi, le critère du lien “étroit” - ce qui signifie qu’il ne doit pas être vague ou indéterminé - entre les infractions et le conflit armé n’est pas très précis et dépend d’une appréciation du cas concret. [...] C’est maladroitement que le Tribunal d’appel a affirmé s’écarter de l’actuelle jurisprudence du TPIR dès lors que, ce nonobstant, il a en définitive appliqué au cas particulier des critères correspondant à ceux que l’on vient d’exposer. Il n’y a donc pas lieu d’analyser de façon plus approfondie cette prétendue divergence dans l’interprétation des normes du droit international humanitaire.*”.

¹²⁷⁷ See ICTR, Trial Chamber, *Akayesu*, § 643: The Trial Chamber held that “Considering the above, and based on all the evidence presented in this case, the Chamber finds that it has not been proved beyond reasonable doubt that the acts perpetrated by Akayesu in the commune of Taba at the time of the events alleged in the Indictment were committed in conjunction with the armed conflict. The Chamber further finds that it has not been proved beyond reasonable doubt that Akayesu was a member of the armed forces, or that he was legitimately mandated and expected, as a public official

a sufficient link with the armed conflict.¹²⁷⁸ One could argue that this conclusion may have been influenced by the fact that Swiss courts did not have any other jurisdictional basis that could be exercised in order to convict Niyonteze.¹²⁷⁹ It is worth noting however that two months later, the Appeals Chamber in the *Ayakesu* case ruled that the Trial Chamber had erred in law by restricting the application of Common Article 3 to a certain category of persons.¹²⁸⁰

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One issue that can be raised is whether Article 109 of the Swiss Military Code was sufficiently precise to satisfy the *nullum crimen sine lege* requirement; this is particularly important as this case constituted the first application of this provision, such that there was a lack of relevant case law.¹²⁸¹ One could argue that the Geneva Conventions to which the provision refers to are sufficiently precise. Indeed, in this case, the Swiss Tribunal directly applied the provisions of the Geneva Conventions on internal conflicts as a basis for prosecution.¹²⁸² It should be noted that such an approach in the case of war crimes was an exception at the time. Indeed, in the case of criminal matters, even if Switzerland is a monist state, implementation of the international rule into domestic law is generally required.¹²⁸³ In this regard, it is noteworthy that Article 109 of the Swiss Military Code was criticized as not providing an entirely sufficient basis for a prosecution, in terms of respect of the legality principle and the principle of legal certainty, because it did not refer to specific sources of law and did not codify customary law.¹²⁸⁴ Since 1 January 2011, the Swiss Criminal Code has

or agent or person otherwise holding public authority or de facto representing the Government, to support or fulfil the war efforts”.

¹²⁷⁸ See L. Reydams, ‘Niyonteze v. Public Prosecutor’, 96 *American Journal of International Law* (2002), at 235.

¹²⁷⁹ *Ibid.*, at 235.

¹²⁸⁰ See ICTR, Appeals Chamber, *Ayakesu*, § 445.

¹²⁸¹ See Sassoli, ‘Le génocide rwandais, la justice militaire suisse et le droit international’, *Revue suisse de droit international public et de droit européen* (2002), at 163.

¹²⁸² See Roth and Jeanneret, ‘Droit suisse’, in Cassese/Delmas-Marty, *Juridictions nationales et crimes internationaux* (Paris : Presses universitaires de France, 2002), at 279.

¹²⁸³ *Ibid.*, at 281; See also Swiss Federal Government, *Message relatif à la modification de lois fédérales en vue de la mise en oeuvre du Statut de Rome de la Cour pénale internationale*, 23 April 2008, FF 2008 3461, available in French online at <https://www.admin.ch/opc/fr/federal-gazette/2008/3461.pdf> (last visited 28 March 2016).

¹²⁸⁴ See inter alia Sassoli, *supra* note 1279, at 163, and Swiss Federal Government, *Message relatif à la modification de lois fédérales en vue de la mise en oeuvre du Statut de Rome de la Cour pénale internationale*, 23 April 2008, FF 2008 3461, available in French online at <https://www.admin.ch/opc/fr/federal-gazette/2008/3461.pdf> (last visited 1 August 2017), at 3478-3479: “Les dispositions du droit suisse permettant de punir les infractions au droit international humanitaire, c’est-à-dire au droit applicable dans le contexte de conflits armés pour en protéger les victimes, se trouvent aujourd’hui au chapitre 6 du CPM. Les actes visés par ces dispositions ne sont

defined the various categories of war crimes precisely, both in the context of international and non-international armed conflict. A catalogue of rules can now be found in the Military Code and in the Criminal Code at Articles 264b to 264j of the Swiss Criminal Code.¹²⁸⁵ However, it is interesting to note that the Swiss Criminal Code also incorporates a provision which provides for a maximum penalty of three years for any person “who in connection with an armed conflict violates a provision of international humanitarian law other than those mentioned in Articles 264c-264i, where such a violation is declared to be an offence under customary international law or an international treaty recognized as binding by Switzerland”.¹²⁸⁶ This provision largely corresponds to former Article 109 of the Military Criminal Code and poses similar problems with regard to the legality principle, especially since this provision is meant for “*les crimes de guerre plus rares, moins graves ou d’un type nouveau [qui sont] punissables en droit suisse même s’ils sont réprimés par le droit international mais ne figurent pas expressément dans la loi*”.¹²⁸⁷ However, given that a number of other crimes have since been precisely defined in the Swiss Penal Code, one can convincingly argue that the current legal solution constitutes a considerable improvement

cependant pas décrits dans le code lui-même, comme cela se fait habituellement, mais font l’objet, à l’art. 109 CPM, d’un simple renvoi général aux conventions internationales et au droit coutumier applicables. Les sources de droit déterminantes ne sont pas citées nommément. Sans compter la difficulté qu’il y a à identifier les normes visées, les conventions ne contiennent généralement pas de définitions précises des actes interdits et, par essence, le droit coutumier n’est pas codifié dans son intégralité. Vu les principes de l’Etat de droit et les exigences particulièrement sévères du principe de légalité en droit pénal, on s’était demandé, en élaborant l’art. 109 CPM, si cette façon de procéder permettait de juger de manière suffisamment claire du caractère punissable d’un comportement en cas de conflit. Ce point a donné lieu à des critiques dans la doctrine suisse, certains auteurs ayant estimé que le renvoi imprécis au droit international risquait d’affaiblir la sécurité du droit et mettait en péril la fonction de garantie remplie par les dispositions expresses de la législation pénale. Même si l’art. 109 CPM permet en principe de punir en Suisse les crimes de guerre relevant du Statut de Rome, il paraît judicieux – pour toutes les raisons indiquées plus haut – d’asseoir sur des bases légales précises la lutte contre ces crimes d’une gravité extrême, qui sont punis de lourdes peines.”

¹²⁸⁵ In addition, the regimes of prosecution of the crimes of genocide and war crimes have been unified. A number of general principles, applicable to all three categories of crime, were also enshrined in the Penal Code (hereafter PC). The principle of command responsibility at Art. 264k PC, the principle of non-defence of superior orders at Art. 264l PC, the exclusion of immunities at Art. 264n PC. Art. 260bis PC punishes preparatory acts to all three offences.

¹²⁸⁶ Art. 264j entitled “Autres infractions au droit international humanitaire” states that “Quiconque, dans le contexte d’un conflit armé, enfreint, d’une manière qui n’est pas réprimée par les art. 264c à 264i, une norme du droit international humanitaire dont la violation est punissable en vertu du droit international coutumier ou d’une convention internationale reconnue comme contraignante par la Suisse est puni d’une peine privative de liberté de trois ans au plus ou d’une peine pécuniaire”.

¹²⁸⁷ Message 2008, 3541.

compared to the legal situation at the time of the *Niyonteze* case.¹²⁸⁸ Indeed, the legislator tried to find a balance between respect for the legality principle on one hand, and the necessity to include all violations of customary international humanitarian law, encompassing its evolution, as well as those of treaties to be ratified in the future, on the other.¹²⁸⁹ Generally speaking, this solution should be approved.¹²⁹⁰ However, two problems may arise. Firstly, it is doubtful that the requirement for an offence to be sufficiently precise and foreseeable is satisfied given the possibility for the prosecution of an offence on the basis of customary international law. Secondly, Article 264m of the Swiss Criminal Code on universal jurisdiction is applicable in respect of Article 264j of the Swiss Criminal Code, notwithstanding that according to international law, not all violations of international humanitarian law are subject to universal jurisdiction.¹²⁹¹ Thus, for instance, if a violation of international humanitarian law is punishable in an international treaty to which only Switzerland, but neither the territorial nor the national state, is party, the question of whether Switzerland can assert jurisdiction is doubtful.¹²⁹²

5. *Rwandan cases in Belgium*

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In 1993, Belgium adopted a law on international humanitarian law, which was only amended in 1999 to include crimes against humanity and genocide.¹²⁹³ Thus, in the initial Rwandan genocide cases, the accused were charged with crimes under the Geneva Convention. The first Belgian trial – known as “The Butare Four Case” – concerned four Rwandan defendants, charged with crimes committed during the 1994 genocide in Rwanda. The accused – Vincent Ntezimana, a professor at the National University of Rwanda, Alphonse Higaniro, a factory owner, Consolata Mukangango and Julienne Mukabutera, both nuns – were accused of collaborating with the Hutus; they were the first persons to be tried and convicted on the basis of the 1993 Act implementing the Geneva Conventions and Additional Protocols. The act provided for universal jurisdiction in respect of serious violations of the Geneva Conventions and

¹²⁸⁸ See Jakob and Maleh, *Commentaire romand*, Art. 264j N 15 (forthcoming).

¹²⁸⁹ Message 2008 3541.

¹²⁹⁰ See Jakob and Maleh, *Commentaire romand*, Art. 264j N 15 (forthcoming) : “*Il est toutefois difficile de reprocher au législateur de n’avoir pas poussé plus loin encore l’exercice de transposition du droit international en droit pénal interne. De même, c’est à juste titre qu’a été rejetée l’alternative consistant à laisser impunis en droit suisse des crimes de guerre pourtant réprimés par le droit international.*”

¹²⁹¹ See Part I.

¹²⁹² See Jakob and Maleh, *Commentaire romand*, Art. 264j N 13 (forthcoming).

¹²⁹³ See Act of 10 February 1999 on the Punishment of Grave Breaches of International Humanitarian Law.

Additional Protocols even when the suspect was not present on Belgian territory, although in this case the suspects were present in Belgium.

Thus, the defendants were accused of international crimes under the Geneva Conventions and Additional Protocols I and II¹²⁹⁴ as they could not be charged with crimes against humanity or genocide, at least under Belgian law.¹²⁹⁵ The trial, which began on 17 April 2001, lasted eight weeks and included the testimony of over 100 witnesses. The defendants were given prison sentences ranging from 12 to 20 years.¹²⁹⁶ On 9 January 2002, the *Cour de Cassation* rejected the appeals of three of the defendants; the fourth defendant did not appeal.

Other Rwandan universal jurisdiction cases have been prosecuted in Belgium since the adoption in 1999 of domestic provisions on genocide and crimes against humanity. It is interesting to note that all of the accused have actually been convicted of war crimes as opposed to genocide. On 29 June 2005, the Brussels Assize Court delivered a judgment against two Rwandan businessmen, Etienne Nzabonimana, and his half-brother Samuel Ndashyikirwa. This was the second trial of Rwandan *génocidaires* under the 2003 Act concerning Grave Breaches of International Humanitarian Law. The accused were both charged with “crimes under international law”, causing harm, by action or inaction, to persons and goods protected by the Geneva Conventions and Additional Protocols I and II. Neither party challenged the legal qualification of the acts as war crimes.¹²⁹⁷ Nzabonimana, was sentenced to 12 years’ imprisonment and Ndashyikirwa to 10 years’ imprisonment. In order to assert its jurisdiction, the court applied Article 6 §1bis of the *Titre préliminaire du Code de procédure pénale*¹²⁹⁸ – which was introduced by the Law of 2003 – according to which every Belgium national or person having his or her main residence in Belgium can be prosecuted if said person allegedly committed a serious violation of international humanitarian law outside of Belgium, and Article 29 § 3 (5) of the 5 August 2003 Act on Grave Breaches of International Humanitarian Law.

¹²⁹⁴ See *Cour d’Assises de l’Arrondissement administrative de Bruxelles-Capitale*, 8 June 2001, available online at <http://competenceuniverselle.files.wordpress.com/2011/07/arret-8-juin-2001.pdf> (last visited 1 August 2017), at 1.

¹²⁹⁵ As we will see below, some Belgian judgments have held that Rwandan suspects could be charged with crimes against humanity because these constituted crimes under customary international law at the time of their commission.

¹²⁹⁶ See *Cour d’Assises de l’Arrondissement administrative de Bruxelles-Capitale*, 8 June 2001.

¹²⁹⁷ L. Reydams, ‘Nzabonimana, and Ndashyikirwa’, in Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), at 860.

¹²⁹⁸ Introduced by the Law of 2003. The provision was thus applied retroactively. On the retroactive application of new rules on universal jurisdiction, see *infra* Section IV, C.

C. Crimes against humanity

1. A general overview

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According to research recently conducted by Bassiouni, only 55 states have enacted legislation criminalizing crimes against humanity; most states have done so since 2002.¹²⁹⁹ Indeed, because of the absence of any international treaty on crimes against humanity, few states established provisions on crimes against humanity before an authoritative definition was adopted in the Rome Statute. As noted above, Belgium adopted a law on international humanitarian law in 1993 but this was only amended in 1999 to include crimes against humanity and genocide. New Zealand did not enact such provisions until 2000. Similarly, only in 2002 did Costa Rica and Australia adopt legislation that criminalized crimes against humanity. Crimes against humanity were inserted into the Spanish Criminal Code in 2004. Other states, while party to the Rome Statute, did not criminalize crimes against humanity until very recently. Switzerland, for instance, only criminalized crimes against humanity on 1 January 2011.¹³⁰⁰ Crimes against humanity were introduced in the Swedish Criminal Code in July 2014.¹³⁰¹ Still today, many do not have provisions defining crimes against humanity. This is the case, for instance, of Bulgaria and the United States.

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Consequently, very few cases have dealt with crimes against humanity. Moreover, a conviction for a crime which was not clearly defined and accompanied by a penalty in national law at the time of its commission would generally be considered, in domestic criminal law, to constitute a violation of the principle of legality or its *corollary*, the principle of *non-retroactivity* of more severe criminal laws;¹³⁰² as a result, domestic authorities did not prosecute

¹²⁹⁹ See Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, at 660.

¹³⁰⁰ On 18 June 2010, a new Law was adopted, entitled "*Loi fédérale portant modification de lois fédérales en vue de la mise en œuvre du Statut de Rome de la Cour pénale internationale du 18 juin 2010*". Since 1 January 2011, crimes against humanity are punishable under Swiss law at Art. 264a of the Criminal Code.

¹³⁰¹ The new *Swedish Act on criminal responsibility for genocide, crimes against humanity and war crimes* makes widespread or systematic attacks against civilians – including murder, sexual abuse and torture – crimes against humanity. On the situation before this legislative change, see M. Klamberg, 'International Criminal Law in Swedish Courts: The Principle of Legality in the *Arklöv* Case', 9 *International Criminal Law Review* (2009) 395-409, at 398.

¹³⁰² For instance, in its Message implementing the Rome Statute, the Swiss Federal Council expressly stated that international rules relating to crimes against humanity could not be directly applied in Swiss criminal proceedings. According to the Swiss Federal Council, "*Faute de prévisibilité des conséquences pénales, il est impossible d'appliquer directement, dans une procédure pénale conduite en Suisse, des normes pénales issues du droit international coutumier visant les crimes contre l'humanité*". Swiss Federal Council, *Message relatif à la modification des lois fédérales en vue de la*

crimes against humanity. For example, the Swiss Federal Council, in its Message implementing the Rome Statute stated that the customary norm prohibiting crimes against humanity could not serve as the basis for a conviction in a Swiss criminal procedure in the absence of a sufficiently precise definition of the objective and subjective elements of the offense. It thus concluded that in light of the principle of legality (*nulla poena sine lege*) and in order to be able to punish crimes against humanity in Switzerland, it was essential to adopt legislation punishing crimes against humanity with an attached penalty.¹³⁰³

This section will show some ways in which domestic courts have addressed the problem of the absence of domestic legislation on crimes against humanity at the moment of their commission and the issue of non-retroactivity. Some courts have argued that international customary law already prohibited crimes against humanity at the time of the events and that the principle of legality was in fact respected. Others have been more reluctant to apply international customary law and have used other international crimes that were established in their domestic legislation.¹³⁰⁴ In other cases, the courts have simply dismissed cases because of the absence of domestic provisions incorporating crimes against humanity.¹³⁰⁵

It is also interesting to note that different approaches have been taken within the same state depending on the particular case. The example of France is particularly striking. In the post World War II context, France prosecuted and convicted Klaus Barbie in 1988,¹³⁰⁶ Paul Touvier in 1994¹³⁰⁷ and Maurice Papon

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mise en œuvre du Statut de Rome de la Cour pénale internationale, 23 April 2008, FF 2008 3461, at 3475.

¹³⁰³ My translation. See Swiss Federal Council, *Message relatif à la modification des lois fédérales en vue de la mise en œuvre du Statut de Rome de la Cour pénale internationale*, 23 April 2008, FF 2008 3461, at 3478 : "Bien qu'il soit généralement reconnu que l'interdiction de commettre des crimes contre l'humanité relève du droit coutumier, cela signifie uniquement que la perpétration de tels crimes est interdite indépendamment de l'existence de règles conventionnelles. Cette interdiction issue du droit coutumier ne peut toutefois servir de base légale à une condamnation dans le cadre d'une procédure pénale menée en Suisse tant que l'on ne dispose pas d'une définition suffisamment précise des éléments objectifs et subjectifs de l'infraction. Le CP ne contient pas d'ailleurs de norme d'incorporation définissant concrètement une peine. A la lumière du principe de légalité (*nulla poena sine lege*), il est donc indispensable de légiférer si l'on veut pouvoir punir les crimes contre l'humanité en Suisse."

¹³⁰⁴ See *infra* the Spanish *Pinochet* case.

¹³⁰⁵ See *infra* the *Hissène Habré* case before Senegal Courts.

¹³⁰⁶ Barbie was sentenced to life imprisonment for crimes against humanity by the Lyon Cour d'Assises. The judgment was affirmed by the Court of Cassation on 2 June 1988.

¹³⁰⁷ Touvier was sentenced to life imprisonment.

in 1998 for crimes against humanity.¹³⁰⁸ In each case, the courts rejected the argument against a conviction for crimes against humanity in the absence of national provisions prohibiting such acts at the time of their commission.¹³⁰⁹ Moreover, in the *Touvier* case, the court rejected the defendant's argument that his conviction violated the legality principle on the basis that the 1964 French law referred only to the IMT Charter but did not constitute an implementation act.¹³¹⁰ It is noteworthy, therefore, that the French courts have not since convicted another person for crimes against humanity. Reference can be made to the *Boudarel* and *Pinochet* cases, notwithstanding that in both cases, the French courts asserted other extraterritorial jurisdictional bases than universal jurisdiction.¹³¹¹ In the latter case, the French judge refused to indict Pinochet for crimes against humanity because of the rule *nullum crimen sine lege*, since the acts for which Pinochet was accused had been committed before the entry into force of the French law on crimes against humanity on 1 March 1994.¹³¹² Furthermore, as seen above in the *Javor* case and in the Rwandan genocide cases, the French courts have relied on a strict application of the legality principle. In the *Boudarel* case, the Court of Cassation ruled that the proceedings could not occur as the acts upon which the complaint was founded were covered by the 1966 amnesty law on crimes committed during the Vietnamese uprising.¹³¹³

2. *The Spanish Pinochet case*

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Before discussing some of the Spanish universal jurisdiction cases and in order to have the applicable law in mind while examining these decisions, it is necessary to briefly describe the history of the legal framework relating to the implementation and the definition of international crimes in Spain.

¹³⁰⁸ On 2 April 1998, Papon was found guilty to ten years' imprisonment by the Bordeaux Assize Court. See V. Thalmann, 'Papon', in Cassese (ed.), *The Oxford Companion to International Criminal Justice*, at 871.

¹³⁰⁹ See Thalmann, 'Touvier', in Cassese (ed.), *The Oxford Companion to International Criminal Justice*, at 958.

¹³¹⁰ *Ibid.*

¹³¹¹ See France, Court of Cassation, *Boudarel*, Judgment, 7 September 1999, available online in French at http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/France/Boudarel_Cassation_7-9-1999.pdf (last visited 1 August 2017); See B. Stern, 'In re Pinochet. French Tribunal de Grande instance (Paris)', 93(3) *The American Journal of International Law* (July 1999) 696-700.

¹³¹² Stern, *supra* note 1309, at 698.

¹³¹³ France, Court of Cassation, *Boudarel*, Judgment, 7 September 1999, available online in French at http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/France/Boudarel_Cassation_7-9-1999.pdf (last visited 1 August 2017).

a. *The implementation of international crimes in Spain*

The Spanish Military Criminal Code of 9 December 1985 transposed into Spanish law the provisions contained in the main conventions on international humanitarian law ratified by Spain, notably the Geneva Conventions of 1949, the Additional Protocols, as well as the Hague Conventions.¹³¹⁴ It contains a chapter dedicated to “crimes against the laws and customs of war”, which criminalizes any act contrary to the provisions of the international treaties ratified by Spain and relative to the conduct of hostilities, the protection of wounded, sick and shipwrecked military personnel, the handling of prisoners of war, the protection of civilians in times of war and the protection of cultural property during armed conflict.¹³¹⁵

Spain ratified the Genocide Convention in 1968, and in 1971 by means of the Law 44/71 of 15 November 1971, the crime of genocide entered the Criminal Code under Article 137b as an example of a crime against humanity (*crimenes contra la humanidad*). The 1971 Code described the perpetrators as “those who, with the aim of destroying in whole or in part a national ethnical, social or religious group, carry out any of the following acts...”.¹³¹⁶ Thus, it is interesting to note that when it was initially incorporated into the Spanish Criminal Code in 1971, the definition of genocide included the intent to destroy a “social” group. Furthermore, by deleting the comma between national and ethnical, these two criteria were merged, instead of being separate.¹³¹⁷ In 1983, the term “racial” was inserted instead of the term “social”, and in 1995, a comma was added after the term “national”.¹³¹⁸ Thus, by 1995, the Spanish Criminal Code had transposed into Spanish law most of the international conventions ratified by Spain, including the 1948 Genocide Convention and the 1984 Torture Convention.¹³¹⁹ Today, genocide is criminalized in Article 607 of the Spanish

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¹³¹⁴ E. C. Rojo, ‘National Legislation Providing for the Prosecution and Punishment of International Crimes in Spain’ 9 *JICJ* (2011) 699-728, at 700.

¹³¹⁵ *Ibid.*, at 700.

¹³¹⁶ L. Turano Taylor, ‘Jurisdiction in the Pinochet Case: The View from Spain’, 6(4) *European Public Law* (2000) 613-627.

¹³¹⁷ See Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, at 27.

¹³¹⁸ M. del Carmen Marquez Carrasco and J. Alcaide Fernandez, ‘In Re Pinochet: Spanish National Court, Criminal Division (Plenary Session), Case 19/97, November 4, 1998; Case 1/98, November 5, 1998’, 93 *The American Journal of International Law* (July 1999) 690-700, at 693.

¹³¹⁹ Rojo, ‘National Legislation Providing for the Prosecution and Punishment of International Crimes in Spain’, 9 *Journal of International Criminal Justice* (2011) 699-728, at 701.

Criminal Code,¹³²⁰ in similar terms to those used in the Genocide Convention and in the ICC Statute.¹³²¹

395 Spain ratified the Rome Statute on 4 October 2000. The Organic Law 15/2003 of 25 November 2003, which came into force on 1 October 2004, amended the Spanish Criminal Code to introduce crimes against humanity into the Spanish legal system. Article 607bis defines crimes against humanity in the language taken directly from the Rome Statute, notwithstanding that some textual differences operate to limit or expand the scope of the crimes.¹³²² It is noteworthy that crimes against humanity were added as a specific crime falling under Article 23(4) of the Law on the Judiciary, which provides for universal jurisdiction, only in 2009. As we will see below, the Supreme Court had however already affirmed this approach in a controversial decision in the *Scilingo* case rendered in October 2007.

396 The Organic Law 15/2003 did not amend the Military Criminal Code however. Thus, in respect of war crimes, some violations mentioned in the ICC Statute are not expressly set out in the Military Criminal Code.¹³²³ Conversely, in some respects, the Military Criminal Code goes beyond the list of crimes established in the ICC Statute.¹³²⁴ War crimes are however also regulated in the Criminal Code under the chapter on “crimes against persons and assets in the event of an armed conflict”.¹³²⁵ Finally, torture is also criminalized in the Spanish Criminal Code in the chapter dedicated to “torture and other felonies against moral integrity” since 1978.¹³²⁶

¹³²⁰ Organic Act 10/1995 on the Criminal Code, 23 November 1995, English translation available online at: http://www.sanchezcervera-abogados.com/en/files/2012/06/Criminal_Code_C%C3%B3digo_Penal.pdf.

¹³²¹ See Art. 607, § 1 of the Spanish Criminal Code. However, in addition to national, racial and religious groups, the Spanish Criminal Code also includes as a protected group “a group determined by the disability of its members”.

¹³²² On this subject, see Rojo, *supra* note 1317, at 705.

¹³²³ *Ibid.*, at 700.

¹³²⁴ *Ibid.*, at 701.

¹³²⁵ Art. 610 of the Criminal Code states that: “Whoever, during an armed conflict, uses or orders methods or means of combat that are prohibited or intended to cause unnecessary suffering or superfluous harm, as well as those conceived to cause, or that can be reasonably be expected to cause extensive, lasting and serious damage to the natural environment, compromising the health or survival of the population, or who orders all-out war, shall be punished with a sentence of imprisonment from ten to fifteen years, without prejudice to the relevant punishment for the results caused”.

¹³²⁶ See Arts 173 ff. of the Spanish Criminal Code.

b. *Reluctance to apply international law directly: The Pinochet case*

One of the best known universal jurisdiction cases in the world is the case of *Augusto Pinochet*, who was the President of Chile until 1990 and Commander-in-Chief of the Chilean Army until 1998, when he was accorded the status of Senator-for-life, which gave him immunity from prosecution in Chile.¹³²⁷ In 1996, criminal complaints were filed in Spain against the Argentinean and Chilean military in relation to the disappearances of Spanish citizens, and victims of other states, in the 1970s. An investigation was opened in Spain against Pinochet and other members of the military Junta of Chile. On 16 October 1998, upon hearing that Pinochet was present in the United Kingdom, investigative Judge Garzon ordered his arrest on charges including genocide, terrorism and torture, and issued an international arrest warrant against him for execution by the British judicial authorities.¹³²⁸ It is worth recalling that crimes against humanity were included in Spanish legislation at that time, but had not been so at the time of the events. In addition, and more importantly, at the time of the decision, crimes against humanity were not subject to universal jurisdiction in Spanish criminal law.

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The Spanish Public Prosecutor lodged an appeal before the Criminal Division of the Spanish National Court. With regard to torture, the Prosecutor argued that both the incorporation of the crime of torture into the Spanish Criminal Code in 1978 and the entry into force of the Torture Convention had taken place after the alleged facts. In its decision of 5 November 1998, the Spanish Criminal Court found that it was not necessary to decide on this issue because the claims of torture comprised part of the crimes of genocide and terrorism.¹³²⁹ It therefore did not dwell on the issue of whether torture constituted an international crime at the time of commission of the acts.

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With regard to genocide, the Spanish Public Prosecutor argued that the acts did not constitute genocide. The *Audiencia Nacional* rendered a very broad interpretation of the term “national groups.” Influenced by the former 1971 definition of genocide, the Spanish National Court applied a “social” conception of genocide and concluded that the acts in question constituted genocide.¹³³⁰

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¹³²⁷ Del Carmen Marquez Carrasco and Alcaide Fernandez, 'In Re Pinochet: Spanish National Court, Criminal Division (Plenary Session), Case 19/97, November 4, 1998; Case 1/98, November 5, 1998', 93(3) *The American Journal of International Law* (July 1999) 690-700.

¹³²⁸ Spain, Audiencia Nacional, 'Spanish Request to Arrest General Pinochet, 16 October 1998', unofficial translation in Brody/Ratner (eds), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (The Hague: Kluwer Law International, 2000), at 57-59; Del Carmen Marquez Carrasco and Alcaide Fernandez, *supra* note 1325, at 692. See also R. J. Wilson, 'Prosecuting Pinochet: International Crimes in Spanish Domestic Law', 21(4) *Human Rights Quarterly* (1999) 927-979.

¹³²⁹ Del Carmen Marquez Carrasco and Alcaide Fernandez, *supra* note 1325, at 694.

¹³³⁰ *Ibid.*, at 693.

Commentators have argued that the court's interpretation of genocide was "far-fetched", since political groups were intentionally excluded from the international definition of the concept, and that the acts in question should have probably been qualified as crimes against humanity.¹³³¹ However, as mentioned above, the key problem was that crimes against humanity were not defined in Spanish criminal law at the time of the acts and were not referred to in Article 23(4) of the Law on the Judiciary as crimes subject to universal jurisdiction.¹³³²

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As a result, the defendant was sought to be convicted for a crime that was not a crime under international law at the time of the commission of the offence and was arguably not a crime under domestic criminal law.¹³³³ In this respect, it is also noteworthy that, contrary to what was decided in Spain, the acts committed by Pinochet were not characterized as acts of genocide by the French courts, but as crimes of torture and crimes against humanity.¹³³⁴

3. *Belgian prosecutions for crimes against humanity: Pinochet and Yerodia*

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In the Belgian *Pinochet* case,¹³³⁵ while the claim was based on war crimes, the Belgian judge concluded that the situation in Pinochet's Chile could not be considered to be an internal armed conflict to which Common Article 3 of the Geneva Conventions or Protocol II applied.¹³³⁶ He considered that the alleged crimes constituted crimes against humanity as defined by customary international law. The problem was that, at the time of the decision – rendered before the 1999 amendment – crimes against humanity did not constitute an offence under Belgian law. The decision however states that at the time "the prohibition on crimes against humanity was part of customary international law and of international *jus cogens*, and this norm imposes itself imperatively and *erga omnes* in our domestic order".¹³³⁷ He then considered that "even in the

¹³³¹ *Ibid.*, at 695.

¹³³² As mentioned above, it is only in 2009 that crimes against humanity were added as a specific crime falling under Art. 23(4) of the Law on the Judiciary, which provides for universal jurisdiction.

¹³³³ M. H. Morris, 'Universal Jurisdiction in a Divided World: Conference Remarks', 35 *New England Law Review* (2000-2001) 337-361, at 353.

¹³³⁴ See Stern, 'In re Pinochet. French Tribunal de Grande instance (Paris)', 93(3) *The American Journal of International Law* (July 1999), at 697.

¹³³⁵ See *supra* N 345 ff.

¹³³⁶ See 'Juge d'instruction au Tribunal de première instance de Bruxelles, 6 November 1998', reproduced in *Revue de droit pénal et de criminologie* (February 1999) 278-291, at 283.

¹³³⁷ Translation in Reydams, 'Universal Criminal Jurisdiction: The Belgian State of Affairs', 11 *Criminal Law Forum* (2000), at 208. In the original French version : "le crime contre l'humanité est consacré par la coutume internationale et fait partie, à ce titre, du jus cogens international qui s'impose dans l'ordre juridique interne avec effet contraignant « erga omnes »" ; Juge d'instruction au Tribunal de première

absence of treaty, national authorities have the right – and in some circumstances the obligation – to prosecute the perpetrators independently of the place where they hide”.¹³³⁸ He concluded that:

[...] we find that, as a matter of customary international law, or even more strongly as a matter of *jus cogens*, universal jurisdiction over crimes against humanity exists, authorizing judicial authorities to prosecute and punish the perpetrators in all circumstances.¹³³⁹

This decision is particularly interesting because the court basically held that a person could be convicted for a crime that was neither a crime in domestic law at the time of the decision, nor established as such in a treaty to which the prosecuting state was party. 402

A similar approach was taken in the *Yerodia* case. In November 1998, Congolese victims residing in Belgium filed complaints against Abdulaye Yerodia Ndombasi, the Foreign Minister of the Democratic Republic of Congo in respect to his role as a senior government official in publicly calling for acts of violence against Tutsis, which had led to arrests and persecution throughout the DRC.¹³⁴⁰ On 11 April 2000, a Belgian investigating magistrate issued an arrest warrant *in absentia* against Yerodia Ndombasi charging him as a perpetrator or co-perpetrator in respect of grave breaches of the Geneva Conventions and Protocols I and II and of crimes against humanity.¹³⁴¹ Again, the problem was that crimes against humanity had not been incorporated in Belgian law but only with the Law of 1999. As in the *Pinochet* case, Investigating Judge Damien Vandermeersch held in his decision that crimes against humanity were crimes under customary international law and constituted part of *jus* 403

instance de Bruxelles, 6 novembre 1998’, reproduced in *Revue de droit pénal et de criminologie* (February 1999) 278-291, at 286.

¹³³⁸ Translation in Reydams, *supra* note 1335, at 208. In the original French version: “*même en dehors de tout lien conventionnel, les autorités nationales ont le droit, et même, dans certaines circonstances, l’obligation de poursuivre les auteurs de tels crimes indépendamment du lieu où il se trouve*”; ‘Juge d’instruction au Tribunal de première instance de Bruxelles, 6 novembre 1998’, reproduced in *Revue de droit pénal et de criminologie* (February 1999) 278-291, at 286.

¹³³⁹ Translation in Reydams, *supra* note 1335, at 208. In the original French version: “*nous considérons qu’il existe une règle coutumière du droit des gens, voire de jus cogens, reconnaissant la compétence universelle et autorisant les autorités étatiques nationales à poursuivre et traduire en justice, en toutes circonstances, les personnes soupçonnées de crimes contre l’humanité*”; ‘Juge d’instruction au Tribunal de première instance de Bruxelles, 6 novembre 1998’, reproduced in *Revue de droit pénal et de criminologie* (February 1999) 278-291.

¹³⁴⁰ N. Roht-Arriaza, ‘Universal Jurisdiction: Steps Forward, Steps Back’, 17(2) *Leiden Journal of International Law* (2004) 375-389, at 384.

¹³⁴¹ Tribunal de première instance de l’arrondissement de Bruxelles, *Mandat d’arrêt international par défaut*, 11 avril 2000, available online in French at <http://competenceuniverselle.files.wordpress.com/2011/07/vandermeersch-avril-2000.pdf> (last visited 1 August 2017).

cogens.¹³⁴² In addition, the judge added that the crimes had already been established as common crimes at the time of their commission. The legality principle provided for at Article 2 of the Belgian Penal Code therefore appeared to be respected, as long as the penalties were those that would have been applicable at the time of commission of the crimes as provided for by ordinary crimes.¹³⁴³

4. *The Spanish Scilingo case: Reliance on international law*

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The Spanish National Court was faced with the same problem in the *Scilingo* case, the first case in which a Spanish court sentenced a foreigner for crimes against humanity committed abroad. The former Argentine Navy Officer, Adolfo Scilingo, was initially charged by the Investigating Judge with genocide, terrorism and torture for acts committed in Argentina between 1976 and 1983 during the military dictatorship. However, unlike in the 1998 decision in the *Pinochet* case, the Spanish National Court finally convicted Scilingo for crimes against humanity. According to some commentators, the *Audiencia Nacional* rightly considered that the facts did not amount to genocide, because the events that occurred in Argentina clearly constituted persecution of political opponents and “political groups”, facts that are not covered by the Genocide Convention.¹³⁴⁴ The *Audiencia Nacional* held:

¹³⁴² The Judgment states “Si l'on admet que la coutume internationale est une source de droit au même titre que le traité et qu'elle résulte d'une pratique où les Etats concernés montrent qu'ils ont le sentiment de se conformer à ce qui équivaut à une règle juridique, l'incrimination de crime contre l'humanité peut apparaître comme coutumière. [...] Ainsi, plusieurs auteurs ont pu conclure qu'avant d'être codifié dans des traités ou des lois, le crime contre l'humanité était consacré par la coutume internationale et faisait partie à ce titre du jus cogens, constituant une incrimination internationale liant coutumièrement la Belgique”. See Tribunal de première instance de l'arrondissement de Bruxelles, *Mandat d'arrêt international par défaut*, 11 avril 2000, available online in French at <http://competenceuniverselle.files.wordpress.com/2011/07/vandermeersch-avril-2000.pdf> (last visited 1 August 2017).

¹³⁴³ Tribunal de première instance de l'arrondissement de Bruxelles, *Mandat d'arrêt international par défaut*, 11 avril 2000, available online in French at <http://competenceuniverselle.files.wordpress.com/2011/07/vandermeersch-avril-2000.pdf> (last visited 1 August 2017): “Dans la mesure où de tels crimes étaient déjà incriminés sous des qualifications de droit pénal commun, le principe de légalité des incriminations tel que prévu à l'article 2 du Code pénal ne paraît pas s'opposer à l'intentement de poursuites pour de telles infractions sous la qualification de crimes contre l'humanité étant entendu que les peines applicables seraient celles qui étaient en vigueur au moment de la commission des infraction, en vertu du droit pénal commun (principe de légalité des peines).”; See Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights*, at 186 ff.

¹³⁴⁴ See C. Tomuschat, 'Issues of Universal Jurisdiction in the Scilingo Case', 3 *Journal of International Justice* (2005) 1074-1081, at 1076-1077.

6. The Court rejects the proposed assessment of the crime of genocide, albeit with the nuances that appear below. At present (and we emphasize that we are referring to the present), in view of the acts that have been proven, these acts are not consistent with the description of genocide provided for in Article 607 of the Penal Code. The elements that define the Penal Code version of genocide include the aim of destroying all or part of a national, ethnic, racial or religious group. It must be understood that such groups do not include groups that are instable in themselves, and this would specifically exclude political groups. The partial destruction of a national group is not the equivalent of nor should include auto-genocide, i.e. the partial destruction of the national group itself, even though there may exist sub-groups that differ according to ideology.¹³⁴⁵

The conviction for crimes against humanity posed serious problems with respect to the principle of legality as set out in the Spanish Constitution (Articles 9(3) and 25) and in the Spanish Penal Code (Article 2), because crimes against humanity did not exist in the Spanish code at the time of their commission and had only been codified in Spanish law in 2004.¹³⁴⁶ The *Audiencia Nacional* rejected the defendant's argument that the prosecution was *ex post facto*, considering that the crimes against humanity conviction did not constitute a violation of the *nullum crimen sine lege* principle since – according to the court – crimes against humanity were already prohibited in customary international law at the time of the events.¹³⁴⁷ Furthermore, the court held that international custom was part of the Spanish legal order, hence, fully respecting the principle of *nullum crimen sine lege* in this case.¹³⁴⁸ The court argued that the starting point was “the International Law prohibition, of such conducts referred to in the recently adopted offence type, and penalised by law for decades, because this prohibition is a regulation of general enforcement in all States, as it is an international peremptory norm (*jus cogens*). Therefore, it would be inaccurate to affirm that such conducts were not prohibited in the past”.¹³⁴⁹

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¹³⁴⁵ *Audiencia Nacional, Public prosecutor v. Adolfo Francisco Scilingo Manzorro*, 19 April 2005, Case No 16/2005.

¹³⁴⁶ It is noteworthy that crimes against humanity were not criminalized in the Argentinean Criminal Code either.

¹³⁴⁷ On this judgment see A. Gil, 'The Flaws of the Scilingo Judgment', 3 *Journal of International Justice* (2005) 1082-1091, at 1083.

¹³⁴⁸ See *Audiencia Nacional, Public prosecutor v. Adolfo Francisco Scilingo Manzorro*, 19 April 2005, Case No 16/2005.

¹³⁴⁹ English translation provided in J. E. E. Moltó, 'Causes and Initial Effects of the Spanish Organic Law 1/2009 Reforming the Principle of Universal Jurisdiction in Spain', XVI *Spanish Yearbook of International Law* (2012) 19-53, at 28; Ruling for crimes against humanity in the Adolfo Scilingo case,

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It has been argued that such a conviction violates 1) the principle of specificity – derived from the *nullum crimen* principle – because the notion of crimes against humanity was uncertain at the time the defendant acted¹³⁵⁰ and 2) the *nulla poena* principle.¹³⁵¹ As a response to these arguments, the *Audiencia Nacional* stated that the *nullum crimen* principle “should be relaxed in international law, as the rules expressed in customary law and general principles of law are sufficient even when they are ambiguous or uncertain”.¹³⁵² Quite surprisingly, to support this view, it referred to the controversial Nuremberg Trials, which have been repeatedly criticized for infringing the principles of legality and non-retroactivity.¹³⁵³ In addition, it should be noted that even if the “relaxation” of the principle of legality in international law – notwithstanding that this is also contested today – might apply before international tribunals,¹³⁵⁴ it does not apply to the enforcement of international law by national courts.¹³⁵⁵

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Aware of possible criticism, the *Audiencia Nacional* held that “the accused was aware of, and able to foresee the penalties that Argentinean domestic criminal law would apply to the facts, even when no specific crime against humanity was contemplated in the Argentinean Criminal law” at the time of the events.¹³⁵⁶ With respect to penalties, the *Audiencia Nacional* applied the penalty provided for in the new Article 607bis of the Spanish Penal Code on crimes against humanity; this was a provision that was clearly not more favorable to the accused. In our view, the conviction and sentencing of Scilingo for crimes

Summary Proceedings 19/1997, Fundamental point of law no. 1.b. All documents of the Scilingo available in Spanish at <http://www.derechos.org/nizkor/espana>.

¹³⁵⁰ B. Van Schaack, ‘*Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals’, 97 *The Georgetown Law Journal*, (2008-2009) 119-192, at 164.

¹³⁵¹ Gil, ‘The Flaws of the Scilingo Judgment’, 3 *Journal of International Criminal Justice* (2005), at 1086.

¹³⁵² *Ibid.*

¹³⁵³ The court argued that the starting point was the “the International Law prohibition, of such conducts referred to in the recently adopted offence type, and penalised by law for decades, because this prohibition is a regulation of general enforcement in all States, as it is an international peremptory norm (*jus cogens*). Therefore, it would be inaccurate to affirm that such conducts were not prohibited in the past.”; Gil, *supra* note 1349, at 1086.

¹³⁵⁴ To some extent, the principle of legality has a special dimension in the international criminal law context, i.e. as applied before international mixed tribunals. It has been said that, initially, international criminal law and especially the Nuremberg Tribunal adopted the doctrine of substantive justice as opposed to strict legality. However, it has been argued that since then, there has been a shift towards the doctrine of strict legality. On the principle of legality in international criminal law, see Cassese et al., *Cassese’s International Criminal Law* (2013) 24-36.

¹³⁵⁵ Gil, *supra* note 1349, at 1086.

¹³⁵⁶ *Audiencia Nacional, Public prosecutor v. Adolfo Francisco Scilingo Manzorro*, 19 April 2005, Case No 16/2005; Gil, *supra* note 1349, at 1088.

against humanity on the basis of Article 607bis of the Criminal Code, and the application of the penalties provided for by this provision, infringes the *nullum crimen, nulla poena sine lege* principle since that legal provision was only introduced in 2003.¹³⁵⁷

On 3 July 2007, the Spanish Supreme Court confirmed the conviction for crimes against humanity and increased the sentence imposed on Scilingo to more than one thousand years in prison.¹³⁵⁸ The Supreme Court thus confirmed that the crimes committed by Scilingo were indeed crimes against humanity and rejected the qualifications of genocide and terrorism. However, the Supreme Court did not adopt the same reasoning as the *Audiencia Nacional*. Firstly, it recognized that the legality principle requires *lex previa, stricta, scripta and certa*.¹³⁵⁹ It also considered that under the Spanish Constitution, international customary law is not directly applicable and thus cannot create a “complete

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¹³⁵⁷ For another view, see Pinzauti, ‘An Instance of Reasonable Universality: The Scilingo Case’, 3 *Journal of International Criminal Justice* (2005).

¹³⁵⁸ Case against Argentine military officer Adolfo Scilingo (Alfred Scilingo, Criminal Division of the Spanish Supreme Court in Appeal nº10049/2006-P, 3 July 2007); Equipo Nizkor, ‘The Supreme Court of Spain affirms that the crimes committed by Adolfo Scilingo are crimes against humanity’, 4 July 2007, available online at <http://www.derechos.org/nizkor/espana/juicioral/doc/com.html> (last visited 1 August 2017).

¹³⁵⁹ “1. *La cuestión que plantea el recurrente exige determinar si la aplicación del artículo 607 bis a los hechos vulneró el principio de legalidad. Este principio, tal como viene formulado en el artículo 25.1 CE en cuanto al ámbito penal, supone que nadie puede ser condenado por acciones u omisiones que en el momento de producirse no constituyan delito o falta, según la legislación vigente en aquel momento. Incorpora en primer lugar “una garantía de índole formal, consistente en la necesaria existencia de una norma con rango de Ley como presupuesto de la actuación punitiva del Estado, que defina las conductas punibles y las sanciones que les corresponden, derivándose una « reserva absoluta » de Ley en el ámbito penal” (STC 283/2006), lo cual implica el carácter escrito de la norma dado nuestro sistema de fuentes para el Derecho Penal (lex scripta). De forma que las conductas constitutivas de delito deben aparecer contempladas en una norma escrita con rango de ley, que además les asocie una pena. Pero no solo esto. En segundo lugar, en términos de la sentencia que se acaba de citar, este principio incorpora otra garantía de carácter material y absoluto, consistente en la “imperiosa exigencia de la predeterminación normativa de las conductas ilícitas y de las sanciones correspondientes, es decir, la existencia de preceptos jurídicos (lex previa) que permitan predecir con el suficiente grado de certeza (lex certa) dichas conductas, y se sepa a qué atenerse en cuanto a la aneja responsabilidad y a la eventual sanción (SSTC 25/2004, de 26 de febrero, F. 4; 218/2005, de 12 de septiembre, F. 2; 297/2005, de 21 de noviembre, F. 6)”. Consiguientemente, el principio de legalidad, en cuanto impone la adecuada previsión previa de la punibilidad, solo permite la sanción por conductas que en el momento de su comisión estuvieran descritas como delictivas en una ley escrita (lex scripta), anterior a los hechos (lex previa), que las describa con la necesaria claridad y precisión (lex certa) y de modo que quede excluida la aplicación análogica (lex stricta). En definitiva, exige lex previa, stricta, scripta y certa.”*

criminal offense";¹³⁶⁰ the norms firstly had to be transposed into domestic law. It also recalled that domestic courts are not like international courts and are therefore obliged to respect their own legal order. Furthermore, it held that customary international law did not contain specific penalties directly applicable by Spanish courts.¹³⁶¹

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However, according to the Supreme Court, Spanish courts cannot, "in the interpretation and application of internal law", ignore "the norms of customary International Criminal Law, insofar as they refer to offenses against the hard core [*núcleo duro*] of fundamental human rights". This is especially so, the Court noted, where those international norms have acquired the status of *jus cogens*.¹³⁶² In this sense, the court could not "accept that the accused appellant could not foresee the criminal character of his acts in the moment of their commission and the consequent possibility that a penalty would be imposed".¹³⁶³ With respect

¹³⁶⁰ Spanish Supreme Court, *Scilingo v Spain*, Appeal judgment, No 798, ILDC 1430 (ES 2007), 1 October 2007: "4. Sin embargo, ello no conduce directamente a la aplicación del Derecho Internacional Penal, siendo necesaria una previa transposición operada según el derecho interno, al menos en aquellos sistemas que, como el español, no contemplan la eficacia directa de las normas internacionales. La Constitución, artículos 93 y siguientes, contiene normas dirigidas a la incorporación del derecho internacional al derecho interno, que deben ser observadas. En este sentido, los Tribunales españoles no son ni pueden actuar como Tribunales internacionales, solo sujetos a las normas de este carácter y a sus propios estatutos, sino Tribunales internos que deben aplicar su propio ordenamiento. No obtienen su jurisdicción del derecho internacional consuetudinario o convencional, sino, a través del principio democrático, de la Constitución Española y de las leyes aprobadas por el Parlamento. El ejercicio del Poder Judicial se legitima, así, por su origen. Por lo tanto, no es posible ejercer ese poder más allá de los límites que la Constitución y la ley permiten, ni tampoco en forma contraria a sus propias disposiciones."

¹³⁶¹ Spanish Supreme Court, *Scilingo v. Spain*, Appeal judgment, No 798, ILDC 1430 (ES 2007), 1 October 2007.

¹³⁶² *Ibid*, § 5 : "5. De lo expuesto no puede deducirse, sin embargo, que las normas de Derecho Internacional Penal consuetudinario, en cuanto se refieren a los delitos contra el núcleo duro de los Derechos Humanos esenciales, puedan ser ignoradas en la interpretación y aplicación de las leyes internas. El artículo 10.2 de la Constitución impone la interpretación de las normas que se refieren a los derechos fundamentales conforme a la Declaración Universal de Derechos Humanos y a los tratados y acuerdos internacionales suscritos por España, entre los que se encuentra el CEDH y el Pacto Internacional de Derechos Civiles y Políticos (PIDCP). De esta forma, los principios contenidos en el Derecho internacional, deben ser tenidos en cuenta al proceder a la interpretación y aplicación del Derecho nacional, con mayor motivo cuando aquellos revisten naturaleza de *ius cogens*. Consiguientemente, tanto las normas de derecho Penal sustantivo como las de orden orgánico o procesal, deben ser interpretadas teleológicamente en coherencia con la necesidad de protección eficaz y con la efectividad de la prohibición de lesión de los Derechos Humanos."

¹³⁶³ R. J. Wilson, 'Spanish Supreme Court Affirms Conviction of Argentine Former Naval Officer for Crimes Against Humanity', 12(1) *ASIL Insights*, 30 January 2008.

to the penalty, unlike the *Audencia Nacional*, the Supreme Court did not apply the new Article 607bis of the Criminal Code, but instead applied the specific penalties provided for the ordinary crimes of murder, unlawful detention, etc.¹³⁶⁴

What is quite surprising in this case is that the Supreme Court convicted Scilingo for national crimes, but referred to the fact that his acts constituted crimes against humanity under international criminal law. While the reasoning is interesting, the application of universal jurisdiction by domestic courts in the absence of domestic provisions allowing them to do so, is more than questionable. This part of the judgment will be discussed further in Section IV of this chapter, which is dedicated to the lack of universal jurisdiction.

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5. *The Hissène Habré case in Senegal and before the ECOWAS Court*

Hissène Habré was President of Chad from 1982 until 1990, when he was overthrown by Idriss Déby, the current President of Chad.¹³⁶⁵ In 1990, Habré fled to Senegal; he has been living in exile ever since.¹³⁶⁶ In May 1992, a National Commission of Enquiry established by President Idriss Déby, reported tens of thousands of instances of enforced disappearance, assassination and torture committed during the reign of Hissène Habré.¹³⁶⁷ However, no action was taken by Senegal until 2000, when Chadian nationals filed a complaint against Habré before the Regional Tribunal of Dakar. Following this complaint, on 3 February 2000, Habré was indicted for complicity in the perpetration of crimes against humanity and crimes of torture and placed under house arrest. On 4 July 2000, the Dakar Appeals Court quashed the indictment, on the assumption that the Penal Code ignored the charges brought against Habré, and that, pursuant to the Code of Criminal Procedure, Senegalese judges could not assert jurisdiction

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¹³⁶⁴ Equipo Nizkor, 'The Supreme Court of Spain affirms that the crimes committed by Adolfo Scilingo are crimes against humanity', 4 July 2007, available online at <http://www.derechos.org/nizkor/espana/juicioral/doc/com.html> (last visited 1 August 2017).

¹³⁶⁵ Idriss Déby was Commander in Chief during part of Habré's reign.

¹³⁶⁶ It is noteworthy that Habré was supported by the United States and France, notably against Libya's president Gaddafi. See Human Rights Watch, *The Case of Hissène Habré before the Extraordinary African Chambers in Senegal*, 2 May 2016, available online at <http://www.hrw.org/news/2012/09/11/qa-case-hiss-ne-habr-extraordinary-african-chambers-senegal#1> (last visited 1 August 2017).

¹³⁶⁷ See Chad, *Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories, Report*, 7 May 1992, available online at <http://www.usip.org/sites/default/files/file/resources/collections/commissions/Chad-Report.pdf> (last visited 1 August 2017).

over acts of torture committed by a foreigner abroad.¹³⁶⁸ Furthermore, crimes against humanity were not provided for in the criminal law of Senegal. Thus, in the absence of a criminalization of crimes against humanity in national law, the principle of legality provided for in Article 4 of the Senegalese Penal Code precluded the prosecution of those crimes by the Senegalese courts.¹³⁶⁹ Habré was released from detention and kept under surveillance. On 20 March 2001, the Senegalese Court of Cassation upheld the appellate decision and rejected the appeal of the victims.¹³⁷⁰ It can be argued that the Court rightly rejected the appeal *inter alia* because “domestic courts cannot evoke their jurisdiction over acts which, although criminal under customary international law, are not incorporated into national rules of criminal law”.¹³⁷¹

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It is worth noting that in the meantime, Belgium had opened investigations into the case. After four years of investigation, which included a visit to Chad by investigating Judge Daniel Fransen to collect evidence and interview witnesses, Belgium issued an international arrest warrant against Hissène Habré, and in September 2005, requested his extradition. The Senegalese authorities arrested Hissène Habré and placed him in detention. However, on 25 November 2005, the Dakar Court of Appeal ruled that it had no jurisdiction to rule on the extradition request, on the ground that Habré was a former head of state.¹³⁷² Hissène Habré was released.

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Following this decision, the government of Senegal turned to the African Union. On 2 August 2006, the Assembly of the African Union “mandate[d] the Republic of Senegal to prosecute and ensure that Hissène Habré is tried, on

¹³⁶⁸ Senegal, Dakar Court of Appeals, *Hissène Habré*, Judgment n° 135, 4 July 2014, available online in French at <http://www.asser.nl/upload/documents/20121105T030720-Cour%20dappel%20Dakar%2004-07-2000.pdf> (last visited 1 August 2017).

¹³⁶⁹ Senegal, Dakar Court of Appeals, *Hissène Habré*, Judgment n° 135, 4 July 2014. The Court held that “*le droit positif sénégalais ne renferme à l'heure actuelle aucune incrimination de crimes contre l'humanité, qu'en vertu du principe de la légalité des délits et des peines affirmés à l'article 4 du Code Pénal, les juridictions sénégalaises ne peuvent matériellement connaître de ces faits*”.

¹³⁷⁰ Senegal, Court of Cassation, *Souleymane Guengueng et Autres contre Hissène Habré* (arrêt no 14), 20 March 2001, available online at https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=90E26EFA1BB31189C1256B21005549B0&action=openDocument&xp_countrySelected=SN&xp_topicSelected=GVAL-992BU6&from=state (last visited 1 August 2017).

¹³⁷¹ Spiga, “Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga”, 9 *Journal of International Criminal Justice* (2011), at 17.

¹³⁷² Senegal, Dakar Appeals Court, *Avis du 25 Novembre relatif à la demande d'extradition de Hissène Habré par la Belgique* [unreported], 25 November 2005, Excerpts available online at http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/habre_cour_dappel.pdf (last visited 1 August 2017).

behalf of Africa, by a competent Senegalese court with guarantees for fair trial.”

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On 12 February 2007, Senegal adopted a law adopting the Rome Statute, which amended the criminal code to include genocide, crimes against humanity and war crimes, and other violations of international humanitarian law.¹³⁷⁴ In addition, under the new terms of Article 431-6 of the Senegalese Penal Code, any individual could “be tried or sentenced for acts or omissions ..., which at the time and place where they were committed, were regarded as a criminal offence according to the general principles of law recognized by the community of nations, whether or not they constituted a legal transgression in force at that time and in that place”.¹³⁷⁵ Following these legislative and constitutional reforms, some victims filed a complaint with the Public Prosecutor of the Dakar Court of Appeal in September 2008, accusing Mr. Habré of acts of torture and crimes against humanity during the years of his presidency.¹³⁷⁶

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On 1 October 2008, following the resolution of the African Union, the legislative changes and the recent complaint, Hissène Habré filed a complaint to the Community Court of Justice of the Economic Community of West African States (hereafter “ECOWAS Court”).¹³⁷⁷ He argued inter alia that by prosecuting him for crimes that had just been added to the jurisdiction of national courts, Senegal would violate the principle of non-retroactivity of criminal law provided for by Article 11(2) of the Universal Declaration on Human Rights, Article 7(2) of the African Charter on Human Rights and the Senegalese

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¹³⁷³ See Decision on the Hissène Habré Case and the African Union, Assembly/AU/3(VII), 2 August 2006, available online at <https://www.hrw.org/news/2006/08/02/decision-hissene-habre-case-and-african-union> (last visited 1 August 2017).

¹³⁷⁴ See *Loi n. 2007-05 du 12 février 2007 modifiant le Code de la Procédure pénale relative à la mise en oeuvre du Traité de Rome instituant la Cour pénale internationale* (Law no. 2007-05 of 12 February 2007 relative to the implementation of the Rome Statute creating the International Criminal Court), available online at : https://iccdb.hrlc.net/documents/implementations/pdf/Senegal_Modification_of_criminal_procedure_code_2007_02_12_Implementation.pdf (last visited 1 August 2017); On these amendments see M. Niang, ‘The Senegalese Legal Framework for the Prosecution of International Crimes’, 7 *JICJ* (2009) 1047-1062.

¹³⁷⁵ See ICJ, Judgment, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, 20 July 2012, § 38.

¹³⁷⁶ *Ibid.*, § 32.

¹³⁷⁷ The ECOWAS Court was set up in 2001 and can inter alia hear cases brought by citizens of member states alleging violations of human rights committed by any member state. The judgments of the ECOWAS Court are binding on member states. It is noteworthy that unlike the ECtHR, local remedies do not need to be exhausted before a case can be brought to the ECOWAS court. Therefore, “every victim of an alleged human rights violation can bring a claim to the Court even while the case is subject to national proceedings”. On the role of the ECOWAS Court, see Spiga, *supra* note 1369, at 8-9.

Constitution.¹³⁷⁸ The ECOWAS Court held that a special ad hoc tribunal, based on the provisions set out in Article 15(2) ICCPR, was the only option that would permit Habré to be tried without applying *ex post facto* laws.¹³⁷⁹ Any trial by Senegal through its domestic courts outside such a framework would violate, firstly, the principle of non-retroactivity of criminal law, enshrined in international human rights as an inalienable right, and secondly, would obstruct the principle of impunity by the same dedicated international texts.¹³⁸⁰ The conclusions of the ECOWAS Court were as follows:

The Court

[...]

Said that in this context the State of Senegal must comply with compliance decisions made by its national courts in particular to respect the authority of *res judicata*;

Accordingly, the Court orders to Senegal on the principle of absolute non-retroactivity;

Said that the mandate given him by the African Union gives it more of a mission design and suggestion from all modalities to continue to try and strictly within the framework of a special procedure ad hoc nature of international law as practiced in International by all civilized nations;

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The judgment was quite widely criticized, especially in terms of the difference it generated between an ad hoc tribunal and a Senegalese court.¹³⁸¹

¹³⁷⁸ For the other grounds, see Community Court of Justice of the Economic Community of West African States (ECOWAS), *Hissein Habré v. Republic of Senegal*, ECW/CCJ/APP/07/08, 18 November 2010, original French version, available online at <http://www.hrw.org/fr/news/2010/11/18/arr-t-cedeaocowas-ruling-hissein-habr-c-r-publique-du-s-n-gal>; English version available online at <http://www.asser.nl/upload/documents/20120419T034816-Habre%20Ecowa%202010.pdf> (last visited on 1 August 2017).

¹³⁷⁹ Spiga, *supra* note 1369, at 10.

¹³⁸⁰ ECOWAS, *Hissein Habré v. Senegal*, ECW/CCJ/APP/07/08, 18 November 2010, original French version, available online at <http://www.hrw.org/fr/news/2010/11/18/arr-t-cedeaocowas-ruling-hissein-habr-c-r-publique-du-s-n-gal>; English version available online at <http://www.asser.nl/upload/documents/20120419T034816-Habre%20Ecowa%202010.pdf> (last visited on 1 August 2017).

¹³⁸¹ See Spiga, 'Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga', 9 *Journal of International Criminal Justice*, (2011). See W. Schabas, 'Bizarre ruling on non-retroactivity from the ECOWAS Court' (2010), available online at <http://humanrightsdoctorate.blogspot.com/2010/12/bizarre-ruling-on-non-retroactivity.html> (last visited 1 August 2017), who criticizes the conclusion of the court according to which "Senegal would be in violation of the norm against non-retroactivity because 'international custom' requires the establishment of ad hoc or special jurisdictions for the prosecution of such crimes" and wonders which "international custom" the court is referring to.

Turning now to the prosecution before Senegalese courts, we will focus on the prosecution of crimes against humanity. The question relating to torture and retroactive application of universal jurisdiction provisions will be discussed *infra*.¹³⁸² The problem with prosecution of crimes against humanity was that at the time of the commission of the offence, they were not criminalized in Senegalese legislation. It can convincingly be argued that the Senegalese legislation criminalizing crimes against humanity did not in fact create new crimes. As argued by Spiga, “the incorporating legislation is only a tool which enables national courts to apply the relevant rule of international law criminalizing the conduct”.¹³⁸³ Indeed, as we have seen, there are a number of “examples of international crimes being prosecuted ‘retroactively’ by ordinary national jurisdictions”.¹³⁸⁴ In the present case, one can indeed convincingly argue that, at the time of the commission of the acts, crimes against humanity were criminalized under customary international law and further, that the accused was therefore aware that his acts were criminal. This at least appears to be consistent with Article 15 ICCPR.¹³⁸⁵ Arguably, this interpretation corresponded to the domestic legality principle, since Senegal had modified its Constitution in 2008 to include a provision similar to Article 15 ICCPR.¹³⁸⁶

It is interesting to note the issue that Chad – the territorial state – had not criminalized crimes against humanity at the time of the commission of the offence was not raised and it was not considered whether this could potentially constitute a violation of *the nullum crimen sine lege* principle.¹³⁸⁷ In any case, one can argue that 1) Hissène Habré’s acts were clearly punishable as ordinary crimes at the time¹³⁸⁸ and 2) crimes against humanity were punishable under international customary law. In fact, this raises the question of whether dual-

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¹³⁸² See *infra* Section IV of this Chapter.

¹³⁸³ Spiga, *supra* note 1379, at 14.

¹³⁸⁴ See Schabas, *supra* note 137.

¹³⁸⁵ See Spiga, *supra* note 1379.

¹³⁸⁶ See Senegal, *Loi constitutionnelle n° 2008-33 du 7 août 2008 modifiant les articles 9 et 95 et complétant les articles 62 et 92 de la Constitution*, available online at <http://www.jo.gouv.sn/spip.php?article7026> (last visited 1 August 2017). Article 9 of the Senegalese Constitution reads as follows “*Toute atteinte aux libertés et toute entrave volontaire à l'exercice d'une liberté sont punies par la loi. Nul ne peut être condamné si ce n'est en vertu d'une loi entrée en vigueur avant l'acte commis. Toutefois, les dispositions de l'alinéa précédent ne s'opposent pas à la poursuite, au jugement et à la condamnation de tout individu en raison d'actes ou omissions qui, au moment où ils ont été commis, étaient tenus pour criminels d'après les règles du droit international relatives aux faits de génocide, crimes contre l'humanité, crimes de guerre. La défense est un droit absolu dans tous les états et à tous les degrés de la procédure.*” Emphasis added.

¹³⁸⁷ In fact, Chad did try Hissène Habré *in absentia*, but convicted him for crimes against the state and sentenced him to death for those crimes.

¹³⁸⁸ In this direction, see Spiga, *supra* note 1379, at 19.

criminality is required in cases of universal jurisdiction over international crimes and/or, more generally, whether the law of the territorial state should to some extent be taken into consideration.¹³⁸⁹

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However, if Senegalese courts had prosecuted Hissène Habré, another problem would have arisen, namely that of penalties. Would the application of the penalty provided for by the new provisions on crimes against humanity, namely “forced labour for life”¹³⁹⁰ comply with the *nulla poena sine lege* principle? In our view, if a Senegalese court had tried Habré for crimes against humanity, it would have had to examine at the very least, 1) whether the penalties provided for in Senegalese law at the time of commission of the crimes were more favorable to the defendant and also perhaps, 2) whether the penalties provided for in Chadian legislation at the time of commission of the acts were more favorable.¹³⁹¹

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For the sake of completeness, it should be noted that Senegal signed an agreement with the African Union on 22 August 2012 establishing a special court within the Senegalese judicial system. In December 2012, Senegal adopted a law allowing for the creation of this special legal body, whose Statute was adopted on 30 January 2013 and which was inaugurated on 8 February 2013 as the Extraordinary African Chambers.¹³⁹² After a long process, the Extraordinary African Chambers were thus set up in Senegal to prosecute and judge Hissène Habré. The trial began on July 20, 2015 and ended on February 11, 2016, after testimony from 93 witnesses and final arguments. This was not only the first trial in the world in which courts from one state prosecuted the former ruler of another for grave human rights violations but also the first universal jurisdiction case to proceed to trial in Africa.¹³⁹³ On 30 May 2016, he was sentenced to life in prison.

¹³⁸⁹ This is discussed *infra* in Section IV.

¹³⁹⁰ See *Loi n° 2007-02 du 12 février 2007 modifiant le Code pénal* ; Article 431-6 provides that “*Les infractions aux articles 431-1 à 431-5 du présent code ayant entraîné la mort sont punies des travaux forcés à perpétuité*”.

¹³⁹¹ This issue will be discussed below in Section V.

¹³⁹² See the website of the Extraordinary African Chambers: <http://www.chambresafricaines.org/> and the Statute available online at <https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers> (last visited 1 August 2017).

¹³⁹³ See Human Rights Watch, *Questions and Answers on Trial of Ex-Chad Dictator*, available online at <https://www.hrw.org/news/2016/05/03/senegal-hissene-habre-verdict-scheduled-may-30> (last visited 1 August 2017).

D. Genocide

With regard to genocide, several questions were raised before domestic courts. Firstly, can a person be convicted of genocide under customary international law, in the absence of domestic norms? Secondly, is the Genocide Convention directly applicable before domestic criminal courts? These two questions will be discussed in Section 1. Section 2 will then go on to examine the question of whether a domestic provision criminalizing genocide can be applied retroactively to acts perpetrated before its entry into force. Finally, issues relating to the definition of genocide will be discussed in Section 3.

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1. *Application of genocide under customary international law or the Genocide Convention*

a. *The Eichmann case*

In the 1961 *Eichmann* trial, the Israeli courts not only asserted passive personality jurisdiction and protective jurisdiction but also universal jurisdiction. Eichmann was convicted for crimes against the Jewish people and crimes against humanity, on the basis of the 1950 Nazis and Nazi Collaborators (Punishment) Law (hereafter NNCL), which provided for retroactive application in order to cover crimes committed during World War II. He was sentenced to death. The NNCL created the offence “crimes against the Jewish people”, a crime similar to the definition of genocide provided for at Article 2 of the Genocide Convention, with some exceptions, such as the specific requirement to destroy Jewish people exclusively and the inclusion of the so-called “cultural genocide”.¹³⁹⁴ In its judgment, the Court, however, considered that “the crimes established in the Law of 1950, [...] under the inclusive heading ‘Crimes against Humanity’, must be seen today as acts that have always been forbidden by customary international law – acts which are of a ‘universal’ criminal character and entail individual criminal responsibility. This being so, the enactment of the Law was not, from the point of view of international law, a legislative act that conflicted with the principle *nulla poena* or the operation of which was retroactive”.¹³⁹⁵

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During the proceedings, the defence argued that the NNCL constituted *ex post facto* penal legislation. His argument was rejected. The Supreme Court held

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¹³⁹⁴ O. Ben-Naftali, ‘Eichmann’, in Cassese (ed.), *The Oxford Companion to International Criminal Justice*, at 655.

¹³⁹⁵ See Israel Supreme Court, Judgment, *Adolf Eichmann v. Attorney General of the Government of Israel*, Criminal Appeal 336/61, 29 May 1962, § 11, available online at http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Eichmann_Appeals_Judgement_29-5-1962.pdf (last visited 1 August 2017).

that “the principle *nullum crimen sine lege, nulla poena sine lege*, insofar as it negates penal legislation with retroactive effect, has not yet become a rule of customary international law”.¹³⁹⁶ In other words, it held that there was no rule of international law prohibiting criminal legislation and penalization with retroactive effect.¹³⁹⁷ With regard to the “ethical aspect of the principle”, the Court agreed that “one’s sense of justice generally recoils from punishing a person for an act committed by him which, at the time of its commission, had not yet been prohibited by law, and in respect of which he could not have known, therefore, that he would become criminally liable”.¹³⁹⁸ However, it held:

that appraisal cannot be deemed to apply to the odious crimes of the type attributed to the Appellant, and all the more so when we deal with crimes of the scope and dimensions described in the Judgment. In such a case, the above-mentioned maxim loses its moral value and is devoid of any ethical foundation. One’s sense of justice must necessarily recoil even more from not punishing one who participated in such outrages.¹³⁹⁹

b. *A more national approach*

i. The Australian *Nulyarimma* case

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In the famous 1999 Australian *Nulyarimma v. Thompson* case, the Aboriginal plaintiffs requested arrest warrants against persons alleged to have engaged in conduct constituting genocide. Their request was denied. On appeal they argued that the prohibition of genocide was an international customary rule and that Australian law incorporated customary norms without the need for legislation.¹⁴⁰⁰ It should be noted that Australia ratified the Genocide Convention in 1949, but at the time of the proceedings had not enacted subsequent legislation criminalizing genocide.¹⁴⁰¹ This decision raised the issue of whether an international crime was automatically “incorporated” into common law or whether a positive legislative act was necessary to “transform” the crime into domestic law.¹⁴⁰²

¹³⁹⁶ *Ibid.*

¹³⁹⁷ *Ibid.*, § 8.

¹³⁹⁸ *Ibid.*

¹³⁹⁹ *Ibid.*

¹⁴⁰⁰ See Federal Court of Australia, *Nulyarimma v. Thompson* [1999] FCA 1192 [Judge Merkel], § 75, available online at http://www.austlii.edu.au/au/cases/cth/federal_ct/1999/1192.html (last visited 1 August 2017).

¹⁴⁰¹ See B. Saul, “The International Crime of Genocide in Australian Law”, 22 *Sydney Law Review* (2000).

¹⁴⁰² *Ibid.*, at 533.

The Federal Court of Australia recognized that, independently from the Genocide Convention, the prohibition of genocide “is a peremptory norm of customary international law, giving rise to a non-derogable obligation by each nation State to the entire international community”.¹⁴⁰³ It also expressly recognized that under customary international law, there is an international crime of genocide, which has acquired the status of *jus cogens* or a peremptory norm; this “means that States may exercise universal jurisdiction over such a crime”.¹⁴⁰⁴ Furthermore, Judge Wilcox recognized “the obligation imposed by customary law on each nation State is to extradite or prosecute any person, found within its territory, who appears to have committed any of the acts cited in the definition of genocide set out in the Convention”.¹⁴⁰⁵ However, the majority of the judges concluded that in the absence of enabling domestic legislation, the offence of genocide was not cognizable in Australian courts.¹⁴⁰⁶ The Court held that:

It is one thing to say Australia has an international legal obligation to prosecute or extradite a genocide suspect found within its territory, and that the Commonwealth Parliament may legislate to ensure that obligation is fulfilled; it is another thing to say that, without legislation to that effect, such a person may be put on trial for genocide before an Australian court. If this were the position, it would lead to the curious result that an international obligation incurred pursuant to customary law has greater domestic consequences than an obligation incurred, expressly and voluntarily, by Australia signing and ratifying an international convention. Ratification of a convention does not directly affect Australian domestic law unless and until implementing legislation is enacted.¹⁴⁰⁷

Referring inter alia to Article 15 § 2 ICCPR, the appellants argued that genocide was one of the international crimes “for the committing of which the responsible individuals can be punished under international law even if the domestic law of a particular State does not declare it to be punishable”.¹⁴⁰⁸ The Federal Court rejected this argument, stating that:

[...] it is not enough to say that, under international law, an international crime is punishable in a domestic tribunal even in the absence of a domestic law declaring that conduct to be punishable. If genocide is to be regarded as punishable in Australia, on the basis that it is an international crime, it must be shown that Australian law

¹⁴⁰³ See Federal Court of Australia, *Nulyarimma v. Thompson* [1999] FCA 1192 [Judge Wilcox], § 18.

¹⁴⁰⁴ See Federal Court of Australia, *Nulyarimma v. Thompson* [1999] FCA 1192 [Judge Whitlam], § 36.

¹⁴⁰⁵ See Federal Court of Australia, *Nulyarimma v. Thompson* [1999] FCA 1192 [Judge Wilcox], § 18.

¹⁴⁰⁶ *Ibid.*, § 32.

¹⁴⁰⁷ *Ibid.*, § 20.

¹⁴⁰⁸ *Ibid.*, § 21.

permits that result. There being no relevant statute, that means Australian common law.

[...] Perhaps this is only another way of saying that domestic courts face a policy issue in deciding whether to recognise and enforce a rule of international law. If there is a policy issue, I have no doubt it should be resolved in a criminal case by declining, in the absence of legislation, to enforce the international norm. As Shearer pointed out at 42, in the realm of criminal law "the strong presumption *nullum crimen sine lege* (there is no crime unless expressly created by law) applies."¹⁴⁰⁹

426 In this respect, Judge Whitlam recalled that in England and in Australia, courts are no longer able to create new criminal offences.¹⁴¹⁰ The function of creating new offences rests with Parliament.

427 In his dissenting opinion, one judge rejected the conclusion according to which the adoption of customary international law into Australian law required legislation, and concluded that the offence of genocide is an offence under the common law of Australia.¹⁴¹¹ Furthermore, he argued that, in this case, courts were in fact not creating a new crime but "determining whether to 'adopt' and therefore receive as part of the common law an existing offence under international law which has gained the status of universal crime".¹⁴¹² In this respect, the judge rejected the uncertainty argument considering that the "evolution of the prohibition against genocide to the status of *jus cogens* and its adoption in the common law does not involve the creation of a new standard leaving potential offenders uncertain as to whether they have, or have not, engaged in criminal conduct".¹⁴¹³

428 This judgment, as well as the *Polyukhovich* case, has led scholars to conclude that even though according to international human rights law, the failure to incorporate an international crime into domestic law does not breach the principle of legality, "the common law conception of the rule of law goes further and requires the express incorporation of even the most heinous violations of international law into domestic law before jurisdiction over an international crime can be said to exist".¹⁴¹⁴

¹⁴⁰⁹ *Ibid.*, § 22.

¹⁴¹⁰ *Ibid.*, § 53.

¹⁴¹¹ *Ibid.*, § 186.

¹⁴¹² *Ibid.*, § 167.

¹⁴¹³ *Ibid.*, § 178.

¹⁴¹⁴ See Eden, 'The Role of the Rome Statute in the Criminalization of Apartheid', *Journal of International Criminal Justice* (2014), at 187.

ii. The Swiss Niyonteze case

As seen above, in the Swiss *Niyonteze* case, the defendant, a Rwandan genocide suspect, was convicted of war crimes, rather than genocide.¹⁴¹⁵ The reasons invoked by the Division Tribunal as well as by the Military Appeals Chamber for not prosecuting Niyonteze for genocide were, inter alia, that Switzerland had at that time not yet ratified the Genocide Convention and the lack of domestic provisions defining genocide.¹⁴¹⁶ Furthermore, the Division Tribunal held that "even if the Tribunal were to declare itself competent to judge the case with regard to genocide and crimes against humanity, it could not necessarily impose a penalty on the accused for crimes against humanity and genocide, in the absence of a sufficient legal basis and of an applicable penalty".¹⁴¹⁷ Indeed, the Tribunal considered that in application of the *nulla poena sine lege* principle, provided at Article 1 of the Swiss Military Criminal Code, a criminal judge could only convict a person of an offence provided for by law and could only impose a penalty provided for by law.¹⁴¹⁸ It is interesting to note that the Tribunal did however consider that a customary international law duty to prosecute crimes against humanity and genocide, wherever they have been committed, may well exist. Nevertheless, he argued that this did not necessarily mean that the Tribunal could execute this obligation.¹⁴¹⁹

This judgment is considered as a typical example of a case where courts decline to prosecute and punish individuals for crimes envisaged only by customary international law.¹⁴²⁰ Some commentators have said that this failed attempt to convict Niyonteze for genocide shows that, in Switzerland, in the

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¹⁴¹⁵ See *supra* N 78 ff.

¹⁴¹⁶ See Tribunal militaire de Division 2, Judgment, *Niyonteze*, 30 avril 1999; See also M. Sassoli, 'Le génocide rwandais, la justice militaire suisse et le droit international', *Revue suisse de droit international public et de droit européen* (2002), at 165; See also Military Appeals Chamber 1A, *Niyonteze*, 26 May 2000.

¹⁴¹⁷ Tribunal militaire de Division 2, *Niyonteze*, Judgment, 30 April 1999 (my translation). According to the original French version: "[...] même s'il admettait sa compétence, le Tribunal de céans ne pourrait pas forcément condamner l'accusé à une peine pour crimes contre l'humanité et crime de génocide en l'absence de base légale suffisante et qui plus est de sanction pénale[.]"

¹⁴¹⁸ Tribunal militaire de Division 2, *Niyonteze*, Judgment, 30 April 1999 (my translation). According to the original French version: "Qu'en effet, en application du principe *nulla poene sine lege* (art. 1er CPM), un juge pénal ne peut condamner que celui qui a commis une infraction prévue par la loi et ne peut prononcer qu'une peine ou une mesure également prévue par la loi."

¹⁴¹⁹ Tribunal militaire de Division 2, *Niyonteze*, Judgment, 30 April 1999 (my translation). According to the original French version: "même si l'on admettait que la Suisse a, en vertu du droit international coutumier, une obligation de réprimer les crimes contre l'humanité et de crime de génocide où qu'ils aient été commis, cela ne signifie pas encore nécessairement qu'en l'absence de toute disposition légale, le Tribunal de céans puisse exécuter cette obligation".

¹⁴²⁰ See Cassese, *International Criminal Law* (2003), at 303-304.

absence of a specific rule of reference, the principle of legality opposes the direct application of international offences for the prosecution of core crimes.¹⁴²¹ This may not be entirely true. Firstly, it should be noted that a general clause providing for universal jurisdiction over “particularly serious crimes proscribed by the international community” was inserted into the Swiss Criminal Code in 2007 and was maintained in the 2010 revision.¹⁴²² This clause makes no mention of the crimes to which it refers and can be considered as a general rule of reference.¹⁴²³ Furthermore, it is interesting to note that in the Niyonteze judgment, the Divisional Tribunal did specify that “the universal obligation [that thus also applied to Switzerland] to punish acts of genocide and crimes against humanity would *certainly* be more stringent if there was a legal vacuum which would make it impossible to prosecute the acts in questions”.¹⁴²⁴ This appears to suggest that the court could have made another interpretation if the acts in question could not be punished at all. However, the Court considered that the actual charges (i.e. war crimes) were sufficient in the case without obliging the Tribunal to take the risk of resorting to non-written law, and even more challenging, to “desirable law”.¹⁴²⁵ The First Military Appeals Court held that:

the [Genocide Convention] which has not yet been ratified by Switzerland, contains elements of customary law [...] which fall under Art. 109 MPC. This convention could hence be applicable as customary law. However, [...] Art. 109 MPC must be interpreted in

¹⁴²¹ Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, p. 41.

¹⁴²² See Art. 7 of the Swiss Criminal Code which provides at its § 1 that “Any person who commits a felony or misdemeanour abroad where the requirements of Articles 4, 5 or 6 are not fulfilled is subject to this Code if: a. the offence is also liable to prosecution at the place of commission or the place of commission is not subject to criminal law jurisdiction; b. the person concerned is in Switzerland or is extradited to Switzerland due to the offence; and c. under Swiss law extradition is permitted for the offence, but the person concerned is not being extradited”. According to § 2, “If the person concerned is not Swiss and if the felony or misdemeanour was not committed against a Swiss person, paragraph 1 is applicable only if: [...] b. the offender has committed a particularly serious felony that is proscribed by the international community”.

¹⁴²³ Henzelin refers to it as a “blanket norm”. See Henzelin, ‘Art. 6’, in *Commentaire Romand du Code Pénal*, N 10.

¹⁴²⁴ Tribunal militaire de Division 2, *Niyonteze*, Judgment, 30 April 1999 (my translation). According to the original French version: “l’obligation universelle de réprimer les génocides et les crimes de guerre serait assurément plus contraignante en cas de vide juridique qui rendrait les actes incriminés non poursuivables”.

¹⁴²⁵ My translation. According to the French version (cited in Henzelin, *La compétence universelle et l’application du droit international pénal en matière de conflits armés – la situation en Suisse*, at 171): “les chefs d’accusation (n.d.a crimes de guerre) suffisent à l’appréciation du cas sans obliger le Tribunal de céder à prendre le risque de recourir au droit non écrit et, plus hasardeux encore, au droit désirable.”

relation to Art. 108 MPC [...]. That provision stipulates that in the case of war or international armed conflict, Art. 109 MPC applies without reservation. In the case for instance, of the war in the former Yugoslavia which had an international dimension, the Swiss courts-martial have jurisdiction on the basis of customary law to try persons accused of breaches of the Geneva Conventions and of the crime of genocide.

However, non-international armed conflicts are covered in particular by para. 2, which restricts international agreements to the wider field of application. In the case of such conflicts Art. 109 MPC does not apply automatically, but requires the existence of an international convention ratified by Switzerland. In the absence of such a convention, it is not possible to apply the customary law provided for under Art. 109 MPC to an internal armed conflict. In the case of the Rwandan conflict, which was non-international [...], Swiss courts-martial do not have jurisdiction to try the case on the basis of the prohibition of genocide established by customary law, as Switzerland has not ratified the Convention on Genocide.¹⁴²⁶

This seems to suggest that it is the lack of ratification by Switzerland of the Genocide Convention, rather than the absence of domestic legislation defining genocide, that precluded the prosecution of Niyonteze for genocide. It might therefore also be considered that if prosecution had not been possible for war crimes under Article 109 of the Military Criminal Code, the courts would have applied the Genocide Convention if Switzerland had ratified it.¹⁴²⁷

Without doubt, this case has played an important role in respect of the insertion in 2000 of a new provision (Article 264) on genocide into the Swiss Criminal Code,¹⁴²⁸ as well as in the recent incorporation of the provisions defining crimes against humanity and war crimes.¹⁴²⁹ In addition, as mentioned above, it should be noted that a general clause providing for universal jurisdiction was inserted into the Swiss Criminal Code, thereby allowing Switzerland to prosecute violations of international humanitarian law under international customary and treaty law has recently been inserted into the Swiss Criminal Code.¹⁴³⁰ One can thus consider that Switzerland does not completely oppose the direct applicability of international law, as long as a provision refers to it. The question of whether this reference must be specific or can be of a

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¹⁴²⁶ Military Appeal Tribunal 1A, *Niyonteze*, Judgment, 26 May 2000, at 9. English translation in Sassòli and Bouvier, *How Does Law Protect in War?*, at 2248-2249.

¹⁴²⁷ On this last possibility, see the similar position in Henzelin, *La compétence universelle et l'application du droit international pénal en matière de conflits armés – la situation en Suisse*, at 171.

¹⁴²⁸ Art. 264 of the Swiss Criminal Code.

¹⁴²⁹ Arts 264a ff of the Swiss Criminal Code.

¹⁴³⁰ See Art. 7 of the Swiss Criminal Code.

general nature is debatable. Another issue that has arisen since the incorporation into the Swiss Criminal Code of a domestic provision on genocide (Article 264) is whether this provision can be applied retroactively to crimes committed before its entry into force in 2000.

2. *Retroactive application of domestic provisions on genocide*

a. *The legal situation of Switzerland*

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The question that arises today is whether Article 264 on genocide can be applied to crimes committed before 2000.¹⁴³¹ The same issue is raised with the retrospective application of Articles 264a ff. on crimes against humanity and war crimes in respect of crimes committed before 2010. More generally, can a person be prosecuted in Switzerland for acts of genocide committed before 2000 or does this constitute a violation of the non-retroactivity of criminal law? While it has shown some hesitancy, the position of the Swiss Federal Government appears to be in favor of a strict application of the principle of non-retroactivity. In other words, the Government appears to indicate that Articles 264 ff. of the Swiss Criminal Code are not applicable to crimes committed before their entry into force. It provides as follows:

La disposition réprimant spécifiquement le génocide est entrée en vigueur le 15 décembre 2000. Elle n'est pas applicable aux génocides qui auraient été commis avant cette date. Les dispositions pénales « classiques » réprimant par exemple le meurtre, l'assassinat ou d'autres infractions contre la vie et l'intégrité corporelle ou contre la liberté s'appliquent toutefois, du moment que l'infraction n'est pas prescrite. Les crimes de guerre, quant à eux, sont punissables depuis le 1er mars 1968 en vertu du CPM.

Selon le droit international coutumier, le génocide est punissable de manière générale et sans restrictions depuis 1951. De ce fait, on peut se demander si la rétroactivité ne devrait pas éventuellement être admise, tout comme elle devrait l'être pour les crimes de guerre et pour les crimes contre l'humanité. La question n'avait pas été débattue dans le cadre de l'instauration de la disposition sur le génocide. L'art. 7, al. 2, CEDH et l'art. 15, al. 2, du Pacte II de l'ONU stipulent que le principe de droit international public « pas de peine sans loi » est respecté dès lors que l'acte, au moment où il a été commis, était punissable en vertu des principes généraux de droit reconnus par les nations civilisées. Adoptées en considération de la procédure du tribunal militaire de Nuremberg, ces règles ont permis à de nombreux Etats d'édicter après 1945 des lois pour sanctionner après coup la commission de crimes de guerre ou la collaboration avec l'ennemi pendant la Seconde Guerre mondiale.

¹⁴³¹ The same issue is raised with regard to crimes against humanity which entered into force in Switzerland on 1 January 2011.

Le droit international public n'interdit pas aux Etats d'aller plus loin et d'étendre le principe de non-rétroactivité en fixant une autre limite. Depuis l'entrée en vigueur du CP, la Suisse pose également une limite stricte à la rétroactivité du droit pénal. L'art. 2 CP (en relation avec l'art. 1) énonce que quiconque commet un crime ou un délit après l'entrée en vigueur dudit code est jugé d'après une disposition pénale (y compris une nouvelle disposition ou une disposition révisée). Il consacre un point cardinal du principe de la légalité ; ce principe est de rang constitutionnel et découle des art. 8 et 9 de la Constitution. La rétroactivité des normes de droit pénal est prohibée si le nouveau droit (national) a des conséquences légales moins favorables pour l'auteur.

On hésite à affirmer dans quelle mesure la volonté d'éviter de laisser impunis des crimes d'une extrême gravité qui touchent la communauté internationale dans son ensemble peut justifier que l'on interprète le principe de la légalité (qui régit le droit suisse) de manière à permettre de poursuivre et de punir rétroactivement les auteurs de ces crimes. D'une part, si les dispositions pénales que nous proposons d'inscrire dans le droit suisse y sont nouvelles sous cette forme, le droit international les connaît depuis longtemps. D'autre part, les peines encourues et les délais de prescription pourraient entraîner une aggravation sensible de la situation de l'auteur.

La rétroactivité des dispositions pénales n'est d'ailleurs pas requise par le Statut de Rome. Sur le plan international, elle n'a été adoptée que par quelques Etats. Au demeurant, aucune requête dans ce sens n'a été déposée dans le cadre de la procédure de consultation.

Compte tenu des motifs exposés ci-dessus et du principe relevant de l'Etat de droit consacré par l'art. 2 CP, le Conseil fédéral préconise d'appliquer le principe de non rétroactivité au génocide, aux crimes contre l'humanité et aux crimes de guerre.¹⁴³²

In our view, this strict application of the principle of non-retroactivity is too restrictive. Indeed, it is arguable that Articles 264 ff. of the Swiss Criminal Code are applicable to crimes committed before their entry into force when the underlying crimes were criminalized in Swiss criminal law and Switzerland had a right or obligation under customary international law or treaty law to punish the crime.¹⁴³³ However, the non-retroactivity of penalties requires that the penalty imposed upon the convicted person must not be heavier than the penalty that would have been applicable at the time of the commission of the acts. Indeed, in Swiss law and in conformity with the ECtHR case law, under the legality principle, every person – as a recipient of the norms – must have

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¹⁴³² Emphasis added.

¹⁴³³ See in this sense Jakob/Maleh, *Introduction aux articles 264 à 264n (titres 12^{bis}, 12^{ter} et 12^{quater})*, N 47 (forthcoming).

some idea, even approximate, of the repressive risk (that is the type of sentence) that he faces if he commits a criminal offence.¹⁴³⁴ Thus, the judge will have to ensure that the penalty imposed is one that was comprised in the range of penalties provided by the provision applicable at the time of the events, namely the provision on murder, serious assault, etc. The case that could arise - theoretically at least - is that penalties provided for by the applicable provisions are not compatible with the penalty provided for by Article 264 of the Swiss Criminal Code, namely 10 years' minimum.¹⁴³⁵ In practice, this would generally be more of a problem in cases of war crimes than genocide. With regard to genocide, the penalties established by the applicable provisions at the time of the events generally coincide with those provided for by the provision on genocide.¹⁴³⁶ However, one can imagine cases, especially with respect to Article 264 (I) (c) and (d), where the only applicable provision at the time of the events would have been, with respect to Article 264(I)(c), for instance abduction (Article 183 of the Swiss Criminal Code), which is punishable by a sentence not exceeding five years or, with respect to Article 264(I)(d), that of coercion (Article 181 of the Swiss Criminal Code), which is punishable by a maximum of three years' imprisonment, or abduction of minors (Article 220 of the Swiss Criminal Code), which is punishable by a maximum of three years' imprisonment. The same problem could theoretically arise with the retroactive application of Article 264a on crimes against humanity, albeit to a lesser extent because the penalty provided for this offence is a minimum of five years' imprisonment.

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In any case, the possibility exists that the penalty provided for in Articles 264 ff. of the Swiss Criminal Code exceeds the range of penalties provided for in the relevant criminal provisions that would have been applicable at the time of commission of the crimes. In this case, the criminal judge would be placed in a difficult position because, on the one hand, he or she is bound by the range of penalties established in the provision applied. On the other, in order to ensure compliance with the *nulla poena sine lege* principle, we would argue that the

¹⁴³⁴ *Message du Conseil fédéral*, at 4925, my translation. According to the French version: "*En droit suisse, en vertu du principe de la légalité, il faut que tout citoyen – en tant que destinataire des normes – puisse avoir une idée, même approximative, du risque répressif (c'est-à-dire du type de peine) qu'il encourt en cas de commission d'un acte délictuel.*"

¹⁴³⁵ However, in the case of Switzerland, war crimes were already provided for in the Military Code in 1950.

¹⁴³⁶ For instance, homicide is punishable by a minimum of five years' imprisonment (Art. 111 of the Swiss Criminal Code); murder is punishable by a minimum of ten years' imprisonment (Art. 112 of the Swiss Criminal Code); serious assault is punishable by a maximum of ten years' imprisonment (Art. 122 of the Swiss Criminal Code); aggravated abduction is punishable by a minimum of one-year imprisonment and a maximum of twenty years (Arts 183 and 184 of the Swiss Criminal Code).

judge must firstly take into consideration the applicable range of penalties at the time of the commission of the crimes and, if need be, reduce the sentence.¹⁴³⁷

This restrictive approach of the principle of non-retroactivity of substantive norms recommended by the Swiss Federal Council appears to be the one adopted by French courts in recent judgments.

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b. The Rwandan genocide cases in France

There are currently 25 Rwandan genocide-related cases pending before the French authorities. So far, the French cases regarding the atrocities committed in Rwanda have not been very successful; the first one that led to a conviction was as recently as 2014.¹⁴³⁸ On 6 July 2016, Baharira and Ngenzi, both Rwandan mayors, were found guilty and condemned to life sentence. Among the pending cases, two have been referred to France by the ICTR, namely the *Munyeshyaka* case¹⁴³⁹ and the *Bucyibaruta* case. Other cases remain pending before French authorities because extradition requests from Rwanda have been systematically denied.

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¹⁴³⁷ It is interesting to note that, like a number of domestic legislations, the Swiss Criminal Code contains a provision – Art. 6 § 2 of the Criminal Code – obliging domestic courts asserting universal jurisdiction not to impose a heavier sentence than that provided by the law at the place of commission. We will come back to this issue in Section V of this chapter.

¹⁴³⁸ On 14 March 2014, a Paris court convicted the former Rwandan intelligence chief, Pascal Simbikangwa, of genocide and crimes against humanity for his participation in the 1994 Rwandan genocide and sentenced him to 25 years in prison. For an analysis of this case, see H. L. Trouille, 'France, Universal Jurisdiction and Rwandan *génocidaires*, The *Simbikangwa* Trial', 14(1) *Journal of International Criminal Justice* (2016) 195-217.

¹⁴³⁹ On 20 July 2005, Munyeshyaka was indicted by the ICTR for genocide, rape as a crime against humanity, extermination as a crime against humanity and murder as a crime against humanity. See ICTR, *Munyeshyaka*, Indictment, ICTR-2005-87-I, 20 July 2005. Munyeshyaka was arrested by French authorities in accordance with an arrest warrant issued by the ICTR; he was however released under court supervision in September 2007. On 20 November 2007, the ICTR Trial Chamber decided to grant the prosecutor's request for the referral of the case to France. The Trial Chamber noted that the conditions for referral were met, notably that the accused was present in France, thus fulfilling the domestic law provisions, and that France was willing and adequately prepared to accept the case. The Chamber consequently ordered that the case "be referred to the French authorities, so that those authorities may forthwith assign the case to the appropriate French court". See ICTR, 'Decision on the Prosecutor's Request for the Referral of Wenceslas Munyeshyaka's Indictment to France', *Munyeshyaka*, ICTR-2005-87-1, 20 November 2007. At the time of writing – 18 years after the complaint was lodged – *Munyeshyaka* has still not been tried and remains in France under court supervision. See United Nations, 'Initial Monitoring Report on the Munyeshyaka Case', *Mechanism for International Criminal Tribunals*, 12 July 2013, at 4.

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Indeed, the French courts have repeatedly refused requests by the Government of Rwanda for the extradition of persons suspected of genocide. They continue to be denied by France, notwithstanding that the ICTR itself and other states like Canada, Sweden and Norway, have authorized case transfers to Rwanda. Following a number of amendments to Rwandan legislation, both the European Court of Human Rights, in a decision of 27 October 2011,¹⁴⁴⁰ and the ICTR, in a decision rendered on 16 December 2011 in the *Uwinkindi* case,¹⁴⁴¹ considered that extradition to Rwanda did not constitute violations of Articles 3 (on the prohibition of torture, and “inhuman or degrading treatment or punishment”) and 6 (on the right to a fair trial) ECHR.

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On 23 October 2008, the Court of Appeal of Toulouse declined the extradition to Rwanda in the *Bivugarabago* case, considering that the suspect would not be guaranteed a fair trial.¹⁴⁴² Following the ICTR’s approach at the time, the Toulouse court considered that a Rwandan tribunal would be sufficiently independent and impartial, but that it would not guarantee a fair trial, in particular with regard to the appearance and protection of defence witnesses. Similar concerns were expressed in the decision of the Court of Appeal of Mamoudzou (*department de Mayotte*) of 14 November 2008, in the *Senyamuhara* case,¹⁴⁴³ in the decision of the Court of Appeal of Paris on 10 December 2008 in the *Kamali* case,¹⁴⁴⁴ in the decision of the Court of Appeal of Lyon of 9 January 2009 in the *Kamana* case,¹⁴⁴⁵ in the decision of the Court of Appeal of Versailles of 15 September 2010 in the *Rwamucyo* case,¹⁴⁴⁶ and in the decision of the Court of Appeal of Bordeaux of 19 October 2010 in the *Munyemana* case.¹⁴⁴⁷ In October 2009, Rwanda also requested the extradition of Agathe Habyarimana, the widow of the former President of the Republic of Rwanda, who was killed in the airplane bombing that triggered the 1994 genocide, for participation and incitement to genocide. She was arrested in Paris on 2 March 2010. In September 2011, the Paris Court of Appeal denied Rwanda extradition of Habyarimana. In one case, the French Court of Appeal of

¹⁴⁴⁰ ECtHR, *Ahorugeze v. Sweden*, Judgment, Application no. 37075/09, 27 October 2011.

¹⁴⁴¹ ICTR, *Uwinkindi*, ‘Decision on Uwinkindi’s Appeal Against the Referral of his Case to Rwanda and Related Motions’, ICTR-01-75-Ar11bis, 16 December 2011.

¹⁴⁴² *Cour d’Appel de Toulouse*, Arrêt, Dossier no 2008/00029, 23 October 2008, available online at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000019884665&fastReqId=2146603581&fastPos=4> (last visited 1 August 2017).

¹⁴⁴³ Decision of the Court of Appeal of Mamoudzou (*department de Mayotte*), *Senyamuhara*, 14 November 2008.

¹⁴⁴⁴ Decision of the Court of Appeal of Paris, *Kamali*, 10 December 2008.

¹⁴⁴⁵ Decision of the Court of Appeal of Lyon, *Kamana*, 9 January 2009.

¹⁴⁴⁶ Decision of the Court of Appeal of Versailles, *Rwamucyo*, 15 September 2010.

¹⁴⁴⁷ Decision of the Court of Appeal of Bordeaux, *Munyemana* 19 October 2010

Chambéry approved the extradition of Kamana to Rwanda.¹⁴⁴⁸ The Court of cassation, however, quashed the decision on 9 July 2008.¹⁴⁴⁹ In another case, the Court of Appeal of Rouen allowed the transfer of Muhayimana, a Rwandan national suspected in participating in two massacres during the 1994 Rwandan genocide that resulted in the death of thousands of victims, to Rwanda, following the 2011 decision of the ECtHR mentioned above. The Court of Cassation subsequently quashed the decision on 11 July 2012, partly on the risk of mistreatment seeing as the lower court had failed to enquire whether Rwanda had provided assurances that the suspect would be detained in accordance with the standards provided for in Article 3 ECHR.¹⁴⁵⁰ The extradition request was thus sent back to the Paris Appeals Court for further judicial review. On 13 November 2013, the Paris Appeals Court approved the extradition of Muhayimana for genocide and crimes against humanity. The Court was convinced that Muhayimana would be granted a fair trial in Rwanda.

On 26 February 2014, the Court of Cassation refused the extradition of Muhayimana on another ground. It held that extradition to Rwanda was not possible because the crime of genocide did not exist in Rwandan law at the time of commission of the relevant acts.¹⁴⁵¹ On the same date, the court also denied the extradition of two other suspects, namely Innocent Musabyimana¹⁴⁵² and Laurent Serubuga¹⁴⁵³, for the same reasons.

Rwanda has been a party to the Genocide Convention since 16 April 1975, but genocide was only incorporated into Rwandan law in 1996 by the Organic Law of 30 August 1996. It is noteworthy that thousands of persons have been

¹⁴⁴⁸ Decision of the Court of Appeal of Chambéry, 2 April 2008.

¹⁴⁴⁹ French Court of Cassation, Criminal Chamber, Judgment, N° 08-82922, 9 July 2008.

¹⁴⁵⁰ French Court of Cassation, *Claude Muhayimana, alias Claude Shingamunono*, Judgment, N° 12-82502, 11 July 2012; See Lafontaine, 'Universal Jurisdiction – the Realistic Utopia', 10 *Journal of International Criminal Justice* (2012), at 1300.

¹⁴⁵¹ French Court of Cassation, *Muhayimana*, Judgment, 26 February 2014, no. 13-87888.

¹⁴⁵² French Court of Cassation, *Musabyimana*, Judgment, 26 February 2014, no. 13-87846.

¹⁴⁵³ See French Court of Cassation, *Serubuga*, Judgment, 26 February 2014, no. 13-86631. On 19 September 2013, the Court of Appeal of Douai denied Rwanda's request for the extradition of Laurent Serubuga, a former colonel in the Rwandan army, and ordered his immediate release. The French Public Prosecutor has appealed the decision. Serubuga had been arrested in France under an international arrest warrant issued by Kigali. The court found that at the time the atrocities were committed, genocide and crimes against humanity were not punishable by law in Rwanda, and therefore Mr. Serubuga could not be tried retroactively for crimes that were not part of the penal code. It also rejected the charges of murder against Serubuga, claiming that it was beyond the statute of limitations. See D. Roets, *La prétendue impossibilité d'extrader vers le Rwanda des rwandais suspectés d'avoir participé au génocide de 1994 (à propos des arrêts rendus par la Chambre criminelle de la Cour de cassation le 26 février 2014)*, available online at <http://jupit.hypotheses.org/?p=114> (last visited 1 August 2017).

convicted under this law by Rwandan courts.¹⁴⁵⁴ The French Court of Cassation's reasoning that the crimes of genocide did not exist under Rwandan law in 1994 appears contrary to the recent case law of the European Court of Human Rights and to the wording of both Article 7 ECHR and Article 15 ICCPR, which both refer to a criminal offence under national or international law at the time when it was committed. One could argue that the Court of Cassation is in principle free to adopt a more restrictive approach to the legality principle and the principle of non-retroactivity,¹⁴⁵⁵ notwithstanding that this approach is certainly different from the one adopted by the French courts in the *Barbie*, *Touvier* and *Papon* cases mentioned above.¹⁴⁵⁶ However, the following paragraph of the Court of Cassation's judgment is somewhat surprising:

*Mais attendu qu'en statuant ainsi, alors que, les infractions de génocide et de crimes contre l'humanité auraient-elles été visées par des instruments internationaux, en l'espèce la Convention sur le génocide du 9 décembre 1948 et celle sur l'imprescriptibilité des crimes contre l'humanité du 26 novembre 1968, applicables à la date de la commission des faits, en l'absence, à cette même date, d'une définition précise et accessible de leurs éléments constitutifs ainsi que de la prévision d'une peine par la loi rwandaise, le principe de légalité criminelle, consacré par le Pacte international relatif aux droits civils et politiques ainsi que par la Convention européenne des droits de l'homme et ayant valeur constitutionnelle en droit français, fait obstacle à ce que lesdits faits soient considérés comme punis par la loi de l'Etat requérant, au sens de l'article 696-3, 1^o, du code de procédure pénale.*¹⁴⁵⁷

Indeed, it can hardly be argued that a precise definition of genocide was not provided for in 1994, considering that the definition was set out at Article II of the Genocide Convention, and is identical to the one found in the ICTY, ICTR and ICC statutes, all of which were supported by France.¹⁴⁵⁸ Moreover, it has been widely accepted and recognized as the authoritative definition of

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¹⁴⁵⁴ On this law and the convictions by Rwandan courts, see Thalmann, 'Rwandan Genocide Cases', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009).

¹⁴⁵⁵ It is however obliged to respect its obligation under international law to prosecute or extradite.

¹⁴⁵⁶ See Roets, *La prétendue impossibilité d'extrader vers le Rwanda des rwandais suspectés d'avoir participé au génocide de 1994 (à propos des arrêts rendus par la Chambre criminelle de la Cour de cassation le 26 février 2014)*.

¹⁴⁵⁷ French Court of Cassation, *Muhayimana*, Judgment, 26 February 2014, no. 13-87888; See also French Court of Cassation, *Musabyimana*, Judgment, 26 February 2014, no. 13-87846, which contains the same wording.

¹⁴⁵⁸ See Roets, *La prétendue impossibilité d'extrader vers le Rwanda des rwandais suspectés d'avoir participé au génocide de 1994 (à propos des arrêts rendus par la Chambre criminelle de la Cour de cassation le 26 février 2014)*, who argues that if the definition of genocide provided in the Genocide Convention may be open to criticism, it is sufficiently precise to fulfill the legality principle.

genocide.¹⁴⁵⁹ Furthermore, it appears difficult to sustain the notion that the definition was not accessible, considering that the Genocide Convention has been ratified by many states, including Rwanda. This very restrictive approach towards the legality principle of the French courts is questionable and could appear to violate France's legal obligation if French courts do not prosecute suspects of genocide. In any event, such an approach appears contrary to the subsidiarity principle, which should govern the application of universal jurisdiction.¹⁴⁶⁰

It is also interesting to examine the Court of Cassation's approach to the direct applicability of the Genocide Convention. The Court held:

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*3°/ alors que le principe de légalité des incriminations et des peines qui a pour corollaire le principe de non-rétroactivité de la loi pénale, est un principe fondamental tant du droit interne que du droit international ; que dès lors ce principe s'oppose à ce qu'une convention internationale ratifiée par un Etat, ait un effet direct, en l'absence de loi interne de transposition et s'oppose tout autant à ce que la loi de transposition puisse produire un effet rétroactif pour les faits commis avant que le droit interne les ait prévus et sanctionnés ;*¹⁴⁶¹

In short, the court seems to affirm that the principle of legality according to international law opposes the direct application by any state of an international treaty. This reasoning is somewhat surprising and deserves further explanation, considering that it appears to be at odds with international law and some state practices. In particular, it appears to contradict the generally recognized rule that each state remains free in the manner in which it chooses to implement international criminal law in its domestic legislation. Indeed, in its decision, the court is in fact implying that Rwanda – the territorial state – violated the (international) legality principle by prosecuting and punishing some thousands of genocide suspects.¹⁴⁶²

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The issue of penalties is more delicate, since no specific penalty was provided for in respect of genocide in Rwanda in 1994. However, in the present case, one can convincingly argue that this problem can be addressed by the fact that penalties were established under Rwandan law at the time for the

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¹⁴⁵⁹ See F. Jessberger, 'The Definition and Elements of the Crime of Genocide', in Gaeta (ed.), *The UN Genocide Convention: A Commentary*, at 88.

¹⁴⁶⁰ See Part III, Chapter 3, *infra* N 685 ff.

¹⁴⁶¹ French Court of Cassation, *Muhayimana*, Judgment, 26 February 2014, no. 13-87888; See also French Court of cassation, *Musabyimana*, Judgment, 26 February 2014, no. 13-87846, which contains the same wording.

¹⁴⁶² This issue will be further discussed in the Chapter dedicated to Subsidiarity. See Part III, Chapter 3, N *infra* N 685 ff.

underlying crimes of killing and causing serious bodily harm.¹⁴⁶³ In our view, the courts merely need to make sure that they do not apply a more severe penalty than the one provided for at the time of commission of the acts.

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Generally speaking, these repeated refusals to extradite are in our view questionable and will be discussed in Chapter 3, dedicated to subsidiarity.¹⁴⁶⁴ The problem is that, despite the repeated refusals to extradite over 20 years, France did not prosecute the Rwandan genocide suspects present on its territory. Following a complaint lodged by one of the plaintiffs, Yvonne Mutimura, France was even convicted by the European Court of Human Rights on 8 June 2004 for violating Article 6(1) of the Convention because of the excessive length of the proceedings and Article 13 of the Convention because of the lack of an effective remedy.¹⁴⁶⁵ French authorities have justified this delay by invoking notably the severance in diplomatic relations between France and Rwanda between November 2006 and November 2009; this arguably made it impossible to carry out investigations during that period.¹⁴⁶⁶ However, some human rights organizations have pointed out that this unreasonable delay is also due to a lack of political will from the French authorities to see these cases come to a successful conclusion.¹⁴⁶⁷ In particular, it has been said – with regard to the case of *Munyeshyaka*, a Rwandan priest who was accused since 1995 for his alleged participation in the genocide in Rwanda, and who had fled to France – that for a long time the necessary resources were simply not allocated to the investigating judges who succeeded each other in this case.¹⁴⁶⁸ On 2 October 2015, after 20 years of proceedings, the case against Munyeshyaka, who was

¹⁴⁶³ See W. Schabas, *French Courts Refuse Extradition for Genocide*, 27 February 2014, available online at <http://humanrightsdoctorate.blogspot.ch/2014/02/french-courts-refuse-extradition-for.html> (last visited 1 August 2017).

¹⁴⁶⁴ *Infra* N 651 ff.

¹⁴⁶⁵ See ECtHR, *Mutimura c. France*, Judgment, Application no. 46621/99, 8 June 2004.

¹⁴⁶⁶ Indeed, Rwanda broke all diplomatic ties with France following the issuance of international arrest warrants against nine Rwandan officials for their complicity in the April 1994 attack. It should be noted that the jurisdiction of France was not asserted on the basis of universal jurisdiction, because the victims were French nationals. On this decision, see Thalmann, 'French Justice's Endeavours to Substitute for the ICTR', 6 *Journal of International Criminal Justice* (2008) 995-1002. In April 2007, the Rwandan government also initiated proceedings against France before the International Court of Justice (ICJ), arguing that France had violated Rwandan sovereignty. However, in order for the ICJ to judge the case, both parties had to accept its jurisdiction. France has until now refused.

¹⁴⁶⁷ See United Nations, 'Second Monitoring Report', *Wenceslas Munyeshyaka*, Case No. MICT-13-45, *Mechanism for International Criminal Tribunals*, 5 November 2013, § 19.

¹⁴⁶⁸ *Ibid.*

charged with genocide, crimes against humanity and acts of torture, was dismissed by France's correctional court because of lack of evidence.¹⁴⁶⁹

Twenty years after the genocide in Rwanda, the first trial finally began on 4 February 2014 before the Paris Assize Court. On 14 March 2014, the accused, Pascal Simbikangwa, a former Rwandan intelligence chief, was found guilty of complicity to genocide and crimes against humanity and sentenced to 25 years' imprisonment.¹⁴⁷⁰ As mentioned above, two other genocide suspects were convicted.¹⁴⁷¹ A number of others have recently been indicted.¹⁴⁷²

In fact, no legal obstacle has prevented France from exercising universal jurisdiction over genocide, even under the strict legality principle. Firstly, as will be discussed below in Section IV, French courts had universal jurisdiction under the legislation implementing the ICTR Statute.¹⁴⁷³ Secondly, France had ratified the Genocide Convention in 1950. It is arguable that, as France is a monist state,

¹⁴⁶⁹ It is noteworthy that *Munyeshyaka* was indicted by the ICTR in 2005 before his case was transferred to France.

¹⁴⁷⁰ Paris Cour d'assises, Arrêt criminel N° 13/0033, *Pascal Senyamuhara SAFARI (alias Pascal Simbikangwa)*, 14 mars 2014, available online at <http://proces-genocide-rwanda.fr/wp-content/uploads/2014/04/scan005.pdf>.

¹⁴⁷¹ Supra N 436.

¹⁴⁷² See list of indicted, available online at <http://www.collectifpartiescivilesrwanda.fr/tableau-des-plaintes-du-cpcr/> (last visited 1 August 2017). Indeed, it should be noted that a 2011 Law (*Loi n° 2011-1862 du 13 décembre 2011 relative à la répartition des contentieux et à l'allègement de certaines procédures juridictionnelles*) set up a specialized Unit for Crimes against Humanity and War Crimes of the Tribunal de Grande Instance of Paris, in charge of investigating. This unit, which is composed of three full-time investigating judges, two prosecutors and four legal assistants, began functioning on 1 January 2012. This unit is currently in charge of about 30 cases, 25 of which relate to crimes committed in Rwanda. It seems that the creation of the unit has accelerated the investigations into the Rwandan cases. See D. Carlens, 'The French specialized war crimes unit: first 18 months', 10 *EU Update on International Crimes*, July 2013, at 4. See also United Nations, 'Initial Monitoring Report on the *Munyeshyaka* Case', *Mechanism for International Criminal Tribunals*, 12 July 2013, at 2 and 'Second Monitoring Report on the *Munyeshyaka* Case', *Mechanism for International Criminal Tribunals*, 5 November 2013, at 2.

¹⁴⁷³ See Art. 2 of the *Loi n° 96-432 du 22 mai 1996 portant adaptation de la législation française aux dispositions de la résolution 955 du Conseil de sécurité des Nations unies instituant un tribunal international en vue de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis en 1994 sur le territoire du Rwanda et, s'agissant des citoyens rwandais, sur le territoire d'Etats voisins* which refers to the *Loi n° 95-1 du 2 janvier 1995 portant adaptation de la législation française aux dispositions de la résolution 827 du Conseil de sécurité des Nations Unies instituant un tribunal international en vue de juger les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis 1991*. According to the relevant provisions, suspects who are found in France can be prosecuted by French courts according to French law.

the Convention should have been of immediate application as soon as it entered into force on 1 January 1951.¹⁴⁷⁴ However, as seen above, this has not been the position held by France. Indeed, these cases show us that, by providing for a strict application of the legality principle, French courts have refused to prosecute a person for acts of genocide committed before the crime was incorporated into domestic law, namely on 1 March 1994; this has been the approach, notwithstanding that the French implementation law refers, like the ICTR Statute, to acts committed “between 1 January 1994 and 31 December 1994”. In practice, this should not pose too much of a problem in the Rwandan cases, because most of the acts of genocide were committed between April and July 1994.

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The Rwandan genocide cases also raise other issues with regard to the legality principle, for instance, the question of whether a provision providing for universal jurisdiction over genocide applies retroactively (see *infra* Section IV). In addition, it should be noted that the provision requires double criminality and that, as seen above, genocide was not criminalized as such in Rwanda in 1994. This issue will be discussed in Section V of this chapter.

3. *Issues relating to the definition of genocide*

a. *Introductory remarks*

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A number of states contain definitions of crimes that do not necessarily coincide with the ICC Statute. That is, some national laws go further than the definitions of international crimes established by the international community.¹⁴⁷⁵ States are naturally free to include, in their legislation, definitions of international crimes that are broader than ICC crimes. An approach that follows the definition of crimes established by the international community could be adopted, by including international conventions other than the ICC¹⁴⁷⁶ as well as customary international law.¹⁴⁷⁷ Generally speaking, a state is, in principle, free to criminalize whatever conduct it wishes to criminalize, as long as it is exercising territorial jurisdiction. However, as already mentioned, if it is “acting on behalf of the international community” and thus asserting universal jurisdiction, it

¹⁴⁷⁴ See C. Fournet, *Genocide and Crimes Against Humanity: Misconceptions and Confusion in French Law and Practice* (Oxford and Portland, Oregon: Hart Publishing, 2013), at 51.

¹⁴⁷⁵ This is the case for instance of Uruguay, Ecuador, Congo, and Ethiopia. See Langer, “Universal Jurisdiction as Janus-Faced: The Dual Nature of the German International Criminal Code”, 11(4) *Journal of International Criminal Justice* (2013) 737-762.

¹⁴⁷⁶ For instance, the Geneva Conventions or the Genocide convention.

¹⁴⁷⁷ See Terracino, ‘National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC’, 5(2) *Journal of International Criminal Justice* (2007), at 425, who gives the examples of Bosnia and Herzovina, Germany, Ecuador, and the Netherlands and Langer, “Universal Jurisdiction as Janus-Faced: The Dual Nature of the German International Criminal Code”, at 737-762.

must limit itself to those crimes established by the international community and follow the definitions set out therein.¹⁴⁷⁸ If not, one can consider that a state is exercising “unilateral universal jurisdiction”. This is the case for instance of several domestic laws which have included war crime acts that are not provided for in Article 8 of the ICC Statute.¹⁴⁷⁹ Reference can be made to Switzerland, for example. In a similar vein, with regard to genocide, some national laws have included groups other than those provided for in the Genocide Convention, such as “social groups”, or “political groups”.¹⁴⁸⁰ In Spain, in addition to national, ethnic, racial and religious groups, the Criminal Code also includes as a protected group “a group determined by the disability of its members”.¹⁴⁸¹ The French definition of genocide also includes any other “group determined on the basis of arbitrary criteria”.¹⁴⁸² Canadian legislation, instead of listing the protected groups, merely refers to “an identifiable group of persons”.¹⁴⁸³ Other

¹⁴⁷⁸ In this sense, see See Langer, *supra* note 1472, at 751, and Terracino, *supra* note 1474, at 426.

¹⁴⁷⁹ See Terracino, *supra* note 1474, at 424, who gives the example of Bosnia and Herzovina.

¹⁴⁸⁰ See the case of Spain when it initially incorporated the definition of genocide in 1971. For the case of Switzerland, see Art. 264 of the Swiss Criminal Code; Ben Saul mentions that social groups are also included in the definitions of genocide in Estonia, Latvia and Lithuania. See Saul, ‘The Implementation of the Genocide Convention at the National Level’, in P. Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009), at 64-65; For an overview of the additional groups included in domestic legislation, see J. Wouters and S. Verhoeven, ‘The domestic prosecution of genocide’, in Behrens/Henham, *Elements of Genocide* (Routledge: 2013) 177-206, at 180.

¹⁴⁸¹ See Art. 607 § 1 of the Spanish Criminal Code, official English translation available online at http://www.sanchezervera-abogados.com/en/files/2012/06/Criminal_Code_C%C3%B3digo_Penal.pdf

¹⁴⁸² See Art. 211-1 of French Penal Code: “*Constitue un génocide le fait, en exécution d'un plan concerté tendant à la destruction totale ou partielle d'un groupe national, ethnique, racial ou religieux, ou d'un groupe déterminé à partir de tout autre critère arbitraire, de commettre ou de faire commettre, à l'encontre de membres de ce groupe, l'un des actes suivants : -atteinte volontaire à la vie ; -atteinte grave à l'intégrité physique ou psychique; -soumission à des conditions d'existence de nature à entraîner la destruction totale ou partielle du groupe ; -mesures visant à entraver les naissances ; -transfert forcé d'enfants. Le génocide est puni de la réclusion criminelle à perpétuité.*” This extension has been criticized as being confusing “given that the groups protected under the Convention are targeted because of their specific characteristics and not for arbitrary reasons”. See Saul, *supra* note 1477, at 65.

¹⁴⁸³ See Art. 6(3) of the Canadian Crimes Against Humanity and War Crimes Act, available online at <http://laws-lois.justice.gc.ca/PDF/C-45.9.pdf> (last visited 1 August 2017), which states that “genocide means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission”.

national laws also add additional physical elements to the definition of genocide beyond those found in the Genocide Convention.¹⁴⁸⁴

451 These extensions do not pose a problem under the legality principles, whether domestic or human rights orientated.¹⁴⁸⁵ With regard to Swiss law for instance, some scholars even consider that “the merit of the Swiss provision is the extension of its protection to the category of “social group” or “political group”, which are not covered by international law”.¹⁴⁸⁶ However, if the definitions are too far from those recognized by international law, the exercise of universal jurisdiction over such crimes may be considered to be unauthorized under international law and may pose problems with regard to the respect of sovereignty of other states.¹⁴⁸⁷

452 Thus, the situation that may pose a problem with regard to the legality principle arises when domestic courts extend the definition, particularly in order to enable courts to exercise universal jurisdiction. As we have discussed above, the Spanish *Audiencia Nacional* provided for a very broad interpretation of the term “national groups” in the *Pinochet* case. Influenced by a previous (1971) definition of genocide,¹⁴⁸⁸ the Spanish National Court applied a “social” conception, concluding that the acts in question constituted genocide. A similar issue was discussed in the German *Jorgić* case, which recognized the concept of “cultural genocide”.

453 Finally, it should be noted that if the Senegalese court had prosecuted Hissène Habré for genocide, the problem that might have arisen is that the definition of the Senegalese Law 2007-02 departs from that set out in Article 2 of the Genocide Convention.¹⁴⁸⁹ In addition to the four criteria set out by the Genocide Convention, the Senegalese Law determines that the protected group can also be “determined by any other criteria” (Art. 431-1). It has therefore been argued that for acts committed before the adoption of the law, “only the notion set out by the Genocide Convention should apply”.¹⁴⁹⁰

b. *The German Jorgić case*

454 Germany has been party to the Genocide Convention since 1954. It is noteworthy that genocide was the only core crime criminalized in German

¹⁴⁸⁴ See Saul, *supra* note 1477, at 65.

¹⁴⁸⁵ Boillat et al., ‘Challenges in prosecuting under universal jurisdiction’, 54(2) *Politorbis* (2012), at 41.

¹⁴⁸⁶ *Ibid.*

¹⁴⁸⁷ See Part I.

¹⁴⁸⁸ See *supra* N 359.

¹⁴⁸⁹ Spiga, ‘Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga’, 9 *Journal of International Criminal Justice* (2011), at 15, footnote 33.

¹⁴⁸⁷ *Ibid.*

law¹⁴⁹¹ until the adoption of the German Code of Crimes against International Law in 2002. In the *Jorgić* case, the Higher Regional Court of Düsseldorf (*Oberlandesgericht*) convicted Nicolai Jorgić, a national of Bosnia and Herzegovina, of genocide pursuant to the former Article 220a of the German Criminal Code for acts committed against the Muslims in the Dobož region and sentenced him to life imprisonment.¹⁴⁹² Jorgić was the first person convicted of genocide by a German court.¹⁴⁹³ Two years later, the same court convicted Maksim Sokolović, a Bosnian Serb who took part in the expulsion of Muslim inhabitants, for aiding and abetting genocide pursuant to the former Article 220a of the German Criminal Code; he was sentenced to five years' imprisonment.¹⁴⁹⁴ German courts established their jurisdiction on the basis of Article 6(1) of the Criminal Code, in conjunction with Article VI of the Genocide Convention.

In its judgment of 26 September 1997 in the *Jorgić* case, the Düsseldorf Court of Appeal convicted the applicant on eleven counts of genocide as defined by former Article 220a of the German Criminal Code, which repeated word for word Article II of the Genocide Convention. The Court considered that the intent to destroy did not necessitate the physical destruction of a group.

The defendant appealed the judgment claiming, *inter alia*, that his conviction violated the *nullum crimen sine lege* principle. The Federal Court of Justice upheld the Court of Appeal's finding that the applicant had intended to commit genocide within the meaning of Article 220a of the Criminal Code, but found that his actions as a whole had to be considered as constituting only one count of genocide. It upheld the view that genocide did not necessitate intent to destroy a group physically, but that it was sufficient to intend its destruction "as a social unit", which would not necessarily require physical or mental injury to the members of the group.¹⁴⁹⁵

On 12 December 2000, the German Federal Constitutional Court declined to consider the applicant's constitutional complaint, stating *inter alia* that the way in which the lower courts had construed the notion of "intent to destroy" in Article 220a of the German Criminal Code complied with the standards of

¹⁴⁹¹ Section 220 ff. of the German Criminal Code.

¹⁴⁹² Higher Regional Court of Düsseldorf (*Oberlandesgericht*), *Nicolai Jorgić*, 26 September 1997.

¹⁴⁹³ See Jessberger, 'Jorgić', in Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), at 738.

¹⁴⁹⁴ Higher Regional Court of Düsseldorf (*Oberlandesgericht*), *Maksim Sokolović*, 29 November 1999; See also Geneuss, 'Sokolović', in Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), at 928-929.

¹⁴⁹⁵ See English translation in Cassese et al., *International Criminal Law: Cases and Commentary* (Oxford: Oxford University Press, 2011), at 229.

Article 103(2) of the German Constitution (*Grundgesetz*)¹⁴⁹⁶ in conjunction with the *Rechtsstaatsprinzip* (principle of the rule of law).¹⁴⁹⁷ Moreover, the interpretation made by the Court of Appeal conformed to that of the prohibition of genocide in public international law – in light of which Article 220a of the Criminal Code had to be construed – by the competent tribunals, several scholars and as reflected in the practice of the United Nations, as expressed, inter alia, in Resolution 47/121 of the General Assembly.¹⁴⁹⁸

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Jorgić challenged his conviction before the European Court of Human Rights, claiming among other things that his conviction violated Article 7(1) of the European Convention because the wide interpretation of the crime of genocide, as adopted by the German courts, did not have a basis in the wording of that offence as laid down in German and public international law.¹⁴⁹⁹ The applicant basically argued that the “ethnic cleansing” carried out by Bosnian Serbs had been aimed at driving all Muslims away from that region by force, that is, at expelling that group, not destroying its very existence.¹⁵⁰⁰ It could therefore not be considered as genocide, because its aim was not to destroy a group as such.¹⁵⁰¹ He also argued that the German courts’ interpretation of “intent to destroy” in Article 220a, was contrary to the interpretation of the same notion in Article II of the Genocide Convention and to the internationally accepted doctrine.¹⁵⁰² Furthermore, he argued that it had not been foreseeable to him at the time of the commission of his acts that the German courts would qualify his acts as genocide under German or public international law.¹⁵⁰³

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With regard to the requirement of genocidal intent, it should be noted that in the cases that followed, the ICTY repeatedly found that genocide required intent to bring about the physical or biological destruction of a group.¹⁵⁰⁴ However, it has been said that in more recent case law, there appears to be “a

¹⁴⁹⁶ Art. 103 of the *Grundgesetz* (on due process) states at its § 2 that “An act can be punished only where it constituted a criminal offence under the law before the act was committed”.

¹⁴⁹⁷ Federal Constitutional Court, *Jorgić*, 12 December 2000, 2 BvR 1290/99, English translation available online at http://www.bverfg.de/entscheidungen/rk20001212_2bvr129099en.html (last visited 1 August 2017).

¹⁴⁹⁸ ECtHR, *Jorgić v. Germany*, § 27.

¹⁴⁹⁹ *Ibid.*, § 89.

¹⁵⁰⁰ *Ibid.*, § 92.

¹⁵⁰¹ On this issue, see F. Jessberger, ‘The Definition and Elements of the Crime of Genocide’, in Gaeta (ed.), *The UN Genocide Convention: A Commentary*, at 104.

¹⁵⁰² ECtHR, *Jorgić v. Germany*, § 93.

¹⁵⁰³ ECtHR, *Jorgić v. Germany*, § 94.

¹⁵⁰⁴ See Jessberger, ‘Jorgić’, in Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), at 739 and the ICTY judgments cited.

tendency to open up the narrow concept of genocidal intent in the direction pointed by the German courts".¹⁵⁰⁵

In its decision, the ECtHR held unanimously that here had been no violation of Article 7(1) of the Convention. It considered that the German courts' interpretation of the crime of genocide "could reasonably be regarded as consistent with the essence of that offence and could reasonably be foreseen by the applicant at the material time".¹⁵⁰⁶ With regard to foreseeability, the ECtHR considered that because it was the first time, since its incorporation into the Criminal Code in 1955, that an applicant had ever been convicted by German courts of genocide under Article 220a of the German Criminal Code, unlike cases concerning a reversal of pre-existing case-law, "an interpretation of the scope of the offence which was – as in the present case – consistent with the essence of that offence must, as a rule, be considered as foreseeable".¹⁵⁰⁷ In its reasoning, the ECtHR did however acknowledge that the scope of genocide had been interpreted differently by international authorities, namely the ICTY in the cases of *Prosecutor v. Krstić* and *Prosecutor v. Kupreškić and others*, who "had expressly disagreed with the wide interpretation of the 'intent to destroy' as adopted by the United Nations General Assembly and the German courts".¹⁵⁰⁸ It recalled that "referring to the principle of *nullum crimen sine lege*, the ICTY considered that genocide, as defined in public international law, comprised only acts aimed at the physical or biological destruction of a protected group".¹⁵⁰⁹ However, the Court held that since the ICTY had delivered its judgments after the commission of the crimes by the defendant, he could not rely on this interpretation.¹⁵¹⁰

Some scholars have argued that this extensive interpretation is contrary to the *nullum crimen* principle, to the exhaustive list of *acta rea* mentioned in letters a) to e) of Article II of the Genocide Convention and to Article 6 of the Rome Statute.¹⁵¹¹ It has also been noted that this case shows that when human rights courts have come to deal with questions of international crimes and the *nullum crimen* principles, "they have been decidedly generous when appraising State action".¹⁵¹²

¹⁵⁰⁵ *Ibid.*

¹⁵⁰⁶ ECtHR, *Jorgić v. Germany*, § 114.

¹⁵⁰⁷ *Ibid.*, § 109.

¹⁵⁰⁸ *Ibid.*, § 112.

¹⁵⁰⁹ *Ibid.*

¹⁵¹⁰ *Ibid.*

¹⁵¹¹ See R. Kolb, 'Droit international pénal', in Kolb and Scalia, *Droit international pénal* (2nd ed., Basel: Helbing Lichtenhahn, 2012), at 84-85.

¹⁵¹² Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2010), at 19.

E. Torture as a discrete crime

1. *The Pinochet case in the UK*

462 Although the decisions in the UK *Pinochet* case largely concern extradition made to a state exercising universal jurisdiction (Spain), the case raises interesting issues relating to universal jurisdiction, international crimes and the legality principle. Indeed, extradition generally requires that the principle of double criminality be satisfied, i.e. that the act be a crime under both the law of the extradition state and the law of the state to which the suspect is extradited. In this respect, the state has to examine whether the crime is punishable under its own legislation. In its decision of 23 March 1999 in the *Pinochet* case, the House of Lords, in the context of a request for extradition from Spain, examined whether the dual criminality requirement was fulfilled, and, in particular, whether torture committed outside of the UK was a crime under UK law.¹⁵¹³ It is interesting to note that the issue was not whether torture was a crime under UK law, but whether “torture committed abroad” was a crime under UK Law.

463 Section 134 of the Criminal Act 1988 incorporated torture committed abroad into UK law on 26 September 1988. Unlike the French cases relating to extradition to Rwanda, the issue was not whether the accusations against Pinochet were crimes under the law of Spain¹⁵¹⁴ (where the crimes were going to be prosecuted) or under the law of Argentine (where the crimes took place). The question that rather interested the House of Lords was whether the crimes were acts under UK law. Thus the issue at stake was whether Pinochet could only be extradited for the acts committed after 26 September 1988 or whether extradition could also be made for the acts committed before that date. The answer to this question was crucial since nearly all of the torture charges against Pinochet concerned acts committed before that date. The House of Lords finally held that only the acts of torture and conspiracy to commit torture committed after 1988 could be retained.¹⁵¹⁵ As a consequence, the charges for which Pinochet could be extradited were radically reduced.

464 The majority of the House of Lords concluded that torture *committed outside* the UK was not a crime under UK law until its incorporation into domestic law in 1988 and that it was not retroactive. Lord Browne-Wilkinson, who wrote the lead opinion, which was followed by six of the seven judges, held:

¹⁵¹³ United Kingdom House of Lords, ‘Regina v. Bartle and the Commissioner of Police for the Metropolis and others Ex Parte Pinochet (N°3)’, in 38 *International Legal Materials* (1999) 581-663.

¹⁵¹⁴ M. Ratner, ‘The Lord’s Decision in Pinochet III’, in Brody/Ratner (eds), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain*, at 36.

¹⁵¹⁵ See *Pinochet (Regina v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet (No.3)* [1999] 2 WLR 827).

Since the Nazi atrocities and the Nuremberg trials, international law has recognised a number of offences as being international crimes. Individual states have taken jurisdiction to try some international crimes even in cases where such crimes were not committed within the geographical boundaries of such states. The most important of such international crimes for present purposes is torture which is regulated by the International Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. The obligations placed on the United Kingdom by that Convention (and on the other 110 or more signatory states who have adopted the Convention) were incorporated into the law of the United Kingdom by section 134 of the Criminal Justice Act 1988. That Act came into force on 29 September 1988. *Section 134 created a new crime under United Kingdom law, the crime of torture.* As required by the Torture Convention "all" torture wherever committed world-wide was made criminal under United Kingdom law and triable in the United Kingdom. No one has suggested that before section 134 came into effect torture committed outside the United Kingdom was a crime under United Kingdom law. Nor is it suggested that section 134 was retrospective so as to make torture committed outside the United Kingdom before 29 September 1988 a United Kingdom crime. Since torture outside the United Kingdom was not a crime under U.K. law until 29 September 1988, the principle of double criminality which requires an Act to be a crime under both the law of Spain and of the United Kingdom cannot be satisfied in relation to conduct before that date if the principle of double criminality requires the conduct to be criminal under United Kingdom law *at the date it was committed*. [...] *In particular, I do not consider that torture committed outside the United Kingdom before 29 September 1988 was a crime under U.K. law.*¹⁵¹⁶

Lord Millet argued that torture was recognized as an international crime that attracted universal jurisdiction well before 1984 and therefore did not create a new offence.¹⁵¹⁷ While the House of Lords did not explicitly analyse the issue of direct application of international offences before domestic courts, their opinions – according to which a domestic statute is necessary – appear to reject such an approach.

With regard to the controversial issue of whether it is the date of the request or the date of commission of the acts which is relevant when examining the

¹⁵¹⁶ (Emphasis added). United Kingdom House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and others Ex Parte Pinochet (N°3)*, in 38 *International Legal Materials* (1999) 581-663, at 581.

¹⁵¹⁷ For an analysis of the opinions in the *decision Pinochet III*, see inter alia Birdsall, *The International Politics of Judicial Intervention: Creating a More Just Order* (London: Routledge, 2009), at 66 ff.

double criminality requirement in extradition, the majority surprisingly opted for the second option, without however really explaining why. Independently from the issue of whether dual criminality should be a requirement in cases of extradition (and the exercise of extraterritorial jurisdiction) of international crimes, the decision to retain the commission date rather than the extradition date was criticized.¹⁵¹⁸ The issue of double criminality will be discussed below in Section V.

2. *The French Munyeshyaka case*

467 In the 1995 *Munyeshyaka* case mentioned above,¹⁵¹⁹ an investigation was opened against him in France for war crimes, crimes against humanity, genocide and torture on the basis of Articles 211-1, 212-1 and 212-3 of the French Penal Code, Articles 689, 689-1 and 689-2 of the French Code of Criminal Procedure and Article 1 of the Torture Convention.¹⁵²⁰ On 9 January 1996, the Investigating Judge held that he had no jurisdiction over war crimes, crimes against humanity and genocide either on the basis of Articles 211-1 ff. of the French Penal Code, the Genocide Convention, or the four Geneva Conventions.¹⁵²¹ He held that he only had jurisdiction over crimes of torture. On appeal, the Nimes Appeals Court held that the acts only amounted to genocide and complicity in genocide and that the French courts lacked jurisdiction over genocide since the Genocide Convention only gave jurisdiction to the courts of the territorial state.¹⁵²²

468 On appeal, the French Court of Cassation quashed the decision and held that the Nimes Appeals Court had committed a breach of law by taking into account *only* the criminal charge of genocide, whereas the acts which were committed could also be considered as crimes of torture, thus allowing the French courts to exercise universal jurisdiction under Article 689-2 of the French

¹⁵¹⁸ See the criticism of the decision of the House of Lords with regard to double criminality by M. Ratner, 'The Lord's Decision in Pinochet III', in Brody and Ratner (eds), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain*, at 38-40. This question is outside the scope of this study but will be briefly addressed when discussing the dual criminality requirement.

¹⁵¹⁹ See *supra* N 137.

¹⁵²⁰ French Court of cassation, Criminal Chamber, *Munyeshyaka*, N° 96-82491, 6 January 1998.

¹⁵²¹ *Ibid.*

¹⁵²² See Cassese, 'Munyeshyaka', in Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), at 828-829.

Code of Criminal Procedure.¹⁵²³ As mentioned above, the case against Munyeshyaka was finally dismissed in 2015.¹⁵²⁴

3. *The Dutch cases*

In 1997, some Suriname victims filed a complaint in the Netherlands against Désiré Bouterse, former President of Surinam, for torture and for the summary execution of fifteen people on 8 and 9 December 1982 by the military government under his command. The *Bouterse* case is an interesting decision that has led to a number of debates on the relationship between national criminal law and international law, and on the content and scope of universal jurisdiction.¹⁵²⁵ One of the issues raised was whether Dutch courts could conduct proceedings for a crime committed by a foreigner outside the Netherlands, based directly on international law, in the absence of relevant provisions of domestic criminal law.¹⁵²⁶

With regard to the legal framework applicable at the time, it should be noted that the specific international crime of torture only became part of Dutch criminal law on 20 January 1989, with the entry into force of the Dutch Torture Convention Implementation Act (hereafter "DTCIA"). Moreover, at the time of

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¹⁵²³ French Court of Cassation, Criminal Chamber, *Munyeshyaka*, Judgment, no. 96-82491, 6 January 1998: "Attendu que, selon les articles 1er et 2 de la loi du 22 mai 1996 précitée, les auteurs ou complices des actes qui constituent, au sens des articles 2 à 4 du statut du tribunal international, des infractions graves aux Conventions de Genève du 12 août 1949, des violations des lois ou coutumes de guerre, un génocide ou des crimes contre l'humanité, peuvent, s'ils sont trouvés en France, être poursuivis et jugés par les juridictions françaises, en application de la loi française ; Attendu qu'il résulte de l'article 689-2 du code de procédure pénale que les juridictions françaises sont compétentes, dans les conditions prévues par l'article 689-1 du même code, pour juger les personnes qui se seraient rendues coupables, à l'étranger, de tortures, au sens de l'article 1er de la Convention de New York du 10 décembre 1984, dès lors que les faits délictueux sont susceptibles de revêtir, selon la loi française, une qualification entrant dans les prévisions de cet article ; Attendu que, pour déclarer le juge d'instruction incompetent, la chambre d'accusation, après avoir décidé que les faits poursuivis doivent être envisagés sous leur plus haute acception pénale, retient qu'ils constituent les crimes de génocide et de complicité de génocide, prévus par l'article 211-1 du code pénal, et que les éléments constitutifs de ces crimes ne sont pas compris dans la définition des actes de torture visés à l'article 1er de la Convention de New York du 10 décembre 1984 ; Mais attendu qu'en affirmant que seule la qualification de génocide était applicable en l'espèce, la chambre d'accusation a méconnu l'article 689-2 précité."

¹⁵²⁴ See *supra* N 432 ff.

¹⁵²⁵ E. Van Sliedregt, 'International Crimes before Dutch Courts: Recent Developments', 20 *Leiden Journal of International Law* (2007) 895–908, at 896.

¹⁵²⁶ See Dutch Supreme Court, *Bouterse (Desire)*, Re, Judgment on Appeal, Decision No LJN: AB1471, Case No HR 00749/01 CW 2323, NJ 2002, 559, ILDC 80 (NL 2001), 18 September 2001.

commission of the acts in 1982, international law did not explicitly provide that torture could be punished, since the Torture Convention had not yet been adopted.¹⁵²⁷ Thus, punishment for the acts of torture could only be based on international customary law.¹⁵²⁸

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In its decision of 20 November 2000, the Court of Appeal of Amsterdam ordered the prosecution of *Bouterse* for the offences committed in Surinam on 8 and 9 December 1982.¹⁵²⁹ In its decision, the question was raised as to whether the DTCIA could be applied to offences that were committed in 1982, without violating the legality principle.¹⁵³⁰ Following the expert opinion of Professor Dugard, the court concluded that the crime of torture was punishable under international customary law in 1982. The question was then whether it was punishable under the Dutch legality principle. In this respect, the Court of Appeal made a distinction between retroactive application, which makes an offence punishable which was not punishable when it was committed, and retrospective application, which does not create a new offence.¹⁵³¹ It held that the Convention Against Torture was of a declaratory nature and merely confirmed existing customary international law regarding the prohibition, punishment and definition of torture as a crime against humanity.¹⁵³² Therefore, the DTCIA could be retrospectively applied to conduct that was punishable at the time under Dutch law, that is, not as torture but as other crimes such as murder or assault, without violating the legality principle set out in Article 15 ICCPR and Article 16 of the Dutch Constitution.¹⁵³³

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The Prosecutor General appealed in cassation “in the interests of the law” questioning inter alia whether Articles 1 and 2 DTCIA defining torture could apply retroactively to acts committed before their entry into force. In a landmark decision, the Supreme Court addressed a number of legal issues including the prohibition of the *ex post facto* application of criminal law. It concluded that the retroactive application of the DTCIA violated the legality principle provided for under Article 16 of the Dutch Constitution and Article 1(1) of the Criminal Code. The Supreme Court held that according to its legislative history, under Article

¹⁵²⁷ See Zegveld, ‘The Bouterse Case’, 32 *Netherlands Yearbook of International Law* (2001), at 99.

¹⁵²⁸ *Ibid.*

¹⁵²⁹ See Amsterdam Court of Appeal, *Bouterse*, Decision of 20 November 2000, § 11, English translation available online at http://www.icrc.org/applic/ihl/ihl-nat.nsf/vwLawsByCategorySelected.xsp?xp_countrySelected=NL.

¹⁵³⁰ *Ibid.*

¹⁵³¹ *Ibid.*

¹⁵³² *Ibid.*, § 6.3.

¹⁵³³ See summary in Dutch Supreme Court, *Bouterse (Desire)*, Appeal in cassation in the interests of the law, Re, Judgment on Appeal, Decision No LJN: AB1471, Case No HR 00749/01 CW 2323, NJ 2002, ILDC 80 (NL 2001), 18 September 2001, in *Oxford Reports on International Law*, at F4.

94 of the Constitution,¹⁵³⁴ international treaties could overrule domestic provisions, but international customary law could not.¹⁵³⁵ Thus, even if torture was an international crime under customary international law in 1982, it could not prevail over national law, namely over the domestic provisions on *nullum crimen sine lege*.¹⁵³⁶ The court held:

4.6 It follows that the provisions of the Criminal Code applicable at the time when the offences that are the subject of the complaint were committed in 1982 may be applied to the offences in so far as they were envisaged and made punishable at the time, but also that Articles 1 and 2 of the Implementation Act may not be applied to such offences since this legislation did not come into force until 20 January 1989. It also follows from the above that in so far as the obligation to declare such offences as punishable with retroactive effect results from unwritten international law, the courts are not free to decide not to apply the Torture Convention Implementation Act (which does not provide for this) on account of the fact that it is contrary to unwritten international law.

According to the parliamentary history of Article 94 of the Constitution, as recounted at 4.4 above, the framers of the Constitution did not wish to accept the application of unwritten international law if such application would conflict with national legal regulations

[...]

4.8 It may be concluded from the above that the Court of Appeal infringed Article 16 of the Constitution and Article 1, paragraph 1, of the Criminal Code and that the disputed decision cannot be upheld.¹⁵³⁷

While the issue of direct application of treaty law was not addressed as such, the Court of Appeal did nevertheless state that “Dutch law requires a national act for incorporating obligations under international law in its own system as punishability of human conduct”.¹⁵³⁸ The Supreme Court did not

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¹⁵³⁴ Art. 94 Constitution reads as follows: “Legislation in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding upon all persons or of decisions by international organizations.”

¹⁵³⁵ Dutch Supreme Court, *Bouterse (Desire)*, § 4.4.1. ff.

¹⁵³⁶ See also Van der Wilt, ‘Bouterse’, in Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), at 618.

¹⁵³⁷ Dutch Supreme Court, *Bouterse (Desire)*, § 4.6 and 4.8.

¹⁵³⁸ Amsterdam Court of Appeal, *Bouterse*, Decision of 20 November 2000, § 8.2, English translation available online at <https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=>

directly address this issue, but did provide that the prohibition provided at Article 16 of the Constitution and the Article 1(1) of the Criminal Code “should not be applicable in cases where this would be incompatible with provisions of treaties or decisions of international organisations binding on all persons”.¹⁵³⁹ One can therefore argue that the Supreme Court thus “clearly endorsed the direct application of penal treaty provisions over the national provisions of the principle of legality”.¹⁵⁴⁰

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On 18 September 2001, the Supreme Court of the Netherlands dismissed the action against Bouterse.¹⁵⁴¹ The Supreme Court of the Netherlands held that the prosecution of Bouterse was not possible because the crimes were committed in December 1982, while the Torture Convention came into force in 1987 and the Netherlands Implementation Act in 1989. The application of the Torture Convention to acts committed before its adoption would violate the principle of legality established by Article 16 of the Dutch Constitution (paragraph 4.3.1). Thus, in this case, and unlike in other cases, the court did not come to the conclusion that torture was a crime under customary international law in order to assert jurisdiction and be able to punish the suspect for his crimes. It applied the national legality principle, rather than the international legality principle provided for at Article 15 ICCPR. It merely concluded that the acts were not punishable as torture at the time of the events.¹⁵⁴²

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It is noteworthy that in 2004, the Rotterdam District Court convicted Sebastien N., a Congolese national, for acts of torture committed in the Democratic Republic of Congo (then Zaire) in 1996.¹⁵⁴³ He was in fact the first person to be convicted of torture in the Netherlands; this was also the first conviction by a Dutch court based on universal jurisdiction.¹⁵⁴⁴

274EBDFA57C67762C1257706003512D4&action=openDocument&xp_countrySelected=NL&xp_topic Selected=GVAL-992BU6&from=state (last visited 1 August 2017).

¹⁵³⁹ Dutch Supreme Court, *Bouterse (Desire)*, § 4.5.

¹⁵⁴⁰ Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (The Hague: TMC Asser Press, 2006), at 69.

¹⁵⁴¹ Netherlands, Supreme Court, *Bouterse*, Judgment, 18 September 2001, available online in Dutch at http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Netherlands/Bouterse_HogeRaad_18-9-2001.pdf (last visited 1 August 2017).

¹⁵⁴² The Supreme Court did not have to address the issue of jurisdiction. However, at the express request of the Prosecutor General, it did so. See Zegveld, *supra* note 1524, at 105. This issue will be discussed below in section IV.

¹⁵⁴³ Rotterdam District Court, *Sebastien N.*, 7 April 2004, English translation available in 51 *Netherlands International Law Review* (2004), at 444-449.

¹⁵⁴⁴ On this case see inter alia Kamminga, 'First Conviction Under the Universal Jurisdiction Provisions of the UN Convention Against Torture: Rotterdam District Court, 7 April 2004, *Sebastien N.*', 51 *Netherlands International Law Review* (2004) 439-449, at 429, and W. Ferdinandusse 'The Dutch

4. *The Ould Dah case in France and before the ECtHR*

Ely Ould Dah, an intelligence officer, was accused of torture of black African members of the military in the former French colony of Mauritania in 1990 and 1991. On 14 June 1993, an amnesty law was passed in Mauritania in favor of members of the armed forces and security forces who had committed offences between 1 January 1989 and 18 April 1992.¹⁵⁴⁵ According to this law, no proceedings could be brought against Ould Dah.

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In 1998, Ould Dah, then captain in the Mauritanian army, travelled to France for military training. On 8 June 1999, the *Fédération internationale des ligues des droits de l'homme* (hereafter "FIDH") and the *Ligue des droits de l'homme* lodged a criminal complaint against him. The Investigating Judge placed him in pretrial detention, where he stayed until his release on 28 September 1999.¹⁵⁴⁶ After his release, Ould Dah fled the country. On 6 March 2002, the Investigation Division of the Nîmes Court of Appeal committed the applicant for trial before the Gard Assize Court. In its decision, the Nîmes court considered that it could apply French law and "override an amnesty law passed by a foreign State where application of that law would result in a breach of France's international obligations and render the principle of universal jurisdiction totally ineffective". On 23 October 2002, the Court of Cassation dismissed the applicant's appeal, confirming France's jurisdiction, notwithstanding the foreign amnesty law.¹⁵⁴⁷ On 30 June 2005, the trial was held before the Gard Assize Court in the defendant's absence; Ould Dah was sentenced *in absentia* to ten years' imprisonment on 1 July 2005.¹⁵⁴⁸ In a second judgment, the court awarded damages to the various civil parties.¹⁵⁴⁹ The Assize Court based its decision on inter alia Articles 303 and 309 of the old Criminal Code, 222-1 of the new Criminal Code and on the United Nations Convention Against Torture of 1984.

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Experience', in Bassiouni (ed.), *International Criminal Law, Volume 3: International Enforcement* (Leiden/Boston: Martinus Nijhoff Publishers, 2008), at 386-387.

¹⁵⁴⁵ ECtHR, *Ould Dah v. France*.

¹⁵⁴⁶ See France, *Cour d'appel de Montpellier, Ordonnance de mise en accusation devant la Cour d'assises et de non-lieu partiel et ordonnance de prise de corps*, 25 May 2001. The release is said to have been ordered because of the Mauritanian authorities' decision to stop military cooperation with France following the arrest. A note from the French minister of affairs underlining the importance of the diplomatic and economic relations between France and Mauritania appears to have been sent to the prosecutor. See 'Un militaire mauritanien mis en examen pour tortures a réussi à fuir la France', in *Le Monde*, 9 April 2000.

¹⁵⁴⁷ French Court of Cassation, Criminal Chamber, No. 02-85379, 23 October 2002. According to the court, "*l'exercice par une juridiction française de la compétence universelle emporte la compétence de la loi française, même en présence d'une loi étrangère portant amnistie*".

¹⁵⁴⁸ France, *Cour d'assises du département du Gard, Arrêt de condamnation*, 1 July 2005.

¹⁵⁴⁹ *Ibid.*

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Ould Dah lodged a complaint before the European Court of Human Rights, claiming that French courts had violated the requirements of Article 7 ECHR, which guarantees the *nullum crimen, nullum poena sine lege* principle and prohibits in particular the retrospective application of the criminal law where it is to an accused's disadvantage.¹⁵⁵⁰ According to this principle, offences and relevant penalties must be clearly defined by the law so that "the individual can know from the wording of the relevant provision, and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable".¹⁵⁵¹

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The ECtHR also examined the question of the accessibility and foreseeability of the French law. Torture and barbarity were expressly provided for in the French Criminal Code at the time of commission of the crime, but as aggravating circumstances:

The question of the accessibility and foreseeability of the French law applied to the applicant now needs to be examined.

On this point the Court notes that at the time of the offence of which the applicant was accused, that is, prior to the entry into force of the new Criminal Code on 1 March 1994, both torture and acts of barbarity were expressly referred to in Article 303 of the Criminal Code. Under that provision, they constituted an aggravating circumstance resulting in either the same penalty as that incurred by a person guilty of murder, where they accompanied a crime, or in a prison sentence of between five and ten years where they accompanied a major offence (*délit*). Article 309 referred to assault resulting in total unfitness for work for more than eight days.

The Court notes that the applicant was convicted, *inter alia*, under Articles 303 and 309 of the Criminal Code applicable at the relevant time, those provisions being expressly cited in the operative provisions of the decision. The applicant, for his part, considered that those provisions could not provide a basis for his conviction since they did not amount to separate offences but aggravating circumstances of the commission of a crime or major offence. Moreover, the judgment of the Assize Court expressly referred to Article 222-1 of the Criminal Code.

The Court notes, however, that acts of torture and barbarity were, as it has observed, expressly provided for in the Criminal Code applicable at the material time. *The submission that at that time they constituted not separate offences but aggravating circumstances is not decisive in the present case: the perpetrator of a crime or major offence*

¹⁵⁵⁰ ECtHR, *Ould Dah v. France*, at 13.

¹⁵⁵¹ *Ibid.*, at 13-14.

could in any event be legally accused of such acts, which constituted – on the basis of a special provision – supplementary elements distinct from the principal offence, resulting in a heavier penalty than the one carried by the principal offence. The Court notes, moreover, that the circular of 14 May 1993 commenting on the new offence expressly indicates that the expression “torture and acts of barbarity” retains the meaning ascribed to it in the case-law characterising such acts as aggravating circumstances. This was subsequently confirmed in the domestic case-law, the Court of Cassation even ruling that the new offences relating to torture and acts of barbarity ensured continuity of the offences provided for in the former Criminal Code. The Court also notes that the difference between the new offence and the former provisions can mainly be explained by the fact that the new provision is of broader application than that of the United Nations Convention against Torture since it was intended to remedy the loopholes in the legal provisions relating to prosecutions, but in situations that do not, however, relate to this case.

Furthermore, the penalty imposed on the applicant did not exceed the maximum one provided for in the former Article 303 of the Criminal Code applicable at the relevant time.

With regard to the provisions of Article 222-1 of the Criminal Code, which came into force on 1 March 1994, in the Court’s view, these are essentially a development of the Criminal Code that have not introduced a new offence, but rather make legislative provision for conduct that had already been expressly referred to and classified as an offence by the former Criminal Code. It should be pointed out that the heaviest penalty available under Article 222-1 was not imposed on the applicant in the present case. *There has not, therefore, been any problem of retrospective application.*

Having regard to the foregoing, the Court considers that at the time when the offences were committed, the applicant’s actions constituted offences that were defined with sufficient accessibility and foreseeability under French law and international law, and that the applicant could reasonably, if need be with the help of informed legal advice, have foreseen the risk of being prosecuted and convicted for acts of torture committed by him between 1990 and 1991 (see, inter alia, Achour, cited above, § 54; Jorgić, cited above, § 113; and Korbely, cited above, § 70).

Accordingly, the applicant’s conviction by the French courts was not in breach of Article 7 § 1 of the Convention.¹⁵⁵²

¹⁵⁵² *Ibid.*, at 18 ff.

5. *The Hissène Habré case before Senegalese courts and the ECOWAS Court*

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Unlike crimes against humanity, torture was criminalized in Senegalese legislation at the time of the decisions of the Senegalese courts.¹⁵⁵³ Senegal ratified the Torture Convention in 1986. However, it was only in 1996 that Senegal adopted a definition of torture in its criminal code.¹⁵⁵⁴ Thus, at the time of the acts, torture was criminalized in Senegalese law, but only as aggravating circumstances.¹⁵⁵⁵ It is noteworthy that most of the crimes in the complaint were committed after 1987,¹⁵⁵⁶ i.e. after the ratification by Senegal of the Torture Convention. In its decision, the Dakar Court of Appeals quashed the decision of the Investigating Judge indicting Hissène Habré of complicity to crimes against humanity and torture.¹⁵⁵⁷

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The court then held that there was no provision allowing it to exercise universal jurisdiction over torture. It did not specifically exclude the retroactive application of the substantive provision on torture. It did however state:

Considérant que la matière qui nous intéresse est relative à la justice pénale ; qu'elle est bâtie sur deux grandes règles : d'une part les règles de fond qui définissent les infractions et fixent les peines et d'autre part, les règles de

¹⁵⁵³ See *Loi 96-16 du 28 août 1996 complétant l'article 295-1 du Code Pénal*. See Art. 295-1 of the Criminal Code of Senegal (on torture), French version available online at http://www.geneva-academy.ch/RULAC/pdf_state/Law-21-July-1965-on-Penal-Code.pdf. The provision was inserted by the Law no. 96-15 of 28 August 1996. See also Senegal, Dakar Court of Appeals, *Hissène Habré*, 4 July 2000, Judgment no. 135, available online in French at <http://www.asser.nl/upload/documents/20121105T030720-Cour%20dappel%20Dakar%2004-07-2000.pdf> (last visited 1 August 2017).

¹⁵⁵⁴ See Art. 295-1 of the Criminal Code of Senegal (on torture), French version available online at http://www.geneva-academy.ch/RULAC/pdf_state/Law-21-July-1965-on-Penal-Code.pdf. The provision was inserted by the Law no. 96-15 of 28 August 1996.

¹⁵⁵⁵ See Senegal, Dakar Court of Appeals, *Hissène Habré*, 4 July 2000, Judgment n° 135, available online in French at <http://www.asser.nl/upload/documents/20121105T030720-Cour%20dappel%20Dakar%2004-07-2000.pdf> (last visited 1 August 2017), which held that "*la loi 96-16 du 28 août 1996 complétant l'article 295-1 du Code Pénal le législateur sénégalais a érigé en infraction autonome les actes de torture qui jusque-là n'étaient connus que comme circonstances aggravantes des crimes ou des délits visés par l'article 288 du Code Pénal*" and that "*cette nouvelle incrimination est en conformité avec l'article 4 de la convention de New York qui oblige les états - parties à veiller à ce que tous les actes de torture constituent des infractions au regard de leur droit pénal*".

¹⁵⁵⁶ See R. Brody, 'The Prosecution of Hissene Habre - An African Pinochet', 35 *New England Law Review* (2000-2001) 321-336, at 329, footnote 33.

¹⁵⁵⁷ Senegal, Dakar Court of Appeals, *Hissène Habré*, 4 July 2000, Judgment no. 135, available online in French at <http://www.asser.nl/upload/documents/20121105T030720-Cour%20dappel%20Dakar%2004-07-2000.pdf> (last visited 1 August 2017).

forme qui déterminent la compétence, la saisine et le fonctionnement des juridictions ;

Elle a toujours manifesté son autonomie par rapport aux autres normes juridiques ; que cette particularité est due au caractère sanctionnateur du droit pénal qui tend à la protection des intérêts de la société comme ceux des individus en cause et exige un certain formalisme de procédure ;

*Considérant de ce fait que toute comparaison avec les autres branches du droit est vouée à l'échec ;*¹⁵⁵⁸

The excerpt of this judgment has been interpreted as stating that *criminal law* is exempted from the general framework, which incorporates treaties.¹⁵⁵⁹ 482

In the appeal to the Court of Cassation, the victims claimed that this passage constituted a violation of Article 79 of the Senegalese Constitution, which – like Article 55 of the French Constitution – places international treaties above domestic legislation.¹⁵⁶⁰ The Court of Cassation did not explicitly address this issue but held that Article 79 of the Constitution was not directly applicable because the execution of the Convention required legislative measures. It appears that the Senegalese Court of Cassation considered that the provisions of the Torture Convention were not self-executing.¹⁵⁶¹ It did not clearly reject the direct application of international criminal treaties in general but merely said that, in the present case, the provisions of the Torture Convention could not be applied without domestic legislation.¹⁵⁶² 483

These decisions were nationally and internationally criticized.¹⁵⁶³ It can be convincingly argued that the Senegalese courts should have taken into account the fact that “at the time of the alleged commission of the relevant facts, torture was criminalized in Senegal pursuant to a rule of international law, clearly applicable both to nationals and foreigners”.¹⁵⁶⁴ Indeed, at the time of facts, torture applicable both to nationals and foreigners had indeed been 484

¹⁵⁵⁸ *Ibid.*

¹⁵⁵⁹ See Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (The Hague: TMC Asser Press, 2006), at 46.

¹⁵⁶⁰ According to Art. 79 of the Senegalese Constitution, “Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l’autre partie”. The same text is now at Art. 98 of the Senegalese Constitution.

¹⁵⁶¹ Senegal, Court of Cassation, *Souleymane Guengueng et autres contre Hissène Habré* (arrêt no 14), 20 March 2001, available online at https://www.hrw.org/legacy/french/themes/habre-cour_de_cass.html (last visited 1 August 2017). See also Ferdinandusse, *supra* note 1556, at 46.

¹⁵⁶² Senegal, Court of Cassation, *Souleymane Guengueng et autres contre Hissène Habré*.

¹⁵⁶³ See inter alia Brody, *supra* note 1553, 321-336.

¹⁵⁶⁴ Spiga, ‘Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga’, 9 *Journal of International Criminal Justice* (2011), at 19.

criminalized under international law – at least with respect to the crimes committed after the entry into force of the Torture Convention. However, in our view, the Senegalese courts cannot be criticized for considering that a national court cannot assert its jurisdiction in the absence of domestic provisions allowing it to do so at the time, on the basis of what it considers a non-executable treaty provision. In this sense, the two aforementioned decisions of Senegalese courts correctly applied the *nullum crimen sine lege* principle.¹⁵⁶⁵

485 However, the same cannot be said about the decision of the 2010 ECOWAS Court.¹⁵⁶⁶ Indeed, in the meantime, Senegal had adapted its legislation to include universal jurisdiction over torture. Thus, arguably, the fact that at the time of the acts, torture was criminalized under international law should have led them to consider that Senegalese courts had jurisdiction to try Hissène Habré for torture.

F. Concluding remarks of section III

486 Reliance on international *jus cogens* and international customary law raises serious concerns regarding legal certainty and as such, one can understand the reluctance of national courts to apply such provisions directly.

487 However, in our view, the strict approach to non-retroactivity of substantive domestic provisions as adopted by the ECOWAS court, the French courts in the Rwandan genocide cases and the Swiss government, are too restrictive. Not only is such an interpretation not required by the principle of legality, but it may also lead to violations of the state's duty to punish serious international crimes. It is submitted that domestic courts should apply newly adopted provisions on core crimes and torture retroactively if the following conditions are fulfilled: (i) at the time when the acts were perpetrated, the elements of the crime were punishable under domestic law, as well as foreseeable and accessible to the person charged with their commission; (ii) the state has the obligation, either under international customary international law or according to a treaty that it ratified, to prosecute the crime; (iii) the offence was punishable under international law at the time of its commission;¹⁵⁶⁷ (iv)

¹⁵⁶⁵ We will come back on the issue of the lack of domestic provisions providing for universal jurisdiction in the following section. See *infra* N 453 ff.

¹⁵⁶⁶ Community Court of Justice of the Economic Community of West African States (ECOWAS), *Hissein Habré v. Republic of Senegal*, ECW/CCJ/APP/07/08, 18 November 2010, original French version, available online at <http://www.hrw.org/fr/news/2010/11/18/arr-t-cedeaoecowas-ruling-hissein-habre-c-r-publique-du-s-n-gal>; English version available online at <http://www.asser.nl/upload/documents/20120419T034816-Habre%20Ecowa%202010.pdf>.

¹⁵⁶⁷ In this sense, the incorporating legislation does not raise issues of foreseeability under human rights law, as the alleged perpetrator should have been aware of the international prohibition.

the new domestic provision contains the elements of crime of the crimes;¹⁵⁶⁸ and (v) the court determines the sentence in a manner that the penalty imposed is not heavier than the one that would have been at the time of commission of the acts according to the domestic legal provisions applicable at the time.

IV. Lack of domestic provisions providing universal jurisdiction

A. Introductory remarks

In some cases, even if international crimes have been incorporated into domestic legislation, domestic legislation does not contain a provision on universal jurisdiction. The typical case in which this arises is in respect of the crime of genocide; states incorporated definitions of genocide after ratifying the Genocide Convention but did not provide for universal jurisdiction as Article VI of the Genocide Convention only provided for territorial jurisdiction. In other cases, as is the case of crimes against humanity for instance, domestic laws contain neither a definition of crimes against humanity nor a provision providing for universal jurisdiction over those crimes. Subsection B addresses these issues and presents examples of universal jurisdiction cases in which the question of whether states can assert universal jurisdiction, in the absence of domestic provisions allowing them to do so, directly on the basis on international treaty law provision (subsection B 1)) and/or on the basis of customary international law or even general principles of law (subsection B 2)) was raised. The case of genocide will be treated separately in subsection B 3). While in many of the cases discussed in this section the states in question have now adopted universal jurisdiction provisions,¹⁵⁶⁹ the problem nevertheless remains relevant today because, as seen in Part II, a number of other states do not provide for the universality principle in their legislation or only provide for it in respect of certain crimes.¹⁵⁷⁰

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Indeed, many, and in fact most, of the states that have incorporated the universality principle into their legislation have done so recently. This is the case for instance in respect of universal jurisdiction provisions on genocide. Consequently, in a number of cases, the issue as to whether universal jurisdiction provisions may apply retroactively has been raised (subsection C).

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¹⁵⁶⁸ Indeed, in this situation, the domestic legislation merely codifies a crime that existed at the time under international law.

¹⁵⁶⁹ Many states contain a provision providing for universal jurisdiction over genocide. This is the case for example of Spain, France, Belgium (at least until 2003), Finland, Italy, Latvia, Luxembourg, the Netherlands (since 2003), Russia, Slovakia, the Czech Republic and Hungary.

¹⁵⁷⁰ See Part II.

B. The absence of domestic provisions on universal jurisdiction

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The key question arising is whether states can exercise universal jurisdiction over international crimes even in the absence of domestic provisions explicitly establishing this possibility. It is interesting to note that this exercise of universal jurisdiction is expressly provided for in Principle 3 of the Princeton Principles, which reads as follows: "With respect to serious crimes under international law as specified in Principle 2(1), national judicial organs may rely on universal jurisdiction even if their national legislation does not specifically provide for it." In our view, this is not compatible with the (national) principle of the Rule of Law and Article 6 ECHR, which guarantees everyone a fair trial by a tribunal established by law.

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The universal jurisdiction cases discussed in this subsection will address the following issues: Can universal jurisdiction be exercised directly on the basis of international treaty provisions, namely on the provisions of the Geneva Conventions and the Torture Convention (subsection 1)? Can universal jurisdiction be asserted by relying on international customary law? In particular, can universal jurisdiction be exercised over crimes against humanity in the absence of any domestic provision (subsection 2)? Can states exercise universal jurisdiction over genocide, despite the wording of Article 6 of the Genocide Convention which only provides for territorial jurisdiction (subsection 3)?

1. *The application of universal jurisdiction based on treaty provisions*

a. *The Geneva Conventions*

i. The Dutch cases

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The Dutch *Knesević* case was a landmark decision that paved the way for war crimes' trials on the basis of universal jurisdiction before the entry into force of the Dutch International Crimes Act on 1 October 2003.¹⁵⁷¹ On 11 November 1997, the Dutch Supreme Court held that the Military Court could exercise universal jurisdiction to try Darko Knenević, a Bosnian-Serb accused of having committed

¹⁵⁷¹ See Sluiter, 'Knenević', in Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), at 761; See also Section 2 of the Dutch Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law (International Crimes Act), available online in English at http://iccdb.webfactional.com/documents/implementations/pdf/Netherlands_International_Crimes_Act_2003.pdf which states: "1. Without prejudice to the relevant provisions of the Criminal Code and the Code of Military Law, Dutch criminal law shall apply to:(a) anyone who commits any of the crimes defined in this Act outside the Netherlands, if the suspect is present in the Netherlands".

war crimes in the former Yugoslavia.¹⁵⁷² It is noteworthy that at the time of the decision, crimes against humanity were not penalized in Dutch criminal law. The court applied the Criminal Act in Wartime Act, which provided for universal jurisdiction over war crimes committed outside the Netherlands.¹⁵⁷³ However, Article 1 of the Criminal Act in Wartime Act only applied to conflicts to which the Netherlands was a party.¹⁵⁷⁴ The Supreme Court dismissed this argument and found that, when drafting the Criminal Law in Wartime Act, the legislator intended to comply fully with its obligations under the Geneva Conventions. The court therefore ruled that Article 1 of the Wartime Act should be interpreted as allowing for the exercise of universal jurisdiction (Article 3) over war crimes (criminalized at Article 8 of the Criminal Act in Wartime Act – including grave breaches and violations of common Article 3 of the 1949 Geneva Conventions, regardless of where and by whom they had been committed).¹⁵⁷⁵

In 2007, in the *Afghan Asylum Seekers* case, The Hague District Court convicted two Afghan asylum seekers for violations of the laws and customs of war in Afghanistan in respect to their roles as military officials and their participation in acts of torture during the Afghan war between 1979 and 1989.¹⁵⁷⁶ The court considered that the armed conflict in Afghanistan was non-international. In both cases, the defence challenged the court's jurisdiction arguing that the Dutch courts lacked universal jurisdiction over violations of Common Article 3 of the Geneva Conventions of 1949, which applies to non-international armed conflicts.¹⁵⁷⁷ They argued that Common Article 3 of the

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¹⁵⁷² Supreme Court of the Netherlands, *Prosecution v. Darko Knezević*, 11 November 1997.

¹⁵⁷³ Section 5(1) of the Criminal Act in Wartime Act; See P.C. Tange, 'Netherlands state practice for the parliamentary year 2000–2001', 33 *Netherlands Yearbook of International Law* (2002) 191-281, at 193.

¹⁵⁷⁴ See Sluiter, 'Knezević', in Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), at 761.

¹⁵⁷⁵ *Ibid.*, at 761 and 902. See also Van Sliedregt, 'International Crimes before Dutch Courts: Recent Developments', 20 *Leiden Journal of International Law* (2007) 895-908, at 902.

¹⁵⁷⁶ See The Hague Court of Appeal, 29 January 2007, LJN: AZ7147, § 5.2; The Hague Court of Appeal, 29 January 2007, LJN: AZ7143, available online at <http://ljn.rechtspraak.nl>, English translation available online at http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/Habibullah_Jalalzoj_Appeals_Judgment.pdf, § 3. The judgement was subject to much scholarly debate. See G. Mettraux, 'Dutch Courts Universal Jurisdiction over Violations of Common Article 3 *qua* War Crimes', 4 *JICJ* (2006) 362-371; L. Zegveld, 'Dutch Cases on Torture Committed in Afghanistan: The Relevance of the Distinction between Internal and International Armed Conflict', 4(4) *JICJ* (2006) 878-880. See G. Mettraux, 'Response to the Comments by Zegveld and Ferdinandusse', 4(4) *JICJ* (2006) 884-889.

¹⁵⁷⁷ Mettraux notes that common Article 3 is applicable to both international and non-international armed conflicts. See Mettraux, 'Response to the Comments by Zegveld and Ferdinandusse', 4(4) *JICJ* (2006), at 885.

Geneva Conventions did not provide for universal jurisdiction.¹⁵⁷⁸ More generally, the defence argued that the national provisions, namely Articles 3 and 8 mentioned above, did not provide a sufficient basis for universal jurisdiction in conflicts to which the Netherlands was not a party.¹⁵⁷⁹ They also invoked the fact that in order for national courts to exercise universal jurisdiction, an authorization from a written or unwritten international rule was required; this however was not the case.¹⁵⁸⁰

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The court dismissed the first argument, on the basis that it was not because the Geneva Conventions imposed an obligation to prosecute grave breaches that they prohibited states from asserting universal jurisdiction over violations of Common Article 3. They referred to Article 146 paragraph 3 of the Fourth Geneva Convention, which provides that states “shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches”¹⁵⁸¹ and concluded that this provision therefore leaves open the possibility for prosecution under universal jurisdiction of violations of Common Article 3.¹⁵⁸² This approach was rightly criticized by legal scholars.¹⁵⁸³ Indeed, the court appears to have confused the

¹⁵⁷⁸ See The Hague District Court, *Judgment in the Case of Public Prosecutor's Office Number 09/751004-04; 09/750006-05 (Afghanistan)*, 14 October 2005, available online in English at <http://www.refworld.org/docid/440713f14.html>; Mettraux, *supra* note 1574, at 884-889.

¹⁵⁷⁹ Van Sliedregt, *supra* note 1572, at 900.

¹⁵⁸⁰ See The Hague Court of Appeal, LJN: AZ7147, 29 January 2007, § 5.2; The Hague Court of Appeal, LJN: AZ7143, 29 January 2007, § 5.2, English translation available online at http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/Habibullah_Jalalzoy_Appeals_Judgment.pdf, § 5.1: “The defence has brought up a number of pleas [...] establishment of such a jurisdiction needs an authorization pertaining to international law which can neither be found in the unwritten legislation pertaining to international law, as was also stated by the Yugoslavia Tribunal (ICTY) in its Tadić decision of October 2, 1995. In the opinion of the defence the issue in Afghanistan was at the time, in any case in as far as important to the practices suspect is charged with, not a non-international armed conflict. Therefore, the public prosecutions department, who are exercising their authority to prosecute contrary to international law, should be declared non-admissible in that prosecution.”

¹⁵⁸¹ See also Art. 49 § 3 of the First Geneva Convention, Art. 50 § 3 of the Second Geneva Convention and Art. 129 § 3 of the Fifth Geneva Convention which also provide that “Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article”.

¹⁵⁸² The Hague Court of Appeal, LJN: AZ7147, 29 January 2007; The Hague Court of Appeal, LJN: AZ7143, 29 January 2007, available at <http://ljn.rechtspraak.nl>, English translation available online at http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/Habibullah_Jalalzoy_Appeals_Judgment.pdf.

¹⁵⁸³ See Mettraux, ‘Dutch Courts Universal Jurisdiction over Violations of Common Article 3 *qua* War Crimes’, 4 *JICJ* (2006) 362-371, at 367; Zegveld, ‘Dutch Cases on Torture Committed in Afghanistan: The Relevance of the Distinction between Internal and International Armed Conflict’, 4(4) *Journal of*

obligation to criminalize an offence with the obligation, or authorization, for states to exercise universal jurisdiction.¹⁵⁸⁴ Undeniably, if common paragraph 3 can be read as criminalizing violations of Common Article 3, it does not give states universal jurisdiction – or any jurisdiction for that matter – in respect to those violations.¹⁵⁸⁵ However, the conclusion of the court is not necessarily incorrect, because, as argued in Part I, it is now admitted that states are entitled to exercise universal jurisdiction over this category of crimes.¹⁵⁸⁶ It is interesting to note that the 1995 ICTY decision, mentioned by the defence,¹⁵⁸⁷ in fact contributed to the support for the recognition of this category of war crimes as being covered by the principle of universal jurisdiction.¹⁵⁸⁸

Against this background, in our view, it is not to say that the Dutch courts could have asserted universal jurisdiction. Indeed, the reasoning of the court is questionable under the principle of the rule of law because it appears to justify the exercise of universal jurisdiction based on Common Article 3. If it is conceivable to argue that a court could base its universal jurisdiction on Articles 49 GCI, 50 GCII, 129 GCIII and 146 GCIV, it is clear that it cannot do so on the basis of Common Article 3.¹⁵⁸⁹ We would even argue that the Geneva Conventions simply do not give jurisdiction to states.¹⁵⁹⁰ They “merely” oblige or authorize states to establish and exercise universal jurisdiction for certain crimes. As rightly underlined by one scholar, “The Geneva Conventions are not, and were not intended to be, criminal codes.”¹⁵⁹¹

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International Criminal Justice (2006), at 879; Van Sliedregt, ‘International Crimes before Dutch Courts: Recent Developments’, 20 *Leiden Journal of International Law* (2007) 895-908, at 900.

¹⁵⁸⁴ See inter alia Mettraux, ‘Dutch Courts Universal Jurisdiction over Violations of Common Article 3 *qua* War Crimes’, 4 *JICJ* (2006) 362-371, at 367.

¹⁵⁸⁵ See Part I, N 147. See also in this sense Zegveld, ‘Dutch Cases on Torture Committed in Afghanistan: The Relevance of the Distinction between Internal and International Armed Conflict’, 4(4) *Journal of International Criminal Justice* (2006), at 879.

¹⁵⁸⁶ See Part I, N 147.

¹⁵⁸⁷ ICTY, Appeals Chamber, *Prosecutor v. Tadić*, Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, § 98 ff.

¹⁵⁸⁸ See Part I, N 147.

¹⁵⁸⁹ See Mettraux, *supra* note 1581, at 368.

¹⁵⁹⁰ See the language used in these provisions: “Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a ‘prima facie’ case.”

¹⁵⁹¹ See Mettraux, *supra* note 1581, at 368 and reference.

With respect to the second argument – namely that in order for national courts to exercise universal jurisdiction, an authorization from a written or unwritten international rule is required, which was not the case because it was a non-international armed conflict – the Court of Appeal concluded that the Dutch War Crimes Act provided a sufficient basis for the exercise of universal jurisdiction by the Dutch courts.¹⁵⁹² It is particularly interesting to note the way in which the court dismissed the issue of whether international law permitted the exercise of universal jurisdiction under Article 3 of the War Crimes Act. Indeed, the court dismissed this argument on constitutional grounds.¹⁵⁹³ It referred to Article 94 of the Dutch Constitution, which states that “Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or resolutions by international institutions”. According to Dutch case law,¹⁵⁹⁴ *a contrario*, this provision stipulates that customary international law in conflict with national statutory law is not applicable in the Dutch legal order.¹⁵⁹⁵ Thus, the court held:

As seems to have widely been accepted, article 94 Constitution does not allow the judge to compare to international law. [...] In the opinion of the court of appeal, in any case no sufficiently legal aspect can be derived from the stipulations of the Geneva conventions, which makes it explicitly clear that article 3 WOS [Criminal Law in Wartime Act] is contrary to the international law pertaining to these conventions. [...] In the opinion of the court of appeal no, in any case no sufficiently legal aspect can be derived from the stipulations of the Geneva conventions, which makes it explicitly clear that article 3 WOS is contrary to the international law

pertaining to these conventions. The defence [...] did refer to the general rule pertaining to international law that universal jurisdiction may only be exercised in as far as the international law authorizes this and argued that such an authorization with regard to violations of the common article 3 (in the case of non-international armed conflicts) cannot be found in the Geneva conventions; when asked, counsel confirmed that such a rule pertaining to international law cannot be found in any written provision of a treaty. Being such the state of affairs, the court of appeal does not consider itself competent

¹⁵⁹² See Zegveld, *supra* note 1582, at 901.

¹⁵⁹³ See Zegveld, *supra* note 1582, at 901.

¹⁵⁹⁴ The Court referred to a judgement of the Supreme Court of 6 March 1959 in the *Nyuagat II* case.

¹⁵⁹⁵ See Zegveld, *supra* note 1582, at 901.

to compare article 3 WOS to the – obviously unwritten – international law.¹⁵⁹⁶

The court thus concluded that it was not *competent* to “compare article 3 WOS to the – obviously unwritten – international law”.¹⁵⁹⁷ The Court of Appeal finally based its decision on the *Knesević* judgment mentioned above in order to conclude that the Dutch judge had universal jurisdiction.¹⁵⁹⁸

A question that can be raised is the following: should the court have examined if this exercise of jurisdiction was in fact permissible under international law both at the time of the decision and at the time of the alleged acts? In this regard, it is interesting to note that in her analysis of the decision, Van Sliedregt raises the question of whether a permissive rule allowing universal jurisdiction existed “in the period 1985-90, *the time of crimes in the Afghan cases*”.¹⁵⁹⁹ She does not examine whether such a permissive rule existed *at the time of the decision*, thereby suggesting that rules on universal jurisdiction are also subject to the *nullum crimen sine lege* principle. We will come back to this issue below when discussing the retroactivity of universal jurisdiction rules.

On 8 July 2008, the Dutch Supreme Court rejected the appeals of Hesamuddin Hesam and Habibullah Jalalzoy.¹⁶⁰⁰

ii. The French cases

Before discussing the French cases, it is useful to briefly describe the evolution of the legal framework regarding universal jurisdiction in French law. Only with the adoption of the 2010 French Statute was a new Article 689-11 introduced;

¹⁵⁹⁶ The Hague Court of Appeal, Judgment, LJN: AZ7147, 29 January 2007; The Hague Court of Appeal, LJN: AZ7143, 29 January 2007, available at <http://ljn.rechtspraak.nl>, English translation available online at http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/Habibullah_Jalalzoy_Appeals_Judgment.pdf, § 5.4.2.

¹⁵⁹⁷ *Ibid.*

¹⁵⁹⁸ *Ibid.*, § 6.4. According to § 5.4.4, “5.4.4 The court moreover establishes, with regard to the history of the formation of the Criminal War Act, that – as analyzed by the Supreme court in its *Knesevic II* ruling – the legislator at the time had the absolute intention to fully comply with the conventional obligation of the Geneva conventions. The main thought then was – as has to be admitted to the defence – especially the obligation to penalize grave breaches, which against the background of the then very recent worldwide conflict should not be surprising. From the verbal treatment of the legislative proposal (p. 2247 and 2251) it however also becomes clear that (also at that time) *the possibility was kept open that crimes committed in a non-international armed conflict* (this was about the coup d’état in Bolivia) *would be dealt with in this country*. Whatever it may be: the court of appeal concludes from the following legal grounds in the latter ruling of the Supreme court that it should be accepted that also in case of violations of the common article 3 there is jurisdiction.”

¹⁵⁹⁹ Van Sliedregt, *supra* note 1597.

¹⁶⁰⁰ Dutch Supreme Court, Judgement, 8 July 2008, available in Dutch online at <http://www.haguejusticeportal.net/index.php?id=9475>.

this expands French jurisdiction in order to allow the prosecution and the trial of alleged suspects of genocide, crimes against humanity and war crimes committed abroad. As mentioned above,¹⁶⁰¹ French law previously only provided for a rule – one which is maintained today – which establishes that “in accordance with the international Conventions quoted in the following articles, a person guilty of committing any of the offences listed by these provisions outside the territory of the Republic and who happens to be in France may be prosecuted and tried by French courts”.¹⁶⁰² As aforementioned,¹⁶⁰³ the Code then lists the international conventions¹⁶⁰⁴ which allow France to exercise extraterritorial jurisdiction simply because the person is in France. Furthermore, as will be seen in Section B, French courts expressly rejected universal jurisdiction on the basis of customary international law.

501 In the 1994 *Javor* case, a complaint was filed by Bosnian victims, refugees in France, against alleged Serbian perpetrators for crimes of torture, war crimes, genocide and crimes against humanity. While the judge found that French courts had no jurisdiction to try crimes of genocide and crimes against humanity, it did find that, on the basis of the Torture Convention and the four Geneva Conventions, France had jurisdiction to investigate.¹⁶⁰⁵ Both the prosecutor and the civil parties lodged an appeal against the order. On 24 November 1994, the Court of Appeal of Paris partially overturned the order, stating that French courts did not have jurisdiction for acts of torture on the basis of Articles 5 and 7 of the Torture Convention, when the defendants were not present on French territory.¹⁶⁰⁶

502 The court found that the Geneva Conventions were not directly applicable in national law and that no implementing legislation had been introduced that would allow for this. Referring to Articles 49(2) of the First Geneva Convention, 50(2) of the Second Geneva Convention, 129(2) of the Third Geneva Convention and 146(2) of the Fourth Geneva Convention, the court stated that:

[...] elles ne sont pas directement applicables en droit interne. Ces dispositions revêtent un caractère trop général pour créer directement des règles de compétence extraterritoriale en matière pénale, lesquelles doivent nécessairement être rédigées de manière détaillée et précise. En l'absence d'effet direct des dispositions des quatre conventions de Genève, relatives à

¹⁶⁰¹ See *supra* Section III B. N 338 ff.

¹⁶⁰² Art. 689-1 of the French Code of Criminal Procedure.

¹⁶⁰³ *Supra* N 338 ff.

¹⁶⁰⁴ See Arts 689-2 to 689-10 CPP. See the list of conventions *supra* note 202.

¹⁶⁰⁵ Cf. Tribunal de Grande Instance de Paris, *Ordonnance d'incompétence partielle et de recevabilité de constitution de parties civiles*, No 94 052 2002/7, 6 May 1994.

¹⁶⁰⁶ See for instance Paris Court of Appeal, Judgment, 24 November 1993.

*la recherche et la poursuite des auteurs d'infractions graves, l'article 689 du code de procédure pénale ne saurait recevoir application.*¹⁶⁰⁷

On appeal, the French Court of Cassation did not address this issue but held instead that the facts fell under the provisions of the French Law of 2 January 1995 on the implementation of the ICTY Statute, which had been adopted in the meantime.¹⁶⁰⁸ Under Articles 1 and 2 of the law, French authorities are competent to prosecute and try perpetrators only if they are present in France; this was not the case here.¹⁶⁰⁹

In the 1995 *RSF v. Mille Collines* case, the issue of direct application of international treaty rules in the absence of domestic provisions providing for universal jurisdiction was raised again. After recalling that, generally speaking, in the absence of domestic provisions, only provisions of international *treaties* but not international customary law may be directly applicable, the Paris Court of Appeal held that the “provisions of international treaties are applicable under the national legal system, on condition that: i) said treaties have been duly approved or ratified by France; ii) The provisions of those treaties have in themselves direct effect on account of their content [...]”.¹⁶¹⁰

¹⁶⁰⁷ Paris Court of Appeal, *Appel d'une Ordonnance d'incompétence partielle et de recevabilité de constitution de parties civiles*, Dossier N A94/02071, 24 November 1994.

¹⁶⁰⁸ It should be noted however that in 1995 and 1996, France adapted its legislation to include universal jurisdiction for crimes incorporated in UN Security Resolution 827 creating the International Tribunal for the Former Yugoslavia and UN Security Resolution 955 creating the International Tribunal for Rwanda (See *Loi no 95-1 du 2 janvier 1995* and *Loi no 96-432 du 22 mai 1996*, available online at <http://www.legifrance.com> (last visited 1 August 2017)). These two bills – which only have a temporary application – provide that French courts have jurisdiction as long as the perpetrator is on French territory; Huet and Koering-Joulin, *Droit pénal international*, at 211.

¹⁶⁰⁹ French Court of Cassation, *Javor*, 26 March 1996, N° du pourvoi 95-81527.

¹⁶¹⁰ See France, Paris Court of Appeal, *RSF v. Mille Collines*, 6 November 1995, English translation in Sassòli and Bouvier, *How Does Law Protect in War?*, at 2222-2223. According to original French version: “Aux termes des quatre Conventions de Genève, entrées en vigueur pour la France le 28 décembre 1951, les États parties s'engagent à prendre les mesures législatives nécessaires pour réprimer par des sanctions adéquates les infractions graves. Les articles 49 alinéa 2 de la première Convention, 50 alinéa 2 de la deuxième Convention, 129 alinéa 2 de la troisième Convention et 146 alinéa 2 de la quatrième Convention, conçus en termes identiques, énoncent: ‘Chaque partie contractante aura l'obligation de rechercher les personnes prévenues d'avoir commis ou ordonné de commettre l'une ou l'autre des infractions graves et elle devra alors les déférer à ses propres tribunaux quelle que soit leur nationalité. Elle pourra aussi, si elle le préfère et selon les conditions prévues par sa propre législation, les remettre pour Jugement à une autre partie contractante intéressée à la poursuite, pour autant que cette partie contractante ait retenu contre lesdites personnes des charges suffisantes’ Il se déduit de l'emploi des termes chaque partie contractante aura l'obligation que les obligations précitées ne pèsent que sur les Etats parties. En outre ces dispositions revêtent un caractère trop général pour créer directement des règles de compétence extra-territoriale en matière

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Thus, while the Geneva Conventions entered into force in France on 28 December 1951, the court considered that the relevant provisions on universal jurisdiction¹⁶¹¹ set out obligations which are incumbent solely upon the state parties and were “too general in nature directly to create rules governing extraterritorial jurisdiction in respect of criminal matters, as such rules must be worded in precise terms”.¹⁶¹² In addition, the Geneva Conventions were not listed in Articles 689-2 to 689-7 of the French Criminal Code of Procedure.

iii. The Swiss cases

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Until 31 December 2010, the prosecution of war crimes in Switzerland was limited to the provisions of the Swiss Military Criminal Code.¹⁶¹³ In the *Grabež* and *Niyonteze* cases, the Swiss military justice was faced with the issue of universal jurisdiction over crimes under the Geneva Conventions. Goran Grabež, a Bosnian Serb who arrived in Switzerland on 17 April 1995 and presented an asylum request, was arrested on 8 May 1995 and accused of violations of the laws and customs of war under Article 109 of the Swiss Military Criminal Code on charges of beating and injuring civilian prisoners in the camps of Omarska and Keraterm in Bosnia and Herzegovina. On 18 April 1997, the Military Tribunal held that it had jurisdiction under Articles 108(2) and 109 of the Military Criminal Code, as amended, over violations of the laws and customs of war, grave breaches of the 1949 Geneva Conventions III and IV and violations of the 1977 Additional Protocols I and II. Article 109 of the Swiss Military Code - adopted after Switzerland ratified the Geneva Conventions - provided that “Any person who violates the requirements of the international conventions on the conduct of war and the protection of war victims [or] any

pénale lesquelles doivent être énoncées avec précision. Ainsi que l'a relevé le magistrat instructeur, en l'absence d'effet direct de ces articles, l'article 689 du code de procédure pénale ne saurait recevoir application. En outre les Conventions de Genève ne figurent pas dans la liste des conventions énumérées par les articles 689-2 à 689-7 du code de procédure pénale.”

¹⁶¹¹ Arts 49(2) of GC I, 50(2) GC II, 129(2) GC III and 146(2) GC IV.

¹⁶¹² See France, Paris Court of Appeal, *RSF v. Mille Collines*, 6 November 1995, English translation in Sassòli and Bouvier, *How Does Law Protect in War?*, at 2222-2223. According to the original French version : “*Les articles 49 alinéa 2 de la première Convention, 50 alinéa 2 de la deuxième Convention, 129 alinéa 2 de la troisième Convention et 146 alinéa 2 de la quatrième Convention, conçus en termes identiques, énoncent [...] : Il se déduit de l'emploi des termes chaque partie contractante aura l'obligation que les obligations précitées ne pèsent que sur les Etats parties. En outre ces dispositions revêtent un caractère trop général pour créer directement des règles de compétence extra-territoriale en matière pénale lesquelles doivent être énoncées avec précision. Ainsi que l'a relevé le magistrat instructeur, en l'absence d'effet direct de ces articles, l'article 689 du code de procédure pénale ne saurait recevoir application. En outre les Conventions de Genève ne figurent pas dans la liste des conventions énumérées par les articles 689-2 à 689-7 du code de procédure pénale.”*

¹⁶¹³ See TRIAL, *La Lutte contre l'impunité en droit suisse : compétence universelle et crimes internationaux en droit suisse : Compétence universelle et crimes internationaux*, § 144 ff.

person who violates other recognized laws and customs of war [...] is punishable of [...] imprisonment [...]”.¹⁶¹⁴ Article 108(1) Swiss Military Code established that these provisions shall apply in all cases of international armed conflicts. According to Article 108(2), “violations of international treaties are also punishable when the latter provide for a wider scope of application”.¹⁶¹⁵ The discussion did not go much further because Grabež was acquitted on all counts for lack of sufficient evidence.¹⁶¹⁶

In the Swiss *Niyonteze* case, the courts based their jurisdiction on Articles 108(2) and 109 of the Swiss Military Code. Furthermore, unlike in the *Grabež* case, the Court also stated that Article 109 of the Swiss Military Code should be put in relation with former Article 9 of the Military Code, which provided that the Code was applicable to offences committed in Switzerland and those committed abroad.¹⁶¹⁷ The First Instance Tribunal convicted Niyonteze on all counts and sentenced him to life imprisonment. On appeal, his conviction in respect to violations of the laws of war was confirmed but he was acquitted of murder; his sentence was reduced to fourteen years’ imprisonment.¹⁶¹⁸ In its judgment, the Military Appeal Tribunal considered that it lacked jurisdiction *ratione personae* over ordinary crimes committed abroad.¹⁶¹⁹ This restriction was

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¹⁶¹⁴ My translation. According to the original French version: “*Celui qui aura contrevenu aux prescriptions de conventions internationales sur la conduite de la guerre ainsi que pour la protection de personnes et de biens, celui qui aura violé d’autres lois et coutumes de la guerre reconnues, sera, sauf si des dispositions plus sévères sont applicables, puni d’une peine privative de liberté de trois ans au plus ou d’une peine pécuniaire et, dans les cas graves, d’une peine privative de liberté de un an au moins.*”

¹⁶¹⁵ According to the original French text, “2. La violation d’accords internationaux est aussi punissable si les accords prévoient un champ d’application plus étendu.”

¹⁶¹⁶ Military Tribunal of 1st Division, Judgment, *G.*, 18 April 1997. An unofficial translation is available in Sassòli and Bouvier, *How Does Law Protect in War?*, at 2063-2070. He was awarded CHF 100’000 as compensation for wrongful pre-trial detention, which lasted 712 days (CHF 30’000 for damages and CHF 70’000 for moral damages). An appeal was lodged by the Prosecutor with respect to the amount of the compensation. The *Tribunal militaire de cassation* reduced the amount of moral damages to CHF 50’000- (*Tribunal militaire de cassation*, Judgment 5 September 1997).

¹⁶¹⁷ According to the French version of former Art. 9 of the Swiss Military Code, applicable at the time, “*Le présent code est applicable aux infractions commises en Suisse et à celles qui ont été commises à l’étranger*”. See Military Tribunal of Cassation, Judgment, 27 avril 2001, at 7, available online at <https://competenceuniverselle.files.wordpress.com/2011/08/niyonteze-tribunal-militaire-de-cassation-27-avril-2001.pdf> (last visited 1 August 2017), which states that “cette norme devant être mise en relation avec l’art. 9 CPM, qui déclare le CPM applicable aux infractions commises en Suisse et à celles qui ont été commises à l’étranger”.

¹⁶¹⁸ Military Appeal Tribunal 1A, Judgment, *Fulgence Niyonteze*, 26 May 2000.

¹⁶¹⁹ *Ibid.*, at 30.

largely approved by Swiss legal scholars.¹⁶²⁰ Indeed, it would have been contrary to the Swiss military law system¹⁶²¹ and in our view, to international law, for Swiss courts to exercise universal jurisdiction over an ordinary crime such as murder. On appeal, the Military Tribunal of Cassation essentially confirmed the conviction, except on the question of eviction.¹⁶²²

iv. The German cases

With the exception of the crime of genocide, German law had not implemented legislation over international crimes prior to the adoption of the Code of Crimes Against International Law (*Völkerstrafgesetzbuch*) of 30 June 2002. Most universal jurisdiction complaints regarding international crimes had to therefore be investigated and prosecuted on the basis of crimes defined in the German Criminal Code. German courts based their universal jurisdiction on Section 6(9) of the German Criminal Code; this provides that German law is applicable to offences which on the basis of an international agreement binding on the Federal Republic of Germany must be prosecuted even though committed abroad. In 1997, Nikola Djajić, a Bosnian Serb from the Dobojo region who was the leader of a paramilitary group located in his native area, was convicted on war crimes charges (for 14 cases of aiding and abetting murder, and 1 case of attempted murder) by the Supreme Court of Bavaria and was sentenced to 5 years' imprisonment. The court referred to the 1949 Geneva Convention IV and the grave breaches regime. It added that the prosecution of war criminals was "in the interest of the international community as a whole", and not only in the particular interest of Germany. It further noted that: "Article 146 [of the 1949 Geneva Convention IV], in its paragraph 2, obliges each State party to the Convention 'to search for persons alleged to have committed ... such grave breaches'. It had to 'bring such persons, regardless of their nationality, before its own courts'." ¹⁶²³ Likewise, in the 1999 *Sokolović* case, the courts applied the Geneva Convention IV, to which both Germany and Bosnia were parties.¹⁶²⁴ Sokolović was sentenced to nine years' imprisonment. He filed an appeal,

¹⁶²⁰ See Henzelin, 'La compétence universelle et l'application du droit international pénal en matière de conflits armés – la situation en Suisse', in L. Burgogne-Larsen, *La répression internationale du génocide rwandais* (Bruxelles: Bruylant, 2003) 155-174, at 159; see M. Sassòli, 'Le génocide rwandais, la justice militaire suisse et le droit international', *Revue suisse de droit international public et de droit européen* (2002)151-178, at 169.

¹⁶²¹ See Henzelin, *supra* note 1620, at 159 ; Military Appeal Tribunal 1A, Judgment, *Fulgence Niyonteze*, 26 May 2000, at 30-31.

¹⁶²² Military Tribunal of Cassation, Judgment, *Fulgence Niyonteze*, 27 avril 2001.

¹⁶²³ Germany, Supreme Court of Bavaria, *Djajić* case, Judgement, 23 May 1997; See also ICRC, 'Germany: National case law', excerpts in English available online at https://www.icrc.org/customary-ihl/eng/docs/v2_cou_de_rule157 (last visited 1 August 2017).

¹⁶²⁴ See Geneuss, 'Sokolovic', in Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), at 928-929.

arguing that German courts did not have jurisdiction; the Federal High Court rejected his appeal and confirmed the ruling. In these judgments, notwithstanding that Germany had not established any provisions defining war crimes, there was established a domestic provision that allowed German courts to exercise universal jurisdiction. One could say that Germany accepted the direct application of substantive international criminal law by a general rule of reference. However, while the perpetrators were convicted of crimes (according to international crimes), the applicable penalties were those provided for in the ordinary domestic criminal code. This combination of international and national law is questionable with regard to the legality principle. In our view, it is not contrary to the *nulla poena sine lege* principle because the penalties applied to the perpetrators were those provided for at the time of commission of the crimes.

b. The Torture Convention

In the French 1995 *RSF v. Mille Collines* case, the courts rejected the direct application of international treaty rules for grave breaches of the Geneva Conventions in the absence of domestic provisions providing for universal jurisdiction. However, with respect to torture, the Paris Court of Appeal held that French courts were competent, because universal jurisdiction was provided for in domestic legislation at former Article 689-2 of the French Code of Criminal Procedure which expressly referred to the 1984 Torture Convention¹⁶²⁵:

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En revanche, pour l'application de la Convention de New-York du 10 décembre 1984 contre la torture et autres peines ou traitements cruels, inhumains ou dégradants une loi d'adaptation a introduit un nouvel article 689-2 dans le code de procédure pénale. Selon les dispositions de ce texte, peut être poursuivie et jugée par les juridictions françaises toute personne qui s'est rendue coupable de torture si elle se trouve en France.

*Dès lors c'est à bon droit que le juge d'instruction n'a pas a priori rejeté sa compétence pour connaître des faits dénoncés sur le fondement de la Convention de New-York du 10 décembre 1984.*¹⁶²⁶

¹⁶²⁵ Between 1 March 1994 and 24 June 1999, Art. 189-2 provided that "*Pour l'application de la convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, adoptée à New York le 10 décembre 1984, peut être poursuivie et jugée dans les conditions prévues à l'article 689-1 toute personne coupable de tortures au sens de l'article 1er de la convention.*" Former Art. 689-1 provided that "*En application des conventions internationales visées aux articles suivants, peut être poursuivie et jugée par les juridictions françaises, si elle se trouve en France, toute personne qui s'est rendue coupable hors du territoire de la République de l'une des infractions énumérées par ces articles. Les dispositions du présent article sont applicables à la tentative de ces infractions, chaque fois que celle-ci est punissable.*"

¹⁶²⁶ See France, Paris Court of Appeal, *RSF v. Mille Collines*, 6 November 1995, available at <http://repositories.lib.utexas.edu/bitstream/handle/2152/5252/2235.pdf?sequence=1>.

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The issue of the direct application of the Torture Convention was however an issue in the *Hissène Habré* case before the Senegalese courts.¹⁶²⁷ While Senegal ratified the Torture Convention, which entered into force on 26 June 1987, it only implemented legislation in 1996, without providing for universal jurisdiction. In its decision of 4 July 2000, the Dakar Appeals Court quashed the indictment of Hissène Habré for torture, stating that pursuant to the Code of Criminal Procedure, Senegalese judges could not assert jurisdiction over acts of torture committed by a foreigner abroad. The legislator should have modified Article 669 of the Senegalese Code of Procedure to include torture as a crime over which the Senegalese courts could exercise universal jurisdiction. The court held that the rules on criminal jurisdiction were rules of “ordre public” and that the Investigating Judge had violated them.¹⁶²⁸

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It is interesting to note that in its reasoning the court referred to the French legislation, which had, since 1 March 1994, criminalized torture, and had also adopted specific provisions granting French courts universal jurisdiction over torture.¹⁶²⁹ Furthermore, it underlined the particularity of domestic *criminal* law

¹⁶²⁷ On the details of the case, see *supra* N. 445 ff.

¹⁶²⁸ See Senegal, Dakar Court of Appeals, *Hissène Habré*, 4 July 2000, Judgment no. 135, available online in French at <http://www.asser.nl/upload/documents/20121105T030720-Cour%20dappel%20Dakar%2004-07-2000.pdf> (last visited 1 August 2017): “*Considérant que l'article 5 de la même convention [Torture Convention] prescrit que les états parties doivent prendre les mesures nécessaires pour établir leur compétence juridictionnelle ; [...]* *Considérant que le législateur sénégalais devrait parallèlement à la réforme entreprise dans le Code Pénal apporter des modifications à l'article 669 du Code de Procédure Pénale en y incluant l'incrimination de torture, qu'en le faisant il se mettrait en harmonie avec les objectifs de la convention et reconnaîtrait par conséquent le principe de la compétence universelle ; [...]* *Considérant qu'il résulte de ce qui précède que les juridictions sénégalaises ne peuvent connaître des faits de torture commis par un étranger en dehors du territoire sénégalais quelque soit les nationalités des victimes, que le libellé de l'article 669 du Code de Procédure Pénale exclut cette compétence ; Considérant que les règles de compétence sont d'ordre public, qu'en inculpant Hissène Habré de complicité de crimes contre l'humanité et d'actes de torture et de barbarie, le juge d'instruction a manifestement violé les règles de compétence matérielle et territoriale.”*

¹⁶²⁹ Senegal, Dakar Court of Appeals, *Hissène Habré*, 4 July 2000, Judgment no. 135, available online in French at <http://www.asser.nl/upload/documents/20121105T030720-Cour%20dappel%20Dakar%2004-07-2000.pdf> (last visited 1 August 2017): “*Considérant que le législateur français après l'adoption de l'article 222-1 du Code Pénal Français réprimant la torture a voté la loi du 16 décembre 1992 entrée en vigueur le 1er mars 1994 relative au titre Xe se rapportant aux infractions commises hors du territoire français ; qu'en effet l'article 689 (C.P.P. français) dispose que les auteurs ou complices d'infractions commises hors du territoire de la République peuvent être poursuivis et jugés par les juridictions françaises soit lorsque, conformément aux dispositions du titre Ier du Code Pénal ou d'un autre texte législatif, la loi française est applicable soit lorsqu'une convention internationale donne compétence aux juridictions françaises pour connaître de l'infraction ; L'article 689 - 1 cite en*

in comparison to other branches of law. It also drew a clear distinction between the universal *incrimination* of crimes and universal *jurisdiction*.¹⁶³⁰

On 20 March 2001, the Senegalese Court of Cassation confirmed the ruling of the Indictment division, stating *inter alia* that “no procedural text confers on Senegalese courts universal jurisdiction to prosecute and judge, if they are found on the territory of the Republic, presumed perpetrators of or accomplices in acts [of torture] ... when these acts have been committed outside Senegal by foreigners; the presence in Senegal of Hissène Habré cannot in itself justify the proceedings brought against him”.¹⁶³¹ In its decision, the court thus considered that while Senegal is a monist system, Article 5(2) of the Torture Convention could not be applied directly.¹⁶³²

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application des conventions internationales visées aux articles suivants :peut être poursuivi et jugé par la juridiction française si elle se trouve en France, toute personne qui s'est rendue coupable alors du territoire de la République de l'une des infractions visée par ces articles ; Et l'article 689- 2 poursuit: pour l'application de la convention contre la torture... adoptée à New York le 10 décembre 1984, peut être poursuivie et jugée dans les conditions prévues à l'article 689-1, toute personne coupable de torture au sens de l'article 1er de la convention."

¹⁶³⁰ See Senegal, Dakar Court of Appeals, *Hissène Habré*, 4 July 2000, Judgment n° 135, available online in French at <http://www.asser.nl/upload/documents/20121105T030720-Cour%20dappel%20Dakar%2004-07-2000.pdf> (last visited 1 August 2017). According to the Court, “[*La justice*] a toujours manifesté son autonomie par rapport aux autres normes juridiques ; que cette particularité est due au caractère sanctionnateur du droit pénal qui tend à la protection des intérêts de la société comme ceux des individus en cause et exige un certain formalisme de procédure ; [...] toute comparaison avec les autres branches du droit est vouée à l'échec, [...] l'arrêt cité pour soutenir la compétence universelle ne saurait prospérer en l'espèce, que l'incrimination universelle ne peut se confondre avec la compétence universelle.”

¹⁶³¹ See translation by the Committee Against Torture, *Suleyman Guengueng et al. v. Senegal*, Communication No. 181/2001, U.N. Doc. CAT/C/36/D/181/2001 (2006), 19 May 2006, available online at <http://www1.umn.edu/humanrts/cat/decisions/181-2001.html> (last visited 1 August 2017).

¹⁶³² See Sénégal, Court of Cassation, Judgment n° 14, 20 March 2001, *Hissène Habré*, available in French online at https://www.hrw.org/legacy/french/themes/habre-cour_de_cass.html (last visited on 1 August 2017), The Court held: “Attendu [...] que l'article 5-2 de la Convention de New-York du 10 décembre 1984 contre la torture et autres peines ou traitements cruels inhumains ou dégradants fait peser sur chaque Etat partie l'obligation de prendre des mesures nécessaires pour établir sa compétence aux fins de connaître des infractions visées à l'article 4 dans le cas où l'auteur présumé de celles-ci se trouve sur tout territoire sous sa juridiction et où ledit Etat ne l'extrade pas; qu'il en résulte que l'article 79 de la Constitution ne saurait recevoir application dès lors que l'exécution de la Convention nécessite que soient prises par le Sénégal des mesures législatives préalables ; Qu'aucun texte de procédure ne reconnaît une compétence universelle aux juridictions sénégalaises en vue de poursuivre et de juger, s'ils sont trouvés sur le territoire de la République, les présumés auteurs ou complices de faits qui entrent dans les prévisions de la loi du 28 août 1996 portant

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Indeed, Article 79 of the Senegalese Constitution does provide that treaties that have been ratified are automatically incorporated into national law. However, this is only the case if they are self-executing. As expressly recognized by the Committee Against Torture, the Torture Convention – at least Articles 5(2) and 7 thereof – are not self-executing.¹⁶³³ In our view, the courts were right to reject the complaint because they could not assert universal jurisdiction in the absence of domestic legislation allowing them to do so. As rightly underlined by the Dakar Court of Appeal, the legislator should have provided for universal jurisdiction over torture, according to the obligations established under the Torture Convention.¹⁶³⁴ Implicitly, the court appears to say that it is not up to the judge to fill this “lacuna”.¹⁶³⁵ As the ICJ rightly held in its decision in the *Belgium v. Senegal* case, “by not adopting the necessary legislation until 2007, Senegal delayed the submission of the case to its competent authorities for the purpose of prosecution. Indeed, the Dakar Court of Appeal was led to conclude that the Senegalese courts lacked jurisdiction to entertain proceedings against Mr. Habré, who had been indicted for crimes against humanity, acts of torture and barbarity, in the absence of appropriate legislation allowing such proceedings within the domestic legal order”.¹⁶³⁶

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Following these decisions, an association of Chadian victims lodged a complaint against Senegal before the Committee Against Torture; it alleged violations of Article 5(2) and Article 7 of the Torture Convention, which had been ratified by Senegal. On 19 May 2006, the Committee against Torture concluded that Senegal had violated those articles.¹⁶³⁷ Senegal proceeded to

adaptation de la législation sénégalaise aux dispositions de l'article 4 de la Convention lorsque ces faits ont été commis hors du Sénégal par des étrangers."

¹⁶³³ Committee Against Torture, *Suleymane Guengueng et al. v. Senegal*, Communication No. 181/2001, U.N. Doc. CAT/C/36/D/181/2001, 19 May 2006, available online at <http://www1.umn.edu/humanrts/cat/decisions/181-2001.html> (last visited 1 August 2017), at § 7.11 and 7.13.

¹⁶³⁴ Senegal, Dakar Court of Appeals, Judgment no. 135, *Hissène Habré*, 4 July 2014: “The Senegalese legislature should, in conjunction with the reform undertaken to the Penal Code, make amendments to Article 669 of the Code of Criminal Procedure [on jurisdiction for crimes committed abroad] by including therein the offence of torture, whereby it would bring itself into conformity with the objectives of the Convention”, translation in ICJ, Judgment, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, 20 July 2012, § 76.

¹⁶³⁵ See in this sense, M. Henzelin, ‘Droit international pénal et droits pénaux étatiques : le choc des cultures’, in Henzelin/Roth (eds), *Le droit pénal à l'épreuve de l'internationalisation* (Paris, Geneva, Brussels : LGDJ, Georg, Bruylant, 2002), at 69-118

¹⁶³⁶ Emphasis added by the author. ICJ, Judgment, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, 20 July 2012, § 76.

¹⁶³⁷ See Committee Against Torture, *Suleymane Guengueng et al. v. Senegal*, Communication No. 181/2001, U.N. Doc. CAT/C/36/D/181/2001 (2006), 19 May 2006, available online at: <http://www1.umn.edu/humanrts/cat/decisions/181-2001.html> (last visited 1 August 2017), § 9.12:

adopt laws incorporating ICC crimes into its penal code and providing for universal jurisdiction over those crimes and the crime of torture. As mentioned *supra*, the Senegalese Constitution was also amended, incorporating the principle of *nullum crimen sine lege* laid down in Article 15 of the ICCPR.¹⁶³⁸ The issue of the retroactive application of these provisions was then addressed in the ECOWAS Court decision (see *infra*. C. 2 d.).

2. *The application of universal jurisdiction based on customary international law*

a. *The UK Pinochet case*

While the case essentially focused on the question of whether extraterritorial torture was a crime under UK law, the issue of whether universal jurisdiction could be asserted over crimes under customary international law in the absence of statutory provision, was also raised in the UK *Pinochet (No.3)* case.¹⁶³⁹ It is noteworthy that the Republic of Chile accepted that “by 1973 the use of torture by state authorities was prohibited by international law, and that the prohibition had the character of *jus cogens* or obligation *erga omnes*”.¹⁶⁴⁰ Nevertheless, it insisted that this did not confer universal jurisdiction. The issue of universal jurisdiction, based on international customary law, was not expressly debated by most of the House of Lords. It has therefore been said that *Pinochet (No.3)* was inconclusive on the issue of the exercise of universal jurisdiction based on international customary law.¹⁶⁴¹ This seems however to have been rejected – at least implicitly – by some of the Lords. Lord Browne-Wilkinson, for instance, stated that he had “doubt that long before the Torture Convention of 1984 state torture was an international crime in the highest sense”¹⁶⁴² but concluded that customary international law did not give courts universal jurisdiction.¹⁶⁴³

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“The Committee against Torture, acting under article 22, paragraph 7, of the Convention, concludes that the State party has violated article 5, paragraph 2, and article 7 of the Convention.”

¹⁶³⁸ See Spiga, ‘Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga’, 9 *Journal of International Criminal Justice* (2011), at 7; See *Loi constitutionnelle n. 2008-33 du 7 août 2008 modifiant les articles 9 et 25 et complétant les articles 562 et 92 de la Constitution* (Constitutional Law no. 2008-33 of 7 August 2008 amending Arts 9 and 25 and supplementing Arts 562 and 92 of the Constitution), 6420 *Journal Officiel de la République du Sénégal*, 8 August 2008, available online at <http://www.jo.gouv.sn/spip.php?article7026> (last visited 1 August 2017).

¹⁶³⁹ See R. O’Keefe, ‘Customary International Crimes in English Courts’, 72(1) *British Yearbook of International Law* (2001) 293-335.

¹⁶⁴⁰ United Kingdom House of Lords, ‘Regina v. Bartle and the Commissioner of Police for the Metropolis and others Ex Parte Pinochet (N°3)’, 38 *International Legal Materials* (1999) 581-663, at 649.

¹⁶⁴¹ O’Keefe, *supra* note 1639, at 301.

¹⁶⁴² United Kingdom House of Lords, *supra* note 1640, at 590.

¹⁶⁴³ United Kingdom House of Lords, *supra* note 1640, at p. 618.

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Lord Millet, in his dissenting opinion, argued that English courts had universal jurisdiction over international crimes under customary international law. He held:

In my opinion, crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a *jus cogens*. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order.¹⁶⁴⁴

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He concluded that both criteria were satisfied in the present case.¹⁶⁴⁵ He went on to state:

Every state has jurisdiction under customary international law to exercise extra-territorial jurisdiction in respect of international crimes which satisfy the relevant criteria. Whether its courts have extra-territorial jurisdiction under its internal domestic law depends, of course, on its constitutional arrangements and the relationship between customary international law and the jurisdiction of its criminal courts. *The jurisdiction of the English criminal courts is usually statutory, but it is supplemented by the common law. Customary international law is part of the common law, and accordingly I consider that the English courts have and always have had extra-territorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law. [...]*¹⁶⁴⁶

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Furthermore, he provided that torture as an instrument of state policy “had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984 [and] consider[ed] that it had done so by 1973”.¹⁶⁴⁷ He thus concluded that “the courts of this country already possessed [at

¹⁶⁴⁴ *Ibid.*, at 649.

¹⁶⁴⁵ *Ibid.*, at 649-650: “Isolated offences, even if committed by public officials, would not satisfy these criteria. The first criterion is well attested in the authorities and text books: for a recent example, see the judgment of the international tribunal for the territory of the former Yugoslavia in *Prosecutor v. Anto Furundzija* (unreported) given on 10 December 1998, where the court stated: “At the individual level, that is, of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every state is entitled to investigate, prosecute, and punish or extradite individuals accused of torture who are present in a territory under its jurisdiction. The second requirement is implicit in the original restriction to war crimes and crimes against peace, the reasoning of the court in *Eichmann*, and the definitions used in the more recent Conventions establishing ad hoc international tribunals for the former Yugoslavia and Rwanda.”

¹⁶⁴⁶ United Kingdom House of Lords, *supra* note 1640, at 650.

¹⁶⁴⁷ Emphasis added by the author.

the time of the commission of the crime] extra-territorial jurisdiction in respect of torture and conspiracy to torture on the scale of the charges in the present case and did not require the authority of statute to exercise it"¹⁶⁴⁸

Again, it is interesting to note that the House of Lords examined whether English courts had universal jurisdiction at the time of the commission of the crime, thereby implying that the legality principle also applies to jurisdictional rules.

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b. *The French cases*

In the *Javor* case, the French Investigating judge held that "universal principles defining crimes against humanity as an international crime are not sufficient to establish [universal] jurisdiction of the French courts".¹⁶⁴⁹ The Court of Appeal upheld this conclusion.¹⁶⁵⁰

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As noted above, the French courts confirmed the rejection of universal jurisdiction based on international customary law in the 1995 *RSF v. Mille Collines* case. In their appeal, the civil petitioners argued that the French courts had universal jurisdiction over genocide, crimes against humanity and war crimes based on international customary law.¹⁶⁵¹ The Paris Court of Appeal held that it did not have jurisdiction because "in the absence of provisions of domestic law, international custom cannot have the effect of extending extraterritorial jurisdiction of the French courts".¹⁶⁵²

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¹⁶⁴⁸ United Kingdom House of Lords, *supra* note 1640, at 581.

¹⁶⁴⁹ See Tribunal de Grande Instance de Paris, *Ordonnance d'incompétence partielle et de recevabilité de constitution de parties civiles*, No. 94 052 2002/7, 6 May 1994, available online in French at http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/JAVOR1994.pdf: "*Attendu que si le requérant souligne justement l'existence de principes universels définissant le crime contre l'humanité comme un crime international, ces seuls principes ne sont pas suffisants pour fixer la compétence juridictionnelle des Tribunaux Français.*" English translation in Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, at 66.

¹⁶⁵⁰ See Paris Court of Appeal, *Appel d'une Ordonnance d'incompétence partielle et de recevabilité de constitution de parties civiles*, Dossier N A94/02071, 24 November 1994: "*le magistrat instructeur a, à juste titre, relevé que les crimes contre l'humanité définis et réprimés par les nouveaux articles 211-1 et 213-5 du code pénal n'étaient régis par aucune règle dérogatoire de compétence.*"

¹⁶⁵¹ According to the original French version, "Dans son mémoire, la partie civile invoque en outre la coutume internationale pour justifier la compétence des juridictions françaises en matière de génocide, de crimes de guerre et de crimes contre l'humanité."

¹⁶⁵² See France, Paris Court of Appeal, *RSF v. Mille Collines*, 6 November 1995, English translation in Sassòli and Bouvier, *How Does Law Protect in War?*, at 2222-2223. As mentioned above (note 578), according to the original French version, available at <http://repositories.lib.utexas.edu/bitstream/handle/2152/5252/2235.pdf?sequence=1> (last visited 1 August 2017): "*Mais la Cour*

In the *Munyeshyaka* case, the Investigating Judge held that he had no jurisdiction over war crimes, crimes against humanity and genocide on the basis of Articles 211-1 ff. of the French Penal Code, of the Genocide Convention, and the four Geneva Conventions.¹⁶⁵³ He held that he only had jurisdiction over crimes of torture. On appeal, the Nimes Appeals Court held that the acts only amounted to genocide and complicity in genocide as defined and that the French courts lacked jurisdiction over genocide since the Genocide Convention only gave jurisdiction to the courts of the territorial state.¹⁶⁵⁴ As mentioned above,¹⁶⁵⁵ on appeal, the French Court of Cassation quashed the decision and held inter alia that the facts fell under the French Law n° 96-432 of 22 May 1996, adopted in the meantime, on the implementation of the ICTR Statute.¹⁶⁵⁶ It held that, according to Articles 1 and 2 of this law, perpetrators found in France could be prosecuted for grave breaches, crimes against humanity and genocide.¹⁶⁵⁷ These decisions all show that the French courts do not accept universal jurisdiction based on customary international law.¹⁶⁵⁸

relève, qu'en l'absence de dispositions de droit interne, la coutume internationale ne saurait avoir pour effet d'étendre la compétence extra-territoriale des juridictions françaises."

¹⁶⁵³ French Court of Cassation, Criminal Chamber, *Munyeshyaka*, N° 96-82491, 6 January 1998, available online in French at <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007069907&dateTexte=> (last visited 1 August 2017).

¹⁶⁵⁴ See Cassese, 'Munyeshyaka', in Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), at 828-829.

¹⁶⁵⁵ *Supra* N 432 ff.

¹⁶⁵⁶ French Court of Cassation, Criminal Chamber, *Munyeshyaka* N° 96-82491, 6 January 1998, available online in French at <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007069907&dateTexte=> (last visited 1 August 2017).

¹⁶⁵⁷ French Court of Cassation, Criminal Chamber, *Munyeshyaka* N° 96-82491, 6 January 1998, available online in French at <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007069907&dateTexte=> (last visited 1 August 2017): "*Vu lesdits articles, ensemble les articles 112-2, 1er du Code pénal, 1 et 2 de la loi n° 96-432 du 22 mai 1996, portant adaptation de la législation française aux dispositions de la résolution 955 du conseil de sécurité des Nations Unies, instituant un tribunal international en vue de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire, commis en 1994 sur le territoire du U... ; Attendu que, selon les articles 1er et 2 de la loi du 22 mai 1996 précitée, les auteurs ou complices des actes qui constituent, au sens des articles 2 à 4 du statut du tribunal international, des infractions graves aux Conventions de Genève du 12 août 1949, des violations des lois ou coutumes de guerre, un génocide ou des crimes contre l'humanité, peuvent, s'ils sont trouvés en France, être poursuivis et jugés par les juridictions françaises, en application de la loi française."*

¹⁶⁵⁸ B. Stern, 'In re Javor. In re Munyeshyaka. Universal jurisdiction over crimes against humanity under French law – graves breaches of the Geneva Conventions of 1949 – genocide – torture – human rights violations in Bosnia and Rwanda', 93(2), *The American Journal of International Law* (April 1999) 525-529, at 529.

c. *The Scilingo case in Spanish courts*

In the *Scilingo* case, in addition to the fact that crimes against humanity were not established as such in domestic law at the time of commission of the acts, the provision on universal jurisdiction applicable at the time – Article 23(4) of the *Ley Orgánica del Poder Judicial* (hereinafter ‘Spanish Organic Law on the Judiciary’, LOPJ), LOPJ – did not grant Spanish courts universal jurisdiction over crimes against humanity.¹⁶⁵⁹ This is why the charges initially brought against Scilingo amounted to those of genocide and torture. Despite this, in a historical decision, and in order to assert its jurisdiction, the *Audiencia Nacional* held that Spanish courts had universal jurisdiction over crimes against humanity, notwithstanding that those crimes were not listed in Article 23(4) LOPJ and that an obligation to prosecute crimes against humanity on the basis of universal jurisdiction was not stipulated in any international treaty.¹⁶⁶⁰ In the court’s opinion, the international rules prohibiting crimes against humanity are peremptory norms (*jus cogens*), which impose *erga omnes* obligations, and as a consequence, a universal claim for their repression arises.¹⁶⁶¹ Basically, the court seems to have concluded that since crimes against humanity are crimes under international law, this automatically gives courts the power to exercise universal jurisdiction. This raises at least two issues. Firstly, it gives rise to the controversial issue of whether the fact that an offence constitutes an international crime or *jus cogens* crime means that it is automatically subject to universal jurisdiction.¹⁶⁶² Secondly, it gives rise to the question of whether, if – as submitted in Part I – crimes against humanity are in fact subject to universal jurisdiction under international law, this constitutes a sufficient legal basis for courts to try a person for that crime on the basis of universal jurisdiction, without violating the legality principle.

The Supreme Court did not adopt the same reasoning as the *Audiencia Nacional* but nevertheless concluded that the Spanish courts had jurisdiction. It accepted an extension of the *jurisdiction* of the Central Criminal Court by applying Article 23(4) by analogy to crimes against humanity: if crimes of genocide and war crimes enabled the Central Criminal Court to exercise universal jurisdiction, *a fortiori*, Spanish courts should be competent to prosecute crimes against humanity, even though they were not specifically

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¹⁶⁵⁹ See Art. 23(3) LOPJ.

¹⁶⁶⁰ All documents of the *Scilingo* case are available in Spanish online at <http://www.derechos.org/nizkor/espana>; Gil, “The Flaws of the Scilingo Judgment”, p. 1089; Moltó, “Causes and Initial Effects of the Spanish Organic Law 1/2009 Reforming the Principle of Universal Jurisdiction in Spain”, p. 24 and 28.

¹⁶⁶¹ Pinzauti, “An Instance of Reasonable Universality: The Scilingo Case”, 3 *Journal of International Criminal Justice* (2005) 1082-1091, at 1095.

¹⁶⁶² See for instance Randall, ‘Universal Jurisdiction under International Law’, 66 *Texas Law Review* (1988) 785-851, at 823.

mentioned in the wording of that norm.¹⁶⁶³ A number of judges dissented, arguing that the Supreme Court should have declared that it did not have jurisdiction.¹⁶⁶⁴

3. *Universal jurisdiction and Article 6 of the Genocide Convention*

a. *Cases in which state legislation does not provide for universal jurisdiction over genocide*

i. Some French cases

525 In the *Javor* case, the *Tribunal de Grande Instance de Paris* rejected the civil party claims that the French courts had jurisdiction to try crimes of genocide.¹⁶⁶⁵ It stated that Article VI of the Genocide Convention only provided for territorial jurisdiction or for the jurisdiction of an international tribunal but did not provide for universal jurisdiction in municipal courts.¹⁶⁶⁶ The Paris Court of Appeal upheld the ruling concerning genocide.¹⁶⁶⁷ However, it was not discussed in the very short judgment of the Court of Cassation.¹⁶⁶⁸ The French Court of Appeals rendered a similar judgment in the *Reporters sans frontières v. Mille Collines* case.¹⁶⁶⁹ The Paris Court of Appeals held:

S'agissant de la Convention du 9 décembre 1948 pour la répression du crime de génocide, elle prévoit dans son article 6 la traduction des coupables présumés devant une juridiction internationale qui n'a jamais été créée ou devant les juridictions sur le territoire duquel l'infraction a été commise.

¹⁶⁶³ A. Garrido Muñoz, 'No dedoblamiento funcional ? Eluding avant-garde International Human Rights Law in Spain: Strategies and Judicial Parallelisms', 23 *International Law, Revista Colombiana de Derecho Internacional* (2013) 153-202, at 163; See Supreme Court, *Scilingo Manzorro*, Judgment on appeal/798, 1 October 2007.

¹⁶⁶⁴ See dissenting opinions of Judges Varela Castro, Maza Martín and Marchena Gómez, Supreme Court, *Scilingo Manzorro (Adolfo Francisco) v Spain*, Appeal judgment, Case No 798, 1 October 2007.

¹⁶⁶⁵ France, *Tribunal de Grande Instance de Paris, Ordonnance d'incompétence partielle et de recevabilité de constitution de parties civiles*, No 94 052 2002/7, 6 May 1994.

¹⁶⁶⁶ Cf. *Tribunal de Grande Instance de Paris, Ordonnance d'incompétence partielle et de recevabilité de constitution de parties civiles*, No 94 052 2002/7, 6 May 1994 ; See also B. Stern, 'In re Javor. In re Munyeskaya. Universal jurisdiction over crimes against humanity under French law – graves breaches of the Geneva Conventions of 1949 – genocide – torture – human rights violations in Bosnia and Rwanda', 93(2) *The American Journal of International Law* (April 1999) 525-529.

¹⁶⁶⁷ Paris Court of Appeal, *Appel d'une ordonnance d'incompétence partielle et de recevabilité de constitution de parties civiles, Javor*, N A94/0271, 25 November 1994.

¹⁶⁶⁸ French Court of Cassation, *Javor*, N° 95-81527, 26 March 1996.

¹⁶⁶⁹ Paris Court of Appeals, *Appel d'une ordonnance d'incompétence partielle et d'irrecevabilité de constitution de partie civile*, 6 novembre 1995.

Dès lors le magistrat instructeur ne pouvait qu'exclure son application dans la présente affaire relative à des faits commis au Rwanda.

As noted, the Court of Cassation did not address this issue but rejected the appeal on the basis that the French Law of 2 January 1995 on the implementation of the ICTR Statute – which had been adopted in the meantime – required the presence of the suspect on the territory, a requirement which was not satisfied in this case.¹⁶⁷⁰

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The Nimes Court of Appeals held a similar position in the *Munyeshyaka* case. The court held that the facts imputed to *Munyeshyaka* amounted to genocide and complicity to genocide as defined by Article 211(1) of the French Criminal Code and the Genocide Convention. However, since the 1948 Genocide Convention only granted jurisdiction to territorial courts, the court considered that it lacked jurisdiction.¹⁶⁷¹

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ii. The Australian *Nulyarimana* case

The issue was raised in the 1999 *Nulyarimana* judgment. Australia, although a party to the Genocide Convention since 1949,¹⁶⁷² did not criminalize genocide in its domestic law until 2002 when it adopted legislation implementing the Rome Statute. Thus, at the time of the judgment, genocide had not been criminalized in domestic law and Australian law had not expressly provided for universal jurisdiction over it. It was “accepted by all parties that under customary international law there is an international crime of genocide, which has acquired the status of *jus cogens* or a peremptory norm”.¹⁶⁷³ The appellants argued that this meant that states could exercise universal jurisdiction over genocide.¹⁶⁷⁴ The Supreme Court of Australia held that while genocide was prohibited by an international peremptory norm and by the Genocide Convention Australian courts lacked jurisdiction because no legislation had been passed providing for universal jurisdiction.¹⁶⁷⁵ Interestingly, in the decision, the judges (rightly) noted that in the *Eichmann* case, the offences, as well as universal jurisdiction, were laid down in a law, namely the *Nazi and Nazi Collaborators (Punishment) Law 1950*;¹⁶⁷⁶ this was to be contrasted with the case before it. Lord Whitlam held:

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¹⁶⁷⁰ See French Court of Cassation, *Javor*, N° 95-81527, 26 March 1996.

¹⁶⁷¹ Cassese, ‘Munyeshyaka’, in Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), at 829. As seen *supra*, the decision was quashed by the French Court of Cassation.

¹⁶⁷² See Saul, ‘The International Crime of Genocide in Australian Law’, 22 *Sydney Law Review* (2000) 527-559.

¹⁶⁷³ See Federal Court of Australia, *Nulyrimana v. Thompson* [1999] FCA 1192, § 36.

¹⁶⁷⁴ *Ibid.*

¹⁶⁷⁵ *Ibid.*, § 20 ff.

¹⁶⁷⁶ *Ibid.*, § 42: “I am unable to read the judgment of the Supreme Court of Israel as suggesting that the doctrine of universal jurisdiction was to be regarded as an “independent source of jurisdiction” for the

The exercise of universal jurisdiction to prosecute such an offence is a matter for the Commonwealth, yet Parliament has expressly abolished common law offences under Commonwealth law. The courts of the States and the Territories can have no authority for themselves to proscribe conduct as criminal under the common law simply because it has now become recognised as an international crime with the status of *jus cogens* under customary international law.¹⁶⁷⁷

b. *The scope and application of Article 6 of the Genocide Convention*

i. The Spanish Pinochet case

Spain ratified the Genocide Convention on 13 September 1968 and incorporated genocide into its domestic legislation in 1971.¹⁶⁷⁸ Universal jurisdiction over genocide was provided for under Article 23(4) LOPJ. In the *Pinochet* case, one of the Spanish prosecutor's grounds of appeal was founded on the notion that Article 6 of the Genocide Convention confers exclusive jurisdiction on the courts of the territorial state or on a competent international tribunal.¹⁶⁷⁹ He argued that international treaties prevailed over domestic law, invoking Article 96 of the Spanish Constitution.¹⁶⁸⁰ In its 1998 decision, the Spanish National Court rejected the ground of appeal. It held:

Article 6 of the Convention does not preclude the existence of judicial bodies with jurisdictions apart from those in the territory where the crime was committed or international tribunals. Article 6 of the Convention [...] imposes on States Parties the duty to ensure that genocide be judged compulsorily by the judicial agencies of the State in which the crimes were committed. However, it would be contrary

trial in *Eichmann*. The offences in that case were laid down in an Israeli statute, the *Nazi and Nazi Collaborators (Punishment) Law* 1950. The Supreme Court said that, in enacting that law, the parliament of Israel (the Knesset) only sought to set out the principles of international law and embody its aims. The court relied (at 287) on two propositions: "(1) *The crimes created by the Law and of which the appellant was convicted must be deemed today as having always borne the stamp of international crimes, banned by the law of nations and entailing individual criminal responsibility.* (2) *It is the peculiarly universal character of these crimes that vests in every state the authority to try and punish anyone who participated in their commission*."

¹⁶⁷⁷ Federal Court of Australia, *Nulyrimana v. Thompson* [1999] FCA 1192, § 57.

¹⁶⁷⁸ See *supra* N 359.

¹⁶⁷⁹ Del Carmen Marquez Carrasco and Alcaide Fernandez, 'In re Pinochet: Spanish National Court, Criminal Division (Plenary Session), Case 19/97, November 4, 1998; Case 1/98, November 5, 1998', 93(3) *The American Journal of International Law* (July 1999) 690-696, at 693.

¹⁶⁸⁰ 'Order of the Criminal Chamber of the Spanish Audiencia Nacional affirming Spain's Jurisdiction, 5 November 1998', in Brody/Ratner (eds), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain*, at 98.

to the spirit of the Convention, which seeks to achieve a compromise between the Contracting Parties by having recourse to their respective criminal laws, with prosecution for genocide as a crime under international law, in order to avoid the commission of impunity of such a serious crime, to consider that this Article of the Convention limits the exercise of the jurisdiction, excluding any jurisdiction other than those envisaged by the provision in question. The fact that the Contracting Parties have not agreed on universal jurisdiction over the crime for their respective national jurisdiction does not preclude the establishment, by a State which is a party to the Convention, of such jurisdiction over a crime which involves the whole world and affects the international community and indeed all of humanity directly, as stated in the Convention itself. Under no circumstances should it be understood that Article 6 precludes signatory States from exercising a right to prosecute established under their domestic legislation. ... Neither do the terms of Article 6 of the Convention of 1948 constitute an authorization to exclude jurisdiction for the punishment of genocide in a State Party such as Spain, whose law establishes extraterritoriality with regard to prosecution for such crimes.¹⁶⁸¹

The court thus confirmed that Spain had jurisdiction. It did however state – with regard to the subsidiarity principle¹⁶⁸² – that “considering the prevalence of international treaties over domestic law”, provided for in Article 96 of the Spanish Constitution and Article 27 of the Vienna Convention on the Law of Treaties, Article 6 of the Genocide Convention renders the actions of jurisdictions subsidiary to those of the territorial state as well as international penal tribunals.¹⁶⁸³

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ii. The Austrian Cvjetković case

The same year as the Pinochet decision in Spain, Austria tried Dusko Cvjetković, a Bosnian Serb who had sought asylum in Austria, in respect of crimes of genocide. The prosecutor did not found jurisdiction on the general treaty clause provided for in Article 64(6) of the Austrian Penal Code but on Article 65(1) of the Austrian Penal Code, which provides that Austrian law is applicable in respect of crimes committed outside Austria subject to the double criminality requirement, the presence of the suspect and his non-extradition.¹⁶⁸⁴ The suspect lodged an appeal before the Austrian Supreme Court arguing that Austrian

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¹⁶⁸¹ ‘Spain, National Court (Criminal Division) (Plenary Session), *Pinochet*, 5 November 1998’, 119 *International Law Reports*, at 335-336 (emphasis added).

¹⁶⁸² The issue of subsidiarity will be discussed in Part III, Chapter 3, *infra* N 685 ff.

¹⁶⁸³ ‘Spain, National Court (Criminal Division) (Plenary Session), *Pinochet*, 5 November 1998’, in Brody and Ratner (eds), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain*, at 98.

¹⁶⁸⁴ See Part II.

courts lacked jurisdiction to try him. By judgment of 13 July 1994, the Supreme Court of Austria (*Oberster Gerichtshof*) held that while Article 65(1) was applicable, it nevertheless had to determine whether there was a basis in the Genocide Convention.¹⁶⁸⁵ The court then found that Article VI of the Genocide Convention presupposed that there was a functioning criminal justice system in the state where the crime was committed or a functioning international criminal tribunal. As this was not the case at the time, the court held that Austrian courts were entitled to exercise jurisdiction against Dusko Cvetković. In the end, Cvetković was acquitted due to lack of evidence of his participation in the Bosnian genocide.¹⁶⁸⁶

iii. The German cases

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The issue of the application of Article 6 of the Genocide Convention was discussed in the *Jorgić* case. As mentioned above, Germany acceded to the Genocide Convention in 1954; moreover, as noted above, genocide was the only core crime expressly criminalized in German law¹⁶⁸⁷ before the adoption in 2002 of the German Code of Crimes Against International Law. Universal jurisdiction over genocide was provided for in Article 6 of the German Criminal Code.¹⁶⁸⁸ The genocide provision was applied for the first time in the 1990s in relation to crimes committed in the former Yugoslavia.¹⁶⁸⁹ Some 100 investigations were opened in Germany involving crimes committed in Bosnia.¹⁶⁹⁰ In several of these decisions, the defence invoked that Article VI of the Genocide Convention only provides for territorial jurisdiction.

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In a judgment rendered on 30 April 1999, the German Federal Court (*Bundesgerichtshof*) stated that no rule of public international law prohibited the applicant's conviction by the German criminal courts in accordance with the

¹⁶⁸⁵ See Redress, *Universal Jurisdiction in Europe: Criminal prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide*, 30 June 1999, at 16-17, available online at <http://www.redress.org/downloads/publications/UJEurope.pdf> (last visited 1 August 2017). Oberste Gerichtshof, Judgment, *Public Prosecutor v. Cvjetkovic*, 13 July 1994 (Supreme Court judgment on interlocutory appeal upholding jurisdiction).

¹⁶⁸⁶ See Redress, *supra* note 1686; See Landesgericht Salzburg, Judgment, *Public Prosecutor v. Cvjetkovic*, 31 May 1995 (trial court acquittal).

¹⁶⁸⁷ See former Section 220a of the German Criminal Code.

¹⁶⁸⁸ According to Art. 6 of the German Criminal Code, "German criminal law shall further apply, regardless of the law applicable at the place of their commission, to the following acts committed abroad: 1. genocide (Article 220a)"; Section 6(9) of the German Criminal Code states that German law is applicable to "offences which on the basis of an international agreement binding on the Federal Republic of Germany must be prosecuted even though committed abroad".

¹⁶⁸⁹ See W. Kaleck, 'German International Criminal Law in Practice: From Leipzig to Karlsruhe', in Kaleck et al., *International Prosecution of Human Rights Crimes* (Berlin, New York: Springer, 2007), 93-112, at 98.

¹⁶⁹⁰ *Ibid.*

principle of universal jurisdiction. It held that while Article VI of the Genocide Convention had not expressly laid down this principle, it did not prohibit persons charged with genocide from being tried by national courts other than the tribunals of the state in the territory of which the act was committed. According to the Federal Court, any other interpretation would not be reconcilable with the *erga omnes* obligation falling to the contracting states per Article I of the Genocide Convention.¹⁶⁹¹ On 12 December 2000, the German Constitutional Court declined to consider Jorgić's complaint, considering that:

b) Whether the Genocide Convention contains such a rule providing for universal jurisdiction must be determined by interpretation of the Convention. Treaties in international law are generally interpreted in accordance with the ordinary meaning of the terms of the treaty, in light of the treaty's object and purpose, and with consideration given to general international law. [...]. The courts' interpretation and application regarding the field of application of the German provisions concerning genocide found in § 6 Number 1 of the German Criminal Code in conjunction with Article VI of the Genocide Convention, are, in any event, neither obviously untenable [...] nor arbitrary, in that, pursuant to no conceivable aspect, they can be considered legally justifiable [...]

aa) In the course of interpreting the treaty in accordance with the meaning of its terms, courts have concluded, with no reservations concerning possible constitutional law violations, that Article VI of the Genocide Convention in no case contains a ban on the application of the German criminal jurisdiction. The Convention's explicit treatment of the jurisdictional element is, however, not exhaustive because the active or passive personality principle as the basis for criminal jurisdiction is also not identified. Pursuant to its object and purpose, the courts have interpreted Article I of the Genocide Convention such that the Convention strives for effective criminal prosecution of genocide. Therefore, the absence of a rule concerning universal jurisdiction only means that the states that are parties to the Convention are under no obligation to prosecute, although they have the opportunity to pursue criminal prosecutions on this basis. There

¹⁶⁹¹ See ECtHR, Judgment, *Jorgić v. Germany*, Application no. 74613/01, 12 July 2007, § 20. The Court also held however that for German courts to have jurisdiction over international crimes of genocide there must be a "legitimate points of contact" (*legitimierende Anknüpfungspunkte*) between the crime or the criminal and the German state; See Germany *Bundesgerichtshof*, Judgment of 30 April 1999. See the English summary in 'German Federal Supreme Court upholds its jurisdiction to prosecute Serb national for genocide based on his role in "ethnic cleansing" that occurred in Bosnia and Herzegovina', 5 *International Law Update*, May 1999, at 52; The issue of the necessity of a link will be discussed in the next chapter (Part III, Chapter 3).

is no reservation when, in justifiable cases, priority is given to the systematic-teleological interpretation of international treaties over the interpretation of a treaty in accordance with the meaning of its terms (cf. International Court of Justice, *South West Africa Cases*, ICJ Reports 1962, p. 319 [at p. 336]). This is especially the case with respect to prosecution of foreign criminal acts on the basis of international treaties, which often do not clearly identify which jurisdictional nexus will be regulated. Genocide is, as the most severe violation of human rights, . . . the classic case for application of universal jurisdiction, the purpose of which is to make possible the most thorough prosecution of crimes perpetrated against the especially important legal interests of the international community of states.¹⁶⁹²

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The applicant lodged an appeal before the European Court of Human Rights, arguing that his conviction violated Article 5(1) ECHR; he argued that the competency expressed by the German courts was not sufficient since it was not recognized internationally, namely by Article 6 of the Genocide Convention. With regard to the jurisdiction of the German courts under the legality principle, the European Court of Human Rights held:

[The Court] observes (...) that the Contracting Parties to the Genocide Convention, despite proposals in earlier drafts to that effect, had not agreed to codify the principle of universal jurisdiction over genocide for the domestic courts of all Contracting States in that Article (...) However, pursuant to Article I of the Genocide Convention, the Contracting Parties were under an *erga omnes* obligation to prevent and punish genocide, the prohibition of which forms part of the *jus cogens*. In view of this, the national courts' reasoning that the purpose of the Genocide Convention, as expressed notably in that Article, did not exclude jurisdiction for the punishment of genocide by States whose laws establish extraterritoriality in this respect must be considered as reasonable (and indeed convincing).¹⁶⁹³

4. Concluding remarks

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The approach adopted by the Dutch courts with regard to war crimes, namely that domestic courts can assert universal jurisdiction merely on the basis of the Geneva Conventions, is highly questionable. As mentioned above, and as held *inter alia* by the French courts in various cases regarding universal jurisdiction

¹⁶⁹² Federal Constitutional Court, *Jorgić*, 12 December 2000, 2 BvR 1290/99, English translation available online at http://www.bverfg.de/entscheidungen/rk20001212_2bvr129099en.html (last visited 1 August 2017), § 3.

¹⁶⁹³ ECtHR, *Jorgić v. Germany*.

over war crimes or torture, by the Senegalese court in the *Hissène Habré* case and by the Australian court in the *Nulyrimana* case, the fact that the provisions of the Geneva Conventions or Torture Convention authorize or even oblige states to establish and exercise universal jurisdiction does not mean that courts are entitled to do so, in the absence of a domestic provision so permitting. It is difficult to argue that these international law provisions are directly applicable. The same can be said of Article VI of the Genocide Convention, which does not even expressly provide for the exercise of universal jurisdiction. Again, while it has been argued that despite the wording of Article 6 of the Genocide Convention, states are in fact obliged to exercise universal jurisdiction over genocide,¹⁶⁹⁴ this does not mean that a national court establishing its jurisdiction simply on this basis, is not in violation of the legality principle and the principle of the rule of law. This is even truer in cases where the only legal basis for the jurisdiction of the court in convicting the perpetrator in respect to an international crime is unwritten customary international law; this was the situation that arose in the Spanish *Scilingo* case. Even common law jurisdictions have held that customary international law does not give domestic courts jurisdiction to prosecute and punish a suspect in a criminal trial. The situation is in our view different if domestic legislation at least provides for some form of universal jurisdiction, even in the form of a general rule.¹⁶⁹⁵

C. Application of a new universal jurisdiction statute to a prior situation: jurisdictional rules as procedural rules

1. Introductory remarks

In a number of cases, the courts have been confronted with the fact that, even though domestic legislation provides for universal jurisdiction over the international crime, said provision only entered into force after the commission of the crime. The issue at stake in this situation is whether the application of new rules providing for universal jurisdiction, not applicable at the time of the event, violates the *nullum crimen sine lege* principle, and more specifically, the principle of non-retroactivity. It raises the question of whether jurisdictional rules – and in particular provisions on universal jurisdiction – can be considered to be “procedural rules” or whether they are rather “substantive rules”. Put simply, if they are considered to be procedural rules, they may be applied retroactively. If they are considered to be substantive rules, the court can only prosecute if universal jurisdiction existed at the time of commission of the offence. The distinction between substantive rules and procedural rules is generally

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¹⁶⁹⁴ See *supra* Part I.

¹⁶⁹⁵ See the Swiss *Nezzar* case, *infra* N 527 ff. and the German cases, *supra* N 474 ff.

recognized; it has however, also been the subject of much criticism.¹⁶⁹⁶ In 2002, Antonio Cassese called the distinction a “proposition [that] is absolutely sound and must be subscribed to”.¹⁶⁹⁷ In the recent *Italy versus Germany* case, the ICJ made use of the distinction between procedural and substantive rules. Interestingly, it did not refer to “procedural rules” but to rules that are “procedural in nature” or “procedural in character”.¹⁶⁹⁸ In fact, the ICJ had already drawn this distinction in the *Arrest Warrant* case, in which it held that while “jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law”.¹⁶⁹⁹ In a similar vein, in the *Armed Activities on the Territory of the Congo* case, the Court referred to “provisions relating to the jurisdiction of the Court” as “procedural provisions”.¹⁷⁰⁰

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In the *Italy versus Germany* case, the ICJ confirmed that rules of a procedural nature do not only encompass “procedural rules”, i.e., the rules governing administrative and judicial proceedings.¹⁷⁰¹ The Court thus appears to suggest that rules on jurisdiction are an example of these rules of a “procedural nature”.¹⁷⁰² It held:

93. [...] The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. That is why the application of the contemporary law of State immunity to proceedings concerning events which occurred in 1943-1945 does not infringe the principle that law should not be applied retrospectively to determine matters of legality and responsibility.¹⁷⁰³

¹⁶⁹⁶ See S. Talmon, ‘*Jus Cogens* after *Germany v. Italy*: Substantive and Procedural Rules Distinguished’, 25 *Leiden Journal of International Law* (2012) 979-1002, at 980-981 and references: the distinction has been called “overly formalistic and detached from the reality of human rights protection”, a ‘purely theoretical construct’, a ‘purely doctrinal proposition’, ‘misguided’ and ‘artificial’, ‘illusory’, and ‘unsatisfying’.

¹⁶⁹⁷ A. Cassese, ‘When May Senior State Officials Be Tried for International Crimes? Some Comments on *The Congo v. Belgium* Case’, 13 *EJIL* (2002) 853 ff., at 867.

¹⁶⁹⁸ Talmon, ‘*Jus Cogens* after *Germany v. Italy*: Substantive and Procedural Rules Distinguished’, 25 *Leiden Journal of International Law* (2012), at 981.

¹⁶⁹⁹ See ICJ, *Arrest Warrant* case, Judgment, 14 February 2002, § 60.

¹⁷⁰⁰ See also ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, 3 February 2006, § 34.

¹⁷⁰¹ S. Talmon, ‘*Jus Cogens* after *Germany v. Italy*: Substantive and Procedural Rules Distinguished’, 25 *Leiden Journal of International Law* (2012) 979-1002, at 982.

¹⁷⁰² See ICJ Reports, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, § 58, 93, 95.

¹⁷⁰³ ICJ Reports, *supra* note 1703, § 93.

As noted, one of the consequences of the distinction between rules procedural in nature and substantive rules is that the former are not subject to the principle that laws should not have a retroactive effect. This principle only applies to substantive rules that “determine matters of legality as well as state and individual criminal responsibility”.¹⁷⁰⁴

Thus, according to the ICJ, substantive rules determine whether a particular conduct or situation is lawful or unlawful.¹⁷⁰⁵ On the other hand, procedural rules are “rules governing the judicial and non-judicial interpretation, implementation, and enforcement of substantive rules”.¹⁷⁰⁶

The subject remains somewhat controversial. While some scholars appear to accept that the introduction of a universal jurisdiction provision is merely a “procedural change”,¹⁷⁰⁷ others adopt a different understanding.¹⁷⁰⁸ In our view, the answer to the question of whether domestic universal jurisdiction provisions can be applied retroactively is not as clear as some commentators seem to consider it to be. That is to say, it could be argued that the legality principle requires that the person – at the moment of commission of the acts – knows which state will prosecute or try him, or at least that it will be possible for a state to try him.¹⁷⁰⁹

As will be shown in this section, domestic courts have taken different positions on this issue.

2. State practice

a. The Pinochet case in Spain, Belgium and the UK

i. The Spanish Pinochet case

In his appeal before the Criminal Division of the Spanish National Court in the *Pinochet* case, the Spanish Public Prosecutor also argued that Spanish courts did

¹⁷⁰⁴ Talmon, *supra* note 1702, at 985.

¹⁷⁰⁵ ICJ Reports, *supra* note 1703, § 58. See also Talmon, *supra* note 1702, at 981.

¹⁷⁰⁶ Talmon, *supra* note 1702, at 982.

¹⁷⁰⁷ See Spiga, ‘Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga’, 9 *Journal of International Criminal Justice* (2011) p. 5-23, at 17: “The Senegalese legislative reform had a twofold nature. On the one hand, it substantively modified the applicable criminal law, introducing in the Penal Code a set of international crimes, namely genocide, crimes against humanity and war crimes. On the other hand, it introduced a procedural change, broadening the range of crimes over which Senegal can exercise universal jurisdiction, by including the abovementioned international crimes and torture.” (Emphasis added).

¹⁷⁰⁸ See for instance Henzelin.

¹⁷⁰⁹ As one scholar submits, “universal jurisdiction of core international crimes requires that persons have notice that certain acts are criminal everywhere”. See Gallant, *The Principle of Legality in International and Comparative Criminal Law*, at 271.

not have jurisdiction over the offences with which the accused was charged, since the acts had occurred between 1973 and 1983; thus, Article 23(4) of the Spanish 1985 Act providing for universal jurisdiction could not apply retroactively. On this issue, the Spanish National Court concluded that Article 23(4) was a procedural norm rather than a substantial one and therefore was not subject to the prohibition of retroactive application of criminal law. It held:

The procedural rule in question applies no unfavorable sanction, nor does it restrict individual rights, thus its application for the purposes of criminal trial for conduct prior to its entry into force does not breach Article 9(3) of the Spanish Constitution. The legal consequence of having one's rights restricted for committing a crime of genocide – the penalty – results from the criminal law provision that punishes genocide, not from the procedural rule that gives Spain jurisdiction to punish the offense. The principle of legality (Article 25 of the Spanish Constitution) requires that the conduct constitute an offense – pursuant to Spanish law, according to the oft-mentioned Article 23(4) – when it takes place, that the penalty that can be imposed be determined by law prior to the commission of the crime, but not that the jurisdictional and procedure rules pre-date the punishable act. Jurisdiction is a procedural requirement, not a necessary element of the offense.¹⁷¹⁰

ii. The Belgian Pinochet case

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The same issue was discussed before Belgian courts. In the Belgian *Pinochet* case, crimes against humanity did not exist at the time of commission of the offence; moreover, Article 7 of the 1993 Act on universal jurisdiction was not applicable at the time. In its Order of 6 November 1998, and referring to the case law of the Belgium Court of Cassation and to Article 3 of the *Code d'Instruction judiciaire*,¹⁷¹¹ the First Instance Tribunal of Brussels concluded that Article 7 could be applied retroactively.¹⁷¹² It considered that rules relating to judicial competence, like any other procedural rules, apply immediately. It is interesting to note that the Court

¹⁷¹⁰ 'Order of the Criminal Chamber of the Spanish Audiencia Nacional affirming Spain's Jurisdiction, 5 November 1998', English translation provided in Brody/Ratner (eds), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain*, at 99.

¹⁷¹¹ Art. 3 of the *Code d'Instruction judiciaire* provides that "*Les lois d'organisation judiciaire, de compétence et de procédure sont applicables aux procès en cours sans dessaisissement cependant de la juridiction qui, à son degré, en avait été valablement saisie et sauf les exceptions prévues par la loi*".

¹⁷¹² '*Juge d'instruction au Tribunal de première instance de Bruxelles*, 6 November 1998', *Revue de droit pénal et de criminologie* (February 1999) 278-291, at 281.

also referred to the recognition by the Belgian legislator of international ad hoc tribunals and their jurisdiction.¹⁷¹³

iii. The UK Pinochet case: a more restrictive approach

Interestingly, in the same case, British courts did not reach the same conclusion. In the UK *Pinochet* case, the majority of the House of Lords held that Section 134 of the Criminal Act of 1988 – on the offence of torture committed in the United Kingdom or elsewhere¹⁷¹⁴ – did not have retroactive application. It held:

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Even if the Torture Convention has removed the head-of-state immunity it has not overridden previous rules which were relevant at the time the acts occurred. The language of the Convention is prospective and, in any event, *the principle of non-retroactivity should not be broken without clear words*. Nor did Parliament in enacting its provisions intend the Convention to have retrospective effect: see Hansard, H.L. 6th Series vol. 135 (1987-1988), 13-24 June. The Criminal Justice Act 1988 itself provided that section 134 should apply to offences two months after it came into effect.

It is interesting to note that Lord Millet generally dissented but did not consider that jurisdictional rules were procedural and could therefore be applied retroactively. On the contrary, he argued that universal jurisdiction over torture already existed in the United Kingdom at the time of commission of the crimes.

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In my opinion, the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984. I consider that it had done so by 1973. For my own part, therefore, I would hold that the courts of this country already possessed extraterritorial jurisdiction in respect of

¹⁷¹³ The Court held: "*S'agissant d'une règle de compétence, l'article 7 de la loi du 16 juin 1992 est d'application immédiate : il s'applique aux infractions commises avant leur entrée en vigueur. Ce principe a d'ailleurs été retenu par le législateur belge lorsqu'il a reconnu les Tribunaux internationaux ad hoc et les a intégrés dans notre ordre juridique interne (loi du 22 mars 1996 relative à la reconnaissance du Tribunal international pour l'ex-Yougoslavie et le Tribunal international pour le Rwanda [...]). Cette loi reconnaît la compétence de ces juridictions internationales pour connaître d'infractions commises avant leur création.*" ; 'Juge d'instruction au Tribunal de première instance de Bruxelles, 6 novembre 1998', *Revue de droit pénal et de criminologie* (February 1999) 278-291, at 281.

¹⁷¹⁴ Section 134 (1) of the Criminal Act of 1988 provides that "A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties".

torture and conspiracy to torture on the scale of the charges in the present case and did not require the authority of statute to exercise it.¹⁷¹⁵

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The House of Lords could be criticized for having adopted a too restrictive approach. Indeed, at the moment of the decision, while the courts had universal jurisdiction over the crime of torture, the court nevertheless held that it could not be exercised retroactively. Arguably, torture was a crime under most domestic laws long before 1988 – the time of the events – including under UK law, Spanish law, and Chilean law.¹⁷¹⁶ Thus, the House of Lords could have argued that the domestic universal jurisdiction statute applied retroactively. However, in our view, it was not incorrect for the House of Lords to pose the question of whether, at the time of some of the events – namely before the adoption of the 1984 Torture Convention – universal jurisdiction over torture was permissible under international law. Rather, if the exercise of universal jurisdiction was allowed under international law at the time of the events, and considering that torture was understood as a crime both under domestic and international law at the time of the events and that the UK courts could have exercised universal jurisdiction at the time of the decision, it appears to us that the approach adopted was too restrictive.

b. The Dutch cases

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Since the implementation of the Statute of the International Criminal Court in the Netherlands on 1 October 2003, Dutch courts have been able to exercise universal jurisdiction over genocide, crimes against humanity, war crimes and torture.¹⁷¹⁷ Prior to this act, under Dutch law, the exercise of universal jurisdiction was possible for torture,¹⁷¹⁸ war crimes, in both internal and international conflicts, and for a number of other crimes.¹⁷¹⁹ However, crimes against humanity were not incorporated as such in the Dutch Criminal Code.

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In its 2000 decision in the *Bouterse* case, the Amsterdam Court of Appeals held that Dutch courts had universal jurisdiction over the acts of torture

¹⁷¹⁵ Emphasis added by the author.

¹⁷¹⁶ See M. Ratner, 'The Lord's Decision in Pinochet III', in Brody and Ratner (eds), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain*, at 36.

¹⁷¹⁷ The Dutch Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law (International Crimes Act). The Implementation Act does not have a retroactive effect.

¹⁷¹⁸ The Netherlands ratified the 1984 Convention against Torture. See Art. 5 of the DTCIA which stipulates that "Dutch criminal law is applicable to anyone who is guilty of committing outside the Netherlands on the indictable offences defined in article 1 and 2 of this Act."; See Zegveld, 'The Bouterse Case', 32 *Netherlands Yearbook of International Law* (2001) 97-118, at 105.

¹⁷¹⁹ See Part II.

committed by Bouterse in 1982 in Suriname, despite the fact that both the 1984 Torture Convention and the 1989 Dutch Torture Convention Implementation Act (DTCIA) only entered into force after the commission of the acts. The court based its reasoning on two alternative arguments:¹⁷²⁰ (1) universal jurisdiction derived from customary international law as it stood in 1982; and (2) the retrospective application of rules on universal jurisdiction provided for in the DTCIA and in the Torture Convention.¹⁷²¹

The Dutch Supreme Court, reversing the Amsterdam Court of Appeals decision, held that the Dutch courts did not have jurisdiction in relation to the acts of torture committed before the entry into force of the DTCIA. Since the court had decided that torture was not a crime in Dutch law at the time of commission of the acts, it did not have to address the issue of universal jurisdiction. Nevertheless, it did address this issue and concluded that “jurisdictional provisions of the Criminal Code did not provide for universal jurisdiction in 1982 and that the Torture Convention Implementation Act did nowhere give retroactive effect to its jurisdictional provisions”.¹⁷²² Furthermore, it considered that basing universal jurisdiction on customary international law would have constituted a violation of the legality principle, as established in the Dutch Constitution.

In 2001, a complaint was filed against Zorreguieta, for his role in respect of the crimes of torture and crimes against humanity, allegedly committed under the Argentinean dictatorship between 1976 and 1983.¹⁷²³ On the basis of the decision of the Dutch Supreme Court in the *Bouterse* case, the Amsterdam Court held that Dutch courts did not have jurisdiction.

The outcome of the *Bouterse* and *Zorreguieta* cases is that the legality principle bars retroactive application of any provision on jurisdiction.¹⁷²⁴

The 2007 *Mpambara* case addressed again the issue of the absence of universal jurisdiction provisions at the time of the alleged commission of the crimes. Mpambara was arrested in the Netherlands in relation to crimes allegedly committed during the Rwandan genocide. In the first indictment, Mpambara was charged only with torture and war crimes; following

¹⁷²⁰ See Zegveld, *supra* note 1720, at 106.

¹⁷²¹ See Amsterdam Court of Appeal, *Bouterse*, Decision of 20 November 2000, § 6.2, English translation available online at http://www.icrc.org/applic/ihl/ihl-nat.nsf/vwLawsByCategorySelected.xsp?xp_countrySelected=NL

¹⁷²² C. Ryngaert, ‘Universal Criminal Jurisdiction Over Torture: A State of Affairs After 20 Years UN Torture Convention’, *Institute for International Law* (Working Paper No 66 (revised), August 2005), at 21-22.

¹⁷²³ *Ibid.*, at 32.

¹⁷²⁴ See Court of The Hague, Judgment, 4 July 2007; See L. Zegveld and J. Handmaker, ‘Universal Jurisdiction: State of Affairs and Ways Ahead: A Policy Paper’, *International Institute of Social Studies* (Working Paper No. 532, January 2012).

consultation with the ICTR, the Dutch Prosecution Office decided to add genocide to the indictment.¹⁷²⁵ However, on 24 July 2007, in an interlocutory decision, the District Court of The Hague determined that the Dutch courts could not exercise universal jurisdiction over the crime of genocide allegedly committed by the accused.¹⁷²⁶ It should be noted that the Act Implementing the Genocide Convention – applicable at the time of the facts – did not provide for universal jurisdiction over genocide. This Act has been repealed on 1 October 2003 and replaced by the International Crimes Act, which provides for universal jurisdiction over genocide. The Court held:

26. It appears from the foregoing that *in the period of the facts described in the summons*, there were no legal provisions applicable - nor in the Penal Code, nor in the Act Implementing the Genocide Convention, nor in the Act on criminal law in time of war, nor in any other Act or regulation - which provided for jurisdiction with respect to genocide committed by a non-Dutch national abroad, if this fact was not committed against or with regard to a Dutch national or a Dutch legal person or if any Dutch interest was not impaired or could be impaired.

27. It must be concluded that statutory provisions *in effect during the period of the facts charged* in the summons give no jurisdiction to prosecute and try the Accused on the grounds of genocide.

[...]¹⁷²⁷

553 Furthermore, referring to Article 94 of the [Dutch] Constitution, the court concluded that no obligation to exercise universal jurisdiction with respect to the crime of genocide could be derived from either the Genocide Convention or from a decision of an international organisation:

(Universal) jurisdiction on the basis of a treaty and/or a decision of an international organisation

¹⁷²⁵ See L. Van den Herik, 'A Quest for Jurisdiction and an Appropriate Definition of Crime: Mpambara before the Dutch Courts', 7 *JICJ* (2009) 1117-1132, at 1119.

¹⁷²⁶ Netherlands, District Court of The Hague, Interlocutory Decision, *Public Prosecutor v. Joseph Mpambara*, 24 July 2007, English translation available online at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2007:BB8462> (last visited 20 April 2016). See also summary of decision online at <http://www.internationalcrimesdatabase.org/Case/748> (last visited 20 April 2016).

¹⁷²⁷ Summary in English provided in Netherlands, District Court of The Hague, Interlocutory Decision, *Public Prosecutor v. Joseph Mpambara*, 24 July 2007, available online at <http://www.internationalcrimesdatabase.org/Case/748> (emphasis added).

31. In the drafting of the International Crimes Act it was the express choice of the legislature to refrain from a retroactive effect in this jurisdiction.

[...]

The foregoing means that direct jurisdiction over the crimes charged cannot be derived from the International Crimes Act.

33. Article 94 [Dutch] Constitution reads as follows:

Regulations effective within the Kingdom [of the Netherlands] shall not be applied if their application is not consistent with obligations erga omnes of treaties and of decisions of international institutions.

34. As a consequence, the Court addressed the question whether there is a treaty under which the legal statutory provision of direct jurisdiction as described supra do not apply. It appears not to be the case. As considered by the Court supra in paragraphs 19 and 21, the Genocide Convention - as far as relevant in casu - implies that the Accused should be tried by a court of the State in which territory the criminal offences are committed or by an international tribunal. The Genocide Convention therefore does not contain any obligation for the Netherlands establishing jurisdiction with respect to acts committed abroad which can be qualified as genocide. Dutch legal provisions, therefore, do not violate this Convention, neither do provisions of any other treaty to which the Netherlands is a party.

35. In 1994, there was no decision of an international organisation containing an obligation to create jurisdiction over acts, which can be qualified as genocide. Neither is there any decision of an international organisation implying an obligation to establish jurisdiction retroactively or to expand provisions retroactively with respect to acts that can be qualified as genocide.¹⁷²⁸

The court further held that customary international law could not serve as a legal basis for the exercise of universal jurisdiction over genocide in the present case.¹⁷²⁹ The court considered:

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39. The Court is of the opinion that domestic provisions on jurisdiction by their nature must be considered as exhaustive - in the interest of legal certainty for both citizens as well as authorities charged with the prosecution and adjudication. This means that the legislature while determining cases in which the Netherlands has jurisdiction, at the same time has established the cases in which the

¹⁷²⁸ Netherlands, District Court of The Hague, Interlocutory Decision, *Public Prosecutor v. Joseph Mpambara*, 24 July 2007.

¹⁷²⁹ *Ibid.*, § 36 ff.

Netherlands has no jurisdiction. The Court follows the conclusion of the then Deputy Advocate-General N. Keijzer, in preparation of the above judgement (see especially paragraphs 16, 17 and 69) in which he argues that provisions on jurisdiction and penalisation are equally governed by the principle of legality. Without criminal jurisdiction the threat of punishment indeed is without sense, according to the Deputy Advocate-General. Penalisation must not be extended without an appropriate legal stipulation. Just as without an appropriate legal stipulation jurisdiction of the Dutch criminal court must not be extended.¹⁷³⁰

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Both the Court of Appeal¹⁷³¹ and the Supreme Court of the Netherlands confirmed that the Public Prosecutor was barred from initiating proceedings against the accused for charges of genocide due to lack of jurisdiction.¹⁷³² Mpambara was finally convicted on 23 March 2009 by the District Court of The Hague for torture.¹⁷³³ The Court of Appeal also found him to be guilty of war crimes and increased his 20 years' prison sentence to life imprisonment.¹⁷³⁴ The Supreme Court subsequently dismissed Mpambara's appeal.¹⁷³⁵

c. *The Spanish Guatemala generals' case*

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In the *Guatemala Generals'* case, the Investigating Judge considered that Article 23 of the LOPJ was a rule of procedure and thus that the principle of the non-retroactivity of unfavorable penal norms was not applicable.¹⁷³⁶

¹⁷³⁰ *Ibid.*, § 39.

¹⁷³¹ Court of Appeal of The Hague, *Public Prosecutor v. Joseph Mpambara*, Judgment, 17 December 2007.

¹⁷³² Supreme Court of The Netherlands, *Public Prosecutor v. Joseph Mpambara*, Judgment, 21 October 2008, English summary available <http://www.internationalcrimesdatabase.org/Case/770> (last visited 1 August 2017).

¹⁷³³ District Court of The Hague Judgment, *Public Prosecutor v. Joseph Mpambara*, 23 March 2009.

¹⁷³⁴ Court of Appeal of The Hague, Judgment, *Public Prosecutor v. Joseph Mpambara*, Judgment, 17 December 2007. The Court of Appeal did not share the District Court's findings. It held that the genocide and the armed conflict in Rwanda had historically been closely related and decided that Mpambara's crimes bore the required nexus with the war. On this part of the decision see A. Cassese, 'The Nexus Requirement for War Crimes', 10(5) *JICJ* (2012) 1395-1417; Van den Herik, *supra* note 1727.

¹⁷³⁵ Supreme Court of the Netherlands, Judgment, *Public Prosecutor v. Joseph Mpambara*, 26 November 2013. English summary available online at <http://www.internationalcrimesdatabase.org/Case/1217> (last visited on 1 August 2017).

¹⁷³⁶ The Constitutional Court did not address this issue directly. See Spanish Constitutional Court Decision, 237, 26 September 2005, *Guatemala Genocide Case* 331/1999-100, at 2b).

d. *The ECOWAS and the ICJ judgments in the Hissène Habré case*

In its judgment in the *Hissène Habré* case, the ECOWAS Court of Justice held that despite the legislative changes made by Senegal, which introduced implementing legislation in respect to core crimes and on universal jurisdiction, any trial by Senegal through its domestic courts would *inter alia* violate the principle of non-retroactivity of criminal law. This decision was subject to criticism. With regard to the non-retroactivity of universal jurisdiction, one legal commentator argued that by amending its laws, Senegal had not only substantively modified the applicable criminal law, introducing into the Penal Code a set of international crimes, namely genocide, crimes against humanity and war crimes, but that it had also “introduced a *procedural change*, broadening the range of crimes over which Senegal can exercise universal jurisdiction, by including the abovementioned international crimes and torture”.¹⁷³⁷

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In February 2009, Belgium finally made a request to the International Court of Justice to order Senegal to either try Habré or to extradite him. Belgium sent a second extradition request to Senegal on 15 March 2011, a third one on 5 September 2011 and a fourth on 17 January 2012. On 20 July 2012, the International Court of Justice delivered its ruling in the case *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. In this judgment, the majority of the judges found that Senegal had breached its obligation under Articles 6(2) and 7(1) of the Convention Against Torture – which provides that “the State Party in the territory of which a person alleged to have committed an act of torture is found, shall [...], if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution”. The Court unanimously held that:

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Senegal’s failure to adopt until 2007 the legislative measures necessary to institute proceedings on the basis of universal jurisdiction delayed the implementation of its other obligations under the Convention. The Court further recalls that Senegal was in breach of its obligation under Article 6, paragraph 2, of the Convention to make a preliminary inquiry into the crimes of torture alleged to have been committed by Mr. Habré, as well as of the obligation under Article 7, paragraph 1, to submit the case to its competent authorities for the purpose of prosecution.¹⁷³⁸

The Court concluded that Senegal “must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of

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¹⁷³⁷ Spiga ‘Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga’, 9 *Journal of International Criminal Justice* (2011) 5-23. Emphasis added by the author.

¹⁷³⁸ ICJ, *Questions Relating to the Obligation to Prosecute or Extradite, Belgium v. Senegal*, Judgment, 20 July 2012, § 119.

prosecution, if it does not extradite him”.¹⁷³⁹ The conclusion that Senegal breached its obligations under the Torture Convention is in our view undisputable. However, according to us, it seems that the Court’s insistence on the obligation to *prosecute* rather than to extradite may be questionable. Indeed, if a state legislator fails to implement legislation, its courts may not be able to simply apply domestic provisions retroactively. In such cases, the state should be obliged to extradite. In our view, this issue deserved, at least, brief elaboration in the judgment.

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In the ICJ proceedings, the question was raised as to whether Article 7 of the Torture Convention could apply to facts that occurred before the entry into force of the Convention in the state in question. During the proceedings, Belgium clearly highlighted that it considered Article 7 to be a procedural rule, which could therefore be applied retroactively to acts committed before its entry into force. It stated:

[t]here is nothing unusual in applying such procedural obligations to crimes that occurred before the procedural provisions came into effect. There is nothing in the text of the Convention, or in the rules of treaty interpretation, that would require that Article 7 not apply to alleged offenders who are present in the territory of a State party after the entry into force of the Convention for that State, simply because the offences took place before that date. Such an interpretation would run counter to the object and purpose of the Convention.

(...) [T]he procedural obligations owed by Senegal are not conditioned *ratione temporis* by the date of the alleged acts of torture. (...) That does not involve a retroactive application of the Convention to the omissions of Senegal. All these omissions took place after both States, Belgium and Senegal, became parties to the Convention and became mutually bound by the procedural obligations contained therein.¹⁷⁴⁰

¹⁷³⁹ *Ibid.*

¹⁷⁴⁰ See Separate Opinion of Judge Cañado Trindade, in ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, § 163, citing ‘Questions Put to the Parties by Members of the Court at the Close of the Public Hearing Held on 16 March 2012: Compilation of the Oral and Written Replies and the Written Comments on those Replies’, Doc. BS-2012/39, 17 April 2012, at 50-52, §§ 49 and 52. While recalling that “the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)”, the ICJ did however clearly state that “the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned”. See ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, § 99 and 100.

e. *The Swiss Nezzar case*

In the recent *Nezzar* case, the Federal Criminal Tribunal rendered an interesting decision, where it admitted that Switzerland could investigate and prosecute a former Algerian Defence Minister for war crimes committed in Algeria between 1992 and 1999.¹⁷⁴¹ In 2011, following a series of complaints by victims, the Swiss Federal Prosecutor opened an investigation into Nezzar. Having been informed that he would be in Switzerland, the prosecutor ordered an enforced appearance and interrogated him. Nezzar appealed to the Federal Criminal Court (hereafter “FCC”) against the decision to open this investigation. The FCC dismissed his appeal on 25 July 2012.¹⁷⁴² On 8 November 2012, the Swiss Federal Supreme Court declared the appeal filed by Nezzar to be inadmissible on procedural grounds.¹⁷⁴³

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A number of interesting issues relating to universal jurisdiction were discussed in this case. Firstly, the question was raised as to whether the new rules of the Criminal Code, and especially Article 264m (on universal jurisdiction) – which entered into force on 1 January 2011 – could apply retroactively. The appellant argued that former Articles 108 ff. of the Swiss Military Criminal Code were applicable. These provisions required the existence of a “close link” to Switzerland, which *in casu* did not exist. The FCC dismissed the issue by ruling that Article 264m of the Swiss Criminal Code, like other provisions on jurisdiction, was a rule of a procedural nature, and that as a result, the principle of non-retroactivity provided for at Article 2 of the Criminal Code did not apply.¹⁷⁴⁴

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This decision is interesting because it is the first addressing the issue of the retroactive application of Article 264m of the Swiss Penal Code. While some authors appear to approve of the conclusions drawn,¹⁷⁴⁵ the case is not

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¹⁷⁴¹ See Federal Criminal Tribunal (*Tribunal pénal fédéral*), *Cour des plaintes, A. contre Ministère Public de la Confédération*, Decision, 25 July 2012.

¹⁷⁴² *Ibid.*

¹⁷⁴³ Supreme Court, *A. v. B., C. et Ministère Public de la Confédération*, Decision, 8 November 2012, 1B_542/2012.

¹⁷⁴⁴ See Federal Criminal Tribunal (*Tribunal pénal fédéral*), *Cour des plaintes, A. contre Ministère Public de la Confédération*, Decision, 25 July 2012, § 2.3. See French translation in SJ 2013 I 43. The Court held: “L’art. 264m CP est une *lex specialis* par rapport à la règle générale contenue à l’art. 7 CP. Régissant la compétence pour poursuivre notamment des crimes de guerre, l’art. 264m CP doit être considéré comme une règle de procédure, à laquelle ne s’applique pas le principe de non rétroactivité prévu à l’art. 2 CP”.

¹⁷⁴⁵ See R. Roth, ‘Representational Capacity or Global Governance?: A Swiss Federal Court Addresses the Accusations against a Former Algerian General’, 11(3) *JICJ* (2013) 643-657, at 646, who argues *inter alia* that this position is in line with the recent judgment of the International Court of Justice in *Germany v. Italy*.

undisputed among Swiss scholars. With respect to former Article 264 of the Swiss Criminal Code,¹⁷⁴⁶ which criminalizes genocide, it has been argued that since this provision was inserted into the “special part” of the Swiss Penal Code, it is of a substantive and not of procedural nature and can therefore not be applied in a retroactive manner, that is, to crimes committed before its entry into force in 2000.¹⁷⁴⁷ The same approach could be applied to Article 264m. This understanding is in our view not very convincing, as the place of the provision in the Code does not appear to be a very significant consideration.

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Be that as it may, the *reasoning* of the Federal Criminal Court on this issue is questionable. The court based its conclusion that universal jurisdiction could be applied retroactively without violating Article 2(1) of the Swiss Criminal Code, on a judgment of the Swiss Supreme Court.¹⁷⁴⁸ However, the judgment to which it refers is in fact a case where the retroactive application of universal jurisdiction was rejected and where the court precisely held that the retroactive application of a procedural rule is not possible when the rule in question concerns the application of the Penal Code in space.¹⁷⁴⁹ It is noteworthy however that in this case, the crime in question was not an international crime.¹⁷⁵⁰

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The conclusion of the Federal Criminal Court is the same as that of the Swiss Federal Government, which considers that rules of procedure and in particular rules on jurisdiction are in principle applicable as soon as they enter into force.¹⁷⁵¹

¹⁷⁴⁶ According to former Art. 264 (1) “*Sera puni de la réclusion à vie ou de la réclusion pour dix ans au moins celui qui, dans le dessein de détruire, en tout ou en partie, un groupe national, racial, religieux ou ethnique : a. aura tué des membres du groupe ou aura fait subir une atteinte grave à leur intégrité physique ou mentale ; b. aura soumis les membres du groupe à des conditions d’existence devant entraîner sa destruction physique totale ou partielle ; c. aura ordonné ou pris des mesures visant à entraver les naissances au sein du groupe ; d. aura transféré ou fait transférer de force des enfants du groupe à un autre groupe.*”, § 2 provides: “*Est également punissable celui qui aura agi à l’étranger, s’il se trouve en Suisse et qu’il ne peut être extradé.*”

¹⁷⁴⁷ See Henzelin, ‘La compétence universelle et l’application du droit international pénal en matière de conflits armés – la situation en Suisse’, in L. Burgogne-Larsen, *La répression internationale du génocide rwandais* (Brussels : Bruylant, 2003) 155-174, at 173.

¹⁷⁴⁸ ATF 117 IV 369, c. 4e, rés. JdT 1993 IV 127.

¹⁷⁴⁹ See H, Maleh (forthcoming) who states that : “*L’ATF 117 IV 369 précise en effet (au considérant qui suit immédiatement celui auquel se réfère le TPF) que l’application rétroactive d’une règle de procédure ne saurait être admise lorsque la règle en question porte sur l’application même du CP dans l’espace, à savoir qu’elle définit l’étendue du ius puniendi de la Suisse ; l’application rétroactive de aCP ⁶⁶ fut dès lors rejetée dans cet arrêt.*”

¹⁷⁵⁰ Ibid.

¹⁷⁵¹ See Federal Government, *Message concernant la modification du code pénal suisse (dispositions générales, entrée en vigueur et application du code pénal) et du code pénal militaire ainsi qu’une loi fédérale régissant la condition pénale des mineurs*, 21 September 1998, N 211.2, at 1798 :

3. Concluding remarks

The above-mentioned provisions in international treaties on universal jurisdiction are not self-executing. They are directed at states. Universal jurisdiction cannot be asserted in the absence of domestic provisions providing for it. As was rightly pointed out in the Senegal judgment, it is up to the legislator to enact such provisions. A judge cannot substitute himself to the legislator without violating the legality principle and the principle of the separation of powers. In a similar vein, and even more significantly, domestic judges cannot assert universal jurisdiction on the basis of customary international law. In this sense, the few decisions that have upheld such a position must be deemed to violate the principle of the rule of law and Article 6 ECHR, which requires that a tribunal have jurisdiction to try a defendant in accordance with the provisions applicable under domestic law.¹⁷⁵²

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The issue of the non-retroactivity of universal jurisdiction provisions is more complex. Simply affirming that they are rules of a procedural nature and can therefore be applied retroactively is in our view not sufficient. As has been seen in some of the decisions discussed, certain courts do not adopt this position. The conclusion that universal jurisdiction provisions are in fact substantive rules and that, if such provisions were not provided for in state legislation at the time of commission of the acts, they cannot be applied retroactively, is no more convincing.

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The issue arising concerns whether a person should have notice at the time of commission that certain acts are criminal everywhere.¹⁷⁵³ It is thus submitted that what should in fact be examined is whether universal jurisdiction over that crime was allowed under international law at the time of commission of the acts. In this sense, if a state has for instance ratified the Geneva Conventions or the Torture Convention at the time of the events, but did not provide universal jurisdiction, it can apply its domestic provisions on universal jurisdiction retroactively. Likewise, if universal jurisdiction was permitted under international customary law at the time of the facts, this would be sufficient to apply domestic provisions on universal jurisdiction retroactively.

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To summarize the conclusions of this section: a state should assert universal jurisdiction if (i) an express domestic legal basis allowing courts to do so exists; (ii) it has the right or the duty to prosecute a crime; and (iii) such a right or duty existed in international law at the time of commission of the events.

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"Conformément à la jurisprudence, les règles de procédure et, notamment, les règles de compétence sont en principe applicables dès leur entrée en vigueur".

¹⁷⁵² The term "law" in Art. 6 ECHR refers to national law and not to international law.

¹⁷⁵³ See Gallant, *The Principle of Legality in International and Comparative Criminal Law*, at 271

V. The role of the foreign law of the territorial state and the legality principle

A. Introductory remarks

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So far, this chapter has addressed the question of the application of criminal law with regard to time, in light of the legality principle. It will now briefly turn to the question of the applicability of criminal law with regard to space, also in light of the legality principle. The issue arising concerns whether the application of the more favorable law of the territorial state and/or its penalties ensures better respect for the legality principle. That is to say, does the legality principle require the application of the foreign law of the territorial state, or at least, the application of the more favorable penalties provided by the territorial state? This understanding was originally based on the assumption that a person expects to be punished according to the laws of the place of commission of the crime, and on the idea that one can only be punished according to the laws of the state that have been broken.¹⁷⁵⁴ It is also based on the premise that the applicable law must be “foreseeable”; in this sense, one could argue that the law applied by a state exercising universal jurisdiction is not always foreseeable. In this final section, we will examine whether, and to what extent, domestic courts exercising universal jurisdiction can or should apply – or at least take into consideration – the law of the territorial state. The examination of the different national legislative provisions on universal jurisdiction shows that such an approach can be adopted in three ways. Firstly, some domestic laws require dual criminality as a condition for the exercise of universal jurisdiction, that is, that the act be criminal both in the forum state and in the state where it was committed (Section B.). Secondly, albeit rare in state legislation, it has been suggested that in order to place universal jurisdiction in conformity with the legality principle, states should apply the foreign criminal law of the territorial

¹⁷⁵⁴ This is in conformity with the conception of Beccaria, of Montesquieu and later Rousseau, according to whom the laws vary from one state to another and a person can only be punished by the laws that were breached, i.e. the laws of the territory on which the crimes were committed. For an interesting overview of these views, see Wilfrid S. Araba, ‘Infractions Pénales Internationales et Actualité du Principe de la compétence Universelle, centre international de formation en Afrique des avocats francophones’, *Session C. I. F. A. F.* (2014). See also Colangelo, ‘Universal Jurisdiction as an International False Conflict of Laws’, 30(3) *Michigan Journal of International Law* (2009) 881-926, at 910, who states that “The legality question of fair notice looms particularly large in cases of extraterritorial jurisdiction because the State asserting jurisdiction is by definition not one in which the defendant committed her allegedly criminal acts. Thus, assumptions about the territorial nature of criminal law and attendant presumptions that the defendant is on notice of that law in the territory in which she acts can quickly fall away”.

state¹⁷⁵⁵ (Section C). Thirdly, in any event, it is submitted that the principle of legality of penalties (*nulla poena sine lege*) requires that the perpetrator not be punished by a penalty which is greater than the one that was provided for the corresponding crimes by the territorial state's law at the time of commission of the crimes (Section D).

B. The dual criminality requirement

In many legal systems, an offender who has acted outside the jurisdiction of the forum state will be punishable only if the act in question is criminal both in the forum state and in the state where it was committed.¹⁷⁵⁶ This so-called "double criminality" is also traditionally required for the extradition of suspects; it is only if the act is punishable in both the requesting state and the requested state that extradition is granted. As we have seen above, this is why France has recently systematically refused to extradite any genocide suspect to Rwanda. The question posed here is whether double criminality is a legal condition in cases of exercise by domestic courts of universal jurisdiction for serious international crimes, i.e. whether domestic legislation on universal jurisdiction can or should require that the crime under international law be defined at the time and in the state where the crime occurred.

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Interestingly, the dual criminality requirement is absent in much of the debate in legal scholarship on universal jurisdiction. It has also been very rarely discussed before domestic courts in universal jurisdiction cases. And yet, the analysis of state legislation shows that a number of states still provide that the exercise of universal jurisdiction over international crimes is subject to the double-criminality requirement.¹⁷⁵⁷ The case of France is especially noteworthy and will be examined in detail below.

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Somewhat surprisingly, few – if any – scholars address this issue. A number of international reports have advocated the removal of this requirement in cases of international crimes without elaborating further on the reasons why this condition has been maintained in a number of states and not in others.¹⁷⁵⁸ It is also interesting to note that some scholars have advocated for the application of

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¹⁷⁵⁵ See Gaeta, 'The Need to Reasonably Expand National Criminal Jurisdiction over International Crimes', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012), at 596.

¹⁷⁵⁶ See J. M. Smits, *Elgar Encyclopedia of Comparative Law*, Second Edition (Edward Elgar Publishing, 2014) at 261.

¹⁷⁵⁷ See Part II.

¹⁷⁵⁸ See for instance FIDH and Redress, *Extraterritorial Jurisdiction in The European Union: A Study of the Laws and Practice in the 27 Member States of the European Union*, December 2010, at 32.

foreign criminal law as a means to further respect the legality principle,¹⁷⁵⁹ without however examining whether double criminality – a condition that, unlike the application of foreign law, is frequently present in state legislation – may also provide a mechanism ensuring better respect for the legality principle.

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In extradition law, the dual criminality requirement is based on the idea that a state does not extradite (for prosecution and punishment) a person that it would not itself prosecute and punish. Thus, the state must examine if, according to its own law, the suspect would be punished. With regard to universal jurisdiction, the question raised by double criminality is whether the acts were also punishable in the state where the crime was committed. However, there are different ways in which the double criminality can be interpreted by domestic courts. Firstly, it can be interpreted as simply requiring the acts to be criminalized in the territorial state, independently from their legal qualification. This is, for instance, the interpretation adopted by the Federal Court of Switzerland.¹⁷⁶⁰ On the contrary, it can also be interpreted strictly, requiring, for instance, that a person can only be prosecuted for genocide in the forum state, when the crime of genocide has been specifically criminalized in the domestic law of the state where it was committed.¹⁷⁶¹

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With regard to international crimes, it is submitted that if double criminality is applied according to the first interpretation, namely requiring the conduct to be punishable in the state, its usefulness appears somewhat limited since all criminal codes criminalize murder, bodily harm, etc., in one way or another. This is perhaps not the case for a small number of war crimes and crimes against humanity, which cannot be “rapprochés d’une incrimination de droit commun”.¹⁷⁶²

¹⁷⁵⁹ See Gaeta, ‘The Need to Reasonably Expand National Criminal Jurisdiction over International Crimes’, in A. Cassese (ed.) *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012), at 604, and Donnedieu de Vabres, ‘Essai d’un système rationnel de distribution des compétences en droit pénal international’, 19 *Revue de droit international privé* (1924), at 48.

¹⁷⁶⁰ See Henzelin, ‘Art. 6’, in Roth and Moreillon (eds), *Commentaire Romand : Code Pénal* (Basel : Helbing Lichtenhahn Verlag, 2009), N 21, who states that “La pratique du Tribunal fédéral est de ne pas s’assurer de l’identité complète des normes pénales applicables : ce qui importe c’est que l’état de fait corresponde aux éléments constitutifs objectifs d’une infraction tant en Suisse, qu’au lieu de commissio, à l’exclusion des conditions particulières en matière de culpabilité ou de répression.”

¹⁷⁶¹ FIFDH and Redress, *supra* note 1760, at 35.

¹⁷⁶² See in this sense, French National Assembly, *Avis de la commission des affaires étrangères sur le projet de loi, adopté par le Sénat, portant adaptation du droit pénal à l’institution de la Cour pénale internationale* (n° 951) (Mme Nicole Ameline, n° 1828, 8 July 2009): “Si une partie des crimes visés par le Statut de Rome, comme les meurtres ou les viols par exemple, sont sanctionnés dans tous les pays, tel n’est pas le cas de tous les crimes contre l’humanité et de tous les crimes de guerre. Si la compétence de la France est conditionnée à l’existence des crimes dans le droit de l’autre pays, elle ne pourra pas s’exercer pour certains faits commis dans les pays où le droit est le moins complet et

If double criminality is understood according to the second interpretation set out above, that is, requiring that the international crime be criminalized in the territorial state at the time of commission of the crime, this could mean that for instance a person could not be prosecuted for genocide if the crime had not been criminalized in the domestic law of the state where the genocide was committed.¹⁷⁶³ With this interpretation, universal jurisdiction would lose much of its purpose. As one scholar noted, it is precisely when a requirement of double criminality is not fulfilled that universal jurisdiction may be needed.¹⁷⁶⁴ More generally, the dual criminality requirement is questionable when international crimes are involved. Requiring dual criminality may indeed bar a state from prosecuting a serious international crime like genocide, because, for instance, the crime of genocide is not provided for in the legislation of the territorial state. In such a case, the consequence of the insertion and application of the double criminality requirement constitutes a breach by the state of its legal obligation under international law to prosecute or extradite genocide suspects. To counter this argument, the French government has argued that the condition of double criminality would never constitute an obstacle to the prosecution and judgment of the most serious crimes.¹⁷⁶⁵ It argued:

*Le Gouvernement souhaite signaler que cette condition de double incrimination ne constituera jamais, en fait, un obstacle à la poursuite et au jugement des crimes les plus graves. Il n'est pas nécessaire en effet, pour l'application de l'article, que les dénominations des crimes soient identiques (notamment que le génocide soit, en tant que tel, incriminé) : il suffit que les faits soient pénalement sanctionnés ; or tous les Etats du monde incriminent l'assassinat et le meurtre.*¹⁷⁶⁶

This basically means that double criminality is a requirement but it never needs to be verified in the case of international crimes.¹⁷⁶⁷ One can therefore wonder why it is so important to maintain the double criminality requirement.

le moins sévère et où il n'y a aucune chance qu'ils soient poursuivis par la justice nationale. C'est pourtant dans ces pays que la compétence extraterritoriale de la France serait la plus nécessaire."

¹⁷⁶³ FIFDH and Redress, *supra* note 1760, at 32.

¹⁷⁶⁴ See the position of Professor Kimpimaki, mentioned in Z. Konstantopoulou, 'Universal Jurisdiction', 80 *Revue internationale de droit penal* (2009/3) 487-512, at 497.

¹⁷⁶⁵ *Observations du gouvernement sur la Loi portant adaptation du droit pénal à l'institution de la Cour pénale internationale*, Decision no. 2010-612 DC, 5 August 2010, available online at http://www.legifrance.gouv.fr/affichJuriSaisine.do;jsessionid=67285CBC61B2A6F08A9B09F8302EB90C.tpdj_o02v_1?idTexte=CONSTEXT000022762678 (last visited on 1 August 2017).

¹⁷⁶⁶ *Ibid.*

¹⁷⁶⁷ See H.-D. Bosly and D. Vandermeersch, *Génocide, crimes contre l'humanité et crimes de guerre face à la justice : les juridictions internationales et les tribunaux nationaux* (2nd ed., Brussels : Bruylant, 2012), at 233.

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In the context of extradition, the question of whether double subsidiarity is required at the time of the commission of the events or at the time of the request is controversial. In recent years, there has been a growing tendency towards the notion that the condition must be fulfilled at the date of the request.¹⁷⁶⁸ This debate does not appear to be applicable in the context of the exercise of universal jurisdiction. Indeed, if double subsidiarity is a condition to the exercise of universal jurisdiction, in our view, it only makes sense if it is understood to require that the acts were criminalized by the state in which they were committed at the time when they were committed. This is because in the context of extraterritorial jurisdiction – unlike extradition – the main *raison d'être* of the double criminality requirement is to ensure respect of the legality principle.

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However, it is generally left to domestic courts to determine if dual criminality is a condition for the exercise of universal jurisdiction and to attribute an interpretation to this condition. Such an approach is uncertain and may constitute a barrier to the exercise of universal jurisdiction and amount to a violation by states of their legal obligations under international law. Furthermore, in our view, it is not necessarily required under the *nullum crimen sine lege* principle in the context of international crimes because by definition, since the crimes are international, they are the same in every state. Furthermore, due to their gravity, it is unlikely that the underlying conduct (murder, bodily harm, torture, etc.) was not punishable at the time of commission of the events.

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In practice, while many states provide for the dual criminality requirement,¹⁷⁶⁹ others do not.¹⁷⁷⁰ In France, the 2010 modifications to the law, which include a provision on universal jurisdiction, removed two conditions underpinning the exercise of universal jurisdiction but maintained the double criminality requirement. According to Article 689-11 of the Code of Criminal Procedure, French courts have jurisdiction over a person habitually residing in France who has committed one of the offenses listed in the Rome Statute,

¹⁷⁶⁸ *Ibid.*, at 249.

¹⁷⁶⁹ This is the case for instance of the Swedish Criminal Code, which provides for universal jurisdiction, but does not require double criminality. See Chapter 2, Section 3, Paragraph 6.

¹⁷⁷⁰ According to the *Report of the Secretary-General*, "In some jurisdictions, there was a requirement for double criminality (e.g., Austria, Cameroon, Denmark, Slovenia, Tunisia). For an act to be punishable in the forum State, it should also be punishable under the law in force on the territory where it was committed (e.g., the Czech Republic). However, there were other countries where double criminality did not apply (e.g., Iraq) or did not apply with respect to certain crimes such as torture (e.g., Cameroon), genocide, terrorism, piracy, crimes against humanity, war crimes, ecocide, the production or proliferation of weapons of mass destruction and the application of prohibited methods of war (e.g., Armenia, Slovenia), financing of terrorism and money-laundering (e.g., Tunisia)". (UN General Assembly, *The scope and application of the principle of universal jurisdiction, Report of the Secretary-General prepared on the basis of comments and observations of Governments*, 65th Session, UN Doc A/65/181, 29 July 2010, at 19.)

provided that the acts are punishable under the law of the state in which they were committed or of the state of the person's citizenship, if the state is a party to the Rome Statute. This issue was the subject of debates during the proceedings leading to its adoption. In particular, the French Rapporteur had underlined that according to French law, double criminality is not required for crimes committed by French citizens but only for *délits* (lesser offences).¹⁷⁷¹ The European Union also removed dual criminality as a requirement for extradition between EU Member States in respect of European Arrest Warrants.¹⁷⁷² It is therefore paradoxical to require stricter conditions to establish the jurisdiction of the courts when it comes to prosecution of the most serious international crimes. The condition of dual criminality was removed with the adoption of the new Article 264m of the Swiss Penal Code. The reason for this was because of the nature of crimes, i.e. international crimes which are directly criminalized in international law. According to the Message of the Swiss Federal Council, it would not be acceptable, considering the gravity of the crimes, for the Swiss authorities to be prevented from prosecuting such crimes simply because the territorial state does not criminalize the acts in its domestic legislation.¹⁷⁷³

¹⁷⁷¹ See, French National Assembly, *Avis de la commission des affaires étrangères sur le projet de loi , adopté par le Sénat, portant adaptation du droit pénal à l'institution de la Cour pénale internationale* (n°951) (Mme Nicole Ameline, n° 1828, 8 July 2009, available online at <http://www.assemblee-nationale.fr/13/rapports/r1828.asp>): *"On notera en outre que, en droit français, pour ce qui est de la poursuite de faits commis à l'étranger, la condition de double incrimination n'est exigée que pour les délits commis par un Français. Elle ne l'est ni pour les crimes commis par un Français, ni pour les crimes ou délits dont la victime est française, ni lorsque les infractions portent atteinte aux intérêts supérieurs de la France ou d'un Etat étranger, ni pour les infractions qui sont l'objet des différentes conventions visées aux articles 689-2 à 689-10 du code de procédure pénale. **Votre Rapporteur estime qu'il serait paradoxal d'exiger cette condition de double incrimination dans les cas les plus graves que sont les crimes contre l'humanité et les crimes de guerre, alors qu'ils font enfin partie des infractions pour lesquelles le mandat d'arrêt européen doit être exécuté sans contrôle de la double incrimination**".*

¹⁷⁷² Council Framework Decision 2002/585/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

¹⁷⁷³ See Swiss Federal Council, *Message du 23 avril 2008 relatif à la modification de lois fédérales en vue de la mise en oeuvre du Statut de Rome de la Cour pénale internationale* (FF 2008 3461), 23 April 2008: *"Il ne faudrait pas, compte tenu de la gravité des crimes contre l'humanité, que les autorités suisses soient empêchées de poursuivre un crime pour le seul et unique motif que l'Etat sur le territoire duquel l'acte a été commis ne le considère pas comme pénalement répréhensible. Après tout, on ne peut pas exclure qu'un ressortissant suisse commette un crime contre l'humanité dans un Etat de ce type. Le risque serait que la Suisse en soit réduite à faire une déclaration d'incapacité au sens de l'art. 17 du Statut de Rome et que la CPI ouvre une procédure contre une personne de nationalité suisse, seulement parce qu'une lacune dans la législation du pays dans lequel le crime a été commis rend impossible l'ouverture d'une procédure pénale en Suisse. Il faut donc, en cas de crime contre*

Generally speaking, the double criminality requirement – originally used in extradition law – has the purpose of protecting human rights.¹⁷⁷⁴ The condition of double criminality is premised, at least partly, on the principle of legality provided for at Article 7 ECHR and Article 15 ICCPR.¹⁷⁷⁵ Its purpose is precisely to avoid prosecuting a person for a crime which was not considered an offence in the state at the time of its commission.¹⁷⁷⁶ However, it can be convincingly argued that the double criminality requirement is not necessary to fulfil the legality principle.¹⁷⁷⁷ It has been submitted that one of the most important differences between universal jurisdiction and other extraterritorial jurisdiction principles is that universal jurisdiction does not require double criminality.¹⁷⁷⁸ In particular, the double criminality requirement is one of the main differences that exists between the principle of vicarious administration of justice (or representation principle), in respect of which the state acts on behalf of another state (generally the territorial state),¹⁷⁷⁹ and the universality principle¹⁷⁸⁰, in respect of which the state is acting as an agent for the international community as a whole.¹⁷⁸¹ This position should be approved. Indeed, the *nullum crimen sine lege* principle does not require states to subject the exercise of universal jurisdiction over serious international crimes to the condition that the acts were criminalized by the legislation of the territorial state at the time of its commission. What it does however require is for the act to have been criminal under *international law* at the time of its commission.¹⁷⁸²

l'humanité, renoncer à exiger que l'acte incriminé soit aussi punissable dans le pays dans lequel il a été commis ; c'est déjà le cas pour le génocide et les crimes de guerre'.

¹⁷⁷⁴ See B. Swart, 'Human Rights and the Abolition of Traditional Principles', in Eser/Lagodny (eds), *Principles and Procedures for a new Transnational Criminal Law* (Freiburg im Breisgau, 1992) 505-534, at 521.

¹⁷⁷⁵ See Bosly and Vandermeersch, *supra* note 1769, at 233.

¹⁷⁷⁶ See Cassese, *International Criminal Law* (2003), at 283.

¹⁷⁷⁷ See in this sense FF 2008 3461, at 3549.

¹⁷⁷⁸ I. Blanco Cordero, 'Universal Jurisdiction : General Report', 79 *Revue internationale de droit pénal* (2008/1) 59-100, at 63.

¹⁷⁷⁹ See *supra* Part I N 50-51.

¹⁷⁸⁰ Blanco Cordero, *supra* note 1780, at 63; See for instance *Scilingo* case in Spain.

¹⁷⁸¹ See *supra* Part I N 57-58.

¹⁷⁸² Cf. Trechsel/Vest, *Praxiskommentar*, Art. 264m N 1; Swiss Penal Code; H. Maleh, *Commentaire*, N 3; See U. Cassanni, in Roth/Moreillon, *Commentaire Romand du Code Pénal*, Art. 5, N 15-21; O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept', 2(3) *Journal of International Criminal Justice* (2004) 735-760, at 759.

C. The application of foreign criminal law

The issue of application of foreign criminal law has already been mentioned in Part I. As set out above, criminal courts, in contrast to their civil counterparts, do not normally apply foreign criminal law, despite the numerous suggestions of imminent scholars. The refusal to do so originally stems from the territorial notion of national sovereignty in which public (including penal) law reigns within the boundaries of the state but nowhere else. As seen above, foreign criminal law is exceptionally taken into account under the examination of the double criminality requirement and regarding the application of more favourable penalties (see *infra* Section D).

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However, nothing in international law prevents states exercising extraterritorial jurisdiction from applying the law of the state in which the acts were committed.¹⁷⁸³ As seen in Part II, only in a few states does domestic legislation provide for the application of foreign law in respect of universal jurisdiction. This is the case for instance of the Penal Code of El Salvador, which contains a rule providing for the application of the foreign law of the territorial state “if its provisions are more favourable to the accused person than those contained in Salvadoran criminal law”.¹⁷⁸⁴ The provision goes on to state that “however, preference shall be given to the claim of the State in whose territory the offence has been committed, if that State calls for prosecution before criminal proceedings have been initiated”.¹⁷⁸⁵ A similar provision was previously established for in the Swiss Penal Code, before its deletion in 2007.¹⁷⁸⁶

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A few arguments have in fact been developed in legal scholarship that convincingly refute the application by domestic criminal courts exercising

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¹⁷⁸³ “*Si l’inculpé peut être jugé d’après des lois différentes, frappé de peines inégales suivant les hasards de l’arrestation à comparaître devant le juge personnel ou le juge d’un Etat tiers, il n’existe pas de certitude dans la réglementation des rapports de droit pénal. La règle Nulla poena sine lege, sauvegarde essentielle de la justice et de la liberté individuelle, est violée dans son esprit, sinon dans sa lettre. Il est nécessaire, en droit pénal comme en droit civil que la loi qui doit gouverner tel ou tel rapport soit déterminée suivant un principe de justice dans l’application soit constante, indépendante de la qualité du juge saisi.*”

¹⁷⁸⁴ See Art. 11 of the Salvadoran Penal Code.

¹⁷⁸⁵ *Ibid.*

¹⁷⁸⁶ See Art. 6bis of the former Swiss Penal Code which provided that “*Le présent code est applicable à quiconque aura commis un crime ou un délit que la Confédération, en vertu d’un traité international, s’est engagée à poursuivre, si l’acte est réprimé aussi dans l’Etat où il a été commis et si l’auteur se trouve en Suisse et n’est pas extradé à l’étranger. La loi étrangère sera toutefois applicable si elle est plus favorable à l’inculpé*”. The current provision (Art. 7(2)) states that “The court determines the sentence so that overall the person concerned is not treated more severely than would have been the case under the law at the place of commission”.

universal jurisdiction of their own criminal law.¹⁷⁸⁷ However, as persuasively argued by some scholars, “*Si l’inculpé peut être jugé d’après des lois différentes, frappé de peines inégales suivant que les hasards de l’arrestation à comparaître devant le juge personnel ou le juge d’un Etat tiers, il n’existe pas de certitude dans la réglementation des rapports de droit pénal. La règle Nulla poena sine lege, sauvegarde essentielle de la justice et de la liberté individuelle, est violée dans son esprit, sinon dans sa lettre. Il est nécessaire, en droit pénal comme en droit civil que la loi qui doit gouverner tel ou tel rapport soit déterminée suivant un principe de justice dans l’application soit constante, indépendante de la qualité du juge saisi.*”¹⁷⁸⁸ As Donnedieu de Vabres argues, “*L’Etat qui, se prévalant de cette doctrine, exerce sa compétence universelle, ne revendique nullement un droit de souveraineté qui lui serait propre, soit à l’égard de l’acte qu’il réprime, soit vis-à-vis de son auteur. Il n’agit pas pour la défense de ses intérêts*”.¹⁷⁸⁹ Consequently, one could argue that there is no reason in fact for the forum state to apply its own national law.

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However, unlike cases in which the state is acting under the representation principle, i.e. in cases where the crime has in fact affected a foreign social order – that of the territorial state –, and where, logically, the forum state should apply the law of the state it is representing,¹⁷⁹⁰ the assertion by a state of universal jurisdiction over international crimes is different. In this latter situation, the state is (theoretically) not acting in the interests of the territorial or national state, but as an organ of the international community as a whole.¹⁷⁹¹ If in fact, the national criminal judges exercising universal jurisdiction over international crimes are fulfilling their role of “international agents” – according to the theory of “*dédoublement fonctionnel*”¹⁷⁹² – they are acting on behalf of the whole community of contracting states in cases where universal jurisdiction is provided by treaties,¹⁷⁹³ and on behalf of the whole community of nations, in cases where

¹⁷⁸⁷ Huet and Koering-Joulin, *Droit pénal international*, at 201.

¹⁷⁸⁸ See Gaeta, ‘The Need to Reasonably Expand National Criminal Jurisdiction over International Crimes’, in A. Cassese (ed.) *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012), at 604, who cites Donnedieu de Vabres, ‘Essai d’un système rationnel de distribution des compétences en droit pénal international’, 19 *Revue de droit international privé* (1924), at 53.

¹⁷⁸⁹ *Ibid.*

¹⁷⁹⁰ Huet and Koering-Joulin, *Droit pénal international*, at 198.

¹⁷⁹¹ Gaeta, *supra* note 1790, at 603.

¹⁷⁹² The theory of the “*dédoublement fonctionnel*” was originally developed by Georges Scelle. According to him, “*Dans l’ordre interétatique (...) les gens et gouvernants étatiques (...) sont investis d’un double rôle. Ils sont agents et gouvernants nationaux lorsqu’ils fonctionnent dans l’ordre juridique étatique ; ils sont agents et gouvernants internationaux lorsqu’ils agissent dans l’ordre juridique international. C’est ce que nous appellerons la loi fondamentale du dédoublement fonctionnel*”. (G. Scelle, ‘Règles générales du droit de la Paix’, IV *R.C.A.D.I.* (1933) 331-697).

¹⁷⁹³ See A. Cassese, ‘Remarks on Scelle’s Theory of “Role Splitting” (dedoublement fonctionnel) in International Law’, 1 *European Journal of International Law* (1990) 210-231, at p. 212.

universal jurisdiction is provided for under customary international law. One could thus argue that logically, there is no reason why a state would apply the foreign criminal law of the territorial or national state. They would merely apply and enforce international prohibitions directed at individuals as implemented in their domestic law. In this sense, the argument of applying foreign criminal law is in our view not convincing. However, as we have seen in this chapter, international rules cannot (yet) always be applied as such in domestic courts, especially since they do not have penalties attached to the criminalization of the conduct. Thus, direct application of international rules without resorting to domestic law contravenes the *nulla poena sine lege* principle. Nevertheless, at the time of commission of the crimes, the acts were criminalized under international law. The perpetrator can therefore not argue that he was not aware his actions were punishable, even if they were not punishable per the legislation of the state in which he committed them. However, since the international provisions in question do not provide for penalties, it is submitted that the state should apply the most favourable penalty (whether it is provided for by the territorial state or the state exercising universal jurisdiction). This will be developed further in Section D.

The question of whether states exercising universal jurisdiction have an obligation to apply the foreign law of the territorial state in order to comply with Articles 15 ICCPR and 7 ECHR was raised in the *Ould Dah versus France* case before the European Court of Human Rights. The applicant complained that he had been prosecuted and convicted in France for offences committed in Mauritania in 1990 and 1991, notwithstanding that he could not have foreseen that French law would prevail over Mauritanian law¹⁷⁹⁴ due to an amnesty law, adopted in 1993, which prohibited any legal proceedings to be taken against those responsible for these acts. He claimed that France had violated the requirements of Article 7 ECHR because the French courts had applied French law rather than Mauritanian law. With respect to the requirement of foreseeability of the law, he argued that “his case was the first one of its kind in France and the possible jurisdiction of the French courts under the United Nations Convention against Torture did not mean that French law was applicable. Such an approach was, moreover, liable to render the law unforeseeable if all countries applied their own rules”.¹⁷⁹⁵ The Court did not address the issue. It merely focused on the issue of retrospective application of the provisions of Article 222-1 of the new French Criminal Code and the question of amnesties. It is worth noting that it did not even refer to the Mauritanian law applicable at the time of the commission in the “relevant law”.¹⁷⁹⁶ The Court did however state:

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¹⁷⁹⁴ ECtHR, *Ould Dah v. France*, at 11.

¹⁷⁹⁵ *Ibid.*, at 13.

¹⁷⁹⁶ *Ibid.*, at 3 ff.

[...] in the Court's view, the absolute necessity of prohibiting torture and prosecuting anyone who violates that universal rule, and the exercise by a signatory State of the universal jurisdiction provided for in the United Nations Convention against Torture, *would be deprived of their very essence if States could exercise only their jurisdictional competence and not apply their legislation*. There is no doubt that were the law of the State exercising its universal jurisdiction to be deemed inapplicable in favour of decisions or special Acts passed by the State of the place in which the offence was committed, in an effort to protect its own citizens or, where applicable, under the direct or indirect influence of the perpetrators of such an offence with a view to exonerating them, this would have the effect of paralysing any exercise of universal jurisdiction and defeat the aim pursued by the United Nations Convention against Torture.¹⁷⁹⁷

587 It is not entirely clear if the Court was only referring to the cases where an amnesty law has been adopted or was generally stating that the exercise of universal jurisdiction under the UN Torture Convention requires the state exercising such jurisdiction to apply its own legislation.

588 From a legal viewpoint, the question that could have been raised is whether Article 7 ECCHR and Article 15 ICCPR each refer to "any national law" or to "the applicable law at the time of the offence". On the one hand, one could argue that, if, at the time of the offence, the domestic legislation of any state provided for universal jurisdiction over genocide with a specific penalty, this law would be sufficient to satisfy the *nullum crimen sine lege* requirement. On the other, one could rather argue that this understanding would entail that a person must know all the legislations of the world which contain such a provision; this admittedly is impossible and is difficult to reconcile with the "foreseeable" requirement.

589 However, from our perspective, the argument according to which the domestic judge should apply the most favourable criminal law is questionable. Firstly, as mentioned above, in our view, it is incoherent with the theory according to which a state is in fact acting as an agent of the international community. Secondly, this understanding may present a number of risks in its application, not only from a practical point of view but also where a state does not criminalize the relevant international crimes in its domestic law. Thirdly, it is admittedly contrary to the practice of state and the general principle of sovereignty that states still apply today, according to which when asserting criminal jurisdiction, states apply their own criminal law. Finally, considering that the acts are in fact crimes under international customary law, the laws of most states are the same.

¹⁷⁹⁷ *Ibid.*, at 16 (emphasis added).

The argument, however, is valid with regard to penalties, because they vary from one state to another.

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D. Penalties and the legality principle

The respect of the legality principle not only requires that the accused should be aware that his acts amount to a criminal offence, but he should also be aware of the penalty attached to those acts.¹⁷⁹⁸ This principle is known as the *nulla poena sine lege* principle. As we have seen in the cases above, with regard to penalties, domestic courts exercising universal jurisdiction generally apply the penalties provided for by their domestic law, even when they directly apply international law provisions.

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There is a great disparity in sentencing legislation among states, which could lead to a situation where the penalty provided for in the legislation of the state exercising universal jurisdiction is more severe than the one provided for in the territorial (or national) state. To take an extreme example, one can imagine that the forum state applies its own penalties for crimes against humanity, namely imposing the death penalty, on a person who committed the crime in the territorial state where the maximum possible sentence is 20 years' imprisonment. One could convincingly argue that such a penalty does not fulfil the requirement of "foreseeability" deriving from the *nulla poena sine lege* principle. In this case, it is submitted that the territorial law which was applicable at the time of commission of the events should apply, if it is more lenient than that of the forum.¹⁷⁹⁹ This is why many states contain a provision obliging criminal courts exercising universal jurisdiction to refrain from imposing a heavier sentence than that provided for by the law at the place of commission.¹⁸⁰⁰ However, one can also imagine a situation where the penalty

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¹⁷⁹⁸ Gaeta, 'The Need Reasonably to Expand National Criminal Jurisdiction over International Crimes', in A. Cassese (ed.) *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012).

¹⁷⁹⁹ However, it should be noted that in practice, it is not always easy for a court to determine which law is more lenient. See for example, ECtHR, *Maktouf*, § 16.

¹⁸⁰⁰ For a different opinion, see Roets, *La prétendue impossibilité d'extrader vers le Rwanda des rwandais suspectés d'avoir participé au génocide de 1994 (à propos des arrêts rendus par la Chambre criminelle de la Cour de cassation le 26 février 2014)*, who considers "pour les crimes internationaux par nature qui sont, tel le génocide, d'une particulière gravité – qui font partie, selon la formule d'Henri Donnedieu de Vabres, du « patrimoine moral de l'humanité » –, en ce qui concerne tant l'application de la loi pénale dans l'espace que l'application de la loi pénale dans le temps, la peine applicable est celle prévue par la *lex fori* au moment du procès : En d'autres termes encore, comme l'internationalité par nature d'une infraction est susceptible de faire échec au principe de territorialité, elle peut, en brisant les chaînes du temps, faire se rencontrer la norme internationale de comportement et les

provided for by the territorial state is extremely low in order to shield the persons responsible of committing international crimes. This would be the case of a national law which, in order to protect its citizens, would provide that the penalty for torture is for instance just a fine. Generally speaking, the forum state should thus apply the law of the territorial state if it is more favourable, but as long as it is not legislation designed to shield the person concerned. In other words, the forum state is not bound by the lower penalty if the sentence is not appropriate compared to the gravity of the crime that was committed.¹⁸⁰¹ In this respect, it is noteworthy that the Torture Convention does not only oblige States to ensure that all acts of torture are offences under its criminal law but also obliges them to make these offences punishable by appropriate penalties which take into account their grave nature.¹⁸⁰²

VI. Concluding remarks to chapter 1

A. The limits to judicial activism, the legality principle and the separation of powers

593 The issues discussed in this chapter illustrate the tension between the rights of the individual and the fight against impunity. On the one hand, from an international criminal law viewpoint, one can only salute the courage and creativity of some national judges in their efforts to combat impunity in respect of those responsible for the most abominable human rights violations in the absence of satisfactory national legislation. The outcome of most of the convictions is probably “*juste*”.

594 On the other hand, from a criminal procedural law point of view, one can only be seriously troubled by a criminal conviction, generally followed by a life-long sentence, for a crime whose legal basis is an unwritten customary rule of international law, especially when it is delivered by a court that does not have jurisdiction according to its own domestic legislation. To a certain extent, it raises the age-old debate of whether the ends justifies the means; this is a debate that has recently gained renewed interest in the context of the use of methods in criminal proceedings which do not respect fair trial rights and other basic human rights, such as the prohibition of the use of torture on alleged terrorists

normes nationales de comportement et de pénalité, celles-ci étant en quelque sorte absorbées par celle-là’.

¹⁸⁰¹ On the notion of “appropriate penalties”, see ICJ, Judgment, *Sylvio Berlusconi and Others*, 3 May 2005.

¹⁸⁰² See Art. 5 of the Torture Convention.

as a means to fight the global “war on terrorism”.¹⁸⁰³ It should be recalled that *the nullum crimen, nulla poena sine lege* principle – like the prohibition of torture – is considered to be non-derogable both in the ICCPR and in the ECHR. It is worth mentioning that one of the general purposes of these conventions is “the maintenance of the rule of law”. In addition, the principle according to which the exercise of authority, and especially that of criminal judges, can only take place on the basis of the rule of law, is one of the fundamental protections afforded to a person against arbitrary prosecution, trial, arrest, and detention.

From a human rights law viewpoint, the universal jurisdiction versus 595
 legality debate also raises another fundamental and delicate debate about the purpose of human rights law: the protection of human rights through criminal prosecution versus the protection of individual rights.¹⁸⁰⁴ Human rights generally exist to protect the individual. In the cases examined above, human rights and, in particular, Article 15(2) ICCPR Article 7(2) ECHR are used to punish persons rather than to protect them. This perspective also raises the issue of whether some human rights are more important than others. One can be somewhat skeptical when reading in a separate opinion of the *ICJ Belgium v. Senegal* case, that “[t]he imperative of the preservation of the integrity of human dignity stands well above pleas of non-retroactivity”.¹⁸⁰⁵ We are not sure that an approach which sacrifices the legality principle and the basic principle of the rule of law constitutes a step in the right direction.

One of the ways in which we might come to terms with these debates is 596
 reflected in the further implementation of international law at the domestic level. It is true that law – unlike judicial activity – implementing international human rights requires political will as well as political capacity,¹⁸⁰⁶ both of which are regrettably often lacking. As a consequence, this may in some cases lead to impunity. Yet this is, in our view, the price to pay to achieve some

¹⁸⁰³ Regarding the use of torture, quite surprisingly, the debate has been openly discussed by legal scholars. The issue was raised in the German *Gäfgen* case. On this topic, see the very interesting article by F. Jessberger, ‘Bad Torture – Good Torture: What International Criminal Lawyers May Learn from the Recent Trial of Police Officers in Germany’, 3 *Journal of International Criminal Justice* (2005) 1059-1073.

¹⁸⁰⁴ Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford: Oxford University Press, 2009), at 293-294; This brings to light once again the opposition between the ‘shield’ function and the ‘sword’ function of human rights in the application of criminal law. Indeed, human rights have both a defensive and an offensive role, “a role of both neutralizing and triggering the application of criminal law”. See F. Tulkens, ‘The Paradoxical Relationship between Criminal Law and Human Rights’, 9(3) *Journal of International Criminal Justice* (2011) 577-595.

¹⁸⁰⁵ See ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Separate Opinion of Judge Cançado Trindade, 20 July 2012, § 149.

¹⁸⁰⁶ See E. M. Hafner-Burton and K. Tsutsui, ‘Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most’, 44(4) *Journal of Peace Research* (2007) 407-425, at p. 409.

consistency between the ends and the means, and to respect the legality principle as well as the principle of the separation of powers. As considered above, the legality principle not only prevents the legislator from punishing past acts by legislation but also prevents the judge from creating new crimes, thus obliging him to apply the laws enacted by the legislator, and thereby preventing the expression of any possible judicial arbitrariness and activism. As we have seen in the cases presented in this chapter, even common law countries have adopted this position, recognizing that judges can no longer create crimes and that domestic legislative provisions are needed to criminalize certain acts. As underlined by Lord Wilcox in the Australian *Nulyrimana* case, “in the realm of criminal law the strong presumption *nullum crimen sine lege* (there is no crime unless expressly created by law) applies. In the case of serious criminal conduct, ground rules are needed. Which courts are to have jurisdiction to try the accused person? What procedures will govern the trial? What punishment may be imposed? These matters need to be resolved *before* a person is put on trial for an offence as horrendous as genocide.”¹⁸⁰⁷

597 As rightly underlined in the Senegalese *Hissène Habré* judgment, it is up to the legislator to adopt a criminal code. Judges interpret and apply the law. In particular, in the absence of domestic provisions allowing it to do so, states cannot exercise universal jurisdiction. Furthermore, states cannot create crimes or widen definitions to a considerable extent in order to achieve a particular goal, for example, the “fight against impunity”. In addition to being contrary to the legality principle, excessive judicial activism poses serious problems with regard to the principle of the separation of powers.¹⁸⁰⁸

B. The need for implementation and the need for international sanctions on states

598 As seen in Part II, while the Rome Statute does not impose an obligation on states to criminalize ICC crimes,¹⁸⁰⁹ the ratification of the Rome Statute has led to an increasing amount of implementing legislation. States are indeed strongly encouraged to take such steps because if they do not, they risk being identified as “unable to carry out its proceedings”, which might lead the ICC to establish

¹⁸⁰⁷ See Federal Court of Australia, *Nulyrimma v. Thompson* [1999] FCA 1192, § 167 (emphasis added).

¹⁸⁰⁸ See Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (The Hague: TMC Asser Press, 2006).

¹⁸⁰⁹ With the exception of Art. 70(4)(a) ICC Statute with regard to crimes against the administration of justice.

its complementary jurisdiction.¹⁸¹⁰ Ultimately, the widespread enactment of national legislation in respect of international crimes will lead to the harmonization of domestic legal orders¹⁸¹¹ and to an increasing amount of domestic legislation incorporating the universal jurisdiction principle. In the meantime, there are ways in which states can be strongly “encouraged” to implement what we consider to be their obligations under international law.

Indeed, in Part I, we have concluded that states have the right – and the obligation – under customary international law to establish and exercise universal jurisdiction over genocide, crimes against humanity, war crimes and torture. Furthermore, it is largely recognized that states have an obligation under treaty law to establish and exercise universal jurisdiction over war crimes and torture.¹⁸¹²

If states fail to implement their obligations, they violate their obligations to enact legislation. The decision of the ICJ in the *Belgium v. Senegal* case, condemning Senegal for its omissions in this respect, can only be welcomed. Other complaints from states heading in this direction, as well as decisions condemning states – like the decision of the Committee Against Torture in the *Hissène Habré* case¹⁸¹³ – can only be strongly encouraged.

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¹⁸¹⁰ R. Bellelli, ‘Obligation to Cooperate and Duty to Implement’, in R. Bellelli (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to its Review* (Farnham: Ashgate, 2010) 211-240, at 212.

¹⁸¹¹ Jessberger, ‘National Legislation on International Crimes’, in Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), at 428-429.

¹⁸¹² See common articles GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146. See also the extension made by Art. 85 of Additional Protocol I to the Geneva Conventions to the listed crimes. In addition to this obligation to establish and exercise universal jurisdiction, states have an obligation to implement the underlying crimes into their domestic legislation. Indeed, Art. 5 of the Genocide Convention obliges states to implement the Genocide Convention at the national level. This obligation includes the duty to enact into domestic law the definition of genocide set out in Art. 2 of the Convention.¹⁸¹² The same can be said for torture and grave breaches of the Geneva Convention.

¹⁸¹³ See Committee Against Torture, *Suleymane Guengueng et al. v. Senegal*, Communication No. 181/2001, U.N. Doc. CAT/C/36/D/181/2001, 19 May 2006, available online at <http://www1.umn.edu/humanrts/cat/decisions/181-2001.html> (last visited 1 August 2017), § 9.12: “The Committee against Torture, acting under article 22, paragraph 7, of the Convention, concludes that the State party has violated article 5, paragraph 2, and article 7 of the Convention”.

Chapter 2: The requirement of a link with the state exercising universal jurisdiction

I. Introductory remarks

One of the main issues arising in the theory and practice of universal jurisdiction is whether a link with the state exercising universal jurisdiction must exist after the crime has been committed.¹⁸¹⁴ Traditionally, scholars have defined “absolute universal jurisdiction” or “pure universal jurisdiction”¹⁸¹⁵ as jurisdiction that does not require any connection between the state and the suspect as opposed to “conditional universal jurisdiction”, which requires some form of link, generally the presence of the suspect on the territory of the state intending to exercise universal jurisdiction (hereafter “the presence requirement”). This terminology is not entirely satisfactory because it seems to imply that the link to the state is the only condition attached to the exercise of universal jurisdiction.¹⁸¹⁶ However, other legal limitations – such as the application of the subsidiarity principle or rules on personal immunities – can make universal jurisdiction “conditional”. That is to say, the absence of the presence requirement does not necessarily make universal jurisdiction “absolute” or pure.

In their legislation, most states require that the offender have some kind of link with them in order to exercise universal jurisdiction.¹⁸¹⁷ As mentioned above, generally, the minimal required link is the presence of the suspect therein at some time after the commission of the offence.¹⁸¹⁸ Recently, the need for closer links, such as the residence of the suspect or of the victim,¹⁸¹⁹ has been introduced in certain domestic laws.¹⁸²⁰ According to Donnedieu de Vabres, universal jurisdiction is linked, in the first instance, to the presence of the

¹⁸¹⁴ The link in question here is of course not the territoriality, active or passive nationality or protective principles, which in any case all exist at the moment of commission of the offence.

¹⁸¹⁵ See Gaeta, ‘The Need Reasonably to Expand National Criminal Jurisdiction over International Crimes’, in A. Cassese (ed.) *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012), at 585-595.

¹⁸¹⁶ See Part I.

¹⁸¹⁷ See Part II.

¹⁸¹⁸ See LaFontaine, ‘The Unbearable Lightness of International Obligations: When and How to Exercise Jurisdiction under Canada’s *Crimes against Humanity and War Crimes Act*’, 23(2) *Revue québécoise de droit international*, (2011) 1-50, at 26.

¹⁸¹⁹ As discussed in Parts I and II, some commentators consider this as active personality jurisdiction rather than universal jurisdiction. In our view, the requirement of residency is merely a more restrictive condition of universal jurisdiction.

¹⁸²⁰ See Part II.

suspect on the territory of the state.¹⁸²¹ Indeed, traditionally, according to the principle *aut dedere aut judicare*, states are obliged to prosecute suspects that are present on their territory if they do not extradite them. On this understanding, the exercise of universal jurisdiction – like extradition – is the negation of the states’ right to grant asylum to offenders.¹⁸²² The state intervenes, when no other state does, in the interest of mankind, to avoid a “scandalous impunity”. Its intervention only appears when the state judging has the offender in its possession.¹⁸²³

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This Chapter will address the issue of whether the presence of the suspect is a requirement under international and domestic law for the exercise of universal jurisdiction or whether a state may conduct an investigation in the absence of a suspect. In the latter case, does this mean that a state can seek extradition or issue an international arrest warrant based on universal jurisdiction? It is indeed one thing to say that any state, who finds on its territory a fugitive suspected of an international crime, has the right, or even the obligation, to investigate and prosecute them (if it does not extradite them). However, it is another to say that any state can issue an international arrest warrant or request the extradition of any person suspected of an international crime,¹⁸²⁴ who may be located anywhere in the world. In the latter scenario, states with domestic legislation authorizing trials *in absentia* would even be able to try suspects in his absence without needing to request their arrest or extradition.¹⁸²⁵

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Section II of this Chapter will begin by examining whether a link between the suspect and the State exercising universal jurisdiction, and in particular, the

¹⁸²¹ Donnedieu de Vabres, *Les Principes modernes du droit pénal international* (1928), at 135: “*Tel qu’on vient de le définir, le système de l’universalité du droit de punir à sa modeste origine dans un texte du Code de Justinien, C. III, 15, Ubi de criminibus agi oportet, 1, qui déterminant le ressort en matière pénale, des gouverneurs de l’Empire, donne à la fois compétence au tribunal du lieu de commission du délit, à celui du lieu d’arrestation du coupable (judex deprehensionis). L’interprétation tendancieuse des glossateurs substitua au judex deprehensionis le judex domicili.*”

¹⁸²² *Ibid.*, at 137-138.

¹⁸²³ My translation. According to the French text: “[L’Etat] intervient, à défaut de tout autre Etat, pour éviter, dans un intérêt humain, une impunité scandaleuse. [...] [Son intervention] ne se manifeste que si l’Etat qui juge a le délinquant en sa possession.”, Donnedieu de Vabres, *Les Principes modernes du droit pénal international* (1928), at 135.

¹⁸²⁴ See Reydams, ‘The Rise and Fall of Universal Jurisdiction’, in Schabas/Bernaz (eds), *Routledge Handbook of International Criminal Law* (London: Routledge, 2011), at 341.

¹⁸²⁵ As will be discussed in Section V below, this will rarely be the case in practice, due to human rights standards established notably by the case law of the European Court of Human Rights. In addition, most domestic legislation, which authorizes trials *in absentia*, includes in its conditions either that the suspect be aware that proceedings are being conducted against him or that the suspect has been heard at least once by the authorities.

presence of the suspect, is required under international law. Section III will examine state practice on the matter. In particular, it will examine whether the requirement of the residence of the suspect – provided for in certain pieces of recent European legislation – is compatible with international law. Section IV will then go on to address the issue of the timing of the presence of the suspect as well as the required length of this “presence”. Finally, in Section V, we will argue in favor of universal jurisdiction *in absentia*, in the case of the unwillingness or inability of the custodial state to act.

II. A jurisdictional link: the debate

A. Terminology

The exercise of universal jurisdiction in the absence of the suspect is referred to as “universal jurisdiction *in absentia*”; sometimes it even appears to be considered by some as a separate concept under international law.¹⁸²⁶ Universal jurisdiction *in absentia* can be defined as “the conducting of an investigation, the issuing of an arrest warrant and/or the bringing of criminal charges based on the principle of universal jurisdiction when the defendant is not present in the territory of the acting state”.¹⁸²⁷ In our view, this term is somewhat confusing, for two reasons. Firstly, the term is generally used to make a distinction with universal jurisdiction *per se*, thus possibly giving the impression that they reflect two different jurisdictional principles;¹⁸²⁸ this is not the case. Secondly, the term leads to some confusion between universal jurisdiction *in absentia* and trials *in absentia*. The two must be carefully distinguished. While the prohibition of universal jurisdiction *in absentia* refers to a “possible limitation on exercising jurisdiction to adjudicate when the suspect is not on the forum state’s

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¹⁸²⁶ See D. Akande, ‘Arrest Warrant Case’, in Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009) 586-587, at 586; However, as underlined one commentator, in the Spanish *Guatemala Generals* case, the presence of the accused on Spanish territory was treated separately by the Constitutional Tribunal because “it works as a procedural condition, not as a distinct basis of jurisdiction”. See Spanish Constitutional Court, *Guatemala Generals* 331/1999-100, Decision 237, 26 September 2005, at 2b). See H. Ascensio, ‘The Spanish Constitutional Tribunal’s Decision in *Guatemalan Generals*: Unconditional Universality Is Back’, 4 *Journal of International Criminal Justice* (2006) 586-594, at 593.

¹⁸²⁷ A. Colangelo, ‘The New Universal Jurisdiction: In Absentia Signaling over Clearly Defined Crimes’, 36 *Georgetown Journal of International Law* (2004-2005) 537-604, at 543.

¹⁸²⁸ See the interesting discussion in O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’, 2(3) *Journal of International Criminal Justice* (2004) 735-760.

territory",¹⁸²⁹ trials *in absentia* refer to the issue of whether an accused may or may not be *tried* in his or her absence and raises issues of human rights law in criminal proceedings. We will briefly come back to trials *in absentia* at the end of this Chapter.

B. The presence requirement: the debate

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The issue of whether there is a need for a jurisdictional link to the forum state, and in particular the need for the presence of the suspect on the state's territory, is controversial. Some scholars have affirmed that the presence of the suspect is a requirement under customary international law for the exercise of universal jurisdiction.¹⁸³⁰ The authors of the Darfur Report notably suggested this.¹⁸³¹ Other scholars have even suggested that international law prohibits the exercise by states of universal jurisdiction *in absentia*.¹⁸³² By contrast, other commentators argue that international law does not prohibit universal jurisdiction *in absentia*.¹⁸³³ According to Kamminga, "for the exercise of universal jurisdiction in respect of gross human rights offenders, no connection whatsoever between the prosecuting state and the suspect is required under either treaty law or customary international law".¹⁸³⁴ According to the authors of the AU-EU Report, international law does not provide any rule specifically restricting the exercise of universal jurisdiction to adjudicate. Thus, a state can assert universal jurisdiction even without the presence of the suspect within its territory.

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Traditionally, universal jurisdiction based on the presence of the offender on the state's territory is based on classical notions of territorial sovereignty: a state's jurisdiction extends to all individuals present in their territory, even in relation to acts that were committed elsewhere.¹⁸³⁵ One could argue however

¹⁸²⁹ J. Geneuss, 'Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU-EU Expert Report on the Principle of Universal Jurisdiction', 7(5) *Journal of International Criminal Justice* (2009) 945-962, at 955.

¹⁸³⁰ See for instance Akande, *supra* note 1826, at 587; Werle and Bornkamm, 'Torture in Zimbabwe under Scrutiny in South Africa: The Judgment of the North Gauteng High Court in SALC v. National Director of Public Prosecutions', 11 *Journal of International Criminal Justice* (2013) 659-675, at 666.

¹⁸³¹ *Darfur Report*, § 614.

¹⁸³² See ICJ, *Arrest Warrant* case, Separate Opinion of President Guillaume, at 44.

¹⁸³³ See ICJ, *Arrest Warrant* case, Dissenting Opinion of Judge Van Wyngaert, § 53 ff.; See for instance O'Keefe, 'The Grave Breaches Regime and Universal Jurisdiction', 7 *Journal of International Criminal Justice* (2009) 811-831 at 829; Ryngaert, *Jurisdiction in International Law* (2008), at 120.

¹⁸³⁴ Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses', 23(4) *Human Rights Quarterly* (November 2001) 940-974, at 954.

¹⁸³⁵ Ryngaert, *Jurisdiction in International Law* (2008), at 120; See however, ICJ, *Arrest Warrant* case, Joint Separate Opinion of Judges Higgins et al., § 41: "By the loose use of language, the latter has

that the obligation to prosecute (or extradite), if the offender is present, in relation to international crimes, does not prohibit the exercise of universal jurisdiction in the absence of the offender. As underlined by Judges Higgins et al.:

58. If the underlying purpose of designating certain acts as international crimes is to authorize a wide jurisdiction to be asserted over persons committing them, there is no rule of international law (and certainly not the *aut dedere* principle) which makes illegal co-operative overt acts designed to secure [the] presence [of those persons] within a State wishing to exercise jurisdiction.¹⁸³⁶

The presence of the suspect is also generally required by states for political or practical reasons.¹⁸³⁷ Indeed, there is a general lack of interest of states in investigating crimes committed by a person who is not even on state territory. Such investigations are costly and states have the fear of overburdening their court system.¹⁸³⁸ There is also a considerable chance that their endeavor will not succeed, in particular due to the difficulties of gathering evidence. In its 2009 decision in the *Rumsfeld* case, the Stuttgart Regional Appeals Court dismissed the appeal lodged against the General Federal Prosecutor's decision and refused to present the case to the Federal Constitutional Court.¹⁸³⁹ It considered that while Rumsfeld was "regularly present in Germany for conferences and meetings" and that it could not be ruled out that such visits would take place in the future, there was a lack of domestic connection as required by § 153(f) of the German Code of Criminal Procedure (StPO). This restrictive application of the provision was largely criticized. However, interestingly, the Court concluded by saying that no fault could be found in the Prosecutor's decision because no prospect existed of "comprehensively investigating the acts from Germany and actually bringing the accused before a court here".¹⁸⁴⁰ It considered that the "reference to the problematic legal and security situation in Iraq and the fact that no cooperation can be expected from the US within the framework of legal assistance requests concerning the facts alleged and the high-level defendants appears justified, and causes the decision to refrain from bringing proceedings

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come to be referred to as "universal jurisdiction", though this is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere."

¹⁸³⁶ ICJ, *Arrest Warrant* case, Joint Separate Opinion of Judges Higgins et al., at 80, § 58.

¹⁸³⁷ According to Judge Van Wyngaert in her Dissenting Opinion in the *Arrest Warrant* case, "The concern for a linkage with the national order thus seems to be more of a pragmatic than of a juridical nature".

¹⁸³⁸ See ICJ, *Arrest Warrant* case, Dissenting Opinion of Judge Van Wyngaert, § 56.

¹⁸³⁹ See A. Fischer-Lescano, 'Introductory Note to the Decision of the General Federal Prosecutor: Center for Constitutional Rights v. Rumsfeld, 20 December 2005', 45 *International Legal Materials* (2006) 115 ff., at 117.

¹⁸⁴⁰ Stuttgart Regional Appeals Court, Decision, 21 April 2009, at 11.

to seem not at all arbitrary".¹⁸⁴¹ Moreover, many states have limited the exercise of universal jurisdiction to those cases in which a person is present on their territory, as it might be considered that the adoption of so-called absolute universal jurisdiction "may show a lack of international courtesy".¹⁸⁴² As we will see below, the negative political impacts on inter-state relations that the initiation of proceedings *in absentia* have entailed have led states to be pressured into changing their legislation.

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Another argument that supports the presence requirement is the need to eliminate positive conflicts of jurisdiction.¹⁸⁴³ In his Separate Opinion in the *Arrest Warrant* case, President Guillaume argues that the absence of such a requirement would risk "creating total judicial chaos" and would also "encourage the arbitrary, for the benefit of the powerful, purportedly acting as agent for an ill-defined international community".¹⁸⁴⁴ Allowing universal jurisdiction *in absentia* implies (theoretically) that any state in the world could initiate proceedings against any person in the world, suspected of committing grave international crimes anywhere in the world against any person in the world. This objection is in our view not very convincing. As our analysis of state legislation and practice shows, many states today have adapted the necessary legal framework allowing them to exercise universal jurisdiction subject to a number of conditions and states remain very reluctant to do so, even when the suspect is present on their territory, for a number of political, practical and financial reasons. National criminal justice systems are already overloaded with cases, and criminal prosecution and trials are costly; the risk of such a "judicial chaos" is in our view highly unlikely in practice. In any event, opening a criminal investigation and initiating proceedings at the national level requires the existence of sufficient evidence against a suspect; a criminal investigation will not be opened if there is no evidence. More concretely, any such proceeding implies, for instance, that victims of grave human rights violations – who will generally be residing in a third state – have, with the help of NGOs, collected sufficient evidence and submitted it to the prosecution. The chances of this happening in many states at the same time is rather slim. Moreover, even if it that were the case, and an investigation were to be opened in several states, the states could share the evidence and decide, if need be, which state would prosecute the suspect, in a similar way as is the case of transnational crimes.

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In any event, these reasons and others have led many commentators to suggest that the presence of the suspect should be a requirement for the exercise of universal jurisdiction. Recently, one scholar suggested that the voluntary

¹⁸⁴¹ *Ibid.*

¹⁸⁴² ICJ, *Arrest Warrant* case, Dissenting Opinion of Judge Van Wyngaert, § 3.

¹⁸⁴³ See A. Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction', 1 *Journal of International Criminal Justice* (2003) 589-595, at 592.

¹⁸⁴⁴ ICJ, *Arrest warrant* case, Separate Opinion of President Guillaume, at 43.

presence of the suspect was necessary in order to respect the principle of legality.¹⁸⁴⁵ She argues that if suspects voluntarily enter the territory of a state, they subject themselves to the criminal jurisdiction of that state, and to the range of penalties attached to their alleged crime.¹⁸⁴⁶ This argument is not entirely convincing. As discussed above, the exercise of universal jurisdiction does raise a number of concerns with regard to the principle of legality as required by Article 7 ECHR and provisions of domestic law. This is especially true when the penalties in the forum state are greater than the penalties that the suspect expected at the time of commission of the offence (i.e. the penalties in the territorial or active nationality state). However, it is difficult to understand how making the (voluntary) presence of the suspect – after the commission of the offence – a condition to the exercise of universal jurisdiction in any way “puts the exercise of universal jurisdiction in conformity to the principle of legality”.¹⁸⁴⁷ The reasoning appears to be the following. If the suspects voluntarily enter a territory, they know and foresee what laws will govern their conduct. On the contrary, pursuant to universal jurisdiction *in absentia*, the forum is arbitrarily determined.¹⁸⁴⁸ suspects cannot foresee which state will exercise jurisdiction, under which national law they will be prosecuted, what punishment may be imposed, and in which state they will serve their sentence.¹⁸⁴⁹ In other words, by seeking refuge in a state, the offender somehow chooses his law and takes the risk of being prosecuted and tried in that state.

Such a conception appears at odds with the general view according to which rules relating to jurisdiction are not substantive rules but procedural rules that may be applied retroactively. We have discussed this issue in detail in the Chapter dedicated to universal jurisdiction and the legality principle. However, at this stage, we would disagree with the contention that the presence requirement is necessary to comply with the legality principle. If one were to follow this view, it would mean that if the state, in which a suspect of grave international crimes is present, were to adopt a new universal jurisdiction statute which required the presence of a suspect, the perpetrator could not be prosecuted because at the moment when he entered the state, he did not

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¹⁸⁴⁵ Gaeta, ‘The Need Reasonably to Expand National Criminal Jurisdiction over International Crimes’, in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012) 585-595.

¹⁸⁴⁶ *Ibid.*, at 603.

¹⁸⁴⁷ *Ibid.*, at 585-595, Abstract.

¹⁸⁴⁸ Ryngaert, *Jurisdiction in International Law* (2008), at 121.

¹⁸⁴⁹ See Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law* (2005), at 147.

voluntarily agree to be subjected to the law. He could therefore continue to live there in perfect impunity, unless he is extradited to another state.¹⁸⁵⁰

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In our view, there are also a number of arguments against the requirement of the presence of the suspect on state territory as a precondition for the exercise of universal jurisdiction. This is especially the case for suspects who are in hiding or “openly living in harbouring countries”.¹⁸⁵¹ Proponents of universal jurisdiction *in absentia* argue that its exercise makes the fight against impunity more effective, especially if victims are present in the forum State, and “excludes negative conflicts of jurisdiction”.¹⁸⁵² We will come back to this in the last section of this thesis.

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The following subsection will show that international law neither clearly imposes a presence requirement, nor prohibits universal jurisdiction *in absentia*. State practice however seems to suggest that a rule is developing that would restrict the exercise of universal jurisdiction to circumstances in which the person is on state territory (Section IV).¹⁸⁵³

III. The presence requirement under international law

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While conventions make reference to the obligation of states, in which a suspect is found, to exercise jurisdiction if it does not extradite them (principle *aut dedere, aut judicare*), no convention clearly and expressly provides for the right (or obligation) of states to exercise universal jurisdiction in the absence of the offender. This has led one commentator to assert that “universal jurisdiction *in absentia* is unknown to international conventional law”,¹⁸⁵⁴ this statement does not appear to hold true in our view, at least today.

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The Torture Convention, for instance, provides at its Article 5(2) that “2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article”. Article 7 of the Convention establishes that “The State Party in the territory

¹⁸⁵⁰ See C. Lombois, ‘De la compassion territoriale’, *Revue de science criminelle et de droit comparé* (1995), at 399 ff. ; see also Reydam, *Universal Jurisdiction : International and Municipal Perspectives* (2003), at 134.

¹⁸⁵¹ A. Colangelo, ‘The New Universal Jurisdiction: In Absentia Signaling over Clearly Defined Crimes’, 36 *Georgetown Journal of International Law* (2005) 578-602, at 543.

¹⁸⁵² Principles 14(2) and 15(1) of the Brussels Principles Against Impunity and for International Justice, adopted by the “Brussels Group for International Justice”, following on from the colloquium “The Fight Against Impunity: Stakes and Perspectives” (Brussels, March 11-13, 2002).

¹⁸⁵³ See in this direction, Akande, ‘*Arrest Warrant Case*’, at 587.

¹⁸⁵⁴ ICJ, *Arrest Warrant case*, Separate Opinion of President Guillaume, § 9.

under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution". The Convention thus only expressly requires the state to act where the alleged offender is present to establish jurisdiction;¹⁸⁵⁵ it does not however preclude the possibility for contracting states to establish criminal jurisdiction on bases other than those imposed by the treaty.¹⁸⁵⁶ Such an approach is in line with Article 5(3) of the Torture Convention, which states that the Convention "does not exclude any criminal jurisdiction exercised in accordance with internal law". This provision can be interpreted as permitting states to exercise universal jurisdiction in the absence of the suspect on their territory.

On the contrary, the text of the Geneva Conventions does not refer to any link to the state. According to Article 49 of the Geneva Conventions, "Each High contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed [...] grave breaches, and shall bring such persons, regardless of their nationality, before its own courts". The *Pictet Commentary* suggests that, on a historical interpretation, the obligation under Article 49 should be understood as being an obligation for states to search for suspects who may be *on their territory*.¹⁸⁵⁷ Some commentators argue that for a number of reasons, the Convention *should* be interpreted as requiring the presence of the suspect of the territory of the state.¹⁸⁵⁸

The most famous case of the exercise of universal jurisdiction *in absentia* is the issuance by Belgium of an international arrest warrant against the (in office) Congolese Minister of Foreign Affairs of the Democratic Republic of Congo, Yerodia Ndombasi, for war crimes and crimes against humanity. In addition to claiming that Belgium had violated international rules on immunities, the DRC's first argument was that the universal jurisdiction claimed by Belgium was not recognized by international law.¹⁸⁵⁹ In its submissions, the DRC

¹⁸⁵⁵ C. Hall, 'The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to recover Reparations for Torture Committed Abroad', 18(5) *The European Journal of International Law* (2008) 921-937, at 925.

¹⁸⁵⁶ Gaeta, 'The Need Reasonably to Expand National Criminal Jurisdiction over International Crimes', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012) 585-595, footnote 12.

¹⁸⁵⁷ See Pictet Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1952, cited in ICJ, *Arrest Warrant* case, Joint Separate Opinion of Judges Higgins et al., § 32.

¹⁸⁵⁸ See Gaeta, 'Les règles internationales sur les critères de compétence des juges internationaux', in Cassese and Delmas-Marty (eds), *Crimes internationaux et juridictions internationales* (Paris : Presses Universitaires de France, 2002) 191- 213, at 206-207.

¹⁸⁵⁹ See Akande, 'Arrest Warrant Case', at 586.

referred to the following statement of Professor Lombois, which provides as follows:

Wherever that condition [the presence requirement] is not put into words, it must be taken to be implied: how could a State search for a criminal in a territory other than its own? How could it hand him over if he were not present in its territory? Both searching and handing over presuppose coercive acts, linked to the prerogatives of sovereign authority, the spatial limits of which are defined by the territory.¹⁸⁶⁰

618 It goes without saying that a state has no enforcement jurisdiction outside its territory (without permission) and that the aforementioned provision of the Geneva Conventions is (obviously) not to be interpreted as suggesting that states can start searching for evidence and suspects on the territory of other states in clear violation of the sovereignty of the latter. However, in our view, the exercise of universal jurisdiction in the absence of the suspect of war crimes on the third state's territory simply opens up the possibility for that state to initiate an investigation and then either arrest the person if they later come on the territory of the state, or request the arrest by the state on the territory of which the suspect is found – by issuing an arrest warrant – or even to merely transfer, if need be, any gathered information to the more concerned state (i.e. the territorial state) or to the International Criminal Court. On this understanding, the presence of the suspect is thus not *necessary* for a state to exercise universal jurisdiction over war crimes.¹⁸⁶¹

619 Regretfully, in the *Arrest Warrant* case, the ICJ did not address the DRC's argument and dismissed the case based on the fact that Belgium had violated its legal obligation towards the DRC to respect the immunity from criminal jurisdiction and the inviolability which the incumbent DRC Minister for Foreign Affairs enjoyed under international law. This approach was criticized by some of the judges who rightly pointed out that "a court's jurisdiction is a question which it must decide before considering the immunity of those before it".¹⁸⁶²

620 However, the very interesting Individual Opinions issued by the judges in this case widely addressed the issue of universal jurisdiction *in absentia*, and the question of whether a state may initiate criminal proceedings against a person

¹⁸⁶⁰ See *Arrest Warrant Case*, Separate Opinion of Judge Rezek.

¹⁸⁶¹ See Henzelin, 'La compétence universelle et l'application du droit international pénal en matière de conflits armés – la situation en Suisse', in L. Burgogne-Larsen, *La répression internationale du génocide rwandais* (Brussels : Bruylant, 2003), at 353-354 ; see ICJ, *Arrest Warrant case*, Dissenting Opinion of Judge Van Wyngaert, § 54.

¹⁸⁶² ICJ, *Arrest Warrant case*, Separate Opinion of President Guillaume, at 35. See also ICJ, *Arrest Warrant case*, Separate Opinion of Judge Rezek, at 91.

not present on its territory. President Guillaume, Judge ad hoc Bula-Bula,¹⁸⁶³ in their Separate opinions, as well as Judge Ranjeva, in his declaration,¹⁸⁶⁴ spoke against the legality of the exercise of universal jurisdiction *in absentia*. President Guillaume held that international law only knows “one true case of universal jurisdiction” (to be understood here as universal jurisdiction *in absentia*): piracy.¹⁸⁶⁵ He argued that universal jurisdiction *in absentia* was unknown to international law; such a possibility was conferred neither by treaty law, nor by customary international law.¹⁸⁶⁶ He underlined that the practice of states indicates that they only exercise universal jurisdiction in cases where the suspect is present on state territory. On the contrary, referring to the *Lotus* case, Judge Van den Wyngaert argued that universal jurisdiction *in absentia* was permissible under international law.¹⁸⁶⁷ Likewise, in their Joint Separate Opinion, Judges Higgins, Koojimans and Buergenthal held that states may choose to exercise universal jurisdiction *in absentia*, as long as a number of safeguards are in place.¹⁸⁶⁸ Firstly, all immunities must be respected. Secondly, the national state of the prospective accused must be offered the opportunity to act upon the charges concerned. Thirdly, the charges may only be laid out by a prosecutor or *juge d’instruction* who acts with full independence, without links to or control by the government of that state. Finally, universal criminal jurisdiction *in absentia* may only be exercised over “those crimes regarded as the most heinous by the international community”.¹⁸⁶⁹

Following the ICJ Judgement and the individual opinions, the status under international law of universal jurisdiction in the absence of the suspect remained uncertain. With respect to torture, in the ICJ 2012 Judgement in the *Belgium v. Senegal* case, the Court noted that “the performance by the State of its obligation to establish the universal jurisdiction of its courts over the crime of torture is a necessary condition for enabling a preliminary inquiry (Article 6, paragraph 2), and for submitting the case to its competent authorities for the purpose of prosecution (Article 7, paragraph 1)”.¹⁸⁷⁰ The Court specified that “Article 6, paragraph 2, obliges the State to make a preliminary inquiry immediately from the time that the suspect is present in its territory”.¹⁸⁷¹ It did not rule out the possibility for states to start this inquiry in the absence of the suspect.

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¹⁸⁶³ See ICJ, *Arrest Warrant* case, Separate Opinion of Judge Bula-Bula.

¹⁸⁶⁴ See ICJ, *Arrest Warrant* case, Declaration of Judge Ranjeva.

¹⁸⁶⁵ ICJ, *Arrest Warrant* case, Separate Opinion of President Guillaume, at 42.

¹⁸⁶⁶ *Ibid.*

¹⁸⁶⁷ See ICJ, *Arrest Warrant* case, Dissenting Opinion of Judge Van Den Wyngaert, § 50 ff.

¹⁸⁶⁸ ICJ, *Arrest Warrant* case, Joint Separate Opinion, Judges Higgins et al., § 59.

¹⁸⁶⁹ *Ibid.*

¹⁸⁷⁰ ICJ, Judgement, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgement, 12 July 2012, § 74.

¹⁸⁷¹ *Ibid.*, § 94. See also § 86.

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This issue is also addressed in a number of other international instruments, most of which however are not binding on states. Principle 1 (“Fundamental of Universal Jurisdiction”) of the 2001 Princeton Principles provides as follows:

1. For purposes of these Principles, universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.

2. Universal jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law as specified in Principle 2(1), *provided the person is present before such judicial body.*

3. A state may rely on universal jurisdiction as a basis for seeking the extradition of a person accused or convicted of committing a serious crime under international law as specified in Principle 2(1), provided that it has established a *prima facie* case of the person’s guilt and that the person sought to be extradited will be tried or the punishment carried out in accordance with international norms and standards on the protection of human rights in the context of criminal proceedings.¹⁸⁷²

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While Principle 1(2) appears to ban the *trial* of a person in their absence, Principle 1(3) suggests that a State can seek extradition of suspects based on universal jurisdiction and therefore that their presence is not a prerequisite to its exercise.

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The “Brussels Principles Against Impunity and for International Justice”, adopted by the Brussels Group for International Criminal Justice, clearly assert that “[universal] jurisdiction is exercisable, in accordance with the rules of fair trial regardless of whether or not the presumed author is present on the territory of the forum state”.¹⁸⁷³ Eurojust’s 2003 “Guidelines for Deciding ‘Which Jurisdiction Should Prosecute’” are not as explicit; they provide that “the location of the accused” is *one* of the factors which should be considered to decide which jurisdiction should prosecute.¹⁸⁷⁴ The Guidelines thus seem to accept that universal jurisdiction may be exercised – as an alternative option –

¹⁸⁷² Princeton Principles, Principle 1, (emphasis added).

¹⁸⁷³ Principle 13 (2), Brussels Principles Against Impunity and for International Justice, adopted by the “Brussels Group for International Justice”, following on from the colloquium “The Fight Against Impunity: Stakes and Perspectives” (Brussels, March 11-13, 2002).

¹⁸⁷⁴ Eurojust, Annex: ‘Guidelines for Deciding ‘Which Jurisdiction Should Prosecute?’’, *Annual Report 2003*, available online at <http://eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202003/Annual-Report-2003-EN.pdf>, at 61-67 (last visited 1 August 2017).

by a state in which the accused is not located. The 2005 IDI Resolution also appears to allow universal jurisdiction *in absentia*; it requests the presence of the alleged offender in the territory of the prosecuting state, “apart from acts of investigation and requests for extradition”.¹⁸⁷⁵

The 2010 AU-EU report does not make the suspect’s presence mandatory for the exercise of universal jurisdiction. Recommendation 4 merely provides that “States of the AU and EU which have persons suspected of serious crimes of international concern within their custody or territory should promptly institute criminal proceedings against these persons”. Universal jurisdiction *in absentia* is therefore not prohibited by this international document either.

It is therefore submitted that international law does not require the presence of suspects on a third state’s territory for that state to initiate universal jurisdiction proceedings.

IV. The requirement of a link in state practice

A. The debate about the presence requirement before some national courts

1. A general overview

An examination of state practice leads to the conclusion that in most of the cases tried based on universal jurisdiction, a link exists between the offender or the offence and the forum state. Moreover, an overview of state legislation shows that a growing number of states condition the exercise of universal jurisdiction on either the presence or the main residence of the suspect after the commission of the crime. The theoretical debate as to whether presence is a requirement under customary international law is “to some extent passé”, because it has lost a lot of significance in practice.¹⁸⁷⁶

The presence of the suspect on state territory is required in a number of pieces of domestic legislation as a condition for the exercise of universal jurisdiction. This is for instance the case of Austria,¹⁸⁷⁷ the Netherlands,¹⁸⁷⁸

¹⁸⁷⁵ Krakov Resolution, 17th Commission, *Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes against Humanity and War Crimes*, § 3 b).

¹⁸⁷⁶ See Lafontaine, ‘Universal Jurisdiction – the Realistic Utopia’, 10 *Journal of International Criminal Justice* (2012) 1277-1302, at 1281.

¹⁸⁷⁷ See Section 65 of the Austrian Penal Code.

¹⁸⁷⁸ See Art. 2(1) of the Netherlands International Crimes Act 2003.

Switzerland,¹⁸⁷⁹ Canada,¹⁸⁸⁰ South Africa¹⁸⁸¹ and a number of other states.¹⁸⁸² Until the adoption of the 2010 French Statute, this was also for instance the case in France “in accordance with international conventions”, namely the Torture Convention, and for the crimes committed in relation to the conflicts in the Former Yugoslavia and Rwanda.¹⁸⁸³ Spanish legislation requires either the presence of the suspect or a “relevant connecting link”.¹⁸⁸⁴

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Some domestic laws are more restrictive and the mere presence of the suspect is not sufficient. This is the case of France, which since 2010 required the suspect’s residence on the territory for the exercise of universal jurisdiction over core crimes.¹⁸⁸⁵ Belgium, which provided for universal jurisdiction *in absentia* before 2003, now requires that either the perpetrator or the victim be a Belgian resident. Until 2010, Swiss legislation required a “close link”, such as the suspect’s main residence in Switzerland or close family members living in Switzerland. Since 1 January 2011, Article 264m of the Swiss Penal Code has provided that the alleged perpetrator must be present in Switzerland. It is interesting to note that following the criticism with respect to the new French Statute, on 26 February 2013, a new Article 689-11 was adopted by the French Senate, which *inter alia* deletes the requirement of the residence of the suspect in France and simply requires that the person finds themselves in France.¹⁸⁸⁶

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There are few domestic laws that do not require any kind of link between either the suspect or the victim and the state. This is for instance the case of Germany,¹⁸⁸⁷ Hungary,¹⁸⁸⁸ Finland,¹⁸⁸⁹

¹⁸⁷⁹ See Art. 264m of the Swiss Penal Code.

¹⁸⁸⁰ The 2010 Statute introduced in the French Code of Criminal Procedure an Art. 689-11 which subjects the exercise of universal jurisdiction over genocide, crimes against humanity and war crimes to four conditions, one of which is that the suspect must be a resident in France; See Canadian Crimes Against Humanity and War Crimes Act (2000), Art. 8.

¹⁸⁸¹ See Section 4(3)(c) of the South African Implementation of the Rome Statute of the International Criminal Court Act 2002.

¹⁸⁸² See Part II.

¹⁸⁸³ See Arts 689-1 and 689-2 of the French Code of Criminal Procedure. See *Loi n° 95-1 du 2 janvier 1995 and Loi n° 96-432 du 22 mai 1996*, available online at www.legifrance.com.

¹⁸⁸⁴ See Art. 23(4) of the Spanish Organic Law on the Judiciary as amended in 2009.

¹⁸⁸⁵ See Art. 689-11 of the French Code of Criminal Procedure. The mere presence of the suspect is required in case of torture (see Art. 689-2 of the French Code of Criminal Procedure) or other treaty based crimes (Art. 689-1 of the French Code of Criminal Procedure).

¹⁸⁸⁶ “*si elle se trouve en France*”.

¹⁸⁸⁷ See Section 1 of the German Code of Crimes against International Law.

¹⁸⁸⁸ See Section 3(2)(a) of the Criminal Code of Hungary 2012, available in English at [http://www.academia.edu/4602286/Criminal_Code_of_Hungary_2012_\(last_visited_1_August_2017\)](http://www.academia.edu/4602286/Criminal_Code_of_Hungary_2012_(last_visited_1_August_2017)).

¹⁸⁸⁹ See Section 7 of the Criminal Code of Finland and Decree on the application of Chapter 1, Section 7 of the Criminal Code of Finland, unofficial English translation available online at <http://iccdb>

New Zealand¹⁸⁹⁰ and Sweden.¹⁸⁹¹ This was also the case of Belgium until 2003 and Spain until 2009.

In some of the states where legislation does not require any specific link, such a requirement has nevertheless been developed by national courts. In Germany, for instance, legislation provides for an “unlimited (or “true”) principle of universal jurisdiction”.¹⁸⁹² The opportunity principle provided for in the German Code of Criminal Procedure authorizes the prosecutor not to pursue a case in certain circumstances. These circumstances allow, for example, that the prosecutor decide not to pursue prosecution if the suspect is not in or expected to be in Germany.¹⁸⁹³ For instance, in the very famous *Tadić* case, the German Supreme Court held that in order to exercise universal jurisdiction, there must be a “legitimizing link” between the suspect and the state, because “in the absence of such a link with the forum state, prosecution would violate the principle of non-interference, under which every State is required to respect the sovereignty of other States”.¹⁸⁹⁴ Such a link was recognized in the *Tadić* case

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.webfactional.com/documents/implementations/pdf/Finland-_Criminal_Code_2012.pdf (last visited 1 August 2017).

¹⁸⁹⁰ See Section 8(1)(c) of the New Zealand International Crimes and International Criminal Court Act 2000.

¹⁸⁹¹ See Chapter 2, Section 3(7) of the Swedish Penal Code.

¹⁸⁹² See K. Ambos, “Prosecuting Guantánamo in Europe: Can and shall the Masterminds of the “Torture Memos” be held Criminally Responsible on the Basis of Universal Jurisdiction?”, 42 *Case Western Reserve Journal of International Law* (2009-2010) 405 ff, at 418 and 420; Section 1 of the German Code of Crimes Against International Law (*Völkerstrafgesetzbuch*, “VStGB” (CCAIL)) states as follows: “This Act shall apply to all criminal offences [*Straftaten*] against international law designated under this Act, to serious criminal offences [*Verbrechen*] designated therein even when the offence was committed abroad and bears no relation to Germany.”

¹⁸⁹³ Section 153f(2) of the German Code of Criminal Procedure states as follows: “In the cases referred to under section 153c subsection (1), numbers 1 and 2, the public prosecution office may dispense with prosecuting an offence punishable pursuant to sections 6 to 14 of the Code of Crimes against International Law, if the accused [suspect] is not present in Germany and such presence is not to be anticipated.”

¹⁸⁹⁴ See Germany, *Public Prosecutor v. Tadić*, German Federal Court of Justice Bundesgerichtshof, 1 BGSt 100.94, 13 February 1994, *Neue Zeitschrift für Strafrecht*, at 232-233, § 4a. The original German text reads as follows: “Nach § 6 Nr. 1 StGB gilt deutsches Strafrecht für ein im Ausland begangenes Verbrechen des Völkermordes (5 220a StGB) und zwar unabhängig vom Recht des Tatorts (sog. Weltrechtsprinzip). Voraussetzung ist allerdings - über den Wortlaut der Vorschrift hinaus -, daß ein völkerrechtliches Verbot nicht entgegensteht und außerdem ein legitimierender Anknüpfungspunkt im Einzelfall einen unmittelbaren Bezug der Strafverfolgung zum Inland herstellt; nur dar n ist die Anwendung inner-staatlicher (deutscher) Strafgewalt auf die Auslandstat eines Ausländers gerechtfertigt. Fehlt ein derartiger Inlandsbezug, so verstösst die Strafverfolgung gegen das sog. Nichteinmischungsprinzip, das die Achtung der Souveränität fremder Staaten gebietet (BGHSt 27, 30

- who was however later transferred to the ICTY - and in the *Djajić* case, because the defendant had been living in Germany for several months. However, it was not recognized in other cases such as *the Center for Constitutional Rights v. Rumsfeld* case. Indeed, in a number of complaints launched against members of the U.S., German, and Israeli governments, as well as in others also targeting members of governments and heads of states of various African and Asian states, the Federal Prosecutor has refrained from initiating a formal investigation invoking Sections 152(2), 153f (1) of the German Code of Criminal Procedure and (2), either on legal grounds¹⁸⁹⁵ or on the lack of any prospects of success, due to the absence of the suspect. As mentioned above, in its 2009 decision in the *Rumsfeld* case regarding the Abu Ghraib prison, the Stuttgart Regional Appeals Court dismissed the case despite the fact that Rumsfeld was regularly present in Germany and would be in the future.¹⁸⁹⁶ This reasoning means that there must in fact be a continuing presence of the suspect on German territory or concrete indicia for his expected presence; such indicia, to be assessed exclusively by the prosecutor within his discretion, are generally deemed to be lacking if the suspect has no professional, personal, or family connections in Germany.¹⁸⁹⁷ As one commentator rightly points out, with such an argumentation, the criterion of the territorial link has regrettably been "reintroduced through the backdoor, ignoring the clear wording of CCAIL [Code of Crimes against International Law] section 1 and paragraph two of CPC section 153f which shall guide prosecutorial discretion".¹⁸⁹⁸

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The question of the presence requirement in cases of universal jurisdiction over acts of torture was debated in the French *Javor* case. On 6 May 1994, a judge held that France had jurisdiction over acts of torture committed by a foreigner abroad even if the defendant was not present on state territory. In particular, he held that despite the wording of Article 689-2 of the French Code of Criminal Procedure, which required the presence of the suspect, French authorities had jurisdiction to investigate the crimes of torture. The judge held:

Attendu que cette convention, dont les dispositions relatives à la compétence ont été reprises en droit interne par l'article 689-2 du Code de Procédure Pénale, énonce que sont compétentes les Juridictions de l'Etat sur le

und 34.334; Oehler JR 1977,424: Holzhausen NSTZ 1992.2681."; Similarly, Düsseldorf Oberlandesgericht, 26 September 1997; Bundesgerichtshof, Jorgić, 30 April 1999; Düsseldorf Oberlandesgericht, 29 November 1995; Bundesgerichtshof, Sokolović, 21 February 2001.

¹⁸⁹⁵ Inter alia, immunity of the possible suspects, the non-applicability of the Code of Crimes Against International Law at the time the alleged act was committed. See Ambos, *supra* note 1892, at 427.

¹⁸⁹⁶ See *supra* N. 8 and Fischer-Lescano, 'Introductory Note to Center for Constitutional Rights v. Rumsfeld', 45 (1) *International Legal Materials* (January 2006) 115-118, at 117.

¹⁸⁹⁷ *Oberlandesgericht* [Higher Regional Court] Stuttgart, 5 Ws 109/05 (Sep. 13, 2005), reprinted in 26 *Neue Zeitschrift Für Strafrecht* (2006); See Ambos, *supra* note 1892, at 427.

¹⁸⁹⁸ See Ambos, *supra* note 1892, at 427.

territoire duquel l'auteur des faits est trouvé, quelque soit le lieu de commission de l'infraction et quelques soient les nationalités de l'auteur et de la victime ;

Attendu que suivre les réquisitions du Ministère Public tendant à la non application de cette règle de compétence universelle, au motif que les auteurs présumés des faits dénoncés par les Parties Civiles n'ont pas été appréhendés en France, conduirait à rendre la Juridiction nationale compétente uniquement selon le hasard de l'arrestation d'un ou des auteurs; Qu'une telle conception, non seulement viderait de sa substance l'objet même de la Convention, mais empêcherait encore toutes victimes de saisir les autorités judiciaires compétentes en vue de l'identification et la recherche de ses tortionnaires ;

Attendu que si les dispositions de l'article 689-2 du Code de Procédure Pénale, stipulent en effet que "quiconque.....peut être poursuivi et jugé par les Juridictions Française s'il est trouvé en France", elles ne constituent pas, néanmoins, un obstacle à la faculté pour la Partie Civile de déclencher l'action publique; qu'en effet si l'exercice de cette dernière appartient exclusivement au Ministère Public (notamment au moyen de réquisitions de mandat de dépôt, de mandat d'arrêt, de réquisitions de renvoi et de condamnation, et d'exercice des voies de recours), la mise en mouvement de cette action publique, selon les dispositions de l'article 1 du Code de Procédure pénale, appartient conjointement à la Partie Civile et au Ministère Public;

Qu'en application de cette faculté les Parties Civiles peuvent non seulement saisir le Juge répressif d'une demande en réparation du préjudice causé par l'infraction mais aussi de toutes mesures d'investigation concernant l'identification et la recherche des auteurs de cette infraction ;

Attendu qu'une telle analyse autorise la mise en place d'un dispositif judiciaire approprié et efficace permettant l'arrestation et la traduction des présumés auteurs des faits dénoncés devant les juridictions françaises ; qu'en conséquence, et pour ces motifs, il y a lieu de se déclarer compétent pour instruire en vertu de la présente Convention de New York.¹⁸⁹⁹

On 24 November 1994, the Court of Appeal of Paris partially overturned the May 1994 Order, stating that French courts did not have jurisdiction for acts of torture on the basis of Articles 5 and 7 of the Torture Convention in those

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¹⁸⁹⁹ *Tribunal de Grande Instance de Paris, Ordonnance d'incompétence partielle et de recevabilité de constitution de parties civiles, No 94 052 2002/7.*

circumstances in which the defendants were not present on state territory.¹⁹⁰⁰ The Court of Cassation rejected the appeal of the civil parties.¹⁹⁰¹

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The Netherlands courts were faced with a similar issue of whether a person suspected of torture could be prosecuted and tried in the Netherlands if he was not present in the Netherlands. In the Dutch *Bouterse* case, the Court of Appeal of Amsterdam ordered the Amsterdam Public Prosecutor to prosecute Bouterse for alleged involvement in the December 1982 murders in Suriname on the basis of universal jurisdiction. The Court of Appeals held that Bouterse could be prosecuted because the case concerned torture, which in 1982 was already a crime subject to universal jurisdiction under customary international law. In addition, the Court held that Bouterse could be prosecuted on the basis of the Torture Convention. The Netherlands Supreme Court, however, ruled that Bouterse could not be prosecuted in the Netherlands for the December murders. It also had to consider whether a person suspected of torture could be prosecuted and tried in the Netherlands if he was not present on its territory. While no provision of the Torture Convention Implementation Act (Implementation Act) provided for this requirement, the Court referred to Dutch legislation implementing the Conventions of The Hague and Montreal, which only give jurisdiction to the Netherlands in cases where "the suspect is in the Netherlands".¹⁹⁰² The Court limited the scope of the Implementation Act and rejected the application of universal jurisdiction *in absentia* because there was no direct link with the Dutch legal order given that Bouterse was still in Suriname and none of the victims were Dutch nationals (para. 8.5). It held that:

[...] prosecution and trial in the Netherlands of the suspected perpetrator of an offence within the meaning of Articles 1 and 2 of the Torture Convention Implementation Act, which was committed abroad, is possible only if a connection mentioned in that Convention for the establishment of jurisdiction is present, for example because the suspected perpetrator or the victim is of Dutch nationality or

¹⁹⁰⁰ See Paris Court of Appeal, *Appel d'une Ordonnance d'incompétence partielle et de recevabilité de constitution de parties civiles*, Dossier NA 94/02071, 24 November 1994. The Court held that "[...] conformément aux obligations prévues par les articles 5 et 7 de la convention [sur la torture] et reprises par la loi interne, la compétence des juridictions françaises résulte d'un élément objectif et matériel de rattachement, consistant en la présence des auteurs présumés sur le territoire français. Or en l'espèce, il n'existe aucun indice de cette présence en France. Il s'ensuit que les juridictions françaises sont incompétentes pour connaître des faits dénoncés sur la base de la convention de New York du 10 décembre 1984."

¹⁹⁰¹ France, Court of cassation, Judgment, No 95-81527, 26 March 1996.

¹⁹⁰² Supreme Court of the Netherlands, Appeal in cassation in the interests of law, *Bouterse*, Institute's Collection No. 5255, 18 September 2001, in 'Netherlands judicial decisions', *Netherlands Yearbook of International Law* (2001) 282-295, § 8.3.4.

must be equated with a Dutch national, or because the suspected perpetrator is in the Netherlands at the time of his arrest.¹⁹⁰³

It should be noted that, even in states where the presence of suspects is not a condition per se, their legislation allows the prosecutor to suspend or terminate proceedings if the suspect is absent.¹⁹⁰⁴

In practice, a number of individuals tried for war crimes committed abroad were in fact residents of the forum state. This was the case for instance in respect to some of the Rwandan cases tried in Belgium and of the ex-Yugoslavian and Rwandan nationals who sought asylum in Switzerland. Jorgić, a Bosnian Serb convicted by a German court, was voluntarily residing in Germany at the time of his arrest. Likewise, most of the successful universal jurisdiction prosecutions in the Netherlands concerned suspects who had their main residence in the Netherlands at the time of the start of the proceedings.¹⁹⁰⁵

2. *The debates in Spain*

On 1 July 1985, Spain adopted Organic Law 6/1985 on the Judiciary (hereafter “Law on the Judiciary”). Until the 2009 amendment, Article 23.4 of the Law on the Judiciary provided a very wide scope for the exercise of universal jurisdiction. It stated that Spanish courts also expressly had jurisdiction over crimes committed by Spanish nationals or foreign citizens outside of Spain, as well as any other crime that, according to international treaties or conventions, must be prosecuted in Spain. The provision did not require any link to Spain; notably, it did not require the presence of the suspect on Spanish territory.

Some Spanish judges attempted to exercise universal jurisdiction in the absence of the suspect on its territory in several cases. The request for extradition of Pinochet by Spain was made on the basis of universal jurisdiction *in absentia*; indeed, it was pursuant to the Spanish international arrest warrants that the British Magistrates issued provisional warrants and Pinochet was arrested.¹⁹⁰⁶ In 1999, Spanish investigative Judge Baltasar Garzón initiated legal proceedings against Ricardo Miguel Cavallo, a former Argentine Navy Captain for crimes committed in Argentina from 1976 to 1983. Following a formal extradition request from the Spanish government, Cavallo was arrested in Mexico on 24 August 2000. Cavallo contested the request and it was only on 10 June 2003 that

¹⁹⁰³ *Ibid.*, § 8.5.

¹⁹⁰⁴ Section 153f (2) of the German Code of Criminal Procedure.

¹⁹⁰⁵ See Zegveld and Handmaker, ‘Universal Jurisdiction: State of Affairs and Ways Ahead’, *International Institute of Social Studies* (Working Paper No. 532, January 2012), at 6. Several Somalis who were convicted of piracy were brought to the Netherlands solely for their trial.

¹⁹⁰⁶ See Del Carmen Marquez Carrasco and Alcaide Fernandez, ‘In Re Pinochet: Spanish National Court, Criminal Division (Plenary Session), Case 19/97, November 4, 1998: Case 1/98, November 5, 1998’, 93(3) *The American Journal of International Law*, (July, 1999) 690-696, at 690-700.

the Supreme Court of Mexico authorized the extradition of *Cavallo* to Spain for genocide and terrorism.¹⁹⁰⁷ The Court refused to extradite him for torture because, under Mexican law, the statute of limitations had expired. The Mexican Supreme court decision is historical because it constitutes the first decision authorizing extradition from Mexico of a citizen, from one country to a third, to stand trial for crimes committed outside the prosecuting country.

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The issue of universal jurisdiction *in absentia* was again brought before the Spanish courts in the famous *Guatemalan Generals* case, in which Guatemalan generals were accused of international crimes including genocide committed against members of the Mayan ethnic group between 1978 and 1990. On appeal, the Spanish National Court dismissed the case. Referring to German and Belgium case law, as well as to the ICJ decision of 14 February 2002 and some relevant doctrine, it considered that when universal jurisdiction does not derive from a treaty, but is only based on internal criminal legislation, its exercise cannot “contravene other principles of public international law nor operate when no point of connection exists between national interests”.¹⁹⁰⁸ The court thus subjected the exercise of universal jurisdiction by Spain to the existence of a link with Spain, i.e. a “direct link with Spanish interests”. As a result, the case was *de facto* restricted to acts of torture committed against Spanish nationals in Guatemala.¹⁹⁰⁹ In the *Guatemalan Generals* case, seven judges of the Spanish Supreme Court Chamber dissented. In their Dissenting Opinion, the judges stated inter alia that by adding the requirement that there be a “nexus or link to the national interest”, the decision makes a *contra legem* interpretation of Article 23.4 of the Law on the Judiciary applicable at the time. The presence of the offenders in Spain does not constitute a general condition for the exercise of universal jurisdiction, but only a requirement at trial according to the Spanish law on trials *in absentia*. Such a condition can be fulfilled by means of extradition. Finally, the Dissenting Opinion pointed out that the ICJ decision of 2002 in the *Congo v. Belgium* case does not decide on the issue of universal jurisdiction but rather limits itself to the issue of personal immunity under international law.¹⁹¹⁰

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The applicants contested the constitutionality of the decision before the Spanish Constitutional Court (hereafter “Constitutional Court”), claiming that it violated their right to effective protection of the courts, the right to an ordinary judge determined by the law and to all procedural guarantees (Article 24 of the

¹⁹⁰⁷ For an English translation see Supreme Court of Mexico, ‘Decision on the Extradition of Ricardo Miguel Cavallo, 10 June 2002’, 42(4) *International Legal Materials* (July 2003) 888-914.

¹⁹⁰⁸ Spanish Supreme Court, *Decision concerning the Guatemala Genocide Case*, 25 February 2003, available online in English at <https://www.icrc.org> (last visited 1 August 2017).

¹⁹⁰⁹ Ascensio, ‘The Spanish Constitutional Tribunal’s Decision in Guatemalan Generals: Unconditional University is Back’, 4 *Journal of International Criminal Justice* (2006) 586-594.

¹⁹¹⁰ Spanish Supreme Court, *Guatemala Genocide Case*, Dissenting Opinion, 25 February 2003, available online at <http://www.derechos.org/nizkor/guatemala/doc/stsgtm.html> (last visited 1 August 2017).

Constitution).¹⁹¹¹ On 25 September 2005, the Constitutional Court reversed the decision in the case of the *Guatemalan Generals*, reiterating most of the arguments raised by the dissenting minority. In particular, it rightly held that Article 6 of the Genocide Convention merely provides a minimum obligation for states to prosecute such crimes within their territories. It also held that the Supreme Court had rendered an unacceptable interpretation of Article 23.4 of the Law on the Judiciary, which was applicable at the time. Regarding the requirement of a “link to Spanish interests”, the Court provided:

The international and cross-border repression sought through the principle of universal justice is based exclusively on the particular characteristics of the crimes covered thereby, whose harm (paradigmatically in the case of genocide) transcends the specific victims and affects the international community as a whole. Consequently, their repression and punishment constitute not only a commitment, but also a shared interest among states [...], whose legitimacy in consequence does not depend on the ulterior interests of each of them.¹⁹¹²

It concluded that no nexus or tie to Spain (neither the presence of the defendant, the nationality of the victim, nor Spanish national interest) was necessary for the exercise of jurisdiction.¹⁹¹³ The presence of the suspect was to be understood as a condition for trial, not for the exercise of jurisdiction.¹⁹¹⁴ The Constitutional Court considered that such requirements would result in an unjustified restriction of the constitutional right to effective judicial protection.¹⁹¹⁵ It also expressly recognized that the Organic Law establishes unconditional universal jurisdiction without any procedural requisites and without any kind of hierarchy between the different bases of jurisdiction.¹⁹¹⁶

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¹⁹¹¹ Spanish Constitutional Court, *Guatemala Genocide Case*, Judgment, N° 237, 26 September 2005, 331/1999-100.

¹⁹¹² *Ibid.*, § 9.

¹⁹¹³ *Ibid.*; See also Roht-Arriaza, ‘Guatemala Genocide Cases: Spanish Constitutional Tribunal decision on universal jurisdiction over genocide claims’, *American Journal of International Law*, (2006), p. 207-213, at 207.

¹⁹¹⁴ Spanish Constitutional Court, Judgment, N° 237, 26 September 2005, *Guatemala Genocide Case* 331/1999-100. .

¹⁹¹⁵ The other grounds of appeal were therefore not examined.

¹⁹¹⁶ Spanish Constitutional Court Decision, 237, 26 September 2005, *Guatemala Genocide Case* 331/1999-100. In response to this decision of the Constitutional Court of 26 September 2005, a doctrine was established by the Plenary of the Criminal Hall of the National Court on 3 November 2005, in order to unify jurisdictional criteria to avoid complaints from all over the world. See De la Rasilla del Moral Ignacio, ‘The Swan Song of Universal Jurisdiction in Spain’, 9 *International Criminal Law Review* (2009) 777-808, at 781. The doctrine set out a new requirement based on the idea of responsibility. If the legal requirements are satisfied, “the jurisdiction as a rule should be accepted, except when it

After the Tribunal's decision, a Spanish magistrate issued international arrest warrants against former Guatemalan military rulers Efraim Rios and Oscar Humberto Mejia, as well as five generals for alleged genocide, torture, and terrorism.¹⁹¹⁷

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Following the pressure exerted on the Spanish government to change its legislation on universal jurisdiction, a very important amendment to Article 23(4) was adopted by the Spanish Senate on 15 October 2009 and entered into force on 5 November 2009, considerably limiting the exercise of universal jurisdiction in Spain. Spanish courts' jurisdiction is now restricted to cases (i) in which the victims are Spanish nationals; (ii) in which Spain has a "relevant connecting link"; or (iii) where the alleged perpetrator is present in Spain, and as long as "proceedings implying an effective investigation and prosecution have not begun in another competent country or in an International Court". A definition of "effective" was not included into the law.¹⁹¹⁸ Regarding the nexus requirement, the Law on the Judiciary did not specify when a case should be considered to have a "relevant" link to Spain. Proceedings based on this provision nevertheless continued to be brought namely against high-ranking Chinese officials. Further pressure ensued and the Organic Law was modified again in March 2014,¹⁹¹⁹ limiting the exercise of Spanish jurisdiction over core crimes committed abroad to (i) Spanish nationals, (ii) foreigners residing in Spain and (iii) persons who are in Spain when Spain has received and denied

is appreciated the concurrence of an excess or abuse of law in view of the absolute foreign character of the matter because it tackles with crimes and places absolutely foreign and/or distant and because the person who has filed the complaint has not proven any direct interest or relationship with them". Translation provided by De la Rasilla del Moral Ignacio, 'The Swan Song of Universal Jurisdiction in Spain', 9 *International Criminal Law Review* (2009) 777-808, at 782.

¹⁹¹⁷ See M. Jouet, 'Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, And Beyond', 35 *Georgia Journal of International and Comparative Law* (2007) 495-537, at 510-511.

¹⁹¹⁸ ICRC, *Implementing Laws and Regulations: Introduction*, available online at <http://www.icrc.org/ihl-nat.nsf/0/F4FC4B95CE6C8126C12576DC002BA119> (last visited 1 August 2017).

¹⁹¹⁹ See Art. 23 (4) of *Ley Orgánica 1/2014, de 13 de marzo, de modificación de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, relativa a la justicia universal*, available online at http://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-2709 (last visited 1 August 2019), which provides that "4. *Igualmente, será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la ley española, como alguno de los siguientes delitos cuando se cumplan las condiciones expresadas: a) Genocidio, lesa humanidad o contra las personas y bienes protegidos en caso de conflicto armado, siempre que el procedimiento se dirija contra un español o contra un ciudadano extranjero que resida habitualmente en España, o contra un extranjero que se encontrara en España y cuya extradición hubiera sido denegada por las autoridades españolas.*"

an extradition request.¹⁹²⁰ Regarding torture and enforced disappearances committed abroad, jurisdiction is limited to crimes committed by Spanish nationals or against Spanish victims.¹⁹²¹ If one considers that jurisdiction over residents is in fact the assertion of activity personality jurisdiction, it must then be concluded that Spain no longer provides for universal jurisdiction in its domestic law, at least with respect to international crimes.

As a consequence, a number of cases were dismissed. However, despite these legislative changes, Spain's *Audiencia Nacional* is continuing its investigation into the alleged torture of men formerly detained at Guantánamo prison by U.S. officials, despite recent legislative restrictions stating that Spanish courts can only investigate human rights violations committed abroad if the suspects are present in Spain.¹⁹²² On 15 April 2014, the Spanish Judge Ruz issued an order in which he claimed that Spain would continue investigating the case, despite the recent legislative restrictions. He ruled that Spain's obligations under international law to investigate any credible allegation of torture took precedence over the new restrictions, and renewed his request for information from the Obama Administration regarding any U.S.-based investigations into torture allegations.¹⁹²³ However, on 17 July 2015, the National Court dismissed the case for lack of jurisdiction because the case did not involve Spanish

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¹⁹²⁰ This last clause is an *aut dedere* provision, which cannot be considered as universal jurisdiction.

¹⁹²¹ See Art. 23 (4) of *Ley Orgánica 1/2014, de 13 de marzo, de modificación de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, relativa a la justicia universal*, available online at http://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-2709 (last visited 1 August 2017) which provides that "4. *Igualment, és competent la jurisdicció espanyola per conèixer dels fets comesos per espanyols o estrangers fora del territori nacional susceptibles de tipificar-se, segons la llei espanyola, com algun dels delictes següents quan es compleixin les condicions expressades [...] b) Delictes de tortura i contra la integritat moral dels articles 174 a 177 del Codi penal, quan: 1r el procediment es dirigeixi contra un espanyol; o, 2n la víctima tingui nacionalitat espanyola en el moment de la comissió dels fets i la persona a la qual s'imputi la comissió del delicte sigui al territori espanyol. c) Delictes de desaparició forçada inclosos en la Convenció internacional per a la protecció de totes les persones contra les desaparicions forçades, feta a Nova York el 20 de desembre de 2006, quan : 1rel procediment es dirigeixi contra un espanyol ; o, 2n la víctima tingui nacionalitat espanyola en el moment de comissió dels fets i la persona a la qual s'imputi la comissió del delicte sigui al territori espanyol'*.

¹⁹²² See 'Spanish Court Refuses to Close Guantánamo Torture Investigation', available online at <http://ccrjustice.org/home/press-center/press-releases/spanish-court-refuses-close-guant-namo-torture-investigation#.U06P4Llo58Q.twitter> (last visited 1 August 2017).

¹⁹²³ See Spain, *Audiencia Nacional*, Order, 15 April 2014, available online in Spanish at <http://www.ccrjustice.org/sites/default/files/assets/files/Court%205%20Decision%2015.04.14.pdf> (last visited 1 August 2017).

nationals or persons living in Spain. The appeal filed against this decision was dismissed on 17 September 2015.¹⁹²⁴

3. *Concluding remarks*

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From the above cases, it appears that most universal jurisdiction cases have been conducted by states with a “legitimizing” link to the crimes in question, which is generally the presence of the suspect within the prosecuting state.¹⁹²⁵ It is interesting to note that despite the numerous attempts to exercise universal jurisdiction in Spain, one of the rare cases in which a sentence was actually handed down (1084 years for torture and crimes against humanity), was one in which the suspect was at some point present in Spain.¹⁹²⁶ One could conclude that this “conditional” universal jurisdiction has now become part of customary international law for some offences such as torture, war crimes, crimes against humanity and genocide.¹⁹²⁷ However, this has not been the position of all national courts. In the recent Swiss *Nezzar* case, the Federal Criminal Court concluded that the existence of a close link was not a requirement under customary international law.¹⁹²⁸

B. **The requirement of the residence of the suspect or the victim**

1. *Introductory remarks*

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Some states restrict the application of universal jurisdiction over international crimes to suspects who have their residence in the state. In the UK for instance, under the International Criminal Court Act 2001, genocide, crimes against humanity and war crimes committed outside the United Kingdom can be prosecuted in the United Kingdom only if they are committed by a UK

¹⁹²⁴ Spain, National Court, Ruling, 17 November 2015, English translation available online at: https://ccrjustice.org/sites/default/files/attach/2016/01/2015-11-17_UJSpain_Appeal_Dismissal_SpanishAgnentsENG.pdf (last visited on 1 August 2017).

¹⁹²⁵ M. Chadwick, ‘Modern Developments in Universal Jurisdiction: Addressing Impunity in Tibet and beyond’, 9 *International Criminal Law Review* (2009) 359-394, at 367.

¹⁹²⁶ In October 1997, Spanish Judge Garzon ordered the arrest of former Argentine Navy Officer Adolfo Scilingo, who was travelling in Spain. This was done in the context of investigations led by Judge Balthazar Garzon into the disappearance of more than 300 Spanish nationals in Argentina between 1976 and 1983 during the military dictatorship. Soon, the investigation was expanded to include the numerous crimes committed during that period against non-Spanish nationals.

¹⁹²⁷ Chadwick, *supra* note 1924, at 367.

¹⁹²⁸ See Decision, *Cour des plaintes*, 25 July 2012, available online at http://bstger.weblaw.ch/pdf/20120725_BB_2011_140.pdf.

resident.¹⁹²⁹ However, it should be noted the Geneva Conventions Act 1957¹⁹³⁰ gives the United Kingdom courts' jurisdiction over grave breaches of the four Geneva Conventions and the Additional Protocol I and III. This is also the case in Belgium and France – for core crimes – today, following a number of changes in legislation and interesting court decisions.

2. Case studies

a. Belgium

Belgium was one of the first countries to enact legislation on universal jurisdiction. On 16 June 1993, it adopted the “Act Concerning Punishment for Grave Breaches of International Humanitarian Law” (hereafter “The 1993 Act”). The 1993 Act provided for universal jurisdiction for serious violations of the Geneva Conventions and Additional Protocols even when the suspect was not present on Belgian territory.¹⁹³¹ The law was amended in February 1999 to include genocide and crimes against humanity.¹⁹³²

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In 2003, following the filing of private complaints in Belgium against Israeli leader Ariel Sharon and others, as well as against US military and political leaders including George W. Bush, Belgium amended its laws as a result of direct political and economic pressure from the United States.¹⁹³³ On 23 April 2003, the “Law Modifying the 16 June 1993 Act Concerning Punishment for Grave Breaches of International Humanitarian Law” (hereafter “Law of 23 April 2003”) was adopted. It provided that the decision on whether to initiate a case for alleged international crimes which occurred outside Belgium no longer rested in the hands of individual public prosecutors but would instead fall to the Federal Attorney General.¹⁹³⁴

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However, this new law was not enough to satisfy U.S. officials. In June 2003, they announced that American officials might stop attending NATO meetings in Belgium, “because of a law that allows ‘spurious’ suits accusing American

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¹⁹²⁹ See According to Section 51 § (2)(a) of the International Criminal Court Act 2001.

¹⁹³⁰ Geneva Conventions Act 1957, available online at <http://www.legislation.gov.uk/ukpga/Eliz2/5-6/52>.

¹⁹³¹ *Loi du 16 juin 1993 relative à la répression des violations graves de droit international humanitaire, (avec les amendements de la loi du 10 février 1999)*, Art. 7.

¹⁹³² *Loi relative à la répression des violations graves de droit international humanitaire*, 10 February 1999.

¹⁹³³ See Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (2012), at 24 and M. Verhaeghe, ‘The Political Funeral Procession for the Belgian UJ Statute’, in Kaleck et al. (eds), *International Prosecution of Human Rights Crimes* (Berlin, New York: Springer, 2007) 139-147, at 142.

¹⁹³⁴ See *Loi modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l'article 144ter du Code judiciaire*, art. 4.

leaders of war crimes".¹⁹³⁵ More importantly, Rumsfeld said the United States would withhold any further funding for a new NATO headquarters in Belgium, stating that "Belgium appears not to respect the sovereignty of other countries".¹⁹³⁶

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The Parliament then passed another law – the "5 August 2003 Act on Grave Breaches of International Humanitarian Law" (hereafter "August 2003 Act") – that completely repealed the Law of 10 February 1999. Its goal was notably to put an end to "*une utilisation politique manifestement abusive de cette loi*" [1993 Act modified on 10 February 1999].¹⁹³⁷ Therefore, genocide, crimes against humanity and war crimes were no longer repressed in a special statute but were incorporated at Articles 136bis, 136ter and 136quater of the Belgian Penal Code.¹⁹³⁸ A number of provisions were also incorporated in the *Titre préliminaire du Code de procédure pénale*, which considerably reduced the numerous complaints open to the Federal Attorney General.¹⁹³⁹ It was no longer possible for Belgium to claim jurisdiction over crimes committed outside of its territory, in which neither the victim nor the perpetrator were Belgian residents. Pursuant to newly amended Article 6 of the *Titre préliminaire du Code de procédure pénale*, every Belgium national or *person with main residence in Belgium* can be prosecuted if the person allegedly committed genocide outside Belgium. In addition, according to Article 10 § 1bis of the same law, Belgian authorities have jurisdiction if the *victim* of genocide has the Belgian nationality or has legally resided in Belgium for three years. Thus, with this 2003 statute, the Belgium legislator opted for the active and passive personality principles. However, it should be noted that it did not completely abandon universal jurisdiction in the sense that perpetrators and victims can be permanent residents and do not necessarily have to be Belgium nationals.¹⁹⁴⁰

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As a consequence of the adoption of the new law, a number of complaints were dismissed. A complaint was lodged on 18 March 2003 against former US President *George H.W. Bush* and other senior American leaders, including Dick Cheney and Colin Powell for breaches to the Geneva Conventions, committed

¹⁹³⁵ J. Garamone, 'Belgian Law May Force U.S. to Stop Attending NATO Meetings', *DefenseLINK News*, 12 June 2003, available online at <http://archive.defense.gov/news/newsarticle.aspx?id=28879> (last visited 1 August 2017).

¹⁹³⁶ *Ibid.*

¹⁹³⁷ Chambre des représentants de Belgique, *Projet de Loi relative aux violations graves du droit international humanitaire*, Exposé des motifs, Doc 51 0103/001, 22 July 2003, at 3, available online at <http://www.lachambre.be/FLWB/pdf/51/0103/51K0103001.pdf> (last visited 1 August 2017).

¹⁹³⁸ *Loi relative aux violations graves du droit international humanitaire* of 5 August 2003.

¹⁹³⁹ R. Baker, 'Universal Jurisdiction and the Case of Belgium: A Critical Assessment', 16(1) *ISLA Journal of International and Comparative Law* (2009) 141-167, at 157.

¹⁹⁴⁰ See Wouters and Verhoeven, 'The domestic prosecution of genocide', in Behrens/Henham, *Elements of Genocide* (Routledge: 2013) 177-206, at 199.

during the first Gulf war in 1991; it was dismissed by the *Cour de Cassation* on 24 September 2003, on the basis that the new 2003 Act provided universal jurisdiction only if the victim or the perpetrator had his main residence in Belgium, which was not the case in this context.¹⁹⁴¹

Likewise, in June 2001, 23 Lebanese and Palestinian victims filed an application under the same 1993 law against Ariel Sharon, then Prime Minister of Israel and Amos Yaron, then Director-General of the Israel Defence Ministry, alleging that the defendants had committed war crimes at the Palestinian refugee camps of Sabra and Shatila during the 1982 invasion of Lebanon by Israel.¹⁹⁴² In a judgment of 12 February 2003, the *Court de Cassation* quashed that of the Brussels Court of Appeal dismissing the case and held that the presence of the accused in Belgium was not required when the crimes in question were committed outside Belgium.¹⁹⁴³ However, a few months later, on 24 September 2003, the Belgian *Court de Cassation* was obliged to dismiss the case because the requirements of the new law were not fulfilled.¹⁹⁴⁴

In 2003, two complaints were filed against the oil and gas company *Total*, its chairman, and former director in Burma, for acts which took place in Burma. The first was filed in France and the second in Belgium. The second complaint came from four Burmese nationals, against *Total*, its chairman and its former director in Burma for crimes against humanity and complicity in crimes against humanity; they alleged the defendants provided moral and financial support to the military regime with full knowledge that this support resulted in human rights abuses by the military (crimes against humanity, such as torture and forced labour committed by the Burmese government in the course of the construction and operation of the Yadana gas pipeline in Burma).¹⁹⁴⁵ As in the *Bush and others* case, the Law of 2003 was passed shortly after this complaint was filed and it provided for the dismissal of pending proceedings, unless a plaintiff

¹⁹⁴¹ Belgium, *Court of Cassation*, 24 September 2003, available online at <http://competenceuniverselle.files.wordpress.com/2011/07/arret-24-septembre-2003-bush.pdf> (last visited 1 August 2017).

¹⁹⁴² It is noteworthy that while the United Nations qualified this massacre to be “an act of genocide”, no one has ever been convicted for these acts. See U.N. General Assembly, Resolution A/RES/37/123, 16 December 1982.

¹⁹⁴³ Belgium, Court of Cassation, Judgment, 12 February 2003, available online in French at <http://competenceuniverselle.files.wordpress.com/2011/07/cass12fevrier2003.pdf> (last visited 1 August 2017); English version available in 42(3) *International Legal Materials* (May 2003) 596-605, at 599.

¹⁹⁴⁴ See Court of cassation of Belgium, Judgment, 24 September 2003, available online at <http://competenceuniverselle.files.wordpress.com/2011/07/arret-24-septembre-2003-sharon.pdf> (last visited 1 August 2017).

¹⁹⁴⁵ See *Summary of Complaint*, available online at http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Belgium/Affaire_Total_Summary_of_Complaint.pdf (last visited 1 August 2017).

was a Belgian national or permanent resident.¹⁹⁴⁶ In this case however, although the plaintiffs were not Belgian nationals, one of them had political refugee status in Belgium. The *Cour de Cassation* therefore referred the question to the *Cour d'arbitrage* for a preliminary ruling.

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On 13 April 2005, the *Cour d'arbitrage* held that exclusion of refugees from access to the provisions on universal jurisdiction was unconstitutionally discriminatory.¹⁹⁴⁷ It ruled that Article 29 § 3 of the Act of 5 August 2003 violated Articles 10 (on equality), 11 (on non-discrimination) and 191 (on protection of foreigners) of the Belgian Constitution.¹⁹⁴⁸ Despite this ruling, in its decision of 29 June 2005, the *Cour de Cassation* applied Article 29 of the Act of 5 August 2003 and dismissed the case.¹⁹⁴⁹ Following this dismissal and a complaint lodged by the plaintiffs, the *Cour d'arbitrage*, in its judgment of 21 June 2006, annulled paragraphs 2, 3 and 4 of Article 29 of the Law of 5 August 2003, as well as the following terms in paragraph 5: "and concerning which jurisdiction has not been declined on the basis of the foregoing paragraph",¹⁹⁵⁰ which amounted to deleting the parts that barred non-citizens from bringing lawsuits.

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However, the *Cour de Cassation* dismissed the entire proceedings in its decision of 28 March 2007, ruling that it could only continue on the basis of a law modified by the Constitutional Court if the modification favoured the defence (in this case Total).¹⁹⁵¹ The Belgian authorities declared the case closed in March 2008, thus dropping the entire case against Total. On 29 October 2008, the *Cour de cassation* rejected an appeal against the decision dropping the case.¹⁹⁵²

b. France

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The 2010 Statute introduced a new Article 689-11, which expands French jurisdiction allowing the prosecution and trial of alleged suspects of genocide, crimes against humanity and war crimes committed abroad. However, this provision subjects the exercise of universal jurisdiction over genocide, crimes against humanity and war crimes to a number of conditions including the

¹⁹⁴⁶ According to Art. 29 § 3 of the newly adopted Law of August 2003: "cases which are under way on the date of the entry into force of this Act and which relate to offences referred to in Book II, Title I bis of the Criminal Code [serious violations of international law] shall be dismissed by the federal prosecutor within thirty days of the entry into force if they do not meet the criteria laid down in articles 6(1)bis 10(1)bis and 12bis of the preliminary Title of the Code of Criminal Procedure".

¹⁹⁴⁷ Belgium, *Cour d'arbitrage, Total*, arrêt no. 68/2005, 13 April 2005.

¹⁹⁴⁸ Belgium, *Cour d'arbitrage, Total*, arrêt no. 68/2005, 13 April 2005, B. 10.

¹⁹⁴⁹ Belgium, *Court of cassation, Total*, Judgment, P.04.0482.F/1, 29 June 2005.

¹⁹⁵⁰ Belgium, *Cour d'arbitrage, Total*, Judgment no. 104/2006, 21 June 2006.

¹⁹⁵¹ Belgium, *Court of cassation, Total*, Judgment, P.07.0031.F/1, 28 March 2007.

¹⁹⁵² Belgium, *Court of cassation, Total*, Judgment, P.09.0548.F, 29 October 2008.

requirement that the suspect have his residence (“*résidence habituelle*”) in France.¹⁹⁵³ The mere presence of the suspect is not sufficient.

The new statute has been criticized as being too restrictive, with respect to its conditions. As underlined by one commentator, “*Au total, on peut se demander s’il était bien utile d’instituer un titre de compétence extraterritoriale assorti de conditions telles qu’il semble programmé pour rester lettre morte*”.¹⁹⁵⁴ Likewise, the National Consultative Commission of Human Rights (“*Commission nationale consultative des droits de l’homme*”) stated that it “*regrette que cette disposition, pourtant essentielle pour lutter contre l’impunité des auteurs des crimes les plus graves, soit assortie de conditions cumulatives injustifiées et contraires aux dispositions préexistantes dans ce domaine [et] craint que le cumul de ces conditions ne rende cette nouvelle disposition totalement inopérante*”.¹⁹⁵⁵

Indeed, this provision requires the residence of the suspect in France rather than his mere presence, unlike many other European state legislations. This requirement is also inconsistent with other provisions of the French Code of Criminal Procedure, namely Article 689-1 (on international treaties), which only requires the presence of the suspect. In consequence, while a person suspected of torture can be arrested and prosecuted if he or she passes in France,¹⁹⁵⁶ a person suspected of genocide or crimes against humanity can come and go freely in France without risking arrest, as long as he or she does not have his or her residence there. Furthermore, the term “*résidence habituelle*” is unclear; does it mean that the suspects must be legally established in France to be prosecuted?¹⁹⁵⁷ In practice, the chances that the Statute will ever be applied are quite slim because a suspect can simply avoid making the “mistake” of taking residence in France.¹⁹⁵⁸

¹⁹⁵³ See Art. 8 of the *Loi d’adaptation à la Cour pénale internationale*, adopted on 9 August 2010, and Art. 689-11 of the French Code of Criminal Procedure.

¹⁹⁵⁴ H. Ascensio, ‘Une entrée mesurée dans la modernité du droit international pénal ; À propos de la loi du 9 août 2010’, 37 *La Semaine Juridique – Édition générale*, 13 September 2010.

¹⁹⁵⁵ *Commission nationale consultative des droits de l’homme, Avis sur la loi portant adaptation du droit pénal à l’institution de la Cour pénale internationale*, 6 November 2008, available online at http://www.cncdh.fr/sites/default/files/08.11.06_avis_cpi.pdf (last visited 1 August 2017).

¹⁹⁵⁶ See Arts 681-1 and 682-2 of the French Code of Criminal Procedure.

¹⁹⁵⁷ France, Senate, *Exposé général, « Proposition de loi tendant à modifier l’article 689-11 du code de procédure pénale relative à la compétence territoriale du juge français concernant les infractions visées par le statut de la Cour pénale internationale »*, Report n° 353 (2012-2013) de M. Alain ANZIANI, 13 February 2013.

¹⁹⁵⁸ Finally, it should be noted that a new Art. 689-11 was adopted by the French Senate on 26 February 2013 proposing to delete the requirement of residence of the suspect in France. See Part II, *supra* note 179.

3. *Concluding remarks*

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With the exception of the above-mentioned states, the overview of state legislation shows that a majority of the domestic provisions will submit the exercise of universal jurisdiction to the presence of the subject on their territory.¹⁹⁵⁹ This has led some authors to suggest that customary international law thus requires the presence of the suspect as a condition to the exercise of universal jurisdiction.¹⁹⁶⁰ Such a viewpoint does not appear to be in conformity with the status of international law. Indeed, if states provide for the presence of the suspect on their territory, it is mainly for practical and political reasons, i.e. to limit the number of universal jurisdiction cases to not overburden their judicial systems as well as to avoid political tensions with other states. It is not because they feel obliged by a rule of international law. *Opinio juris* thus appears to be lacking. Surprisingly, the presence requirement is still the subject of much scholarly debate. However, in our view, this debate is to some extent “dépasseé”.¹⁹⁶¹ Indeed, while many commentators address the general issue of whether universal jurisdiction can be exercised without the presence of the suspect, few discuss what we consider to be the main issues, namely what is actually considered to constitute “presence” on the territory of a state and, more importantly, at which stage of the proceedings presence is required.¹⁹⁶²

V. The definition of “presence” and the timing

A. Introductory remarks

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International decisions and instruments, as well as national legislation, generally only make reference to the requirement that the subject must be present. This raises a number of questions. Is the presence of the suspect required at all stages of the proceedings in order for a state to exercise universal jurisdiction? Or is the presence at the opening of an investigation sufficient? Is the requirement satisfied if the person is on vacation, on a business trip or on

¹⁹⁵⁹ See *supra* Part II.

¹⁹⁶⁰ See *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004*, UN Doc. S/2005/60, Geneva, 25 January 2005, § 614; A. Cassese, ‘Peut-on poursuivre des hauts dirigeants des Etats pour des crimes internationaux? A propos de l’affaire Congo c/ Belgique (C.I.J.)’, 3 *Revue de science criminelle et de droit comparé* (2002) 479-499, at 483, note 10.

¹⁹⁶¹ See Lafontaine, ‘Universal Jurisdiction – the Realistic Utopia’, 10 *Journal of International Criminal Justice* (2012) 1277-1302, at 1281.

¹⁹⁶² Werle and Bornkamm, ‘Torture in Zimbabwe under Scrutiny in South Africa: The Judgment of the North Gauteng High Court in SALC v. National Director of Public Prosecutions’, 11 *Journal of International Criminal Justice* (2013) 659-675, at 666.

the territory for medical treatment?¹⁹⁶³ According to some authors, the suspect's presence may not be short; a brief holiday is not sufficient, because there would be no time to conduct preliminary criminal proceedings.¹⁹⁶⁴ Does this imply that a suspect must be present throughout the entirety of the preliminary criminal proceedings? Can a person suspected of genocide, crimes against humanity or war crimes stay in a state, for instance on a three-month visit, without being subject to criminal investigations by the state authorities? If this is the case, then the "presence" requirement ultimately amounts to a residence requirement, which as we have seen above is neither compatible with international law, nor desirable in light of the need to efficiently fight impunity for the gravest international crimes.

In our view, there are some arguments which militate against the view necessitating the suspect's presence at the opening of an investigation. Firstly, we do not conceive that the collection of evidence or the hearing of victims' and witnesses' testimony infringes upon the territorial state's sovereignty, as long of course as this is done on the territory of the forum state.¹⁹⁶⁵ Secondly, allowing for the opening of an investigation *in absentia* gives authorities the possibility to collect and preserve evidence as a form of "anticipated legal assistance" for other states or international tribunals, for instance if witnesses or victims were, at that time, present on the state's territory.¹⁹⁶⁶ In other words, to prohibit such investigations may result in lost opportunities for the collection of important evidence. Thirdly, allowing for the opening of investigations only when the suspect has entered the country might dictate that, by the time enough evidence has been gathered in order to issue an arrest warrant, the suspect may have left again.¹⁹⁶⁷ The following section will present some of the discussions that took place in Switzerland and before Swiss courts as this provides a good illustration of the debate.

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¹⁹⁶³ H. J. Steiner, 'Three Cheers for Universal Jurisdiction - Or Is It Only Two', 5 *Theoretical Inquiries in Law* (2004) 199-236, at 208.

¹⁹⁶⁴ Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction', 1 *Journal of International Criminal Justice* (2003) 589-595, at 593.

¹⁹⁶⁵ It goes without saying that any evidence will have to be given to the suspect and any witnesses cross-examined by the defence before a conviction is made.

¹⁹⁶⁶ Geneuss, 'Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU-EU Expert Report on the Principle of Universal Jurisdiction', 7(5) *Journal of International Criminal Justice* (2009) 945-962, at 956.

¹⁹⁶⁷ *Ibid.*

B. The debate in Switzerland

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Until 2004, universal jurisdiction over war crimes could be exercised in Switzerland with no restrictions. Former Article 9, paragraph 1 of the Military Criminal Code stated that, “the present Code is applicable to offences committed in Switzerland and to offences committed abroad”. However, in 2004,¹⁹⁶⁸ the requirement of a close link (*un lien étroit*) was introduced at Article 9, along with two other conditions: firstly, persons had to be located in Switzerland and, secondly, extradition to another state or a transfer to an international criminal tribunal could not be possible. As underlined by Kolb, this new requirement of a “close link” did not codify existing practice, but rather consisted of a new requirement.¹⁹⁶⁹ The reason for the introduction of this requirement was fear – following the filing of complaints against heads of state in Belgium – that politically-motivated complaints would also be filed in Switzerland.¹⁹⁷⁰ It was widely criticized, not only because of its vagueness but its conformity with international law was also called into question.¹⁹⁷¹ A “close link” would have included, for example, the situation where the suspect has his main residence in Switzerland or has close family members living in Switzerland.

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On 28 September 2001, a complaint was filed in Switzerland against *Barzan Al-Tikriti*, for genocide and violations of the Geneva Conventions committed in Iraq in 1983. Al-Tikriti, one of the half-brothers of former Iraqi leader Saddam Hussein and a former leader of the Iraqi intelligence service, had been living in Switzerland since 1988. On 12 November 2002, the Federal Prosecutor dismissed the complaint for genocide on two grounds. Firstly, it was considered that the application of Article 6bis of Swiss Penal Code required that the suspect be on Swiss territory; this was not the case at the moment of the complaint.¹⁹⁷² According to the letter of dismissal, since the Public Minister did not have sufficient evidence before the defendant left the country, “it was therefore impossible to intervene [at that time] against Al-Tikriti”.¹⁹⁷³ Secondly, Article 264 of the Swiss Penal Code (on genocide) was not in force at the time of the

¹⁹⁶⁸ Introduced by ch. II of the Federal Law of 19 December 2003; entry into force on 1 June 2004 (RO 2004 2691 2694; FF 2003 693).

¹⁹⁶⁹ Kolb and Scalia, *Droit international pénal*, at 256.

¹⁹⁷⁰ See *Message concernant la modification de la procédure pénale militaire (protection des témoins)*, FF 2003 693, 22 January 2003, at 735.

¹⁹⁷¹ See inter alia, the discussion in *Message relatif à la modification des lois fédérales en vue de la mise en œuvre du Statut de Rome de la Cour pénale internationale*, FF 2008 3461, 23 April 2008, at 3493-3496.

¹⁹⁷² Federal Minister of the Confederation, ‘Dénonciation pénale de Monsieur ____ du 28 septembre 2001 dirigée contre Monsieur Barzan Al-Tikriti pour genocide’, 12 November 2002.

¹⁹⁷³ *Ibid.*

events.¹⁹⁷⁴ On appeal, the military authorities also dismissed the complaint for war crimes; they held that Al-Tikriti could not be prosecuted for violations of the Geneva Conventions because there was no “armed conflict” in Iraq in the summer of 1983 and because Al-Tikriti was no longer on Swiss territory.¹⁹⁷⁵ The Swiss Federal Department of Defence, Civil Protection and Sports (hereafter DDCPS) rejected the appeal lodged against this decision on 23 December 2003.¹⁹⁷⁶ In this decision, the DDCPS held that the Geneva Conventions (Articles 49, 50, 129 and 146) leave open the question of the presence of the suspects in the territory of the contracting party.¹⁹⁷⁷ Citing the ICRC Commentary on the Geneva Conventions, and the *Message du Conseil fédéral*, it concluded that according to legal doctrine and practice in Switzerland, the opening of an investigation required the presence of the suspect on Swiss territory.¹⁹⁷⁸ Thus, since an entry ban had been ordered against Al-Tikriti, it was logical not to open an investigation in Switzerland.¹⁹⁷⁹ Mr. Al-Tikriti was sentenced to death by hanging by the Iraqi Special Court on 5 November 2006. His sentence was executed on 15 January 2007.

On 17 September 2003, a criminal complaint was filed by the Swiss organization TRIAL¹⁹⁸⁰ against Habib Ammar, a Tunisian national, who was formerly Commander of the Tunisian National Guard and former Interior Minister.¹⁹⁸¹ According to the complaint, Ammar actively participated in the torture of Tunisian people in the 1980s. The Swiss jurisdiction was based on Article 6bis of the Criminal Code and the Convention Against Torture. It was argued that Ammar did not enjoy any immunity, neither under any international treaty, nor under customary international law. The complaint was filed as Habib Ammar was expected in Geneva to participate in the preparatory work for the session of the World Summit on the Information Society (WSIS). The Geneva General Prosecutor dismissed the complaint and the case, on the basis of Article 12 of a Headquarters Agreement of 22 July 1971 between

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¹⁹⁷⁴ *Ibid.*

¹⁹⁷⁵ Office de l’Auditeur en Chef, ‘Dénonciation du 28.09.2011 de M. ___ contre M. Barzan Al-Tikriti’, 16 April 2003.

¹⁹⁷⁶ Swiss Federal Department of Defence, Civil Protection and Sports, Decision, 22 December 2003, 880.9-009.

¹⁹⁷⁷ *Ibid.*, at 4.

¹⁹⁷⁸ *Ibid.*, at 6.

¹⁹⁷⁹ *Ibid.*, at 6.

¹⁹⁸⁰ A Swiss Association against impunity.

¹⁹⁸¹ See TRIAL, ‘Dénonciation pénale contre M. Habib AMMAR, actuellement résidant à l’hôtel Longchamp, rue Rothschild 32, 1202 Genève’, 17 September 2003, available online at <https://trialinternational.org/wp-content/uploads/2016/06/plainteAMMAR.pdf> (last visited 1 August 2017).

Switzerland and the International Telecommunications Union, which provided for immunity on representatives of the members of the Union.¹⁹⁸²

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The *Niyonteze* case marked the first Swiss conviction under universal jurisdiction.¹⁹⁸³ Fulgence Niyonteze, a former Rwandan *bourgmestre* (mayor) of the Mushubati Commune, suspected of participating in the 1994 genocide, fled with his family to Switzerland after the genocide, where they obtained asylum in May 1995.¹⁹⁸⁴ An investigation was opened against him and he was arrested on 28 August 1996. The ICTR did not take over the proceedings. Rwanda reportedly requested the extradition of the defendant but the request was denied by Switzerland.¹⁹⁸⁵

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The Swiss Military Attorney General charged Niyonteze under the Swiss Military Code with murder, incitement to commit murder and serious violations of the laws and customs of war, as well as violations of Common Article 3 of the 1949 Geneva Conventions and Article 4(2)(a) of Additional Protocol II. Article 108 of the Swiss Military Code provided as follows:

Celui qui aura contrevvenu aux prescriptions de conventions internationales sur la conduite de la guerre ainsi que pour la protection de personnes et de biens, celui qui aura violé d'autres lois et coutumes de la guerre reconnues, sera, sauf si des dispositions plus sévères sont applicables, puni de l'emprisonnement. Dans les cas graves, la peine sera la réclusion.

L'infraction sera punie disciplinairement si elle est de peu de gravité.

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During the proceedings, the court proceeded to an on-site visit and even climbed Mount Mushabi, a key location in the trial. It also interrogated a number of witnesses *in situ*, with the help of video recordings. It is, among other things, on the basis of its observations of the crime scene that the Tribunal found many of Niyonteze's claims not credible.¹⁹⁸⁶ In addition, a number of witnesses were transferred from Rwanda to Switzerland to be heard at trial, an endeavor

¹⁹⁸² *Accord entre le Conseil fédéral suisse et l'Union internationale des télécommunications pour régler le statut juridique de cette organisation en Suisse*, 22 July 1971, available online at <http://www.admin.ch/opc/fr/classified-compilation/19710186/index.html> (last visited 1 August 2017).

¹⁹⁸³ Kaleck, 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008', 30 *Michigan Journal of International Law*, (2008-2009) 927-980, at 939.

¹⁹⁸⁴ Military Appeal Tribunal 1A, Judgment, *Fulgence Niyonteze*, 26 May 2000, at 9.

¹⁹⁸⁵ Swiss federal law on international assistance in criminal matters bars extradition if the requesting state cannot guarantee that the extradited person will not be executed or submitted to any treatment affecting his or her physical integrity. At the time, the Rwandan special genocide law, *Loi organique No. 8196 du 30/8/96 sur l'organisation des poursuites des infractions constitutives du crime de génocide ou de crimes contre l'humanité, commises à partir du 1er Octobre 1990*, provided the death penalty for certain categories of *genocidaires*. See Reydam's, 'Niyonteze v. Public Prosecutor', 96 *American Journal of International Law* (2002), at 231-236.

¹⁹⁸⁶ See for instance, Military Appeal Tribunal 1A, *Fulgence Niyonteze*, Judgment, 26 May 2000, at 16.

that encompassed considerable financial and logistical efforts.¹⁹⁸⁷ A special scheme had to be put into place to ensure the security of these witnesses.¹⁹⁸⁸ The investigation team even travelled to Arusha to learn about the ICTR's witness protection system, and then applied some of what they had learned to the Swiss courtroom, in order to guarantee the anonymity of the witnesses.¹⁹⁸⁹ Other difficulties included the translation into French of the Rwandan language, as well as the understanding of the complex structures of the Rwandese population.¹⁹⁹⁰ The First Instance Tribunal convicted him on all counts and sentenced him to life imprisonment.

Interestingly, as noted by a scholar, the case was similar to the *Akayesu* case, which the ICTR tried. However, while the *Akayesu* trial lasted fifteen months, and while it faced similar logistical difficulties, the Swiss first instance case was disposed of in less than a month.¹⁹⁹¹

On appeal, his conviction for violations of the laws of war was affirmed but he was finally acquitted of murder and his sentence was reduced to fourteen years' imprisonment.¹⁹⁹² In its judgment, the Military Appeal Tribunal considered that it lacked jurisdiction *ratione personae* over civilians under the Military Criminal Code.¹⁹⁹³ The Military Tribunal of Cassation essentially affirmed the conviction on appeal, except on the question of eviction.¹⁹⁹⁴

This trial entailed a number of consequences at the legislative level. Firstly, it is interesting to note that as a result of the trial, special legislation on witness protection was drafted and integrated into the Swiss Military Code of Criminal Procedure in 2003.¹⁹⁹⁵ Secondly, it has been said that this trial played an important role for the adoption of a new provision (Article 264) on genocide in the Swiss Criminal Code.

On 18 June 2010, a new law was adopted entitled "Loi fédérale portant modification de lois fédérales en vue de la mise en œuvre du Statut de Rome de la Cour pénale internationale du 18 juin 2010". It entered into force on 1 January 2011. One major change implemented by said law was the suppression of the

¹⁹⁸⁷ For details on the transport see R. Arnold, 'Witness Protection under Swiss Legislation: An Offspring of International Law', 7 *International Criminal Law Review* (2007) 483-503.

¹⁹⁸⁸ *Ibid.*, at 488.

¹⁹⁸⁹ *Ibid.*

¹⁹⁹⁰ *Ibid.*, at 490.

¹⁹⁹¹ Reydam, 'Niyonteze v. Public Prosecutor', 96 *American Journal of International Law* (2002), at 231-236.

¹⁹⁹² Military Appeal Tribunal 1A, *Fulgence Niyonteze*, Judgment, 26 May 2000.

¹⁹⁹³ *Ibid.*, at 30.

¹⁹⁹⁴ Military Tribunal of Cassation, *Fulgence Niyonteze*, Judgment, 27 avril 2001.

¹⁹⁹⁵ Cf. *Message concernant la modification de la procédure pénale militaire (protection des témoins)*, FF 2003 693, 22 January 2003.

“close link” to Switzerland requirement. According to the Message of the Swiss Federal Government, “Switzerland has an eminent interest in extending its jurisdiction to acts committed abroad, because if it does not do so, it will become a pole of attraction for serious criminals”.¹⁹⁹⁶ Thus, two conditions must be fulfilled for a person suspected of committing a grave international crime abroad to be punishable in Switzerland, if neither the alleged perpetrator nor the victim are Swiss nationals, and if the crime was not committed on Swiss territory: (1) The alleged perpetrator is present in Switzerland; and (2) he cannot be extradited to another State or surrendered to an international criminal tribunal.

671 However, the law merely states that the suspect must be present in Switzerland without specifying at which stage of the proceedings he or she must be present. Does the suspect have to be in Switzerland when the prosecutor opens an investigation according to Article 309 of the Code of Criminal Procedure?

672 According to some scholars, a transit journey through Swiss territory should be regarded as sufficient to meet the requirement of “being present”.¹⁹⁹⁷ These authors consider that the suspect must be present on Swiss territory at the moment of the opening of proceedings. If the suspect is no longer in Switzerland, the authorities can then “assess prospects of no-return to the territory as foreseen within Article 264m (2) (b)” of the Swiss Criminal Code.¹⁹⁹⁸ This means that if the suspect has never visited Switzerland before, the prosecutor cannot anticipate his or her arrival by alerting the national search database with a view to carrying out an arrest or interrogation, since such coercive measures may only be ordered against suspects who have already been to Switzerland and against whom criminal proceedings have already been opened.¹⁹⁹⁹ If the arrival cannot be anticipated, the only possibility to proceed for the cantonal and federal criminal prosecutorial authorities (i.e. the police and the Office of the Attorney General of Switzerland) is to “design coordinated working processes ensuring their rapid and flexible reaction once such presence

¹⁹⁹⁶ My translation; the French version reads as follows: “*La Suisse a pourtant un intérêt éminent à étendre sa compétence aux actes commis à l'étranger, car si elle ne le faisait pas, elle deviendrait un pôle d'attraction pour les grands criminels.*”, *Message relatif à la modification des lois fédérales en vue de la mise en œuvre du Statut de Rome de la Cour pénale internationale*, FF 2008 3461, 23 April 2008, at 3491.

¹⁹⁹⁷ Boillat et al., ‘Challenges in prosecuting under universal jurisdiction’, 54(2) *Politorbis* (2012) 41-45, at 43.

¹⁹⁹⁸ *Ibid.*; According to Art. 264m (2), “Where the victim of the act carried out abroad is not Swiss and the perpetrator is not Swiss, the prosecution, with the exception of measures to secure evidence, may be abandoned or may be dispensed with provided: [...] b. the suspected perpetrator is no longer in Switzerland and is not expected to return there.”

¹⁹⁹⁹ Boillat et al., *supra* note 1996, at 44.

is signaled (e.g. by an NGO, a complainant or the media) or discovered by the prosecutorial authorities.”²⁰⁰⁰

According to another view, the absence of the suspect should not prevent the prosecutor from opening an investigation when it knows that the suspect will come to Switzerland.²⁰⁰¹ Any other option would prevent him, for example, from interviewing potential victims and so on, in order to perhaps proceed to an arrest of the coming suspect. This view is notably supported by Resolution 3 b) of the Institute of International Law according to which “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”.²⁰⁰² However, as a rule, if the suspect is not in Switzerland, Swiss authorities will generally not request his or her extradition if he or she is not a Swiss national, lives in a foreign state and if the victim is not a Swiss national.²⁰⁰³

In any case, Article 264m (2) of the Swiss Criminal Code states that the authorities can suspend or terminate proceedings if: “(a) a foreign authority or an international criminal court whose jurisdiction is recognized by Switzerland is prosecuting the offence and the suspected perpetrator is extradited or delivered to the court; or (b) the suspected perpetrator is no longer in Switzerland and is not expected to return.” The prosecuting authority must nevertheless ensure conservatory measures to secure evidence.²⁰⁰⁴

Even without this provision, the Code of Criminal Procedure already states that the prosecutor may suspend proceedings if the suspect cannot be found (Article 314 (1)(a)). In addition, even if investigations were to take place in the absence of the suspect, it would be impossible to try him in his absence. Indeed, the Swiss provisions on proceedings *in absentia* state that “[p]roceedings *in absentia* may only be held if the accused has previously had adequate opportunity in the proceedings to comment on the offences of which he or she is accused”.²⁰⁰⁵ It is difficult to imagine that this condition could be fulfilled if the suspect has never been present on Swiss territory.

The Federal Criminal Tribunal recently rendered an interesting decision in the *Nezzar* case, where it admitted that Switzerland could investigate and prosecute a former Algerian Defence Minister for war crimes committed in

²⁰⁰⁰ *Ibid.*

²⁰⁰¹ See in this sense, H. Maleh, ‘Art. 264m’, in *Commentaire romand du Code pénal*, § 15.

²⁰⁰² Underlined by the author. Institute of International Law, *Resolution on Universal Jurisdiction with Respect to the Crime of Genocide, Crimes against Humanity and War Crimes*, adopted on 26 August 2005 during the Krakow session.

²⁰⁰³ *Message relatif à la modification des lois fédérales en vue de la mise en œuvre du Statut de Rome de la Cour pénale internationale*, FF 2008 3461, 23 avril 2008, at 3491.

²⁰⁰⁴ Boillat et al., *supra* note 1996, at 43.

²⁰⁰⁵ Art. 366(4)(a) Swiss Code of Criminal Procedure.

Algeria between 1992 and 1999.²⁰⁰⁶ In 2011, following a series of complaints by victims, the Swiss Federal Prosecutor opened an investigation against Nezzar. Having been informed that he would be in Switzerland, the prosecutor ordered an enforced appearance and interrogated him. Nezzar appealed to the Federal Criminal Court (hereafter “FCC”) against the decision to open an investigation. The FCC dismissed his appeal on 25 July 2012.²⁰⁰⁷ The issue of the condition of the presence of the suspect was raised in the decision of the FCC. The Court ruled that this condition must be fulfilled at the moment of the opening of investigations.²⁰⁰⁸ However, if the suspect leaves Switzerland during the procedure, this does not automatically mean that Switzerland no longer has jurisdiction over him or her.²⁰⁰⁹ It is up to the prosecuting authority to decide whether it wants to suspend or stop proceedings when the suspect can no longer be found in Switzerland and when he or she is not likely to come back. Thus, in the present case, the Swiss concluded that the presence requirement in the legislation did not necessitate the presence of the offender in Switzerland at all times after the commission of the offence, but merely at the opening of the investigation.

VI. Critical assessment and concluding remarks to chapter 2

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The problem posed by the presence requirement is that it does not address the issue of perpetrators who remain at large in their own countries either because of amnesties or because their state does not intend to prosecute them.²⁰¹⁰ Nor does it address the case where the custodial state is unable or unwilling to prosecute. This is why, in some cases, state legislation or national judges have turned to so-called “universal jurisdiction *in absentia*”. However, it is true that this form of universal jurisdiction finds little support in international treaties, most of which require the presence of the suspect on the territory.²⁰¹¹ Furthermore, as practice has shown, the exercise of universal jurisdiction *in*

²⁰⁰⁶ See Federal Criminal Tribunal (*Tribunal pénal fédéral*), *Cour des plaintes, A. contre Ministère Public de la Confédération*, Decision, 25 July 2012.

²⁰⁰⁷ See Federal Criminal Tribunal (*Tribunal pénal fédéral*), *Cour des plaintes, A. contre Ministère Public de la Confédération*, Decision, 25 July 2012. On 8 November 2012, the Swiss Federal Supreme Court declared the appeal filed by Nezzar inadmissible on procedural grounds. See Federal Court, *A. v. B., C. et Ministère Public de la Confédération*, Decision, 1B_542/2012, 8 November 2012.

²⁰⁰⁸ See Federal Criminal Tribunal (*Tribunal pénal fédéral*), *Cour des plaintes, A. contre Ministère Public de la Confédération*, Decision, 25 July 2012, § 3.1.

²⁰⁰⁹ *Ibid.*

²⁰¹⁰ Chadwick, ‘Modern Developments in Universal Jurisdiction: Addressing Impunity in Tibet and beyond’, 9 *International Criminal Law Review* (2009) 359-394.

²⁰¹¹ The Geneva Conventions do not require such a link.

absentia without limits has – regrettably – led to political consequences obliging states to radically change their legislation and install stricter criteria such as that of “permanent residency”. Not only does this restrictive criterion not comply with states’ obligations under international law, but it also generates the considerable risk that many perpetrators of the gravest international crimes will be left unpunished.

A number of cases examined demonstrate a certain state practice, according to which the presence of the suspect – at some point during the proceedings – is a legal condition to the exercise of universal jurisdiction. It is our contention, however, that such presence is not required for investigative acts or for a preliminary enquiry. In this respect, the High Court of South Africa took a very interesting approach in the landmark judgment handed down in November 2013 regarding acts of torture committed in Zimbabwe. It found that despite the fact that section 4(3)(c) of its ICC Act requires the presence of the suspect as a condition for the exercise of jurisdiction, this requirement only applied to the trial itself and not to the pre-trial investigation.²⁰¹² The Court held that any other reading of the provision would lead to an “absurdity”: if a suspect left South Africa, even for a short period, the jurisdiction would be lost and only if he later re-entered, an investigation could continue.²⁰¹³ The Court did however recognize that investigations should not be required when there is absolutely no chance of the suspect being present in the state at a future date.²⁰¹⁴

This view is consistent with the IDI Resolution of the Institution of International Law, which, as mentioned above also appears to allow the undertaking of investigations *in absentia*.²⁰¹⁵ Thus, it appears that in the view of the drafters of the Resolution, investigative acts may be undertaken *in absentia* and may lead to an extradition request to the state in which the suspect is

²⁰¹² Werle and Bornkamm, ‘Torture in Zimbabwe under Scrutiny in South Africa: The Judgment of the North Gauteng High Court in *SALC v. National Director of Public Prosecutions*’, 11 *Journal of International Criminal Justice* (2013) 659-675, at 664.

²⁰¹³ High Court of South Africa (North Gauteng High Court), Judgment, *South African Litigation Centre and Others v. The National Director of Public Prosecutions and Others*, Case Number: 77150/09, 8 May 2012, at 91.

²⁰¹⁴ C. Gevers, ‘The Application of Universal Jurisdiction in South African Law’, *EJIL: Talk!*, 24 April 2012, available online at www.ejiltalk.org/universal-jurisdiction-in-south-africa/; See F. Lafontaine, ‘La compétence universelle et l’Afrique: ingérence ou complémentarité?’, 45(1) *Etudes internationales* (2014) 129-151, at 134.

²⁰¹⁵ Para. 3 b) states that “*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”. Underlined by the author; Institute of International Law, *Resolution on Universal Jurisdiction with Respect to the Crime of Genocide, Crimes against Humanity and War Crimes*, adopted on 26 August 2005 during the Krakow session.

present.²⁰¹⁶ If this interpretation is correct, questions arise as to what constitute “acts of investigation” and to when the presence of the suspect is required. One possible interpretation is that the presence requirement is limited to “the procedural stage of the arrest of the suspect or a summons directed to the latter to appear before the court”.²⁰¹⁷ Another is that the Resolution merely prohibits trials *in absentia*. In any event, in both of these interpretations, the distinction between universal jurisdiction and universal jurisdiction *in absentia* becomes less important.²⁰¹⁸ Indeed, states cannot subject persons to forcible measures in their absence because such measures necessarily imply the presence of suspects, i.e. that they either voluntarily enter the territory of the state or that they are extradited by the state where they are found.²⁰¹⁹ Therefore, the investigating measures that states can take in the suspect’s absence include compiling information, hearing witnesses, seizing assets and issuing arrest warrants with a view to obtaining the custody of the suspect.²⁰²⁰ Ryngaert thus rightly argues that such investigative acts *in absentia* do not interfere in the domestic affairs of foreign states more than the exercise of universal jurisdiction.²⁰²¹

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Much of the debate and many of the fears expressed regarding universal jurisdiction *in absentia* seem, in our view, linked to the confusion between universal jurisdiction *in absentia* and trials *in absentia*. These are in fact two entirely separate concepts that need to be distinguished. As Judges Higgins et al. observed in their Joint Separate Opinion in the *Arrest Warrant* case:

Some jurisdictions provide for trial *in absentia*; others do not. If it is said that a person must be within the jurisdiction at the time of the trial itself, that may be a prudent guarantee for the right of fair trial but has little to do with bases of jurisdiction recognized under international law.²⁰²²

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Concerns about universal jurisdiction *in absentia* are often expressed in relation to states that allow trials *in absentia*; the fear is that the suspect will not be granted a fair trial, because they will be tried in their absence. This is rarely the case in practice. Firstly, in most states, trials *in absentia* are not allowed. Therefore, states will need to ensure or bring about the physical presence of the offender on their territory before trying him or her. Secondly, in states that do allow trials *in absentia* – mostly continental European states – they generally

²⁰¹⁶ See Kress, “Universal Jurisdiction over International Crimes and the *Institut de Droit international*”, 4 *Journal of International Criminal Justice* (2006), at 576.

²⁰¹⁷ *Ibid.*

²⁰¹⁸ Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law*, at 102.

²⁰¹⁹ Ryngaert, *Jurisdiction in International Law* (2008), at 122.

²⁰²⁰ *Ibid.*

²⁰²¹ *Ibid.*, at 123.

²⁰²² ICJ, *Arrest Warrant* case, Joint Separate Opinion of Judges Higgins et al., at 80 § 58.

respect the human rights guarantees set out in the case law of the European Court of Human Rights. This notably includes the requirement that the suspect is aware that proceedings are being conducted against him or that he has been heard by the authorities, at least once.²⁰²³ Concretely, this implies that, at some point during the proceedings, the suspect will have to be present on the state's territory. Finally, it may be useful to recall that the reason why proceedings *in absentia* have been provided for in some domestic systems; that is to say, it is to overcome the problem where persons know that they are accused of committing an offence, they have been interrogated and seen the evidence, and to avoid conviction, they have fled the country or cannot be found. This is not the usual scenario in the case of universal jurisdiction for international crimes, and thus trials *in absentia* rarely occur in practice. It is however interesting to note that the Swiss authorities, when adopting the presence requirement in Article 264m of the Swiss Penal Code justified it by stating that in this way, there was no risk of a suspect being tried *in absentia*.²⁰²⁴

The presence of a suspect as a requirement for the exercise of universal jurisdiction is in fact not as important as it appears to be. In fact, in our view, states provide for this requirement in their legislation mainly for the purposes of limiting the number of potential cases that they would have to potentially investigate and prosecute; it is thus established to avoid the overburdening of their judicial system and to avoid the political repercussions faced by other states like Belgium which did not have this legal limitation.²⁰²⁵ It is also a way of avoiding possible conflicts of jurisdiction.

What does however appear essential is that states – and in particular political authorities – do not adopt a restrictive interpretation of the presence requirement by, for example, requiring a prolonged presence, from the opening of the investigation to the conviction. Such an interpretation then becomes essentially an equivalent to the “residency requirement”. It is equally important that any jurisdictional link be explicitly required in state legislation rather than subject to the prosecutorial discretion. This avoids the risk that a “close link” requirement, such as that which exists in Germany, will develop in practice; it is a very vague notion that lacks transparency and can thus easily appear to be used to make politically sensitive cases disappear.

²⁰²³ See for instance the Swiss Code of Criminal Procedure.

²⁰²⁴ See *Message du Conseil fédéral*, at 3492 which states as follows: “*La première condition à laquelle est subordonnée la compétence des autorités de poursuite pénale suisses est la présence de l’auteur sur le territoire suisse. On exclut ainsi le risque de devoir ouvrir et mener une procédure par défaut.*”

²⁰²⁵ See *Message du Conseil fédéral*, at 3495 which states as follows: “*Relevons encore que la condition de la présence de l’auteur sur le territoire suisse – qui n’avait pas son pendant dans la législation belge – a empêché le déferlement d’une vague de plaintes ces dernières années : les procédures entamées contre des criminels de guerre originaires d’ex-Yougoslavie ou du Rwanda ont pu être menées à terme dans des conditions raisonnables.*”

To summarize, if the presence requirement exists in national law, this should not prevent prosecuting authorities from opening investigations in the absence of a suspect and then apprehending the suspect when they enter the state's territory or even issuing an international arrest warrant. Investigations should also be continued where necessary, when that person leaves the territory of the state. If need be, an international arrest warrant can be issued to oblige the person to return to be questioned, to examine evidence, and so forth. The question of whether one particular state permits a person to then be convicted in their absence is an entirely different issue which depends in particular on the legislation of each state. If such proceedings - which are considered by the European Court of Human Rights to be compatible, under certain circumstances, with the right to a fair trial - are allowed in a state, any conviction would naturally need to respect the very detailed human rights safeguards which inter alia include the guarantee for the person tried in their absence to be tried again in their presence after having learned about their conviction, as well as the right to be heard, the right to counsel, and the right to examine evidence and cross-examine witness testimony.

Chapter 3: Subsidiarity

I. Introductory remarks

Given the different bases of jurisdiction (territoriality, nationality, universality, etc.), it is possible that several states may assert jurisdiction in respect to a particular act. In this case, there are “valid but competing jurisdiction claims”.²⁰²⁶ Unlike private international law, international criminal law has not (yet) developed rules allocating jurisdiction between states.²⁰²⁷ There is no global convention on criminal jurisdiction, which sets a hierarchy between the various jurisdictional bases. There is no international treaty rule that, for instance, accords priority to the state in the territory of which the crime occurred or to the state of the nationality of the author or the victim. Moreover, customary international law allows states to choose their jurisdiction bases, and some international treaties oblige states to establish certain forms of jurisdiction over a crime (see *supra* Part 1). Generally, in practice, if the territorial state is able and willing to prosecute, this is usually the best course; however, it is not always the case. If two or more states affirm jurisdiction, which has priority?

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The problem of conflict of jurisdictions is clearly not limited to universal jurisdiction, however, as underlined by one scholar, one natural consequence of universal jurisdiction is “the proliferation of jurisdictional claims” which is “conductive of an increase in positive conflicts of jurisdiction”.²⁰²⁸ While there is no set hierarchy between the various jurisdictional bases, it is evident that the territoriality principle should prevail for obvious reasons.²⁰²⁹ With respect to extra jurisdictional grounds, the issue of the jurisdictional base having priority in a specific case is subject to debate. One would logically submit that when determining the state to which the case should be referred, the assessment should be based on the state with the “significantly greater nexus”.²⁰³⁰ However, aside from the territorial state, there does not seem to be much consensus among states in terms of which of the extraterritorial jurisdictional bases has a “greater

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²⁰²⁶ Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (2012), at 12.

²⁰²⁷ *Ibid.*; Stigen, ‘The Relationship between Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010) 133-160, at 134.

²⁰²⁸ H. Van der Wilt, ‘Universal Jurisdiction under Attack: An Assessment of African Misgivings towards International Criminal Justice as Administered by Western States’, 9 *Journal of International Criminal Justice* (2011) 1043-1066, at 1062.

²⁰²⁹ See Part I.

²⁰³⁰ See ICTY, Appeals Chamber, *Janković*, Decision on Rule 11bis Referral, 15 November 2005, § 37.

nexus”.²⁰³¹ This “vaste” debate is however outside the scope of our study. The question of interest in this chapter is whether universal jurisdiction over international crimes is “subsidiary” to other bases of jurisdiction, in particular to the jurisdiction of the territorial state.

687 Generally speaking, the subsidiarity principle can be defined as the rule that bars a state from exercising jurisdiction “when a state with a closer connection to the crime genuinely exercises its priority jurisdiction”.²⁰³² In relation to universal jurisdiction, and for the purposes of this chapter, subsidiarity is understood as the principle according to which states asserting universal jurisdiction defer the case to the territorial state or to another state with a closer link, if that state is able and willing to prosecute.²⁰³³

688 It must be noted that subsidiarity is engaged here as mainly focusing on cases where no state has yet tried the case in question. A different yet related issue arises but will not be discussed in detail in this chapter because it touches upon double jeopardy concerns; it is the question of whether a state may exercise universal jurisdiction when a judgment has already been rendered by the territorial or national state, or vice-versa, and if so, under what conditions. This could typically be the case of a state that doubts the quality of trials that have taken place in the territorial state – and for instance led to an acquittal based on an amnesty law – and on this basis, launches criminal proceedings again.²⁰³⁴ Moreover, this situation might arise in the case where the territorial state is offended by a judgment of a third state and decides to recommence proceedings.²⁰³⁵

689 With respect to terminology, different wording is used in international instruments and in national practice to refer to the principle of subsidiarity. Terms such as “priority”, “preference”, “complementarity” and “horizontal

²⁰³¹ One scholar submits that “the extraterritorial protective applicability has the highest linkage, followed by the extraterritorial passive personality applicability, the extraterritorial active personality applicability, and at last the extraterritorial universality applicability, which has the lowest linkage in the given context”. See Halleve, *A Modern Treatise on the Principle of Legality in Criminal Law* (2010), at 131. From a civil law background, the statement according to which “extraterritorial passive personality applicability has higher linkage to the state [...] than does the extraterritorial active personality applicability” is disputable. See Subsection III.

²⁰³² Geneuss, ‘Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU–EU Expert Report on the Principle of Universal Jurisdiction’, 7(5) *Journal of International Criminal Justice* (2009) 945-962, at 957.

²⁰³³ Ryngaert, *Jurisdiction in International Law* (2008), at 157.

²⁰³⁴ Van der Wilt, ‘Universal Jurisdiction under Attack: An Assessment of African Misgivings towards International Criminal Justice as Administered by Western States’, 9(5) *Journal of International Criminal Justice* (2011) 1043-1066, at 1063.

²⁰³⁵ *Ibid.*

complementarity”²⁰³⁶ are used. In this chapter, the terms “subsidiarity” (of the forum state) and “priority” (of the state with a closer link) will both be used. The state(s) that have a stronger nexus to the case, such as the territorial state and that of the nationality of the author, will be referred to as “the primary state(s)” or “the affected state(s)”.

Firstly, we will address the debate concerning whether the principle of subsidiarity can be considered as a rule of international law (Section II). Secondly, we will discuss the scope and content of the principle of subsidiarity and the various problems raised as a result of its application by national courts (Section III). Finally, we will explain why, in our view, the principle of subsidiarity should be a requirement under international law rather than a “policy” and should be applied by states as a binding legal rule, according to which the principle must be applied if (and only if) a number of strict conditions are fulfilled (Section IV).

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II. Is the principle of subsidiarity a rule of international law?

A. The debate in international law

Most international law instruments do not expressly establish a subsidiarity criterion. If we look at the wording of the Geneva Conventions and their Additional Protocols or at the Torture Convention, they appear to leave it up to the state to decide. Articles 49, 50, 129 and 146 of the Geneva Conventions obligate states to bring suspects before their own courts or if they prefer “and in accordance with the provisions of [their] own legislation”, hand them over to another state party. However, there is a growing tendency to consider that, in treaties relating to core crimes, the “prosecute obligation” takes precedence over the “extradite obligation”.²⁰³⁷ This is notably supported by Article 88(2) of Additional Protocol I, which affirms a primary obligation of the state in which the suspect is located, to search for him and to prosecute. According to this view, the custodial state has a primary obligation to prosecute, rather than to extradite to a state with a stronger nexus, such as the territorial or suspect’s national state. Subsidiarity is not applied.

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²⁰³⁶ See for instance, C. Ryngaert, ‘Complementarity in Universality Cases: Legal-Systemic and Legal Policy Considerations’, in Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 165-200.

²⁰³⁷ See Lafontaine, ‘Universal Jurisdiction – the Realistic Utopia’, 10 *Journal of International Criminal Justice* (2012) 1277-1302; Cassese, ‘Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction’, 1 *Journal of International Criminal Justice* (2003) 589-595, at 593-594.

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According to the wording of the Torture Convention, each state shall bring the suspect before its competent authorities “if it does not extradite him”.²⁰³⁸ The International Court of Justice supported the precedence of the prosecution obligation in the *Belgium v. Senegal* case, stating that:

[...] the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.²⁰³⁹

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Thus, according to this view, states must consider the prosecution of torture, including on the basis of universality, as an obligation and extradition as an alternative option.²⁰⁴⁰ Unlike the other Conventions, the Genocide Convention does not clearly give priority to prosecution on the basis of universality rather than extradition; it only obligates the territorial state to prosecute and try genocide suspects. It can thus be argued that Article 6 of the Convention, while not prohibiting the exercise of universal jurisdiction over genocide, gives priority to the territorial state.²⁰⁴¹

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Looking at the case law, in the *Arrest Warrant* case – which concerned the issuance by a Belgian investigating magistrate of an “international arrest warrant” against the incumbent Minister of Foreign Affairs of the Congo, alleging grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto and crimes against humanity – the International Court of Justice regrettably did not take a position on the subsidiarity principle in its judgment. Notwithstanding, some judges recognized the principle in their Separate Opinions. According to the Joint Separate Opinion of Judges Higgins, Kooijmans and Buerenthal:

A State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective

²⁰³⁸ Art. 7 § 1 Torture Convention.

²⁰³⁹ ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, § 95.

²⁰⁴⁰ Lafontaine, *supra* note 2037. It is not entirely clear what this means in practical terms with regard to the principle of subsidiarity. If the obligation to prosecute (including under universal jurisdiction) takes precedence over the extradition option, this could appear to be in contradiction with the (possible) obligation for the forum state asserting universal jurisdiction to defer to the state with a closer link, namely the territorial or national state.

²⁰⁴¹ For further detail, see Thalmann, ‘National Criminal Jurisdiction over Genocide’, in P. Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford: Oxford University Press, 2009), 232-258.

accused person the opportunity itself to act upon the charges concerned.²⁰⁴²

Likewise, Judge Rezek argued: “domestic criminal jurisdiction based solely on the principle of universal justice is necessarily subsidiary in nature”.²⁰⁴³ He invoked the fact that the *locus delicti* is the most qualified to see a criminal trial through to its conclusion in the proper manner, if for no other reason than that the evidence lies closer to hand and that the forum has greater knowledge of the accused and the victims. As he rightly pointed out, the territorial state definitely has a clearer appreciation of the full circumstances surrounding the offence.²⁰⁴⁴

It cannot be said that a general subsidiarity rule stems from international treaty law. In addition, as underlined by the ICTY Appeals Chamber in the *Janković* case, “attempts among States to establish a hierarchy of criteria for determining the most appropriate jurisdiction for a criminal case, where there are concurrent jurisdictions on a horizontal level (*i.e.* among States), have failed thus far”.²⁰⁴⁵

It has been argued by a number of scholars and international judges that the rule of subsidiarity has crystallized into a rule of customary international law.²⁰⁴⁶ According to Cassese, “under customary international law, universal jurisdiction may only be triggered if those other states [territorial and active nationality states] fail to act, or else have legal systems so inept or corrupt that they are unlikely to do justice. Universality operates, then, as a default jurisdiction”.²⁰⁴⁷ Kress argues that “despite the relative scarcity of practice to argue”, it would now seem that subsidiarity has grown into a principle of universal jurisdiction over crimes under international law.²⁰⁴⁸ He recognizes however that “the details of the subsidiarity remain to be clarified as the state practice evolves.”²⁰⁴⁹ Colangelo also seems to support the idea of subsidiarity as

²⁰⁴² ICJ, *Arrest Warrant*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, § 59.

²⁰⁴³ ICJ, *Arrest Warrant*, Separate Opinion of Judge Rezek, at 92 f.

²⁰⁴⁴ It is for political rather than practicable reasons that a number of domestic systems rank, immediately after the principle of territoriality, a basis of criminal jurisdiction of a different kind, one which applies irrespective of the *locus delicti*: the principle of the *defence of certain legal interests* to which the state attaches particular value: the life and physical integrity of the sovereign, the national heritage, good governance.

²⁰⁴⁵ ICTY, *Janković*, Appeals Chamber, Decision on Rule 11bis Referral, 15 November 2005, § 34.

²⁰⁴⁶ ICJ, *International arrest warrant*, individual opinion, Higgins/Kooijmans/Buergenthal (N 59); see also Permanent Court of International Justice, *Lotus*, Dissenting Opinion Altamira, at 95.

²⁰⁴⁷ Cassese, “Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction”, 1 *Journal of International Criminal Justice* (2003) 589-595, at 593.

²⁰⁴⁸ Kress, “Universal Jurisdiction over International Crimes and the *Institut De Droit International*”, 4 *Journal of International Criminal Justice* (2006) 561-585.

²⁰⁴⁹ *Ibid.*, at 580.

a principle of international customary law, while remaining somewhat cautious.²⁰⁵⁰ Other scholars also adopt the same position.²⁰⁵¹

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This view is also maintained by a number of international instruments. The Resolution of the *Institut de droit International*, for instance, clearly supports the subsidiarity principle. According to its paragraphs 3 c) and d):

c) 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.

d) Any State having custody over an alleged offender, to the extent that it relies solely on universal jurisdiction, should carefully consider and, as appropriate, grant any extradition request addressed to it by a State having a significant link, such as primarily territoriality or nationality, with the crime, the offender, or the victim, provided such State is clearly able and willing to prosecute the alleged offender.²⁰⁵²

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Likewise, the *African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes*²⁰⁵³ provides for the application of a “priority” principle to the territorial state. According to Article 4(2), “in exercising jurisdiction under this law, the Courts shall accord priority to the court of the State in whose territory the crime is alleged to have been committed, provided that the State is willing and able to prosecute”. The Darfur Report also clearly supports subsidiarity, stating that only if the territorial state and the national state “refuse to seek the extradition, or are patently unable or unwilling to bring the person to justice, may the State on whose territory the person is present initiate proceedings against him or her”.²⁰⁵⁴

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Other international or regional documents of an advisory nature are silent or vaguer on this issue. The *International Law Commission’s Draft Code of Crimes Against Peace and Security of Mankind* does not give priority to any state, merely

²⁰⁵⁰ A. Colangelo, ‘Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory’, 86 *Washington University Law Review* (2009) 769-785, at 835.

²⁰⁵¹ See for instance M. Cosnard, ‘La compétence universelle en matière pénale’, in Tomuschat/Thouvenin (eds), *The Fundamental Rules of the International Legal Order, Jus Cogens and Obligations Erga Omnes* (2006), at 359.

²⁰⁵² Institute of International Law, *Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes* (2005), § 3 (d).

²⁰⁵³ African Union, *Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters*, 7 to 15 May 2012, available online at <http://www.ejiltalk.org/wp-content/uploads/2012/08/AU-draft-model-law-UJ-May-2012.pdf> (last visited 1 August 2017).

²⁰⁵⁴ *Darfur Report*, at 614.

stating that “the State Party in the territory of which an individual alleged to have committed a crime set out in article 17,18,19 or 20 is found shall extradite or prosecute that individual”.²⁰⁵⁵ The Draft Article adopted on first reading provided that “particular consideration should be given to a request from the State in whose territory the crime was committed”.²⁰⁵⁶ Interestingly, the Special Rapporteur suggested including the priority of the request of the territorial state in a specific provision, but the Drafting Committee considered that “this question was not ripe for codification”.²⁰⁵⁷ The *Princeton Principles on Universal Jurisdiction*²⁰⁵⁸ do not rank jurisdictional claims,²⁰⁵⁹ but provide a list of criteria that states should take into account when deciding whether to prosecute or extradite. In practice, the territorial state will often fulfil most of the criteria set out in Principle 8.²⁰⁶⁰

On the contrary, the *AU-EU Expert Report on the Principle of Universal Jurisdiction* clearly states that positive international law does not recognize any hierarchy among the various bases of jurisdiction.²⁰⁶¹ It even expressly provides as an example that a state that enjoys universal jurisdiction over crimes against

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²⁰⁵⁵ International Law Commission’s Draft Code of Crimes Against Peace and Security, art. 9.

²⁰⁵⁶ International Law Commission’s Draft Code of Crimes Against Peace and Security with commentaries.

²⁰⁵⁷ International Law Commission’s Draft Code of Crimes Against Peace and Security with commentaries, at 32.

²⁰⁵⁸ The Princeton Principles on Universal Jurisdiction, 2001, available online at http://lapa.princeton.edu/hosteddocs/unive_jur.pdf (last visited 1 August 2017).

²⁰⁵⁹ Commentary to The Princeton Principles on Universal Jurisdiction, 2001, available online at http://lapa.princeton.edu/hosteddocs/unive_jur.pdf (last visited 1 August 2017).

²⁰⁶⁰ According to Principle 8 relating to the “Resolution of Competing National Jurisdictions”:
 “Where more than one state has or may assert jurisdiction over a person and where the state that has custody of the person has no basis for jurisdiction other than the principle of universality, that state or its judicial organs shall, in deciding whether to prosecute or extradite, base their decision on an aggregate balance of the following criteria:
 (a) multilateral or bilateral treaty obligations;
 (b) the place of commission of the crime;
 (c) the nationality connection of the alleged perpetrator to the requesting state;
 (d) the nationality connection of the victim to the requesting state;
 (e) any other connection between the requesting state and the alleged perpetrator, the crime, or the victim;
 (f) the likelihood, good faith, and effectiveness of the prosecution in the requesting state;
 (g) the fairness and impartiality of the proceedings in the requesting state;
 (h) convenience to the parties and witnesses, as well as the availability of evidence in the requesting state; and
 (i) the interests of justice.”

²⁰⁶¹ Council of the European Union, *The AU-EU Expert Report on the Principle of Universal Jurisdiction* (Brussels, 16 April 2009), § 14 and R9.

humanity is under no legal obligation to accord priority in respect of prosecution to the territorial state or to the national state.²⁰⁶² In other words, the report considers that the principle cannot be regarded as a rule of customary international law, restraining the exercise of universal jurisdiction.²⁰⁶³ Despite this, the report does go on to say that “states should, as a matter of policy, accord priority to territoriality as a basis of jurisdiction”.²⁰⁶⁴ The principle of subsidiarity does seem to stem from several recommendations of the AU-EU Expert Report.²⁰⁶⁵ Recommendation 4 states that “[t]hose Member States of the AU and EU which have persons suspected of serious crimes of international concern within their custody or territory should institute proceedings unless they decide to extradite the suspect to the territorial state, (the “suspect’s national state”) or the state of nationality of the victims”. Recommendation 9 clearly establishes that states should “as a matter of policy accord priority to territoriality as a basis of jurisdiction, since such crimes, while offending against the international community as a whole by infringing universal values, primarily injure the community where they have been perpetrated and violate not only the rights of the victims but also the general demand for order and security in that community. In addition, it is within the territory of the state of alleged commission that the bulk of the evidence will usually be found”.²⁰⁶⁶ Recommendations 10 and 12 also go in this direction.

702 The view that there is no principle giving priority to the territorial state also finds a basis in the *Mejakić* case.²⁰⁶⁷ In its 2005 decision, the Referral Bench stated that “[...] it has not been shown that there is an established priority in international law in favor of the State in whose territory a crime was committed. International extradition treaties, whether multilateral or bilateral, offer some analogy, but these do not typically provide for primacy of any one ground of jurisdiction. In domestic jurisdictions, the question is often regulated by statute and there is no universal provision or practice.”²⁰⁶⁸

703 Likewise, some scholars argue that it is not possible to conclude that the subsidiarity principle has crystallized into a rule of customary international

²⁰⁶² *Ibid.*, § 14.

²⁰⁶³ Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (2012), at 27.

²⁰⁶⁴ Council of the European Union, *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, Brussels, 16 April 2009, R9, at 42.

²⁰⁶⁵ Council of the European Union, *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, Brussels, 16 April 2009.

²⁰⁶⁶ *Ibid.*

²⁰⁶⁷ ICTY, *Prosecutor v. Mejakić et al*, Appeals Chamber, Decision on Joint Defence Appeal Against Decision On Referral Under Rule 11 bis, 7 April 2006, § 43.

²⁰⁶⁸ ICTY, *Prosecutor v. Mejakić et al*, Trial Chamber, Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 bis, 20 July 2005, § 40.

law.²⁰⁶⁹ Geneuss, for instance, argues that the subsidiarity principle “cannot (yet) [in 2009] be regarded as a firm rule of international law, even though it has been implemented in some states by legislation or jurisprudence”.²⁰⁷⁰ She, however, argues in favor of such a principle, stating that “the subsidiarity principle provides a fair balance between sovereignty interests and international justice interests”. Analyzing the state practice of four states (Spain, France, Belgium and Germany), Ryngaert argues that it is not possible to infer from this practice that the subsidiarity principle is an emerging principle of international law.²⁰⁷¹ According to him, the “absence of a conviction on the part of States that subsidiarity has the compelling force of law probably leads to the inevitable conclusion that the subsidiarity principle is not a norm of customary international law”.²⁰⁷² In 2006, he had however argued that “the principle of subsidiarity [was] in the process of crystallization as a norm of customary international law”, submitting that the subsidiarity may even derive from the very nature of universal jurisdiction.²⁰⁷³

Stigen argues that “there is too little state practice to conclude that international law attaches a subsidiarity principle to universal jurisdiction”,²⁰⁷⁴ although, in our view, it can convincingly be argued that it is in the process of being developed. This is also the direction indicated in regional documents. In its 2003 annual report, Eurojust provided guidelines deciding which jurisdiction should prosecute.²⁰⁷⁵ It begins with the presumption that, “if possible prosecution should take place in the jurisdiction where the majority of the

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²⁰⁶⁹ Williams, *supra* note 2063, at 27.

²⁰⁷⁰ Geneuss, ‘Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU–EU Expert Report on the Principle of Universal Jurisdiction’, 7(5) *Journal of International Criminal Justice* (2009) 945-962, at 957.

²⁰⁷¹ C. Ryngaert, ‘Applying the Rome Statutes Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting Under the Universality Principle’, 19 *Criminal Law Forum* (2008) 153-180, at 173.

²⁰⁷² Ryngaert, ‘Complementarity in Universality Cases: Legal-Systemic and Legal Policy Considerations’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 165-200, at 175.

²⁰⁷³ See C. Ryngaert, ‘Universal Jurisdiction in an ICC Era: A Role to Play for EU Member States with the Support of the European Union’, 14/1 *European Journal of Crime, Criminal Law and Criminal Justice* (2006) 46-80, at 61.

²⁰⁷⁴ See Stigen, ‘The Relationship between the Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010) 133-160, at 141.

²⁰⁷⁵ Eurojust, Annex: ‘Guidelines for Deciding ‘Which Jurisdiction Should Prosecute?’’, *Annual Report 2003*, available online at <http://eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202003/Annual-Report-2003-EN.pdf> (last visited 1 August 217), at 61-67.

criminality occurred or where the majority of the loss was sustained”.²⁰⁷⁶ It then lists a number of factors that should be taken into account including inter alia the location of the accused, the willingness of witnesses to give evidence and their protection, the length of time which proceedings will take in a jurisdiction, the interests of victims, notably to claim compensation, and the costs of the prosecution in a jurisdiction. In 2005, the European Commission suggested that an EU provision could oblige member states to establish a priority rule in favor of the “leading” member state.²⁰⁷⁷ A number of criteria could be used to choose the leading jurisdiction – and thus prevent and resolve conflicts of jurisdiction. The list “could include territoriality, criteria related to the suspect of defendant, victims’ interest, criteria related to State interests, and certain other criteria related to efficiency and rapidity of the proceedings”.²⁰⁷⁸ Likewise, in its *amicus curiae* brief in the United States *Sosa v. Humberto Alvarez-Machain et al.* case,²⁰⁷⁹ the European Commission supported the view that the approach of complementarity under the Rome Statute should be taken with regard to universal criminal jurisdiction.

B. Conclusions arising from national legislation and case law

1. Domestic legislation

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Some states expressly provide for subsidiarity over core crimes and torture in their legislation, generally to the territorial state. In France, for instance, the prosecution of genocide, crimes against humanity and war crimes on the basis of universality can only be exercised if no state has requested the extradition.²⁰⁸⁰ No subsidiarity requirement exists under French law for torture and enforced disappearance, meaning that courts do not need to give priority to the courts of the states where the crimes occurred. Other states contain similar provisions

²⁰⁷⁶ *Ibid.*, at 63.

²⁰⁷⁷ Commission of the European Communities, *Green Paper on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings*, COM (2005) 696, Brussels, 23 December 2005.

²⁰⁷⁸ *Ibid.*, § 2.

²⁰⁷⁹ See European Commission, *amicus curiae* brief, Supreme Court of the United States, *Sosa v. Alvarez-Machain et al.*, 23 January 2004, § 25, available online at <http://documents.law.yale.edu/sites/default/files/Brief%20of%20European%20Commission%20to%20Sosa.pdf>. According to the European Commission, “There is some support for the proposition that the same approach should be taken to the exercise of universal criminal jurisdiction”.

²⁰⁸⁰ Art. 689-11(2) of the French Code of Criminal Procedure.

including Croatia,²⁰⁸¹ Ethiopia,²⁰⁸² Luxembourg,²⁰⁸³ Portugal,²⁰⁸⁴ and Slovenia.²⁰⁸⁵ It is noteworthy that some states only provide for subsidiarity if universal jurisdiction is exercised over some specific crimes, which depending on the national legislation may be international or transnational crimes,²⁰⁸⁶ or ordinary crimes.²⁰⁸⁷

In other states, however, subsidiarity is not considered as a criterion as such, but as a basis for prosecutorial discretion.²⁰⁸⁸ In Belgium, for instance, the Federal Prosecutor “may” decide to transfer the case to the territorial, national or custodial state, if “it is apparent from the specific circumstances of the case that, it is in the interests of the proper administration of justice and in respect for Belgium’s international obligations [...] in so far as such court demonstrates the attributes of independence, impartiality and equity which accord, in particular, with the relevant international commitments between Belgium and that State”.²⁰⁸⁹ In Germany, although the system is based on mandatory prosecution (*Legalitätsprinzip*), the Prosecutor is nevertheless authorized not to pursue an offence committed abroad if surrender to an international tribunal or

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²⁰⁸¹ Art. 10(2) of the Croatian Law on the implementation of the Statute of the International Criminal Court and the prosecution of criminal offences against international law of war and humanitarian law provides that “other crimes shall be prosecuted in the Republic of Croatia, regardless of the place where they were committed or the nationality of the suspect [...] if the respective suspect for one reason or another cannot be tried before the International Criminal Court or a state where the crime was committed, a court of the state of the suspect’s residence or another competent court from which a fair trial can be expected.”

²⁰⁸² Art. 19(1) (b) of the Ethiopian Criminal Code.

²⁰⁸³ Art. 7-4 of the Code of Criminal Procedure of Luxembourg.

²⁰⁸⁴ Art. 5(1)(b) of the Portuguese Criminal Code.

²⁰⁸⁵ Art. 13(2) of the Criminal Code of Slovenia.

²⁰⁸⁶ See for instance Section 11 of the Cameroon Penal Code.

²⁰⁸⁷ See for instance Art. 119(2) of the Criminal Code of the Republic of Macedonia.

²⁰⁸⁸ Stigen, ‘The Relationship between the Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010) 133-160, at 147.

²⁰⁸⁹ See Art. 10ter of the Preliminary Chapter of the Code of Criminal Procedure, which provides that “*Saisi d’une plainte en application de l’alinéa précédent, le procureur fédéral ou le procureur du Roi requiert le juge d’instruction d’instruire cette plainte sauf si : [...] 4° des circonstances concrètes de l’affaire, il ressort que, dans l’intérêt d’une bonne administration de la justice et dans le respect des obligations internationales de la Belgique, cette affaire devrait être portée soit devant les juridictions internationales, soit devant la juridiction du lieu où les faits ont été commis, soit devant la juridiction de l’Etat dont l’auteur est ressortissant ou celle du lieu où il peut être trouvé, et pour autant que cette juridiction présente les qualités*”.

extradition to a prosecuting state is admissible and intended.²⁰⁹⁰ Under German law, the Prosecutor is thus allowed to defer to a foreign state but is not obliged to do so. It has been said that Germany “does not consider the principle of horizontal complementarity to be a norm that binds prosecutors and courts”.²⁰⁹¹

2. Case law

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Other states have (initially) developed subsidiarity in their case law. Some have later incorporated it into their legislation. This has been true in the case of Spain for instance. Following the pressure exerted on the Spanish government to change its legislation on universal jurisdiction, Article 23.4 of the Law on the Judiciary (LOPJ) was amended on 15 October 2009, considerably limiting the exercise of universal jurisdiction.²⁰⁹² The new provision expressly introduced the subsidiarity principle as a legal requirement, stating that Spanish courts shall only have jurisdiction “where proceedings have not been initiated that constitute an *effective investigation and prosecution*, in relation to the punishable facts”. The subsidiarity principle has been the subject of very interesting debates before the Spanish courts, although it was not required by Article 23.4 LOPJ until the 2009 Amendment. This section will therefore focus on the debates that took place before the Spanish courts, and which illustrate some of the issues and controversies raised by the application of the subsidiarity principle. It will then briefly address some of the legal discussions that took place before the criminal courts of other states.

a. The debates on subsidiarity before Spanish courts

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The Spanish National High Court first applied the principle of subsidiarity of universal jurisdiction on 23 December 2000, in the *Guatemalan Generals* case. The Court held that Spain could not exercise jurisdiction over acts committed by five Guatemalan Generals, accused of committing acts of genocide, terrorism and torture against members of the Mayan ethnic group in Guatemala between 1978 and 1990.²⁰⁹³ It argued mainly that while Article 6 of the Genocide Convention did not prevent other states from exercising jurisdiction over genocide committed abroad, it had the effect of giving precedence to the territorial state

²⁰⁹⁰ Section 153 (f)(2) *in fine* StPO.

²⁰⁹¹ See Rynjaert, ‘Complementarity in Universality Cases: Legal-Systemic and Legal Policy Considerations’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 165-200, at 182-183.

²⁰⁹² The amendment entered into force on 5 November 2009.

²⁰⁹³ Decision of the *Audencia Nacional*, 13 December 2000, available online in Spanish with a summary in English at http://www.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=E020BC9287127E7FC1256BC00033280E&action=openDocument&xp_countrySelected=ES&xp_topicSelected=GVAL-992BU6&from=state (last visited 1 August 2017).

(principle of subsidiarity).²⁰⁹⁴ In this case, unlike in the previous Chilean and Argentinean cases, the unwillingness of the Guatemalan courts to act had not been demonstrated and no domestic (Guatemalan) legislation had prevented prosecution.²⁰⁹⁵

The complainants – a number of individuals as well as associations²⁰⁹⁶ – appealed the order, claiming that violations of Article 849 of the Law of Criminal Procedure and Article 23 of the Law on the Judiciary had been committed, denouncing inter alia the inactivity of the Guatemalan courts relating to the alleged acts and arguing that there had been rendered an incorrect interpretation of Article 6 of the Genocide Convention, resulting in a misapplication of the principle of subsidiarity.²⁰⁹⁷ They argued that Article 6 of the Genocide Convention does not establish a principle of subsidiarity, but rather a principle of universal jurisdiction, which, in accordance with Article 23.4 of the Law on the Judiciary, determines the jurisdiction of the Spanish courts over acts alleged to constitute the crime of genocide.²⁰⁹⁸

In its decision of 25 February 2003, the Supreme Court criticized the lower court's application of the criteria of subsidiarity, stating that in addition to not being recognized either expressly or implicitly in the Genocide Convention,²⁰⁹⁹ "basing such a decision on either real or apparent inactivity on the part of the courts of another sovereign State implies a judgment by one sovereign State on the judicial capacity of similar judicial bodies in another sovereign State".²¹⁰⁰ The Spanish Supreme Court finally dismissed the appeal, essentially by subjecting the exercise of universal jurisdiction by Spain to the existence of a link with Spain, i.e. a "direct link with Spanish interests".²¹⁰¹ As a result, the case

²⁰⁹⁴ *Ibid.*

²⁰⁹⁵ Spanish Supreme Court, Decision concerning the *Guatemala Genocide Case*, 25 February 2003, available in English online at <http://www.derechos.org/nizkor/guatemala/doc/stsgtm.html>.

²⁰⁹⁶ The Association Argentina from Human Rights – Madrid, the Union of Labor Commissions and the Free Association of Attorneys, the Association against Torture, *the Association D'amistada amb el Poble de Guatemala*, the Association Center for Documentation and Solidarity between Latin America and Africa and the Commission of International solidarity of Zaragoza and the Association for Human Rights in Spain.

²⁰⁹⁷ Spanish Supreme Court, Decision concerning the *Guatemala Genocide Case*, 25 February 2003, available online in English at <http://www.derechos.org/nizkor/guatemala/doc/stsgtm.html>.

²⁰⁹⁸ Spanish Supreme Court, Decision concerning the *Guatemala Genocide Case*, 25 February 2003, available online in English at <http://www.derechos.org/nizkor/guatemala/doc/stsgtm.html>.

²⁰⁹⁹ *Ibid.*

²¹⁰⁰ *Ibid.*

²¹⁰¹ Referring to German and Belgium case law, to the ICJ decision of 14 February 2002, as well to some doctrine, it considered that when universal jurisdiction does not derive from a treaty, but is only based on internal criminal legislation, its exercise cannot "contravene other principles of public international law nor operate when no point of connection exists between national interests". See Spanish Supreme

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was *de facto* restricted to acts of torture committed against Spanish nationals in Guatemala.²¹⁰² However, it is worth noting that seven judges of the Spanish Supreme Court Chamber dissented in this case. They noted that such a principle of subsidiarity did not appear in domestic law or in the Genocide Convention and that the “universal jurisdiction of crimes of genocide as crimes of international law is not governed by the principle of subsidiarity, but rather by a principle of *concurrent jurisdiction*”.²¹⁰³ They argued that in the present case “it is manifestly clear that many years have passed since the occurrence of [the] act, and for some reason or another, the courts in Guatemala have not been able to effectively exercise jurisdiction with regard to genocide of the Mayan population”.²¹⁰⁴

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The Spanish Supreme Court was faced again with the application of the subsidiarity principle in the *Peruvian Genocide* case. In a decision of 25 May 2003, the Court confirmed the finding of the *Audiencia Nacional* of 21 January 2002 saying Spanish courts did not have jurisdiction over crimes committed in Peru since 1986. However, the Spanish Supreme Court did not refer to the subsidiarity principle as such, but rather to the “principle of necessity of jurisdictional intervention” (*principio de necesidad de la intervención jurisdiccional*) – which is derived from the very nature and purpose of universal jurisdiction.²¹⁰⁵ It held that the application of this principle entailed a need to determine the priority of the competence of territorial jurisdiction in cases of competing jurisdictions. National courts should thus look at whether the courts of the territorial state are effectively exercising jurisdiction.²¹⁰⁶ In the present case, some investigations were taking place before the Peruvian courts and some

Court, Decision concerning the *Guatemalan Genocide* Case, 25 February 2003, available online in English at <http://www.derechos.org/nizkor/guatemala/doc/stsgtm.html>, at 18.

²¹⁰² Ascencio, ‘The Spanish Constitutional Tribunal’s Decision in *Guatemalan Generals: Unconditional Universality Is Back*’, 4 *Journal of International Criminal Justice* (2006) 586-594, at 587.

²¹⁰³ Spanish Supreme Court, Dissenting Opinion, *Guatemala Genocide* Case, 25 February 2003, available online at <http://www.derechos.org/nizkor/guatemala/doc/stsgtm.html>, at 29.

²¹⁰⁴ *Ibid.*, at 30.

²¹⁰⁵ *Tribunal Supremo, Sentencia del Tribunal Supremo sobre el caso Peru por genocidio, Sentencia* N° 712/2003, available online at <http://www.derechos.org/nizkor/peru/doc/tsperu.html> (last visited 1 August 2017), which states that “*Sin embargo ha de admitirse que la necesidad de intervención jurisdiccional conforme al principio de Justicia Universal queda excluida cuando la jurisdicción territorial se encuentra persiguiendo de modo efectivo el delito de carácter universal cometido en su propio país. En este sentido puede hablarse de un principio de necesidad de la intervención jurisdiccional, que se deriva de la propia naturaleza y finalidad de la jurisdicción universal.*”

²¹⁰⁶ *Tribunal Supremo, Sentencia del Tribunal Supremo sobre el caso Peru por genocidio, Sentencia* N° 712/2003, available online at <http://www.derechos.org/nizkor/peru/doc/tsperu.html> (last visited 1 August 2017); See also Roht-Arriaza, “Universal Jurisdiction: Steps Forward, Steps Back”, 17(2) *Leiden Journal of International Law* (2004) 375-389, at 382.

suspects were in jail. Thus, the Supreme Court concluded that, for the time-being at least, the intervention of the Spanish courts was not necessary.²¹⁰⁷

Two years later, in its 2005 judgment in the *Guatemalan Generals* case, the Spanish Constitutional Court stated that Article 23.4 LOPJ did not establish any explicit or implicit hierarchy between jurisdictions and focused on the nature of the crime, not on ties to the forum.²¹⁰⁸ The provision established concurrent jurisdiction. The Court held that, in order to exercise universal jurisdiction, Spanish courts did not need to show that trial was impossible in the territorial state.²¹⁰⁹ Imposing such an additional condition would constitute a violation of the right to effective legal protection. The Court however did not completely reject the application of the subsidiarity principle, recognizing that there were important procedural, political and criminal reasons to support giving priority to the *locus delicti*. Faced with concurrent jurisdictions, it was important to introduce “a rule of priority” according to which elementary and political-criminal considerations must give priority to the jurisdiction in which the crime was committed.²¹¹⁰ It held, for instance, that a state should refrain from exercising universal jurisdiction “when a legal process has already been initiated in the territorial jurisdiction” or “when the effective prosecution of the crimes can be foreseen to occur in a short period of time”.²¹¹¹ Thus, in case of competing jurisdictional claims, the territorial state enjoyed priority.²¹¹² The Constitutional Court therefore provided a preference for the word “priority” rather than the term “subsidiarity”. It also seemed to say that this priority principle was governed by political-criminal considerations rather than legal rules. The Spanish Constitutional Court reiterated its position in the *Falun Gong* case in a decision of 22 October 2007.²¹¹³

The issue of subsidiarity was raised again in cases before the Spanish courts, namely in the *Tibet* case. A complaint was filed against former Chinese Officials including former Chinese President Jang Zemin, former Prime Minister Li-Ping

²¹⁰⁷ See Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (2006), at 179.

²¹⁰⁸ N. Roht-Arriaza, ‘Guatemala Genocide Cases: Spanish Constitutional Tribunal decision on universal jurisdiction over genocide claims’, *American Journal of International Law* (2006) 207-213, at 210.

²¹⁰⁹ Spanish Constitutional Court, *Guatemala Genocide Case*, 26 September 2005. English translation provided by the Center for Justice and Accountability, at 20.

²¹¹⁰ *Ibid.*, § 4.

²¹¹¹ *Ibid.*

²¹¹² See Ryngaert, *Jurisdiction in International Law* (2008), at 217.

²¹¹³ See Sala Segunda, Sentencia 227/2007, de 22 de octubre de 2007, available online at <http://hj.tribunalconstitucional.es/es/Resolucion/Show/6194> (last visited 1 August 2017). On 15 October 2003, several exiled Falun Gong members filed a complaint against Chinese officials including China’s former President Jiang Zemin and top official Luo Gan, alleging genocide and torture committed in China against members of the Falun Gong group.

and five other officials for acts of genocide, torture and crimes against humanity, including the murder or displacement of more than a million Tibetans, committed in the autonomous province of Tibet since 1950. The complaint was initially rejected by the Spanish *Audiencia Nacional* on 5 September 2005.²¹¹⁴ However, after the Spanish Constitutional Court rendered its famous decision in the *Guatemala Generals* case,²¹¹⁵ the Spanish *Audiencia Nacional* revisited the complaint and considered it admissible in a decision of 10 January 2006.²¹¹⁶ Applying the recent reasoning of the Spanish Constitutional Court, the Spanish Court examined whether the crimes committed against the Tibetan population were unlikely to be prosecuted by the territorial state or an international criminal court.²¹¹⁷ Although the crimes committed against the Tibetan population have been condemned by several international and regional resolutions,²¹¹⁸ these reactions remained of a merely political rather than legal nature.²¹¹⁹ Furthermore, the Court stated that the ICC did not have jurisdiction because the crimes had occurred before the entry into force of the ICC Statute and because China was not a state party.²¹²⁰ Finally, it concluded that given the time that had passed since the acts had occurred and in light of the numerous steps undertaken by the Tibetan people, it was unlikely that they would find a remedy before the Chinese courts.²¹²¹ The case led to the issuance in November 2013 of arrest warrants against five former Chinese leaders including former Chinese President Jiang Zemin and ex-premier Li Peng on charges of genocide, torture and crimes against humanity.²¹²² However, the case was dismissed in

²¹¹⁴ C. Bakker, 'Universal Jurisdiction of Spanish Courts over Genocide in Tibet: Can it Work?', 4 *Journal of International Criminal Justice* (2006) 595-601, at 596.

²¹¹⁵ *Ibid.*

²¹¹⁶ *Juzgado Central de Instrucción* nº 2, *Audiencia Nacional*, Decision of 10 January 2006 (in Spanish). English translation available online at <https://sites.google.com/site/legalmaterialsontibet/home/spain-case> (last visited 1 August 2017); See also Bakker, *supra* note 2114, at 595-601.

²¹¹⁷ Bakker, *supra* note 2114, at 598.

²¹¹⁸ See UN General Assembly Resolutions 1353 (XIV) 1959; UN General Assembly Resolution 1723 (XVI) of 1961; UN General Assembly Resolution 2079 (XX) 1965.

²¹¹⁹ Bakker, *supra* note 2114, at 599.

²¹²⁰ *Ibid.*

²¹²¹ *Juzgado Central de Instrucción* nº 2, *Audiencia Nacional*, Decision, 10 January 2006 (in Spanish). English translation available online at <https://sites.google.com/site/legalmaterialsontibet/home/spain-case> (last visited 1 August 2017); See also Chadwick, 'Modern Developments in Universal Jurisdiction: Addressing Impunity in Tibet and beyond', 9 *International Criminal Law Review* (2009) 359-394, at 377.

²¹²² See 'National Court, Criminal Chamber, Fourth Section, Order of 18 November 2013, Proceedings 63/2008, Appeal No. 270/2013, Central Investigating Court No. 2', 16 *Yearbook of International Humanitarian Law*, Correspondents Reports Spain (2013), at 2; 'High Court asks Interpol to arrest former Chinese president and prime minister', *El País*, 11 February 2014, available online at

June 2014, following the adoption of new Article 24.3 LOPJ which expressly provides that pending cases not fulfilling the conditions of the new law shall be dismissed.²¹²³ Plaintiffs then appealed to Spain's Supreme Court which, in May 2015, rejected the appeal. An appeal has been lodged against this decision by the Berlin-based European Center for Constitutional and Human Rights (ECCHR) and the Center for Constitutional Rights (CCR).

The issue of subsidiarity was again the subject of interesting legal debates in the *Al-Daraj (Gaza)* case. On 29 January 2009, a Spanish Judge issued a court order indicating that he was investigating seven Israeli officials for alleged war crimes and crimes against humanity related to a bomb attack committed in Gaza city in 2002, which had led to the killing of a Hamas leader as well as 14 civilians including children, and to 150 persons being injured.²¹²⁴ With respect to subsidiarity, he stated that the facts could and must be investigated under the exercise of Spanish jurisdiction, especially since no response whatsoever had been received to the request made by the court to the state of Israel concerning relevant information, nor had there been advanced any evidence that investigative proceedings had been initiated.²¹²⁵ On 4 May 2009, the Spanish judge rejected the Public Prosecution's request to declare Spain incompetent and authorized the investigation, considering that "since the date on which the events were committed, in the month of July 2002, the judicial authorities of Israel have not initiated any criminal proceedings with the objective of determining if the events denounced could entail some criminal liability".²¹²⁶ Israeli officials then informed Spanish authorities that the case was subject to proceedings in Israel. The Prosecutor therefore requested the court not to proceed with the case, but his request was rejected by the judge. On 9 July 2009, the Criminal Division of the *Audiencia Nacional* reversed the decision to

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http://elpais.com/elpais/2014/02/11/inenglish/1392116564_521060.html?rel=rosEP (last visited 1 August 2017).

²¹²³ See *Ley Orgánica 1/2014, de 13 de marzo, de modificación de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, relativa a la justicia universal*, which provides: "*Disposición transitoria única. Las causas que en el momento de entrada en vigor de esta Ley se encuentren en tramitación por los delitos a los que se hace referencia en la misma quedarán sobreseídas hasta que no se acredite el cumplimiento de los requisitos establecidos en ella.*"

²¹²⁴ Central Magistrates' Court No. Four, *Audiencia Nacional* (Spanish National Court of Justice), Court Order issued by the Judge Fernando Andreu, Preliminary Report no. 157/2.008-G.A., 29 January 2009, unofficial English translation available online at http://www.fidh.org/IMG/pdf/admission_order_properly_translated-1.pdf (last visited 1 August 2017).

²¹²⁵ *Ibid.*

²¹²⁶ Central Magistrates' Court No. Four, *Audiencia Nacional*, Preliminary Proceedings, No. 157/2008, 4 May 2009, English translation available online at <http://www.bloggersperlapace.net/bloggersperlapace/modules.php?op=modload&name=News&file=article&sid=2122> (last visited 1 August 2017).

prosecute, dismissing the case based on the fact that the object of the complaint had led to an internal investigation in Israel.²¹²⁷ The Spanish National Court reaffirmed the rule of priority of *locus delicti*:

Regarding the tension between the principle of concurrence and principle of alternative jurisdiction, note is made that it is unquestionable that there are substantial reasons, both procedural and political-criminal, to endorse the priority of *locus delicti*, and that this constitutes part of the classical heritage of International Criminal Law. On the basis of this fact, (...) the truth is that, given its theoretical formulation, the principle of alternative jurisdiction should not be interpreted as a rule that is opposite to or divergent from the one that introduces the so-called principle of concurrence, because in the face of concurrent jurisdictions, and for the purpose of avoiding the possible duplication of procedures and violation of the prohibition of the principle *ne bis in idem*, it is essential to introduce some rule of priority. As all States have the common commitment (at least in respect to principles) to pursue such abominable crimes as they affect the international community, elementary procedural and political-criminal reasonableness must give priority to the jurisdiction of the State where the crime was committed.²¹²⁸

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In their dissenting opinion, some judges argued that the facts in question were not being sufficiently and efficiently investigated in Israel.²¹²⁹ They further argued for the rejection of the principle of subsidiarity or priority rule, preferring the application of “criteria of priority”, based on the intensity of a state’s relationship to a case, when the investigation was “efficient and sufficient” in that state. They considered that:

The principle of universal competence and the concurrence of jurisdictions is the result of the obligation to prosecute crimes. [...] There is no subordination or primacy possible; it simply entails

²¹²⁷ National High Court Criminal Division, Preliminary Proceedings No. 157/08, Ruling No. 1/09, 9 July 2009, unofficial English translation available online at http://ccrjustice.org/files/National%20High%20Court%20-%20Appeals%20Majority%20Decision%20of%2007.09.2009_ENG.pdf (last visited 1 August 2017).

²¹²⁸ Spain, National High Court Criminal Division, 9 July 2009, unofficial English translation available online at https://ccrjustice.org/sites/default/files/assets/National%20High%20Court%20-%20Appeals%20Majority%20Decision%20of%2007.09.2009_ENG.pdf (last visited 1 August 2017).

²¹²⁹ See National High Court, Criminal Division, Dissenting Opinion Regarding Ruling 1/2009, issued by the Magistrates Manuel Fernandez Prado, Jose Ricardo de Prada Solaesa, Clara Bayarri Garcia and Ramon Saez Valcarcel, 17 July 2009, unofficial English translation available online at http://www.ccrjustice.org/files/National%20High%20Court%20-%20Appeals%20Dissent%20Opinion%20of%2007.17.2009_ENG.pdf (last visited 1 August 2017).

determining which jurisdiction is best prepared to prosecute the events.

Subsidiarity was linked to the old Westphalian paradigm of non-intervention. The obligation to pursue and to avoid impunity has converted said principle into an old-fashioned guarantee of impunity. [...] In current international law the paradigm of universal validity of human rights is what prevails. However, this does not entail an obstacle to accepting that certain States are first obliged to engage in the pursuit of crimes due to their proximity with the events, which then triggers the supplementary actions of the other States. Subsidiarity and supplementary are not synonymous terms, whether on the basis of their meaning or their effect. Supplementary intervention seeks to mitigate the deficiencies in a prosecution and operates in the face of lack of will or effectiveness of the State that is first obliged to act (see as reference the cases mentioned in Articles 17.2 and 17.3 of the Statutes of the International Criminal Court.)

Thus, the duty to pursue crimes under international law has nothing to do with the territory. The *locus delicti* is a criterion to determine jurisdiction, but is not the deciding factor nor is it the only one. This is particularly applicable in the case under consideration: the events took place in Gaza where the Palestinian Authority has legal competence over the territory. The Public Prosecutor of the International Criminal Court even announced a few months ago that the possibility of extending the Court's jurisdiction to the Palestinian Occupied Territories was under study, which would acknowledge de facto the international status of a State with the possibility of ratifying the International Criminal Court's Statute.

[...]

In its judgment 237/2005 [*in the Guatamela Generals case*]²¹³⁰, the Constitutional Court expressed the need to establish some rule of priority in the case of conflicts of jurisdictions. For these cases, it argued that there are significant reasons, both procedural and political and criminal, to endorse the priority of the *locus delicti*, which is part of the classical heritage of International Criminal Law. The criteria of priority only expresses the State of Israel's particularly intense relationship with the facts, which more than a right should entail, *prima facie*, an obligation to investigate in an effective manner and also to criminally prosecute the perpetrators, if required.

[...]

²¹³⁰ Added by the author.

On the basis of these criteria, it *does not seem acceptable to accept as sufficient investigation what a governmental control commission has been charged to do, [namely] to analyse the military intelligence errors that caused the death of innocent civilians*. In fact, simply raising the problem of the assassination of protected persons in terms of *incident, collateral effect, error in intelligence reports, controlled or directed liquidation and preventive executions*, clashes directly with the concept of the dignity of persons deprived of life in this manner.²¹³¹

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On 4 March 2010, the Spanish Supreme Court confirmed the lack of jurisdiction of the Spanish courts. It held that the facts constituting the object of the complaint had led to an internal investigation dismissed not only by the Office of the Attorney General of Israel, but also in civil procedures.²¹³² As we will see below,²¹³³ this decision generated widespread criticism, which alleged that the Spanish judiciary had yielded to political pressure from the Spanish Ministry of Foreign Affairs and from Israel.²¹³⁴

²¹³¹ See National High Court, Criminal Division, Dissenting Opinion Regarding Ruling 1/2009, issued by the Magistrates Manuel Fernandez Prado, Jose Ricardo de Prada Solaesa, Clara Bayarri Garcia and Ramon Saez Valcarcel, 17 July 2009, unofficial English translation available online at http://www.ccrjustice.org/files/National%20High%20Court%20-%20Appeals%20Dissent%20Opinion%20of%2007.17.2009_ENG.pdf (last visited 1 August 2017).

²¹³² See Supreme Court of Justice, Criminal Court, Appeal No. 1979/2009, 4 March 2010, unofficial English translation available online at http://ccrjustice.org/files/AIDaraj_SupremeCourt_Decision_03.04.2010_ENG.pdf, at 7, which states that "And on these premises it is found that there is a military investigation in the field, with results sent to the General Military Prosecutor, and complaints received by the Attorney General, an internal investigation which ended up being dismissed by the Office of the Attorney General of Israel. It is pointed out that currently there is a criminal case pending, *Shehadeh* Case (TSJ 8794/03) whose major procedural steps are described, stopping at the issuance of the foregoing decision; the parties agreed to the creation of an independent commission to investigate the facts, which is carrying out its task under judicial review of its decisions. Finally, in its analysis the National Court adds that there have been and are civil procedures for claiming economic compensations, some filed by complainants in this case. The ruling appealed concludes that there has been real and true action to prove possible commission of a crime, and that the matter is pending in the courts. Along these lines, it is said that placing in doubt the impartiality and organic separation and function of the Office of the Prosecutor and the Investigation Commission with respect to the Executive entails ignoring the evidence of a social and democratic rule of law, and hence no uncertainty may be harbored – as the appeal suggests – about the exercise of the proper criminal actions if criminally relevant conduct is uncovered".

²¹³³ See *infra*.

²¹³⁴ Stigen, 'The Relationship between Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes', in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010), p. 133-160, at 139.

The issue of subsidiarity was raised again in the case of alleged torture and violations of the Geneva Conventions committed against four former detainees in the United States' military base in Guantanamo, Cuba.²¹³⁵ In an order of 13 January 2012, a Spanish judge asserted the jurisdiction of Spanish courts, stating *inter alia* that over two years and eight months after the case was filed, there was "still no procedure entailing an investigation and actual prosecution, if indicated, of such sanctionable deeds in another competent country or within an international tribunal".²¹³⁶ It invoked the lack of reply to the rogatory letters sent by the Spanish court to the competent judicial authorities of the United States and the United Kingdom.²¹³⁷ On 15 April 2014, the Spanish Judge Ruiz issued an order in which he claimed that Spain would continue investigating the case, despite the recent legislative restrictions.²¹³⁸ In this decision, he underlined:

the lack of any formal indication thus far and at this stage of the procedure, more than four years and ten months after initiation of the case, and as is clear from the successive certifications issued by the General Office of International Legal Cooperation of the Ministry of Justice in the case record, of any 'procedure entailing an investigation and an effective pursuit, where indicated, of such sanctionable acts' in another competent country or in an international court, given the lack of reply to the letters rogatory submitted and repeated by this Court to the competent judicial authorities of the United States, as a country whose jurisdiction - along with the one of the United Kingdom in the case of victims of English nationality - could be considered to be 'another competent country' - criterion of subsidiarity - in terms of the LOPJ itself.²¹³⁹

After the appeal of the Public Prosecutor of a lower court which ruled that proceedings could move forward, Spain's National Court dismissed the case for

²¹³⁵ A preliminary investigation was opened by Judge Baltasar Garzón on 27 April 2009. See National Court of Madrid, Central Court for Preliminary Proceedings, Decision, 27 April 2009, Preliminary Investigations 150/09, unofficial English translation available online at <http://ccrjustice.org/ourcases/current-cases/spanish-investigation-us-torture#files>.

²¹³⁶ National Court, Preliminary Proceedings 150/2009-P, Central Investigating Court No. 5. Order of 13 January 2012, unofficial English translation available online at <http://ccrjustice.org/files/2012-01-13%20AUTO%20GUANTANAMO%20%28Eng%29.pdf> (last visited 1 August 2017).

²¹³⁷ *Ibid.*

²¹³⁸ *Audiencia Nacional, Diligencias Previas* 150/2009-P, 15 April 2014, available in Spanish at <http://www.ccrjustice.org/files/Court%205%20Decision%2015.04.14.pdf> (last visited 1 August 2017).

²¹³⁹ Central Court for Preliminary Criminal Proceedings No. 5 National Court, 15 April 2014, Unofficial translation available online at http://ccrjustice.org/sites/default/files/assets/15April2014_No.5_Decision_Ordering_case_to_proceed_ENG.pdf

lack of jurisdiction on 17 July 2015.²¹⁴⁰ It held inter alia that the crimes under investigation were not crimes that were subject to Section p) of Article 23.4 LOPJ.²¹⁴¹ With respect to the principle of subsidiarity, the Court recalled that “the principle of subsidiarity shall not be applicable when the State exercising its jurisdiction is not willing to carry out the investigation or really cannot do so, and such is the assessment of the Second Chamber of the Supreme Court”.²¹⁴² The National Court did state:

However, it should not be forgotten that the presence of the cause of the exception of the exclusion of jurisdiction entailed by the principle of subsidiarity (article 23.5 LOPJ) does not imply an unconditional exercise of jurisdiction. It is contingent, as the law itself indicates, upon the presence of an absolutely necessary presence of the determination that Spanish jurisdiction extends to the deeds in question, as set forth in an authorizing internal organic law (art. 23.4 LOPJ). And in this case, as indicated, domestic laws do not authorize the extraterritorial application of Spanish law, in accordance with the interpretation of them laid down by the Second Chamber of the Supreme Court.²¹⁴³

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On 17 March 2009, a class action was filed before the *Audiencia Nacional* against six former officials of the Bush administration for their alleged responsibility in the establishment of a plan of torture and inhumane treatment at the Guantanamo detention center (the so-called “Bush Six” case). The

²¹⁴⁰ See http://ccrjustice.org/sites/default/files/attach/2015/08/2015-07-17_UJSpain_NationalCourtDecision2_eng.pdf (last visited 1 August 2017).

²¹⁴¹ This section grants competence to Spanish jurisdiction for trying “any other offense the prosecution of which is made mandatory by a treaty in force for Spain or by other normative acts of an international organization of which Spain is a member, in the cases and conditions therein determined”. The Court held that “Section p) of article 23.4 of the LOPJ does not apply to Grave Violations of the Geneva Convention, whatever the name applied to them, such as war crimes, crimes against persons protected in the event of armed conflict, or crimes against International Humanitarian Law. Only section a) applies”. It concluded that “Consequently, and to make it clear in this and other procedures with similar basis, according to the current Organic Law 1/2014, the Spanish courts do not have jurisdiction to investigate and prosecute crimes against persons and property protected in the event of armed conflict committed abroad, except when the procedure is directed against a Spanish or a foreign citizen normally residing in Spain, or against a foreigner who is in Spain and whose extradition has been refused by the Spanish authorities. Such jurisdiction may not be understood to be “in absentia” on the basis of the nationality of the victim or of any other circumstance”.

²¹⁴² Spain, National Court, Ruling, 17 July 2015, unofficial translation available online at http://ccrjustice.org/sites/default/files/attach/2015/08/2015-07-17_UJSpain_NationalCourtDecision2_eng.pdf

²¹⁴³ *Ibid.*

investigating judge, Judge Baltazar Garzón, admitted the complaint but the case was later referred to another investigating judge.²¹⁴⁴ On 4 May 2009, the new Investigative judge sent an international rogatory letter to the United States asking them to confirm “whether the acts pertinent to this complaint are or are not now being investigated or prosecuted by any Authority of that country or in the case that an investigation or prosecution is to be carried out, to indicate the specific Authority that may be doing so and identify the specific procedure to be followed”.²¹⁴⁵ In the meantime, Article 23.4 was amended on 15 October 2009, thus expressly introducing the subsidiarity principle, stating that Spanish courts shall only have jurisdiction “where proceedings have not been initiated that constitute an *effective investigation and prosecution*, in relation to the punishable facts”. The 11 March 2011 reply of the United States to the rogatory letter of 6 May 2009 demonstrated quite clearly that it was neither investigating nor prosecuting the allegations and charges set forth in the March 2009 criminal complaint.²¹⁴⁶ Despite this, the Spanish investigating judge finally issued a ruling on 13 April 2011 ordering the provisional stay of the case and transferring it to the US Department of Justice for it to be continued.²¹⁴⁷ In its order of 23 March 2012, the Spanish National Court considered that there was no doubt that the competent authorities of the United States had conducted “a series of legal investigations and proceedings focusing on the facts reported here”.²¹⁴⁸ On 25 September 2012, 27 international law organizations and experts submitted an amicus brief to the Spanish Supreme Court, urging it to reopen the case based on errors of law and fact made by Judge Velasco, including his conclusion that the United States authorities were investigating torture. The Supreme Court denied the appeal on 20 December 2012. On 22 March 2013, a petition for review was filed with the Spanish Constitutional Court; this remains pending.²¹⁴⁹

²¹⁴⁴ See Ambos, ‘Prosecuting Guantanamo in Europe: Can and Shall the Masterminds of the “Torture Memos” Be Held Criminally Responsible On the Basis of Universal Jurisdiction?’, 42 *Case Western Reserve Journal of International Law* (2009-2010) 405-448, at 433.

²¹⁴⁵ National Court Preliminary Investigation No. 134/2009, Decision, 4 May 2009, unofficial English translation available online at <http://ccrjustice.org/files/Bush%20Six%20Order%20Rogatory%20Letter%20English%20%282%29.pdf> (last visited 1 August 2017).

²¹⁴⁶ Request for Assistance from Spain to the US Department of Justice, 1 March 2011, available online at <http://ccrjustice.org/sites/default/files/assets/US%20Letters%20Rogatory%20Response%20March%201,%202011%20-%20ENG.pdf> (last visited 1 August 2017).

²¹⁴⁷ Spain, Supreme Court of Justice, Appeal No. 1133/2012, 20 December 2012.

²¹⁴⁸ ‘National Court, Criminal Chamber, Third Section, Order of 23 March 2012, Proceedings 14/2011, Appeal No. 0148/2011, Central Investigating Court No. 6, in Cases - Guantanamo Bay’, 15 *Yearbook of International Humanitarian Law: Correspondent’s Reports* (2012).

²¹⁴⁹ An unofficial English translation of the petition is available online at [http://ccrjustice.org/sites/default/files/assets/2013-03-22%20ENG%20Application%20for%20amparo%20\[2\]\[1\]\[971\]\[0978.pdf](http://ccrjustice.org/sites/default/files/assets/2013-03-22%20ENG%20Application%20for%20amparo%20[2][1][971][0978.pdf) (last visited 1 August 2017).

b. *The debates on the existence of the subsidiarity before other domestic courts*

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Austria was also faced with the issue of subsidiarity in a universal jurisdiction case. On 21 May 1994, *Duško Cvjetković*, a Bosnian Serb who had sought asylum in Austria was arrested and placed in pre-trial custody, on charges of genocide. The suspect lodged an appeal before the Austrian Supreme Court arguing that Austrian courts lacked jurisdiction to try him. By a judgment of 13 July 1994, the Supreme Court of Austria (*Oberster Gerichtshof*) held that Article VI of the Genocide Convention presupposed that there was a functioning criminal justice system in the state where the crime was committed or a functioning international criminal tribunal. As this was not case at the time, the Court held that Austrian courts were entitled to exercise jurisdiction against *Duško Cvjetković*. While *Cvjetković* was finally acquitted for lack of evidence of his participation in the Bosnian genocide, and while the Supreme Court of Austria did recognize the priority of the territorial state over other states, it was however considered that Austria could exercise jurisdiction if there was not a functioning criminal justice system in the state where the crime was committed.²¹⁵⁰

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A universal jurisdiction complaint was lodged in Belgium against *Tommy Franks*, a former military commander during the second United States invasion in Iraq for grave breaches of international humanitarian law.²¹⁵¹ On 21 May 2003, the Belgian government decided to transfer proceedings to the American judiciary, and put a stop to proceedings in Belgium. The complainants appealed against the decision to transfer the proceedings to the American courts. The Belgian Law was amended in August 2003; under the new Statute, the Federal Prosecutor may close the case without further action, particularly if he considers that an international court or another national court has a “more justified” competence. The only requirements are the competence and “guarantees of impartiality and independence” of the court. Consequently, the closure of the case is not conditional upon the existence of effective proceedings before that other court. On 23 September 2003, the Brussels Court of Appeal dismissed the appeal against the government’s decision.²¹⁵² This decision is in our view subject to criticism in that the acts were not even committed on American territory.

²¹⁵⁰ *Oberste Gerichtshof*, 150s99/94, 13 July 1994, available online in German at <http://www.ris.bka.gv.at/> (last visited 1 August 2017).

²¹⁵¹ The victims’ complaint is available in French at http://www.asser.nl/upload/documents/20120412T015606-Franks%20Tommy%20Belium_complaint_14-5-2003.pdf (last visited 1 August 2017).

²¹⁵² FIDH and Redress, ‘Universal Jurisdiction Trial Strategies, Focus on victims and witnesses’, A report on the Conference held in Brussels, 9-11 November 2009, at 7, footnote 24.

In Canada, subsidiarity is an informal criterion which is taken into consideration in the exercise of prosecutorial discretion.²¹⁵³ In the *Hape* case, the Canadian Supreme Court recalled that “the interplay between the various forms and bases of jurisdiction is central to the issue of whether an extraterritorial exercise of jurisdiction is permissible. At the outset, it must be borne in mind, first, that the exercise of jurisdiction by one state cannot infringe on the sovereignty of other states and, second, that states may have valid concurrent claims to jurisdiction. Even if a state can legally exercise extraterritorial jurisdiction, whether the exercise of such jurisdiction is proper and desirable is another question”.²¹⁵⁴ It added however that:

The nature and limitations of comity need to be clearly understood. International law is a positive legal order, whereas comity, which is of the nature of a principle of interpretation, is based on a desire for states to act courteously towards one another. [...] Acts of comity are justified on the basis that they facilitate interstate relations and global co-operation; however, comity ceases to be appropriate where it would undermine peaceable interstate relations and the international order.²¹⁵⁵

It underlined that the principle of comity does not offer a rationale for condoning another state’s breach of international law.²¹⁵⁶

In Germany, the subsidiarity principle was discussed in the context of a torture complaint filed on November 2004 with the German Federal Prosecutor by the American Center for Constitutional Rights against the United States Minister of Defence Rumsfeld, the former CIA-Director Tenet and U.S. military personnel.²¹⁵⁷ The complaint alleged that said persons were responsible for acts of torture committed by U.S. military personnel in the Abu Ghraib prison in Iraq. The German Prosecutor made a broad interpretation of the subsidiarity principle. He stated that: “the competence of uninvolvement third countries is [...] to be understood as a subsidiary competence, which should prevent impunity, yet not inappropriately push aside the primarily competent jurisdictions. [...] Only if criminal prosecution by primarily competent states, or an international court, is not assured or cannot be assured, for instance if the perpetrator has removed himself from criminal prosecution by fleeing abroad, is the subsidiary jurisdiction of German prosecutorial authorities implicated. This hierarchy is justified by the special interest of the state of the perpetrator and victim in criminal prosecution, as well as by the usually greater proximity of these

²¹⁵³ Lafontaine, ‘La compétence universelle et l’Afrique : ingérence ou complémentarité ?’, at 140.

²¹⁵⁴ Supreme Court of Canada, *R. v. Hape*, [2007] 2 S.C.R. 292, 2007 SCC 26, § (62).

²¹⁵⁵ *Ibid.*, § (50).

²¹⁵⁶ *Ibid.*, § (51)

²¹⁵⁷ Decision of the General Federal Prosecutor at the Federal Court of Justice, *Center for Constitutional Rights et al. v. Donald Rumsfeld et al.*, 10 February 2005, 45 *International Legal Materials* 119 (2006).

primarily competent jurisdictions to the evidence.” The Prosecutor referred to the complementarity principle of Article 17 of the ICC Statute.²¹⁵⁸ He considered that neutral third states only step in when the territorial state or the national state of the perpetrator or victim fail to adequately dispense justice. He found that there was no indication that the United States, the national state of the alleged perpetrators, had refrained or would refrain from undertaking a criminal investigation.²¹⁵⁹ We will come back to this judgment when discussing the criteria used to assess a state’s unwillingness to prosecute.

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The Netherlands courts addressed the issue of the priority of the territorial state in the *Bouterse* judgment. In an initial decision of 3 March 2000, the Court of Appeal “put first that the instituting of criminal proceedings in respect of the offences committed on Surinam’s own territory, which offences led to violations of human rights, is, in principle, an obligation that arises the Republic of Surinam from the [ICCPR] [...]”.²¹⁶⁰ It however considered that it was not expected that Bouterse would be prosecuted and tried in Surinam in the near future for the offences to which the complaint related.

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The text of Switzerland’s new statute does not expressly give priority to extradition over the exercise of universal jurisdiction,²¹⁶¹ although preparatory work indicates that the non-extradition requirement poses a preference for the territorial or national state. In the *Nezzar* case, the Federal Criminal Court concluded that the exercise of universal jurisdiction was governed by a principle of “preference” for the territorial state and the state of the suspect’s nationality, thereby concretely applying the subsidiarity principle.

C. Concluding remarks

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In classic international law, there is no hierarchy between jurisdictional bases; the jurisdiction of a third state (i.e. the custodial state) is concurrent with, rather than complementary to, the jurisdiction of the territorial or national state.²¹⁶² However, there appears to be a general agreement that the principle of subsidiarity to the territorial state should be applied at least as “good judicial

²¹⁵⁸ *Ibid.*, at 120.

²¹⁵⁹ See Ryngaert, ‘Universal Criminal Jurisdiction Over Torture: A State of Affairs After 20 Years UN Torture Convention’, *Institute for International Law* (Working Paper No 66 (revised) – August 2005), at 21-22.

²¹⁶⁰ See Amsterdam Court of Appeal, Decision, *Bouterse* case, 20 November 2000.

²¹⁶¹ See Art. 264m Swiss Criminal Code.

²¹⁶² See Ryngaert, ‘Complementarity in Universality Cases: Legal-Systemic and Legal Policy Considerations’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010), p. 165-200, at 167.

policy".²¹⁶³ In addition, the analysis of state legislation and practice demonstrates that most states apply the subsidiarity principle or at least some form of subsidiarity or priority.

Nevertheless, at this stage, it is not possible to conclude that the rule is part of customary international law. Custom is generally considered to contain two elements: state practice and *opinio juris*. State practice has to be uniform, consistent and settled.²¹⁶⁴ *Opinio juris* reflects the sense of a legal obligation. First of all, there are (still) not enough cases applying the subsidiarity principle to conclude that such widespread practice exists.²¹⁶⁵ Secondly, as we have seen above, the practice is not consistent and the scope, content and conditions to the application of the subsidiarity principle are still unsettled. Finally, the analysis of state practice demonstrates that states have not yet felt bound by the subsidiarity principle. This is especially true considering the number of states which apply the subsidiarity principle as a basis for prosecutorial discretion rather than as a legal criterion for exercising universal jurisdiction.

Developments in state practice in the past years have shown that the principle of subsidiarity for universal jurisdiction as a legal rule is in the process of emerging.²¹⁶⁶ Some domestic courts are now under a *domestic* legal obligation to apply the subsidiarity principle. The application by states of the subsidiarity principle not only as a "policy" but also as a binding rule is in our view highly desirable,²¹⁶⁷ subject to a number of conditions that will be discussed further below. The reasons justifying our position will be briefly developed at the end of this chapter (Section IV), following an analysis of the issues arising from the application of this principle by states and an attempt at clarifying the scope and content of this principle (Section III).

²¹⁶³ See Kress, 'Universal Jurisdiction over International Crimes and the *Institut de Droit International*, 4 *Journal of International Criminal Justice* (2006), at 579.

²¹⁶⁴ See Reydam, *Universal Jurisdiction: International and Municipal Perspectives* (2003), at 7.

²¹⁶⁵ In this direction, see Stigen, 'The Relationship between Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes', in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010) 133-160, at 141.

²¹⁶⁶ In this direction, see Stigen, 'The Relationship between Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes', in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010) 133-160, at 134; Kress, "Universal Jurisdiction over International Crimes and the *Institut de Droit international*", 4 *Journal of International Criminal Justice* (2006), at 579.

²¹⁶⁷ In this direction, see inter alia Ryngaert, 'Complementarity in Universality Cases: Legal-Systemic and Legal Policy Considerations', in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 165-200, at 177.

III. Issues arising from the analysis of state practice

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The analysis of national legislation and case law shows that a number of issues relating to the *definition of the scope* of the principle of subsidiarity have not been settled. Firstly, at what moment does the subsidiarity principle apply (*subsection A*)? Secondly, does subsidiarity apply to the same precise case (namely the same suspect and the same offences) or to a “complex of facts” (*subsection B*)? Moreover, does it only apply to the territorial state, or also to the active nationality state, or to other states as well (*subsection C*)? Finally, how does a state assess whether it can exercise its subsidiary universal jurisdiction? What is the “standard” to prove that the territorial or national state is not going to prosecute? How and by whom is the inability or unwillingness of the concerned state(s) assessed? Does the state have to make a formal request to the concerned state(s)? Is the consent of those states necessary? (*subsections D and E*)

A. The time of the subsidiarity principle

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One of the issues relates to the temporal dimension of the subsidiarity principle. When does the choice of jurisdiction occur? Two hypotheses must be distinguished: the situation where another state is already investigating the case, and where the case is not being investigated by any state. In the first variant, when the case is already being investigated in the concerned state, the subsidiarity principle applies at the outset of the investigation and bars the state from exercising universal jurisdiction.²¹⁶⁸ In other words, priority should be given to the territorial state investigating the case before a third state begins its own investigation.

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In the second variant, namely when the case has *not* been investigated by the primary state(s), there appears to be an agreement among certain scholars that, if the principle of subsidiarity is to be applied by one state, it should only be applied at the *conclusion* of another state’s investigation.²¹⁶⁹ This position

²¹⁶⁸ Geneuss, ‘Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU–EU Expert Report on the Principle of Universal Jurisdiction’, 7(5) *Journal of International Criminal Justice* (2009) 945-962, at 958.

²¹⁶⁹ See Joint Expert Opinion of Ratner, Kalleck, etc., 26 April 2010, in the Spanish Case “*Bush Six*”, available online at <http://ccrjustice.org/spain-us-torture-case>, at 17; See also instance Stigen, ‘The Relationship between Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010) 133-160, at 153-154; However, another viewpoint was adopted by the German Federal Prosecutor in the *Rumsfeld et al.* case: The German Federal Prosecutor considered that the principle of subsidiarity already applies at

should be approved. Indeed, if investigations are initiated simultaneously in different countries based on universal jurisdiction, the evidentiary material collected can be, if necessary, shared via mutual legal assistance and transferred to the state with the closer nexus – i.e. the territorial state – which will then ultimately prosecute the matter. This view also finds support in a number of international instruments. The Resolution of the *Institut de Droit international*, for instance, seems to suggest that the principle applies “before the trial starts”,²¹⁷⁰ which can be understood as the moment when investigations are terminated. Likewise, in their Joint Separate Opinion, Judges Higgins, Kooijmans and Buergenthal state that “commencing an investigation on the basis of which an arrest warrant may later be issued does not of itself violate [the] principles [relating to the exercise of universal jurisdiction]”.²¹⁷¹

B. The same precise case or the “situation”?

Another essential issue that has regularly come up in national case law is related to the meaning of the term “case”, with regard to the case being investigated. For instance, is the exercise of jurisdiction also barred when the ongoing investigation in the territorial or national state “concerns another suspect or another crime arising out of the same complex of facts”?²¹⁷² In the *Rumsfeld et al.* case, the German Federal Prosecutor held that “when interpreting the concept of prosecution of a crime, the overall series of events have to be taken into account, and the interpretation shall not be merely based on one particular criminal suspect and his participation in the crime”.²¹⁷³ It referred to the concept of “situation” (*Gesamtcomplex*) within the meaning of the ICC: as long as the “situation” is the object of investigation in the primarily competent states, the Prosecution is precluded from taking investigating steps.²¹⁷⁴ The United States were considered to be dealing with the situation, even though there was clearly

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the initial investigative stage. See Kress, ‘Universal Jurisdiction over International Crimes and the *Institut de Droit international*, 4 *Journal of International Criminal Justice* (2006), at 580.

²¹⁷⁰ See para. 3 c) of the Resolution of the *Institut de droit International*.

²¹⁷¹ ICJ, *Arrest Warrant* case, Joint Separate Opinion of Judges Higgins et al., § 59; See Stigen, ‘The Relationship between Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010) 133-160, at 154.

²¹⁷² Geneuss, ‘Fostering a Better Understanding of Universal Jurisdiction: A Comment on the AU–EU Expert Report on the Principle of Universal Jurisdiction’, 7(5) *Journal of International Criminal Justice* (2009) 945-962, at 958, footnote 65.

²¹⁷³ Decision of the General Federal Prosecutor at the Federal Court of Justice, *Center for Constitutional Rights et al. v. Donald Rumsfeld et al.*, 10 February 2005, 45 *International Legal Materials* 119 (2006), at 121.

²¹⁷⁴ *Ibid.*

no prospect of proceedings against Rumsfeld being initiated.²¹⁷⁵ The Spanish courts adopted a similar view in the *Guantanamo* case and in the *Al-Daraj* case. In the *Bush Six* case, following indications by the U.S. that they were investigating some instances of mistreatment of detainees,²¹⁷⁶ the investigating judge finally issued a ruling on 13 April 2011 ordering the provisional stay of the case and transferring it to the US Department of Justice for its continuation.²¹⁷⁷ However, none of the actions or investigations mentioned in the US Submission involved any of the victims or any of the defendants in the case before the Spanish court, namely the senior Bush administration officials.²¹⁷⁸

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There are two main reasons to argue that the subsidiarity principle only applies if the same specific case – i.e. same facts and same indictee(s) – is being prosecuted in the concerned state.²¹⁷⁹ Firstly, any parallel with Articles 13 and 14 of the ICC Statute is unjustified because such referral proceedings are unknown at the domestic level. In this respect, rather than referring to the ICC system, which is unknown at the inter-state level, state authorities could refer to the notions developed in relation to the problem of *ne bis in idem*. Secondly, admitting the applicability of the “situation” theory would clearly open the door to impunity, resulting in an outcome whereby national authorities who are being pressurized politically by other states consider that the “situation” is “generally” being investigated in order to get rid of politically sensitive cases involving strong political powers or allied states.

²¹⁷⁵ Stigen, ‘The Relationship between Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010) 133-160, at 143.

²¹⁷⁶ See U.S. Department of Justice, Submission, 1 March 2011, available online at <http://ccrjustice.org/spain-us-torture-case> (last visited 1 August 2017).

²¹⁷⁷ Spain, Supreme Court of Justice, Appeal No. 1133/2012, 20 December 2012.

²¹⁷⁸ See ECCHR, ‘Response to the Submission from the United States in Relation to the Criminal Complaint against David Addington, Jay Bybee, Douglas Feith, Alberto Gonzales, William Haynes and John Yoo in the *Audiencia Nacional*, Madrid, Spain, Case N° 134/2009, April 2011, available online at <http://ccrjustice.org/spain-us-torture-case>.

²¹⁷⁹ In this direction, see Ryngaert, ‘Applying the Rome Statutes Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting Under the Universality Principle’, 19 *Criminal Law Forum* (2008) 153–180, at 14, and Stigen, ‘The Relationship between Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010) 133-160, at 143-144; K. Ambos, ‘Völkerrechtliche Verbrechen, Weltrechtsprinzip und § 153 f StPO’, *Neue Zeitschrift für Strafrecht* (2006), at 436.

C. Subsidiarity to which state?

Another issue regarding the scope of the subsidiarity principle concerns the scope of application of the principle; that is, whether it applies only to the territorial state, whether it also applies to the state of the suspect's nationality or even to the state of the victim's nationality, or whether it can potentially be applied to any other state with a personal interest in the case. On the one hand, it can convincingly be argued that any state that has a specific interest in the case, in addition to being a member of the international community prosecuting a grave international crime, should be accorded priority. On the other, as discussed in Part I, with the possible exception of the active nationality state, there is no general international consensus on the basis of which it could be considered that other extra jurisdictional bases are as legitimate as the territorial state. Moreover, on a more pragmatic level, such a view would mean that states willing to prosecute on the basis of universal jurisdiction – which are already very reluctant to exercise jurisdiction on this basis – would have to verify that the prosecution of the case is impossible in all states having recognized jurisdictional bases before asserting jurisdiction.

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Some international instruments indicate that the subsidiarity principle should also apply to the suspect's national state. Article 5 of the Torture Convention obliges the custodial state to establish jurisdiction, stating that if it does not exercise universal jurisdiction, it must extradite the suspect 1) to the territorial state, 2) to his/her national state or 3) to the victim's national state ("if that State considers it appropriate").²¹⁸⁰ Some advisory international instruments also provide that the subsidiarity principle applies to the suspect's national state. This is the case of the Resolution of the *Institut de droit international* which puts the active personality principle on the same level as the territorial principle. Likewise, according to the *Darfur Report*, subsidiarity applies both to the territorial state and to the state of active nationality.²¹⁸¹ The *Princeton Principles* merely mention the "nationality connection of the alleged perpetrator" as one of the criteria that states should take into account when deciding to extradite or prosecute.²¹⁸² They appear to give priority to any state which has a personal interest in the case (notably the territorial state, the active nationality state, and the passive nationality state), without indicating a "preference" for any of these states. As discussed in Chapter 1, the active nationality principle is a widely recognized and accepted jurisdictional basis, at

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²¹⁸⁰ Art. 5 § 1 and 2 Torture Convention.

²¹⁸¹ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004*, UN Doc. S/2005/60, Geneva, 25 January 2005, § 614.

²¹⁸² Principle 8 of the *Princeton Principles*.

least in continental European states.²¹⁸³ It is also interesting to note that Article 12 of the ICC Statute provides, as a prerequisite for the exercise of jurisdiction in cases referred to the Court via Article 13 (a) or (c) of the Rome Statute, either the consent of the territorial state or the consent of the state of the nationality of the accused.²¹⁸⁴ Somewhat surprisingly, in their Joint Separate Opinion, judges Higgins, Kooijmans and Buergenthal only suggest that priority should be accorded to the “national state of the prospective accused person”.²¹⁸⁵ Conversely, according to Article 4(2) of the *African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes*, priority is only accorded to the territorial state.

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State practice is very inconsistent on this issue. Belgium accords priority to the territorial state, the suspect’s national state and the custodial state. Germany accords priority to the territorial state, the suspect’s national state and the victim’s national state; the subsidiary nature of the competence of third states towards these three primarily competent states was confirmed by the Federal General Prosecutor in the *Rumsfeld et al.* case. Swiss legislation does not mention any state in particular but preparatory works and case law suggest that priority should be given to the territorial state and the suspect’s national state.²¹⁸⁶ French legislation appears to give priority to “any state which requests the suspect’s extradition”,²¹⁸⁷ while the case law does not discuss the issue. Spanish legislation refers to “proceedings [...] in another competent country”, without any further specification.²¹⁸⁸ In its report to the UN, Australia provides that “as a general rule, the State in which a crime took place (the territorial State) and the State of nationality of the perpetrator (the national State) have primary

²¹⁸³ See Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law* (2005), at 181.

²¹⁸⁴ Art. 13 of the Rome Statute provides: “The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.”

²¹⁸⁵ ICJ, *Arrest Warrant case*, Joint Separate Opinion of Judges Higgins et al., § 59.

²¹⁸⁶ See *Message du Conseil fédéral* and *Tribunal pénal fédéral*, Nezzar, § 3.4.

²¹⁸⁷ Art. 689-11 of the French Code of Criminal Procedure.

²¹⁸⁸ Art. 23.4 LOPJ.

responsibility in the fight against impunity".²¹⁸⁹ While international instruments tend to provide that states should accord priority only to the territorial state alone or to the territorial state and the author's national state, some states also give priority to others, including the victim's national state or even the custodial state. In our view, seeing that the passive personality principle – and to some extent the active personality principle – remains controversial under international law, the subsidiarity rule should only apply to the territorial state. Some have also argued that the victims' state should not have the right to invoke subsidiarity because there may exist a greater danger of violation of the suspects' human rights in the victim's home state.²¹⁹⁰ In our view, with this line of reasoning, one could also argue that the suspect's home state (the active personality state) is more likely to protect its nationals for crimes committed abroad. In any case, as will be underlined in the subsection dedicated to extradition issues, an extradition to a state with a closer nexus should only be possible under the subsidiarity principle if that state is genuinely willing to investigate and prosecute the case. Furthermore, any extradition is subject to the condition that the state in question guarantees a fair trial to the accused.

However, in practice, to our knowledge, few universal jurisdiction cases have raised the issue of whether the victims' national state has priority over the custodial state. The practical consequences of this debate are therefore not very significant. In our view, currently under international law, it appears that the subsidiarity principle should at least apply to the territorial state.

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D. What is the "standard" to test the inaction of the territorial/national state?

1. Assessing the "performance" of another sovereign state and the principle of non-interference

State practice shows that state authorities have often justified their considerable use of the subsidiarity principle by invoking the principle of non-interference in order not to exercise universal jurisdiction over core international crimes. In our view, a state can only apply the subsidiarity principle to justify its non-interference if the primary state is either conducting or about to conduct criminal proceedings. It cannot simply refuse to investigate and prosecute

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²¹⁸⁹ See *Australian Views on the Scope and Application of the Principle of Universal Jurisdiction*, available online at: http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Australia.pdf (last visited on 1 August 2017).

²¹⁹⁰ See for instance Stigen, 'The Relationship between Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes', in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010) 133-160, at 151.

simply because the concerned state – generally the territorial state – claims that it is investigating or that it will investigate. If the concerned state does not seriously intend to bring the suspect to justice, deferring the case to that state “will mean impunity, and the purpose of universal jurisdiction will be undermined”.²¹⁹¹

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As a consequence, one of the inevitable adverse effects of the application of the subsidiarity principle is that it implies an assessment by a sovereign state of the “performance” or “lack of performance” of another sovereign state.²¹⁹² This is of course a delicate matter, given that the fundamental principle of “equal sovereignty” among states is a *fundamental principle of international law*. Indeed, it is one thing for the International Criminal Court – which is considered by most states as an independent and impartial supra-national arbiter²¹⁹³ – to assess, under the complementarity test, that a sovereign state is unable or unwilling to prosecute a case. It is another for the authorities of a state (often a Western state) to assess the ability and willingness of the authorities of another sovereign state to prosecute crimes that were committed on their own territory. States are clearly more inclined to accept a judgment of their performance coming from the ICC than one coming from another state. In addition, one can also wonder whether a state has the “required expertise and resources to conduct a complex in-depth evaluation of another state’s proceedings”.²¹⁹⁴ Thus, paradoxically, the subsidiarity principle – which initially aimed at reducing interference in state sovereignty by giving priority to the territorial state – suddenly makes “the application of universal jurisdiction more intrusive”.²¹⁹⁵

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This issue has been the subject of some debate before domestic courts. For instance, in the famous 2003 decision of the *Guatemalan Generals* case discussed above, the Spanish Supreme Court stated that, unlike the International Criminal Court, national courts should not judge the ability of another state to administer

²¹⁹¹ Stigen, ‘The Relationship between Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010) 133-160, at 142.

²¹⁹² The Spanish court in the *Guatemala Genocide* case said that assessing the performance or lack of performance of another sovereign state implies “a judgment by the authorities of one sovereign state on the judicial authorities of another state”.

²¹⁹³ Stigen, ‘The Relationship between Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010) 133-160, at 157.

²¹⁹⁴ *Ibid.*

²¹⁹⁵ *Ibid.*, at 158.

justice because this could have a significant effect on foreign relations.²¹⁹⁶ More recently, in the 2012 decision of the *Guantanamo* case, the Spanish court held that:

the applicability of the principle of discretionary prosecution in the American criminal justice system, as in other legal systems, a discretionary opportunity moreover, where the Prosecutor indeed decides whom to accuse and for which crimes, does not mean that such a decision is exercised arbitrarily, or that it is made, as stated by the appellants, on the basis of purely political considerations, or that the principle of legality is not respected in that system. It is a system that follows a different conception about what the role of the public prosecutor's office is, what the purpose of criminal proceedings is, and what the involvement of the victims should be; it is not for us to judge that conception, nor does it in itself call into question the impartiality and the organic and functional separation of the office of prosecutor from the executive.²¹⁹⁷

Likewise, in the *Rumsfeld et al.* case, the German Federal Prosecutor held that the exercise of universal jurisdiction must “occur in the framework of non-interference in the affairs of foreign countries”.²¹⁹⁸ He further stated that “a third State cannot examine the legal practice of foreign States according to its own standards”.²¹⁹⁹ Basically, in “what order and what means the state with primary jurisdiction carries out an investigation of an overall series of events” must be left up to this state.²²⁰⁰

One of the solutions proposed by scholars to avoid the problem of one state judging another has been the intervention of an international regulatory body. Kress therefore argues that “an international judicial organ rather than the state concerned should be entrusted with the power to make the decision as to whether another state was or is unwilling or unable to conduct the criminal proceedings in a given case”.²²⁰¹ He has suggested that this function could be

²¹⁹⁶ N. Roht-Arriaza, ‘Guatemala Genocide Case’, Constitutional Tribunal, 26 September 2005’, *International Legal Materials* (2006) 207-213, at 208-209; See also Spanish Supreme Court, Decision of the Supreme Court concerning the *Guatemala Genocide Case*, Decision No. 327/2003.

²¹⁹⁷ Spanish Court, 20 December 2012, unofficial translation available online at <http://ccrjustice.org/files/2012-12-20%20Spanish%20National%20Court%20Decision%20Final%20English.pdf>, at 10.

²¹⁹⁸ ‘Decision of the General Federal Prosecutor at the Federal Court of Justice: *Center for Constitutional Rights et al. v. Donald Rumsfeld et al.*, 10 February 2005’, 45 *ILM* 119 (2006), at 120.

²¹⁹⁹ *Ibid.*, at 120.

²²⁰⁰ *Ibid.*, at 121.

²²⁰¹ Kress, ‘Universal Jurisdiction over International Crimes and the *Institut de Droit International*, 4 *Journal of International Criminal Justice* (2006), at 584-585 ; Lafontaine, ‘La compétence universelle et l’Afrique : ingérence ou complémentarité ?’, at 141.

assumed by the ICC.²²⁰² Indeed, as early as 2008, the African Union expressed the “need for an international regulatory body with competence to review and/or handle complaints or appeals arising out of abuse of the principle of Universal Jurisdiction by individual States”.²²⁰³ While the establishment of an independent international mechanism would in fact address these concerns and appear to be an ideal solution in theory, in practice this would undermine one of the main goals of universal jurisdiction.²²⁰⁴ The ICC is already overwhelmed and has difficulties in facing the great challenges before it. It is our contention that national courts – i.e. independent and impartial national judges – have the capacity to apply international and national law and to assess whether the subsidiarity criteria are fulfilled, namely to determine whether a state is in fact able and willing to exercise jurisdiction.²²⁰⁵ This decision, however, should be one of a panel of independent judges, and not the sole decision of a prosecutor (or of another similar organ) subject to executive power who can exercise prosecutorial discretion without scope for judicial review;²²⁰⁶ moreover, the decision should not be one for a single national judge but rather for a panel of qualified judges.²²⁰⁷ This solution does not appear to contradict international principles, keeping in mind that the state contesting the exercise of universal jurisdiction by another state always has the possibility to bring the case to the International Court of Justice on the basis of a violation of the rules on subsidiarity.²²⁰⁸ Furthermore, other mechanisms can be designed by states to increase the assurance of international fair trial standards.²²⁰⁹ One mechanism already exists for European states exercising universal jurisdiction: the

²²⁰² Kress, *supra* note 2201, at 584, footnote 111.

²²⁰³ See African Union, *Decision on the Abuse of the Principle of Universal Jurisdiction*, Doc. Assembly/AU/11(XIII), § 5: “Further reiterates its conviction on the need for an international regulatory body with competence to review and/or handle complaints or appeals arising out of abuse of the Principle of Universal by individual States”.

²²⁰⁴ See Lafontaine, ‘La compétence universelle et l’Afrique : ingérence ou complémentarité ?’, at 141.

²²⁰⁵ For a similar view, see *ibid.*, at 142.

²²⁰⁶ See in this sense, *ibid.*

²²⁰⁷ The recent strong reactions of the African Union following the arrest in London, United Kingdom (UK), on 20 June 2015, of Lieutenant-General Emmanuel Karezi Karake, Chief of the National Intelligence and Security Services of the Republic of Rwanda, who was on an official visit in the UK, are linked to the non-respect of immunities and not to the exercise of universal jurisdiction per se. See more at <http://www.peaceau.org/en/article/communique-of-the-519th-psc-meeting-on-universal-jurisdiction-26-june-2015#sthash.OIGGkel0.dpuf> (last visited 1 May 2016).

²²⁰⁸ See Stigen, ‘*The Relationship between the Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010) 133-160, at 57.

²²⁰⁹ See Lafontaine, ‘Universal Jurisdiction – the Realistic Utopia’, 10 *Journal of International Criminal Justice* (2012) 1277-1302, at 1299.

European Court of Human Rights. The African Commission on Human and Peoples' Rights could be tasked with monitoring universal jurisdiction cases tried by African states. Other monitoring mechanisms exercised by NGOs, independent observers or even state representatives could also be envisaged.²²¹⁰

2. *The criteria/standard to assess a state's inactivity*

Given the above mentioned concerns, when examining whether the territorial or national state has investigated or will investigate a case, one could argue that a high level of deference is necessary in order to respect the cultural, social and political particularities of the concerned state.²²¹¹ However, allowing for a significant degree of deference generates the risk of creating a path to impunity because the case may be deferred to the territorial state, which may then fail to effectively investigate and prosecute or will in the alternative conduct sham proceedings. What are the criteria to assess that jurisdiction is exercised in "good faith"? Is the ICC's "unwilling or unable" test applicable? And if this is case, what is the standard of proof required to determine whether or not the concerned state(s) is unwilling or unable to prosecute the case?²²¹²

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A primary issue has been raised concerning whether a state can simply assume that the primary state will adequately deal with the case based on a general evaluation of the state's judiciary or whether it has to analyse if the case in question is being genuinely investigated.²²¹³ For the same reasons set out in Section B above, the answer clearly seems to be that the third state needs to determine whether the case in question is being investigated²²¹⁴ and – to some extent – demonstrate that the primary state is unwilling or unable to prosecute. Contrary to what some have suggested, the simple presence of the suspect on the third state's territory is not sufficient to prove the unwillingness or inability of the territorial state to prosecute. The issue that arises is to what extent and according to what criteria the custodial state has to make this assessment itself.

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There does not appear to be a general consensus as to what standard of proof is required in assessing whether or not the directly primary state(s) is

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²²¹⁰ *Ibid.*

²²¹¹ See Ryngaert, 'Complementarity in Universality Cases: Legal-Systemic and Legal Policy Considerations', in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 165-200, at 177.

²²¹² Kress, *supra* note 2201, at 20.

²²¹³ See Stigen, 'The Relationship between Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes', in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010) 133-160, at 141.

²²¹⁴ This issue is discussed below in section.

unwilling or unable to prosecute.²²¹⁵ It is often suggested that the ICC's principle of complementarity set out at Article 17 of the ICC Statute is a useful reference to assess the "good faith" of the concerned state.²²¹⁶ This "test" finds support in the African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes.²²¹⁷ The Darfur Report also specifies that "it is only if the state in question refuses to seek extradition or is patently unable or unwilling to bring the person to justice, that the State on whose territory the suspect is present may initiate proceedings against him or her".²²¹⁸ Article 17(1)(a) of the ICC Statute states that a case is inadmissible where the "case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution". To determine unwillingness in a particular case, Article 17(2) of the ICC Statute provides:

the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

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Article 17 does not examine the situation where a state is considering criminal proceedings but has not yet initiated them. However, subsidiarity

²²¹⁵ L. Arimatsu, *Universal Jurisdiction for International Crimes: Africa's Hope for Justice?*, Briefing paper, Chatham House, April 2010, at 13.

²²¹⁶ See Jessberger, Kaleck and Schueller, 'Concurring Criminal Jurisdiction under International Law', in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 233-245, at 241; see Stigen, 'The Relationship between Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes', in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010) 133-160, at 142.

²²¹⁷ Art. 4(2).

²²¹⁸ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004*, UN Doc. S/2005/60, Geneva, 25 January 2005, § 614.

applied between states should also cover this hypothesis. In other words, with respect to the determination of willingness, the forum state should ask the territorial state if it intends to initiate criminal proceedings, and if not, the reason why. Regarding the determination of the possible inability for the territorial state to launch proceedings in a particular case, “the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings”.²²¹⁹

At the national level, some states have relied on the ICC’s complementarity principle.²²²⁰ In the 2005 German *Rumsfeld* case, the Prosecutor provided for a very restrictive application of the principle. It basically held that since there were no indications that the US authorities were refraining or would refrain from investigating the case, there was no scope for the German authorities to take action.²²²¹ The appeal was dismissed by the Appeals Court. The fact that the US had put a number of low-ranking soldiers on trial, who had been involved in the Abu Ghraib crimes, was sufficient to allow the German court to decline opening a case against *Rumsfeld et al.*²²²² In the *Guatemala Genocide* case, the Spanish Constitutional Court criticized the lower court’s “enormously interpretation of the rule of subsidiarity”.²²²³ Indeed, the lower court had required that the plaintiffs either prove the territorial state authorities’ legal impossibility to proceed or establish their prolonged judicial inaction. The plaintiffs were thus faced with the impossible task of proving negative facts – which comes close to a *probatio diabolica* – thereby frustrating the finality of universal jurisdiction.²²²⁴ Some have concluded that this judgment has helped to clarify that the ICC’s “unable or unwilling” requirement does not apply to national courts.²²²⁵

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²²¹⁹ Art. 17(3) ICC Statute.

²²²⁰ See for instance Decision of the General Federal Prosecutor at the Federal Court of Justice, ‘*Center for Constitutional Rights et al. v. Donald Rumsfeld et al.*’, 10 February 2005’, 45 *International Legal Materials* 119 (2006), at 121; See also Ryngaert, ‘Universal Jurisdiction in an ICC Era: A Role to Play for EU Member States with the Support of the European Union’, 14(1) *European Journal of Crime, Criminal Law and Criminal Justice* (2006) 46-80, at 60.

²²²¹ *Oberlandesgericht Stuttgart*, ‘*Center for Constitutional Rights v. Rumsfeld et al.*’, 45 *International Legal Materials* (2006) 122-126, at 123.

²²²² See Jessberger, Kaleck and Schueller, *supra* note 2216, at 233.

²²²³ Spanish Constitutional Court, *Guatemala Genocide Case*, 26 September 2005, English translation provided by the Center for Justice and Accountability.

²²²⁴ Spanish Constitutional Court, *Guatemala Genocide Case*, 26 September 2005, at 13.

²²²⁵ N. Roht-Arriaza, ‘Guatemala Genocide Cases: Spanish Constitutional Tribunal decision on universal jurisdiction over genocide claims’, *American Journal of International Law* (2006) 207-213, at 213.

As mentioned above,²²²⁶ in the *Al-Daraj (Gaza)* case, the Spanish Supreme Court confirmed that Spanish courts did not have jurisdiction, considering that an effective criminal investigation was taking place in Israel. It based this conclusion on the fact that (i) the punishable acts presented in the complaint were the subject of an internal investigation by Israeli Military authorities, although they had led to a decision not to open any criminal investigation, (ii) a Special Investigation Commission of the *Shehadeh* case had been created by the Prime Minister of Israel and was to issue a report, and (iii) several civil proceedings were currently before different Israeli Courts in connection with the *Shehadeh* case.²²²⁷ As one scholar noted, this decision “prompted widespread criticism that the Spanish judiciary had yielded to political pressure from the Spanish Ministry of Foreign Affairs and Israel”.²²²⁸ In their dissenting opinion, some judges argued that the facts in question were not being sufficiently and efficiently investigated in Israel. This opinion further restated the rejection of the principle of subsidiarity in favor of a “criteria of priority” in cases where the investigation is “efficient and sufficient”.²²²⁹

[...] the conclusion cannot be that a criminal judicial investigation of the events is underway in Israel, as stated in the majority’s decision, because the information provided indicates the contrary. There is only a governmental commission which is preparing a report on whether it is appropriate to initiate a judicial investigation, and as long as there is no decision to initiate criminal judicial proceedings the listpendens established in the majority’s resolution lacks any kind of basis.

[...]

7. Conclusion

The conduct that was being investigated in the Preliminary Proceedings of the Central Magistrates’ Court no. 4 is not being

²²²⁶ *Supra* N. 3

²²²⁷ National High Court Criminal Division, Preliminary Proceedings No. 157/08, Ruling No. 1/09, 9 July 2009, unofficial English translation available online at: http://ccrjustice.org/files/National%20High%20Court%20-%20Appeals%20Majority%20Decision%20of%2007.09.2009_ENG.pdf.

²²²⁸ Stigen, ‘The Relationship between the Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 133-160, at 139.

²²²⁹ See National High Court, Criminal Division, Dissenting Opinon Regarding Ruling 1/2009, issued by the Magistrates Manuel Fernandez Prado, Jose Ricardo de Prada Solaesa, Clara Bayarri Garcia and Ramon Saez Valcarcel, unofficial English translation available online at http://www.ccrjustice.org/files/National%20High%20Court%20-%20Appeals%20Dissent%20Opinion%20of%2007.17.2009_ENG.pdf

investigated in Israel, nor are the perpetrators thereof being criminally prosecuted, which said country was obliged to do pursuant to international law. In consequence, there is no obstacle to the exercise of jurisdiction in Spain by virtue of the principle of universal competence, as the conduct involves the most serious international crimes, committed in this case against protected persons and property in an armed conflict. [...]

In the *Bush Six* case, following indications by the U.S. that the authorities were investigating certain cases of mistreatment of detainees,²²³⁰ the investigating judge finally issued a ruling on 13 April 2011 ordering the provisional stay of the case, transferring it to the US Department of Justice for its continuation.²²³¹ It considered that Article 23.4 LOPJ as amended²²³² did “not require that a judicial procedure have been undertaken in the country of preferential jurisdiction [...] but merely [...] that a procedure have been initiated (without qualifying inasmuch as in comparative law there also arise administrative alternatives to jurisdiction protection entailing an investigation and effective prosecution of the alleged deeds)”.²²³³ However, as mentioned above none of the actions or investigations mentioned in the US Submission involved any of the victims or any of the defendants, namely the senior Bush administration officials.²²³⁴ The appellants contested this decision arguing that

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²²³⁰ See U.S. Department of Justice, Submission, 1 March 2011, available online <https://ccrjustice.org/sites/default/files/assets/US%20Letters%20Rogatory%20Response%20March%201,%202011%20-%20ENG.pdf> (last visited 1 August 2017).

²²³¹ Court for Preliminary Criminal Proceedings No. 006, Preliminary Report, Summary Proceedings 0000134 /2009, Ruling, 13 April 2011, unofficial English translation available online at <http://ccrjustice.org/spain-us-torture-case> (last visited 1 August 2017).

²²³² Art. 23.4 LOPJ as amended in 2009 states that “Without detriment to what might be provided in treaties and international agreements signed by Spain, in order for the Spanish courts to hear the aforementioned offences [including genocide, crimes against humanity and any offence which according to treaties ought to be prosecuted in Spain] it must be established that [...] no procedure entailing an investigation and effective prosecution of such sanctionable deeds, where appropriate, has been initiated in another country or in an international court. A criminal prosecution brought before the jurisdiction of the Spanish courts shall be granted a stay of proceedings where it is established that a judicial action in relation to the acts has been started in the country or court referred to in the previous paragraph.”; See Spain, Supreme Court of Justice, Appeal No. 1133/2012, 20 December 2012, at 5.

²²³³ See Court for Preliminary Criminal Proceedings No. 006, Preliminary Report, Summary Proceedings 0000134 /2009, Ruling, 13 April 2011, unofficial English translation available online at <http://ccrjustice.org/spain-us-torture-case>.

²²³⁴ See ECCHR, ‘Response to the Submission from the United States in Relation to the Criminal Complaint against David Addington, Jay Bybee, Douglas Feith, Alberto Gonzales, William Haynes and John Yoo

the investigations and judicial processes instituted by the US authorities did not really constitute an effective investigation of the facts constituting the object of the complaint in terms of Article 23.4 of the LOPJ.²²³⁵ The appeal was dismissed in March 2012 by the Spanish National Court.²²³⁶ Three judges dissented.²²³⁷ The appellants appealed to the Supreme Court, claiming that the US investigations were neither sufficient nor effective.²²³⁸ The Spanish court dismissed the appeal. It held that the administrative and criminal procedures launched by US authorities were sufficient. It is noteworthy that the administrative procedure to which they referred in their decision constituted a five-year investigation carried out by the US Department of Justice in which two of the defendants were being investigated, in a manner that could have led to disciplinary action, in terms of their possible responsibility related to their professional activity.²²³⁹ This investigation generated a report, which was sent to a Deputy Attorney General who did not initiate an administrative or criminal action. The Spanish decision also refers to the fact that an investigation into the treatment of some detainees at the detention center in Guantanamo, led by the Attorney General, was – and is – ongoing, although it is not centered on any of the defendants of the Spanish claim.²²⁴⁰ The Spanish court concluded that, although no criminal charges had been made, “the United States has investigated the events at Guantanamo” effectively, against the argument that the application of the principle of discretionary prosecution in the American criminal justice system did

in the Audiencia Nacional, Madrid, Spain, Case N° 134/2009, April 2011, available online at <http://ccrjustice.org/spain-us-torture-case>.

²²³⁵ Spanish Court, 20 December 2012, unofficial translation available online at <http://ccrjustice.org/files/2012-12-20%20Spanish%20National%20Court%20Decision%20Final%20English.pdf> (last visited 1 August 2017), at 7.

²²³⁶ *Audiencia Nacional*, 24 March 2012, available online in Spanish at <http://ccrjustice.org/ourcases/current-cases/spanish-investigation-us-torture>.

²²³⁷ “*Voto particular que formulan los magistrados Clara Bayarri García, Ramón Sáez Valcárcel y José Ricardo de Prada Solaesa, contra el Auto del Pleno de la Sala de lo Penal de fecha 23 de marzo de 2012 en el recurso de apelación interpuesto en el procedimiento DP 134/2009 del Juzgado Central de Instrucción nº 6 de la Audiencia Nacional*”, available online in Spanish at <http://ccrjustice.org/ourcases/current-cases/spanish-investigation-us-torture>.

²²³⁸ See Appeal, Association for the Dignity of Male and Female Prisoners of Spain, “*Bush 6*” case, 12 June 2012; see also ‘Amicus Brief (*Final*) In Support of the Association for The Dignity of Male and Female Prisoners of Spain in Their Appeal Pending Before the Spanish Supreme Court in Relation to Criminal Complaint Pending Against David Addington, Jay Bybee, Douglas Feith, Alberto Gonzales, William Haynes, and John Yoo in The *Audiencia Nacional*, Madrid, Spain, Case N° 134/2009, 25 September 2012.

²²³⁹ Spain, Supreme Court, Ruling, 20 December 2012, at 7, English translation available online at: https://ccrjustice.org/sites/default/files/assets/2012-12-20%20Spanish%20National%20Court%20Decision%20Final%20English_0.pdf (last visited on 1 August 2017).

²²⁴⁰ *Ibid.*, at 8.

not mean that it has been applied on the basis of purely political considerations.²²⁴¹ Some have concluded that it appears that Spain now recognizes that states are “effectively investigating” even if the proceedings are administrative, military or civil in nature.²²⁴²

E. Is the forum state obliged to inform the affected states? Does a request need to be made to the territorial state?

Under the complementary principle, Article 18(1) of the ICC Statute states that when the Prosecutor has determined that there would be a reasonable basis to commence an investigation or if he has initiated an investigation, he “shall notify all state parties and those States which [...] would normally exercise jurisdiction”. Does such a rule also exist in inter-state relations? More specifically, is there an obligation for the state exercising universal jurisdiction to inform the primary state(s) of its intention to investigate? Furthermore, is it necessary for the state to formally ask the primary state(s) if it is willing and able to exercise its primary jurisdiction, before exercising universal jurisdiction?

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According to some international instruments, before initiating any proceedings, a state should ask the territorial or suspect’s national state whether it is willing to institute proceedings against the suspect and to request his/her extradition. This view was supported in the Darfur Report.²²⁴³ This is also the position of the African Union. Likewise, in their Joint Separate Opinion in the *Arrest Warrant* case, Judges Higgins *et al.* held that a “State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity to act upon the charges concerned”.²²⁴⁴

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In the Swiss *Nezzar* case, the convicted appellant argued before the Swiss Federal Criminal Court that no request had been made to Algeria. The Federal Criminal Court held that, in *certain exceptional cases*, a specific request to the concerned state is not needed. This is the case if concrete signs show that the territorial state is not seriously willing to prosecute; for example, in respect to this particular case, Algeria had adopted an amnesty law that rendered it illegal to prosecute the appellant in Algeria. Likewise, in the Dutch *Bouterse* case, the Amsterdam Court of Appeal considered that, although there were communications in the press that a preliminary inquiry had started in Surinam

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²²⁴¹ *Ibid.*, at 10.

²²⁴² *Ibid.*

²²⁴³ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004*, UN Doc. S/2005/60, Geneva, 25 January 2005, § 614.

²²⁴⁴ ICJ, *Arrest Warrant* case, Joint Separate Opinion of Judges Higgins *et al.*, § 59.

against Bouterse, it was competent to hear the case since it had received no official communication as to the existence of such a preliminary inquiry, the outcome of the investigation could not be predicted, and that there was no certainty as to whether criminal proceedings would actually be brought against Bouterse.²²⁴⁵

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Clearly, it appears difficult for the primary state to invoke its priority if it is not informed of the fact that the forum state is considering exercising universal jurisdiction²²⁴⁶ and if it is not given the opportunity to exercise its “primary” jurisdiction. It thus appears that it is in the interest of the proper application of the subsidiarity principle for the forum state to be obliged to inform the affected state(s) and to see whether that state intends to exercise its primary jurisdiction. Exceptions to this principle may be admitted when it is clear that the primary state will not exercise jurisdiction as it is unable to do so, a result, for example, of its national legislation, and in particular, its adoption of an amnesty law. When informing the affected state, the content of the information given to that state may be limited in order to avoid any obstructions of justice, notably the risk that the suspect, if he or she is not in custody, “will try to escape, remove or destroy evidence or intimidate witnesses once he or she becomes aware of the forum state’s intention to investigate”.²²⁴⁷ In addition, if there is no perspective of extradition out of human rights concerns or if, for instance, giving the identity of the victim to the territorial state may endanger his family who is still living there, the forum state is not obliged to inform the territorial state. In fact, the forum state should only be obliged to inform the territorial if there is a chance that that state will prosecute the suspects. Likewise, if the forum state informs the territorial state and does not receive any reply within a reasonable time, it should consider that the territorial state has no intention of prosecuting the case. In any event, during this period of time, the forum state should continue investigating independently from any reply from the territorial state.

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The African Union has gone as far as to suggest that the state wishing to exercise universal jurisdiction should first obtain the *consent* of both the territorial and the national state.²²⁴⁸ This view was also expressed by Cuba in its comments to the United Nations on the scope and application of the universal

²²⁴⁵ Amsterdam Court of Appeal, *Bouterse* case, Decision, 20 November 2000.

²²⁴⁶ Stigen, ‘The Relationship between Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 133-160, at 151.

²²⁴⁷ *Ibid.*, at 152.

²²⁴⁸ United Nations, *Report of the Secretary-General, “The Scope and Application of the Principle of Universal Jurisdiction” General Assembly*, Doc. A/66/93 (20 June 2011), § 161.

jurisdiction principle.²²⁴⁹ Interestingly, the requirement for the consent of the territorial state had been suggested by the United States delegation during the drafting of the Genocide Convention.²²⁵⁰ It had proposed that in addition to the original text which provided for universal jurisdiction over genocide, subject to the presence of the offender, the phrase “with the express consent of the State where the act was committed, itself try and upon conviction punish such offender” also be added.²²⁵¹

In fact, if the forum state is acting with consent of the territorial state, it is no longer exercising universal jurisdiction but is acting as a representative of the state which has primary jurisdiction (the territorial and national state), or as a representative of the international community, if such consent is considered having been given due to the ratification of a treaty providing for universal jurisdiction.²²⁵² In the first case, one can refer to the notion of “delegated jurisdiction” or the representation principle; in the second, one can refer to universal jurisdiction based on treaty law as defined in Part 1. As a representative of the concerned states, a second distinction can be identified between the state which acts upon the request of the concerned states or “upon a presumption that the represented would (or will) give its consent”.²²⁵³ Indeed, according to the theory of representational rule, the state acquires the power to exercise jurisdiction based on a delegation by the territorial or national state to the forum state. This delegation can either be implicit or explicit.

The issue of consent or absence of consent thus essentially poses a problem where there does not exist a conventional basis for the exercise of universal jurisdiction. While it is true that even when universal jurisdiction is exercised within the framework of a convention, the territorial or national state doesn't need to consent to the exercise of universal jurisdiction in the concrete proceedings; indeed, such a framework indicates that the concerned state consented *in abstracto*.²²⁵⁴ In this case, one can argue that the territorial or

²²⁴⁹ “International regulation should consider the possibility that, when a State wishes to invoke the principle of universal jurisdiction, it should first obtain the consent of the State in which the violation took place or the country or countries of which the accused is a national.” Permanent Mission of Cuba to the United Nations, 27 June 2011, available online at http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Cuba%20%28S%20to%20E%29.pdf.

²²⁵⁰ UN, Sixth Committee, *Legal questions, Summary Records of Meetings, 16 September – 26 November 1947*, at 240.

²²⁵¹ *Ibid.*, at 240 (emphasis added).

²²⁵² See Roth, ‘Representational Capacity or Global Governance? A Swiss Federal Court Addresses the Accusations against a Former Algerian General’, 11(3) *Journal of International Criminal Justice* (2013) 643-657.

²²⁵³ *Ibid.*, at 656.

²²⁵⁴ D’Aspremont, ‘Multilateral Versus Unilateral Exercises of Universal Criminal Jurisdiction’, *Israel Law Review* (2010) 301-329, at 325.

national state has “in a way or another, approved it beforehand”.²²⁵⁵ However, it has been argued that, in the absence of a conventional framework, the prohibition of the crime by international customary law is insufficient to support the idea that consent was given by the concerned state. The view that the exercise of universal jurisdiction over core international crimes is subject to the consent of the more affected state cannot be followed, not only because that state may not give its consent – which would then undermine the whole purpose of universal jurisdiction – but also for a number of reasons linked to extradition.

F. Extradition issues

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In some cases, extradition to the territorial or national state is not possible, either because it is clear that that state has no intention of prosecuting the suspect or because the extradition of the suspect is impossible. In the former case, this might become clear where the primary state has conducted, is conducting or will conduct proceedings which are merely designed to shield the suspect from justice. The application of the subsidiarity principle might also be impossible because of the absence of an extradition treaty between the custodial state and the concerned state. In the Dutch *Mpambara* case for instance, it was considered that extradition to Rwanda was not an option because an extradition treaty did not exist between Rwanda and the Netherlands.²²⁵⁶

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Extradition may also be impossible because of the risk that the suspect would not be granted a fair trial. Indeed, before according priority, the forum state must make sure that the primary state will investigate and prosecute in accordance with international fair trial standards. In particular, it must not impose the death penalty, torture or any other cruel, inhuman or degrading treatment.²²⁵⁷ The forum state must also determine whether the investigation and prosecution by the primary state will be conducted according to the “principles of independence, effectiveness, promptness and impartiality”.²²⁵⁸ It must be noted that this duty of the forum state to ensure that suspects will

²²⁵⁵ *Ibid.*

²²⁵⁶ See Van den Herik, ‘A Quest for Jurisdiction and an Appropriate Definition of Crime: Mpambara before the Dutch Courts’, 7 *Journal of International Criminal Justice* (2009) 1117-1132.

²²⁵⁷ Hall, ‘The Role of Universal Jurisdiction in the International Criminal Court Complementarity System’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010), at 230; See Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, Introduction, at 48.

²²⁵⁸ Jessberger, Kaleck and Schueller, ‘Concurring Criminal Jurisdiction under International Law’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 233-245, at 240;

receive a fair trial in the primary state is not a direct consequence of the subsidiarity principle, which serves to prevent impunity. Rather it is a result of the general obligation of every state to respect human rights.²²⁵⁹ In this respect, the AU-EU Expert Report on Universal Jurisdiction provides that the forum state should only extradite the suspect “on the condition that the latter state is willing and able to conduct a fair trial consistent with international human rights standards”.²²⁶⁰

A related issue that will not be discussed here, notably because it has not been raised often in practice, concerns whether a state can consider the primary state using alternative accountability mechanisms, such as a truth and reconciliation commission, “unable to prosecute”, and can therefore initiated universal jurisdiction proceedings in parallel.²²⁶¹

If the forum state decides not to extradite a suspect to the primary state because of fair trial issues, it has the obligation to initiate *ex officio* and immediately a genuine, impartial and serious investigation.²²⁶² The danger of mistreatment of the suspect in the territorial state is particularly evident when there has been a change of regime and a new government seeks to prosecute officials of the former regime.²²⁶³ These were some of the concerns initially expressed with respect to the transfer of cases to Rwanda. Requests by the Government of Rwanda for the extradition of persons suspected of genocide have repeatedly been refused by French courts, even after the ICTR itself, and other countries like Canada, Sweden and Norway, authorized case transfers. Following a number of amendments that were made to Rwandan legislation, both the European Court of Human Rights, in a decision of 27 October 2011,²²⁶⁴ and the ICTR, in a decision rendered on 16 December 2011 in the *Uwinkindi* case,²²⁶⁵ considered that extradition to Rwanda did not constitute a violation of either Articles 3 or 6 of the Convention.

On 23 October 2008, the Court of Appeal of Toulouse declined to order the extradition to Rwanda in the case of *Bivugarabago* because it considered that a

²²⁵⁹ See Stigen, ‘The Relationship between Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010) 133-160, at 150.

²²⁶⁰ See R4 of the AU-EU Report on the Principle of Universal Jurisdiction.

²²⁶¹ Stigen, *supra* note 2259, at 143.

²²⁶² See Inter-American Court of Human Rights, case of the *Moiwana Community*, Judgment, 15 June 2005, § 145-146, cited in: Jessberger, Kaleck and Schueller, *supra* note 2258, p. 240.

²²⁶³ Stigen, *supra* note 2259, at 150.

²²⁶⁴ ECtHR, Judgment, *Ahorugeze v. Sweden*, Application no. 37075/09, 27 October 2011.

²²⁶⁵ ICTR, ‘Decision on Uwinkindi’s Appeal Against the Referral of his Case to Rwanda and Related Motions’, *Uwinkindi V. The Prosecutor*, Case No. Ictr-01-75-Ar11bis, 16 December 2011.

fair trial could not be guaranteed.²²⁶⁶ Following the ICTR's approach at the time, the Toulouse court considered that a Rwandan tribunal would be sufficiently independent and impartial, but that it nevertheless could not guarantee a fair trial, in particular with regard to the appearance and protection of defence witnesses.²²⁶⁷ Similar concerns were expressed in the decision of the Court of Appeal of Mamoudzou (department de Mayotte) of 14 November 2008, in the *Senyamuhara* case,²²⁶⁸ in the decision of the Court of Appeal of Paris on 10 December 2008 in the *Kamali* case,²²⁶⁹ and in the decision of the Court of Appeal of Lyon of 9 January 2009 in the *Kamana* case.²²⁷⁰ On 15 September 2010, the Court of Appeal of Versailles rejected Rwanda's request for the extradition of Rwamucyo, a doctor accused of participating in the 1994 genocide who was arrested in France in May 2010, following an arrest warrant issued by the Rwandan government.²²⁷¹ The Versailles court found that the crimes of genocide for which Rwamucyo had been charged were not punishable under Rwandan law at the time when they were allegedly committed and that the "ordinary crimes" listed in the extradition request fell under a ten-year statute of limitations.²²⁷² It also considered that Rwamucyo, if extradited, would not benefit from fundamental procedural guarantees and the protection of the rights of defence. Likewise, on 19 October 2010, the Court of Appeal of Bordeaux rejected the extradition to Rwanda in the *Munyemana* case.²²⁷³

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Rwanda also requested the extradition of *Agathe Habyarimana*, the widow of the former President of the Republic of Rwanda, killed in the airplane bombing which triggered the 1994 genocide. In October 2009, Rwanda issued an international arrest warrant against Agathe Habyarimana for participation and incitement to genocide. She was arrested in Paris on 2 March 2010. In September 2011, the Paris Court of Appeal denied to extradite. Interestingly, the French Court of Appeal of Chambéry had actually approved the extradition of a genocide suspect to Rwanda in April 2008. The Court of Cassation, however, quashed that decision on 9 July 2008.²²⁷⁴ In another case, the Court of Appeal of Rouen allowed the transfer of a suspect, Muhayimana, to Rwanda, following

²²⁶⁶ *Cour d'Appel de Toulouse*, Judgment, No 2008/00029, 23 October 2008, available online at <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000019884665&fastReqId=2146603581&fastPos=4> (last visited 1 August 2017).

²²⁶⁷ ECtHR, *Ahorugeze v. Sweden*, Judgment, Application no. 37075/09, 27 October 2011, § 62.

²²⁶⁸ Decision of the Court of Appeal of Mamoudzou (*department de Mayotte*), *Senyamuhara*, 14 November 2008.

²²⁶⁹ Decision of the Court of Appeal of Paris, *Kamali*, 10 December 2008.

²²⁷⁰ Decision of the Court of Appeal of Lyon, *Kamana*, 9 January 2009.

²²⁷¹ Decision of the Court of Appeal of Versaille, *Rwamucyo*, 15 September 2010.

²²⁷² ECtHR, § 62.

²²⁷³ Decision of the Court of Appeal of Bordeaux, *Munyemana*, 19 October 2010

²²⁷⁴ Cour de cassation, Chambre criminelle, N° 08-82922, 9 July 2008.

the ECtHR decision mentioned above. Again, this decision was quashed by the Court of Cassation, this time on 11 July 2012, partly on the basis of the risk of mistreatment because the lower court had failed to enquire as to whether Rwanda had provided assurances that the suspect would be detained in accordance to the standards of Article 3 ECHR.²²⁷⁵ On 9 April 2014, however, the suspect was finally arrested in Rouen by the French authorities and charged in relation to his implication in the genocide. On 3 April 2015, the Investigation Chamber of the Court of Appeal of Paris decided to release Muhayimana from custody.

Meanwhile, on 19 September 2013, the Court of Appeal of Douai denied Rwanda's request for the extradition of *Laurent Serubuga*, a former colonel in the Rwandan army, and ordered his immediate release. Serubuga had been arrested in France under an international arrest warrant issued by Kigali. The court found that at the time the atrocities were committed, genocide and crimes against humanity were not punishable by law in Rwanda, and therefore Serubuga could not be tried retroactively for crimes that had not at that time formed part of the penal code.²²⁷⁶ It also rejected the charges of murder made against Serubuga, claiming that it was beyond the statute of limitations.

Domestic courts have also denied extradition requests because the dual criminality requirement provided in state legislation has not been fulfilled. Indeed, as seen in Part II, many provisions of state legislation provide for the dual criminality requirement. The issue was notably addressed in the *Pinochet* case.²²⁷⁷ The House of Lords addressed the issue of whether the principle of double criminality required that the conduct be criminal under the state's legislation at the date it was committed or at the date of extradition. According to Lord Browne-Wilkinson, whose opinion was shared by other Lords:²²⁷⁸

In general, a state only exercises criminal jurisdiction over offences which occur within its geographical boundaries. If a person who is alleged to have committed a crime in Spain is found in the United Kingdom, Spain can apply to the United Kingdom to extradite him

²²⁷⁵ France, Court of cassation, *Case of Claude Muhayimana, alias Claude Shingamunono*, Judgment, No. 12-82502, 11 July 2012; See F. Lafontaine, 'Universal Jurisdiction – the Realistic Utopia', 10 *Journal of International Criminal Justice* (2012) 1277-1302, at 1300.

²²⁷⁶ As discussed in Part III, Chapter 1, this argument is not convincing with regard to Art. 7(2) ECHR.

²²⁷⁷ House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* (On Appeal from a Divisional Court of the Queen's Bench Division), Judgment, 24 March 1999, available online at <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm> (last visited 1 August 2017).

²²⁷⁸ Lord Hope of Craighead stated: "I respectfully agree with the reasons which my noble and learned friend Lord Browne-Wilkinson has given for construing the definition as requiring that the conduct must have been punishable in the United Kingdom when it took place, and that it is not sufficient for the appellants to show that it would be punishable here were it to take place now."

to Spain. The power to extradite from the United Kingdom for an "extradition crime" is now contained in the Extradition Act 1989. That Act defines what constitutes an "extradition crime". For the purposes of the present case, the most important requirement is that the conduct complained of must constitute a crime under the law both of Spain and of the United Kingdom. This is known as the double criminality rule. [...]

In these circumstances, the first question that has to be answered is whether or not the definition of an "extradition crime" in the Act of 1989 requires the conduct to be criminal under U.K. law at the date of commission or only at the date of extradition.

[...]

The question is whether the references to conduct "which, if it occurred in the United Kingdom, would constitute an offence" in section 2(1)(a) and (3)(c) refer to a hypothetical occurrence which took place at the date of the request for extradition ("the request date") or the date of the actual conduct ("the conduct date").

[...]

It is therefore quite clear from the words I have emphasised that under the Act of 1870 the double criminality rule required the conduct to be criminal under English law at the conduct date not at the request date.²²⁷⁹

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In recent Rwandan cases, the French *Cour de cassation* has refused to extradite genocide suspects to Rwanda because the dual criminality was not respected,²²⁸⁰ that is, genocide was not as such punishable at the time of the events. This decision has been widely criticized for different reasons. Firstly, requiring dual criminality in order to extradite a genocide suspect accused of international crimes to the state where the crimes were committed is questionable. Secondly, if double criminality is required, the question is whether it is required at the date of commission of the crime or at the date of extradition. A detailed analysis of whether, in the context of extradition, double

²²⁷⁹ House of Lords, Judgment, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* (On Appeal from a Divisional Court of the Queen's Bench Division), 24 March 1999, available online at <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm> (last visited 1 August 2017).

²²⁸⁰ France, *Cour de Cassation* (Criminal Chamber), Decision n° 808 (13-86.631), 26 February 2014, available online at https://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/808_26_28552.html (last visited 16 March 2016); Decision n° 810 (13-87.888), 26 February 2014, available online at https://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/810_26_28535.html (last visited 1 August 2017).

criminality is required at the date of commission of the crime or at the date of extradition falls outside the scope of this study. In any case, as discussed in Chapter 1,²²⁸¹ the crimes in question were punishable at the time in Rwanda and it can hardly be argued that a precise definition of genocide was not provided for in 1994.²²⁸² As a consequence of these decisions of the French Supreme Court, unlike other European countries which have authorized extradition to Rwanda, the 27 Rwandan genocide suspects currently in France and under investigation by the *pôle génocide et crimes contre l'humanité*²²⁸³ will not be extradited to Rwanda and will have to be tried before the French courts. In 2014, 20 years after the Rwandan genocide, the first trial took place in France of a Rwandan génocidaire, Pascal Simbikangwa. He was convicted for complicity in genocide, as well as in crimes against humanity, and sentenced to 25 years in prison.²²⁸⁴ In July 2016, Octavien Ngenzi and Tito Barahirwa - two other suspects - were sentenced to life imprisonment for the crime of genocide and crimes against humanity.

IV. Concluding remarks

A. The rationale for the subsidiarity principle

Some scholars claim that there should be no priority for territorial states, for the states of the suspects' or of the victims' nationality.²²⁸⁵ Hall even argues that where competing jurisdictional claims arise, the custodial state has a better claim than the territorial state to act on behalf of the international community.²²⁸⁶ Others, on the contrary, argue in favor of a rigorous hierarchy of criminal jurisdiction. Donnedieu de Vabres for example, argued in favor of such a hierarchy, with the territorial state and the state of the nationality of the perpetrator having priority over the bystander state.²²⁸⁷ Strapatsas argues that

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²²⁸¹ See *supra* N 129 ff.

²²⁸² See *supra* Chapter 2, N 134.

²²⁸³ Trouille, 'France, Universal Jurisdiction and Rwandan *génocidaires*, The *Simbikangwa* Trial', 14(1) *Journal of International Criminal Justice* (2016) 195-217.

²²⁸⁴ On this case, see Trouille, 'France, Universal Jurisdiction and Rwandan *génocidaires*, The *Simbikangwa* Trial', 14(1) *Journal of International Criminal Justice* (2016) 195-217.

²²⁸⁵ Hall, 'The Role of Universal Jurisdiction in the International Criminal Court Complementarity System', in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010), p. 201-232, at 230.

²²⁸⁶ *Ibid.*, at 230.

²²⁸⁷ Donnedieu de Vabres, *Les principes modernes du droit pénal international* (1928), at 169, cited in Ryngaert, 'Applying the Rome Statutes Complementarity Principle: Drawing Lessons from the

universal jurisdiction should be exercised as “a last resort situation”, where the state in question has cautiously taken every step to ensure that the perpetrator be punished by a state having a link to the infraction, “in order to respect the principle of territoriality which is also *jus cogens*”.²²⁸⁸

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In our view, it can convincingly be argued that the necessity of subsidiarity as a condition for exercising universal jurisdiction is “rooted in the rationale of universal jurisdiction”.²²⁸⁹ Universal jurisdiction is only exercised to prevent impunity in cases where gaps exist; if jurisdiction is exercised or can be exercised on other grounds – in a real and effective manner – there is no need for universal jurisdiction.²²⁹⁰ This viewpoint allows for the limitation of infringements with the principle of sovereign equality of states²²⁹¹ and the principle of non-interference, which is the most common argument leveled against universal jurisdiction.²²⁹² A state has the right (and obligation) to prosecute only if it is necessary to avoid impunity; universal jurisdiction does not give states an unconditional right to prosecute on the grounds of the international nature or seriousness of the crime, or to interfere in the internal affairs of the state where the crime has been perpetrated.²²⁹³ For the subsidiarity rule to be applicable, the territorial state must be given the opportunity to investigate and prosecute. However, as discussed above,²²⁹⁴ investigation prior to a request for extradition constitutes no real interference in practice.

Prosecution of Core Crimes by States Acting Under the Universality Principle’, 19 *Criminal Law Forum* (2008) 153–180, at 5.

²²⁸⁸ Strapatsas, ‘Universal Jurisdiction and the International Criminal Court’, 29(1) *Manitoba Law Journal*, (2002-2003) 1-32, at 31; See also Fletcher and Abi-Saab, ‘The Proper Role of Universal Jurisdiction’, *Journal of International Criminal Justice* (2003) 596-602.

²²⁸⁹ Jessberger, Kaleck and Schueller, ‘Concurring Criminal Jurisdiction under International Law’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 233-245, at 239.

²²⁹⁰ *Ibid.*

²²⁹¹ The principle of sovereign equality is formulated in Art. 2(1) UN Charter: “[t]he Organisation is based on the principle of the sovereign equality of all its Members”. Further clarification is provided by the General Assembly’s 1970 Declaration on Principles of International Law.

²²⁹² In the context of the *Tibet* case, China has claimed that the Spanish investigation constitutes an interference in its internal affairs.

²²⁹³ See Stigen, ‘The Relationship between Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010) 133-160, at 158; See also A. Cassese (*International Criminal Law* (2008), at 452), who states that “the exercise of [universal jurisdiction does not] lead to undue interference in the internal affairs of the state where the crime has been perpetrated”.

²²⁹⁴ See *supra* N. 48.

There are a number of other reasons why the territorial forum is always the better forum. Firstly, access to evidence such as on-site investigations and witness testimony is generally easiest in the territory on which the crime occurred. Secondly, suspects are much more likely to be found in the territorial state. This also leads to greater procedural efficiency and cost-effectiveness. Thirdly, victims – who are generally numerous where international crimes have been committed – are more likely to be able to participate in proceedings, or at least feel more involved, if they take place in their home state. Fourthly, the courts of the territorial state are close to the events and the judges are nationals of the state, and therefore have a better understanding of the social-political, historical and cultural context of the case.²²⁹⁵ Fifthly, the undertaking of the trial close to the *locus delicti* is more likely to be perceived as legitimate by the population involved and the international community in general. It has also been argued that it is more likely to benefit national reconciliation,²²⁹⁶ to deter the future recurrence of violence and to nurture a culture of accountability.²²⁹⁷ A criminal trial is based on different interests, including the interests of the victims and of the local community; the territorial state is necessarily the place where most of these interests come together, because it is generally where the victims and the local community can be found.²²⁹⁸

Finally, on a more political level, two additional reasons can be invoked. Firstly, it is useful to recall that a fundamental rationale underpinning the acceptance of over 110 states to be parties to the Rome Statute encompasses the subsidiarity of its jurisdiction to that of the national courts.²²⁹⁹ It is our opinion that the establishment of a priority rule would contribute to making universal jurisdiction more acceptable.²³⁰⁰ Secondly, the application of the subsidiarity principle is the only way to partly answer to the criticism that universal jurisdiction is a “European imperialist construct”, and to assert some kind of legitimacy over the universality principle. In our view, it is crucial that the

²²⁹⁵ R. Rastan, ‘Complementarity: Contest or Collaboration?’, in Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010) 83-132, at 99.

²²⁹⁶ Ryngaert, *Jurisdiction in International Law* (2008), at 216.

²²⁹⁷ Rastan, ‘Complementarity: Contest or Collaboration?’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010) 82-132, at 99.

²²⁹⁸ See Fletcher and Abi-Saab, ‘The Proper Role of Universal Jurisdiction’, *Journal of International Criminal Justice* (2003) 596-602.

²²⁹⁹ Stigen, ‘The Relationship between Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Torkel Opsahl Academic EPublisher, 2010) 133-160, at 134.

²³⁰⁰ *Ibid.*

territorial state be given the primary right to investigate and prosecute, and that “due respect be shown for ongoing local prosecutorial efforts”.²³⁰¹

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However, one has to keep in mind the reality of international crimes and recognize that the territorial state might rarely be the ideal states for prosecution, because international crimes are often committed by state authorities or military officials – or at least with their complicity, support or acquiescence.²³⁰² This is typically the case in respect to war crimes committed by servicemen, torture perpetrated by police officers, or genocide carried out with the (tacit) approval of state authorities.²³⁰³ Here, state authorities are naturally reluctant to prosecute state agents or private individuals when these proceedings may eventually involve state organs. The prosecution by the territorial state is possible when there has been a change of regime in the time since the atrocities occurred. This was the case in Rwanda, where the Tutsis (victims) took power following the 1994 genocide. Rwandan courts have convicted thousands of the authors of genocide.²³⁰⁴ Notwithstanding, the ICTR and states were reluctant to refer or extradite cases to Rwanda for two reasons: firstly, because Rwanda still had the death penalty, and after it enacted legislation abolishing the death penalty, because of the punishment of life imprisonment in isolation faced by the accused, and secondly, because the accused would potentially not receive a fair trial, notably due to the lack of independence of the judiciary.²³⁰⁵

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However, when no change of regime has occurred, the case may also be covered by amnesty laws, which preclude prosecution of authors of violations of grave international crimes in the territorial state. The courts of a foreign state exercising universal jurisdiction do not have to recognize the amnesty however. In a number of cases, the enactment of such legislation has justified the decision to not accord priority to the territorial state: this was for instance the case of the

²³⁰¹ Ryngaert, ‘Complementarity in Universality Cases: Legal-Systemic and Legal Policy Considerations’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 165-200, at 198.

²³⁰² Pocar and Maystre, ‘The Principle of Complementarity: A Means Towards a More Pragmatic Enforcement of the Goal Pursued by Universal Jurisdiction’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 247-303, at 253.

²³⁰³ *Ibid.*, at 252.

²³⁰⁴ See Thalmann, ‘Rwandan Genocide Cases’, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) 498-505.

²³⁰⁵ See for instance ICTR, Trial Chamber II, *Prosecutor v. Munyakazi*, ‘Decision on The Prosecutor’s Request for Referral of Case to the Republic of Rwanda: Rule 11bis of the Rules of Procedure and Evidence’, Case No. ICTR-97-36-R11bis, 28 May 2008.

2006 Algerian Decree²³⁰⁶ rendered in the *Nezzar* case, and the case of the 1983 Argentinean Law (which was finally found to be unconstitutional by the Argentinean Constitutional Court). Moreover, it is worth noting that the alleged perpetrator(s) may also enjoy personal immunities under the domestic law of the territorial state.

B. The subsidiarity principle as a legal rule rather than a “policy”

As we have seen, while some states apply the principle of subsidiarity as a matter of law, others do not understand it as a legal matter.²³⁰⁷ Even where the principle is found in the law, as is true for Germany, prosecutorial discretion allows authorities to decide whether or not to apply it.²³⁰⁸ Attempts to seek judicial review of a prosecutor’s decisions not to prosecute have failed.²³⁰⁹ The principle is thus too often used as a tool to avoid or get rid of complicated core crimes’ cases or politically sensitive cases.

As we have seen above, the AU-EU Report – like other international documents, and scholarship – recommends that priority should be accorded to territoriality as a basis of jurisdiction “as a matter of policy”.²³¹⁰ However, if subsidiarity is understood as a matter of policy or comity, it may lead to a “picking and choosing” situation, whereby states decide to apply subsidiarity depending on whether there are political and/or economic interests at stake.²³¹¹ Applying the subsidiarity principle as a matter of law, rather than as a matter of “policy”, would create two distinct obligations. Firstly, it would clearly establish

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²³⁰⁶ See Decree of 27 February 2006 Implementing the Algerian Charter for Peace and National Reconciliation

²³⁰⁷ Ryngaert, ‘Complementarity in Universality Cases: Legal-Systemic and Legal Policy Considerations’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 165-200, at 174.

²³⁰⁸ In Germany, prosecutorial discretion sometimes allows authorities to determine whether to apply the principle or not. When this is the case, subsidiarity – even as a legal rule – can still be used for political purposes. The issue of prosecutorial discretion will be discussed in Chapter 4.

²³⁰⁹ Hall, ‘The Role of Universal Jurisdiction in the International Criminal Court Complementarity System’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 201-232, at 230.

²³¹⁰ See for instance Lafontaine, ‘La compétence universelle et l’Afrique : ingérence ou complémentarité ?’, at 139 ff.

²³¹¹ On the contrary, in the case of Rwanda, French courts still refuse to extradite, despite the fact that all other European states have agreed to do so. See *supra* N 82. See Roets, *La prétendue impossibilité d’extrader vers le Rwanda des rwandais suspectés d’avoir participé au génocide de 1994 (à propos des arrêts rendus par la Chambre criminelle de la Cour de cassation le 26 février 2014)*.

that a state exercises universal jurisdiction only if the territorial state does not prosecute and try the suspect. This can be referred to as the “negative obligation” or the obligation to refrain. The authorities would thus be obliged to examine whether the authorities of the territorial state are conducting or plan to conduct proceedings.²³¹²

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The second consequence of applying the principle of subsidiarity as a legal rule is the implication that if the territorial or another state with a closer link is unable or unwilling to prosecute core crimes’ violations, the state has the *obligation* to exercise universal jurisdiction over these crimes. This can be defined as the “positive” obligation of subsidiarity or the obligation to act. This dictates that even if it goes against political and economic interests of a state, the state nevertheless has the obligation to prosecute grave international crimes if the territorial state is unwilling or unable to do so effectively.

C. The content of the subsidiarity principle

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As we have seen, the content of these obligations must be clarified. There is a need to develop an international standard that could be applied by all domestic courts. In this chapter, an attempt to define some of the conditions of the subsidiarity principle has been made. Firstly, it has been suggested that the subsidiarity principle may always be applicable to a specific case and not to a situation in general. Secondly, it appears that there is some support to the notion that subsidiarity is mainly applicable to the territorial and possibly the suspect’s national state. In our view, subsidiarity as a legal condition should apply to the territorial state. This does not prevent states from extraditing the suspect or deferring the case to another state with a closer link, as long as this state has the willingness and the ability to prosecute the suspect effectively. Thirdly, in the absence of an independent international scrutiny mechanism, it is up to the forum state to determine the adequacy of domestic proceedings in another state.²³¹³ Fourthly, in order to assess whether a state has initiated a prosecution or has the intention to do so, the state can rely on the “unable” or “unwilling”

²³¹² An interesting example mentioned by Ryngaert (*supra* note 2307), which provides support for the notion of subsidiarity as a legal requirement, is the *Gusmisiriza* case. In 2008, a Spanish investigative judge issued an indictment, charging 40 current or former Rwandan military officials with genocide, crimes against humanity, war crimes and terrorism. Strangely, the indictment did not inquire as to whether investigations or prosecutions of the alleged crimes had been initiated by national courts. In the meantime, the Rwandan proceedings had been initiated and were on-going against one of the accused, Wilson Gumisiriza, after the case had been transferred to Rwanda by the ICTR; Commentator, ‘The Spanish Indictment of High-ranking Rwandan Officials’, 6(5) *Journal of International Criminal Justice* (2008) 1008-1009.

²³¹³ See Lafontaine, ‘La compétence universelle et l’Afrique : ingérence ou complémentarité ?’, at 146.

test provided for in the ICC Statute. Fifthly, a “proactive subsidiarity”²³¹⁴ should be encouraged, where the forum state has the duty to inform the concerned state(s) and to offer them to prosecute the case. This would help limit interference in state sovereignty. Exceptions to this rule exist when there are clear indicators – such as the passing of an amnesty law – that the state will not investigate and prosecute the case. The consent of the primary state(s) cannot be a requirement, without undermining the whole *raison d’être* of universal jurisdiction. Finally, in our view, it is very risky to interpret the subsidiarity principle as to admit that administrative or even civil proceedings can be sufficient to prevent criminal proceedings based on universal jurisdiction by the custodial state.

V. Double-subsidiarity: Does “priority” also apply to the International Criminal Court?

Another issue linked to the exercise of subsidiarity concerns whether the “priority” not only goes to the primary interested state but also to the International Criminal Court. Most state legislation provides that the exercise of universal jurisdiction is not only subject to the non-extradition of the suspect to another state (the subsidiarity principle),²³¹⁵ but also to “non-surrender to the ICC when core crimes are concerned”.²³¹⁶ French legislation, for instance, provides that universal jurisdiction can only be exercised if no international criminal tribunal can prosecute the suspect.²³¹⁷ It therefore seems to establish that the ICC jurisdiction takes priority over national universal jurisdiction. French prosecutors must expressly ask the International Criminal Court to decline jurisdiction over the case, which appears at odds with the principle of complementarity.²³¹⁸ Indeed, the ICC is designed to complement national courts and to initiate judicial action only where national courts have failed to do so.²³¹⁹

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²³¹⁴ Stigen, *The Relationship between Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (2008), at 158.

²³¹⁵ See for instance Art. 10(2) of the Croatian Law on the implementation of the Statute of the International Criminal Court and the prosecution of criminal offences against international law of war and humanitarian law; Art. 19(1) (b) of the Ethiopian Criminal Code; Art. 7-4 of the Code of Criminal Procedure of Luxembourg; Art. 119(2) of the Criminal Code of the Republic of Macedonia; Art. 5(1)(b) of the Portuguese Criminal Code; Art. 13(2) of the Criminal Code of Slovenia.

²³¹⁶ See for instance Art. 5(1) of the Portuguese Law no. 31/2004 and Art. 10(2) of the Croatian Law on the implementation of the Statute of the International Criminal Court and the prosecution of criminal offences against international law of war and humanitarian law.

²³¹⁷ See Art. 689-11 of the French Code of Criminal Procedure.

²³¹⁸ See Human Rights Watch, *The Legal Framework for Universal Jurisdiction in France*, at 3.

²³¹⁹ According to Art. 1 of the ICC Statute, the International Criminal Court (“the Court”) “shall be complementary to national criminal jurisdictions”.

This raises the issue of the relationship between the complementarity principle and the exercise of universal jurisdiction for core international crimes.²³²⁰

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The principle of complementarity is embodied in the Preamble and in Articles 1 and 17 of the Rome Statute. In its passive form, complementarity means that the ICC only steps in as a “last resort” court when states cannot or refuse to deal with international crimes.²³²¹ Under the positive form of complementarity, the Prosecutor encourages states to enact legislation, investigate and prosecute core crimes, including through the use of universal jurisdiction.²³²² The rationale of the principle of complementarity is based both on respect for the primary jurisdiction of states and on considerations of efficiency and effectiveness, since states will generally have the best access to evidence and witnesses, and the resources to carry out proceedings, and international courts do not have their own police forces, etc.²³²³ The principle also serves to respect states’ sovereign right to prosecute crimes that were committed on their territory. Moreover, there are limits on the number of prosecutions that the ICC, a single institution, can feasibly conduct. The ICC is built to deal with those *most responsible* for the gravest international crimes. As one author puts it, “[a]ccordingly, it leaves a huge gap between those most responsible and those innocent”.²³²⁴ Thus, lower-level perpetrators of grave international crimes can only be held responsible with the help of national jurisdictions.

²³²⁰ This issue has been the subject of an in-depth study conducted by the Forum for International Criminal and Humanitarian Law. See M. Bergsmo, *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010).

²³²¹ See Hall, ‘The Role of Universal Jurisdiction in the International Criminal Court System’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 201-232, at 202, and Krings, ‘The Principles of ‘Complementarity’ and Universal Jurisdiction in International Criminal Law: Antagonists or Perfect Match?’, 4(3) *Goettingen Journal of International Law* (2012) 737-763, at 740.

²³²² See Hall, ‘The Role of Universal Jurisdiction in the International Criminal Court System’, in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 201-232, at 202; See Hall, ‘Positive Complementarity in action’, in Stahn and El Zeidy (eds.), *The International Criminal Court and Complementarity: From theory to practice* (2010).

²³²³ See ICC, OTP, *Informal expert paper: The principle of complementarity in practice* (2003), at 3, available online at <https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf> (last visited 1 August 2017); Krings, ‘The Principles of ‘Complementarity’ and Universal Jurisdiction in International Criminal Law: Antagonists or Perfect Match?’, 4(3) *Goettingen Journal of International Law* (2012) 737-763, at 750 and the references in footnote 35.

²³²⁴ Krings, ‘The Principles of ‘Complementarity’ and Universal Jurisdiction in International Criminal Law: Antagonists or Perfect Match?’, 4(3) *Goettingen Journal of International Law* (2012) 737-763, at 739.

According to some authors, state parties to the Rome Statute envisaged that universal jurisdiction would be part of the complementarity regime. It has even been suggested that state parties had recognized their duty to exercise mandatory universal jurisdiction and that the ICC Statute provides for an obligation on states to exercise universal jurisdiction.²³²⁵ In our view, as discussed in Part I, it appears difficult to infer a duty to prosecute under the universality principle based on the ICC Statute. It is also unclear whether the term “jurisdiction” used in the Preamble and in Article 17 of the Statute includes universal jurisdiction.²³²⁶ Moreover, it could be argued that since the jurisdiction of the ICC was limited to crimes committed in the territorial and active personality states,²³²⁷ the state parties to the Rome Statute were inclined to accept these jurisdictional bases, including the jurisdiction mentioned in Article 17 of the Rome Statute.²³²⁸ However, it can in our view be convincingly argued that since the wording of Article 17 of the Rome Statute lacks precision, states are free to include in the term “jurisdiction” the jurisdictional bases they deem appropriate, including universal jurisdiction, for ICC crimes. This would fall in line with the *Lotus* approach, according to which the exercise of extraterritorial jurisdiction over international crimes is possible *unless* it is prohibited by rules of international law.²³²⁹

While the issue of priority of jurisdiction over a crime under the Rome Statute, between the ICC and a state exercising universal jurisdiction, raises some interesting legal and theoretical questions,²³³⁰ it will not be addressed thoroughly because it has little practical impact. Indeed, for the few cases that are being investigated or prosecuted by the International Criminal Court, it appears unlikely that third states with no particular link to the crime will be pushing to exercise universal jurisdiction, considering that they are already quite reluctant to do so when no investigation or prosecution is taking place, even in cases where the suspects are present on their territory. For example, a case arose in which two Congolese men, accused of committing crimes against humanity and war crimes, were arrested in Germany under the universal jurisdiction statute.²³³¹ Since the Democratic Republic of Congo is a “Situation” before the ICC, would the ICC be barred from exercising jurisdiction due to the

²³²⁵ For a detailed analysis see Hall, *supra* note 2322, at 207-212. See Part I, N 178 to 183 and the references.

²³²⁶ See also Kleffner, ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law’, 1 *Journal of International Criminal Justice* (2003) 86-113, at 106.

²³²⁷ Art. 12 Rome Statute.

²³²⁸ See Krings, *supra* note 2324, at 753.

²³²⁹ See Part I N 8 ff.

²³³⁰ For a legal analysis of the relevant provisions, see inter alia Hall, *supra* note 2322, at 207 ff. and Krings, *supra* note 2324, at 754 ff.

²³³¹ Section 1 of the German Code of Crimes against International Law.

principle of complementarity? While it appears difficult to conceive that Germany would refuse to surrender a suspect to the ICC – even if for mere diplomatic reasons –, it does not appear to be contrary to the complementarity of the ICC system and its aim in combatting impunity, that these Congolese men could be arrested and tried by German courts without involving the ICC.²³³²

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However, for the cases currently being investigated and prosecuted by the ICC, we would argue that, similar to the territorial state that is genuinely investigating and prosecuting a case of international crimes committed on its territory, the ICC's jurisdiction enjoys priority over that of a state willing to exercise universal jurisdiction. Indeed, prosecution by the ICC limits one of the inevitable effects of the exercise of universal jurisdiction and its possible political repercussions in inter-state relations, that is, the infringement of the principle of non-interference. Giving priority to the ICC also avoids the above-mentioned adverse effects of the application of the subsidiarity principle, which is the assessment by one sovereign state of the "performance" or "lack of performance" of another sovereign state, i.e. its inability or unwillingness to prosecute crimes committed on its own territory. Moreover, as mentioned above, states are clearly more inclined to accept a judgment of their performance coming from the ICC than one coming from another state. Furthermore, the assurances of full respect of internationally-recognized fair trial standards are greater in the ICC than those offered by a third state, due to, for example, the extent of media coverage of ICC proceedings. Finally, it is arguable that an international court – the ICC – has greater authority to obtain information and evidence on the territorial state than a third state, which dictates that a decision of the ICC has in theory a greater chance of being enforced. It is however not our main concern to discuss whether national courts exercising universal jurisdiction or international criminal tribunals are better suited for investigating and prosecuting grave international crimes. It is rather our contention that they have both been involved in a "continuous process of international law making".²³³³ In referring to each others' judgments, international criminal tribunals and domestic courts can cooperate and contribute to the development of international criminal law and the fight against impunity.²³³⁴

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In any case, universal jurisdiction is a useful tool in "filling the impunity gap" between, on the one hand, the cases tried by territorial states and other states under the active, passive or protective jurisdictions, where there is an unwillingness or an inability of these states to prosecute, and, on the other, the very limited number of cases which are or can be investigated and prosecuted

²³³² Krings, *supra* note 2324, at 756.

²³³³ Van der Wilt, 'Universal Jurisdiction under Attack: An Assessment of the African Misgivings towards International Criminal Justice as Administered by Western States', 9(5) *Journal of International Criminal Justice* (2011) 1043-1066, at 1059.

²³³⁴ *Ibid.*

by international courts;²³³⁵ at this point, international courts are basically limited to the International Criminal Court.²³³⁶ As one scholar rightly points out, “the impunity gap is immense and there is an air of unreality in much of the discussion by governments and academics about its scope”.²³³⁷ Firstly, the ICC can only investigate and prosecute crimes of genocide, crimes against humanity and war crimes. It does not have jurisdiction over other international crimes such as torture, enforced disappearances, extrajudicial executions or, as has become more significant recently, terrorism. Secondly, the ICC neither has jurisdiction over crimes committed before the entry into force of the Rome Statute on 1 July 2002, nor over crimes committed before the entry into force of the Rome Statute for each member state and before the period recognized in the Article 12(3) declaration, providing for ICC jurisdiction.²³³⁸ Thirdly, the ICC does not have jurisdiction for crimes committed in the territory of states that have not ratified the Rome Statute or made declarations after those dates, if the accused is not a national of a state party, unless the Security Council has referred the situation to the Prosecutor. This leaves a considerable number of cases where the ICC does not have jurisdiction and if the territorial state does not prosecute, the only option left in order to avoid impunity is the exercise of universal jurisdiction. According to one scholar, less than one tenth of one per cent of the more than several million individuals suspected of grave international crimes since the 1930s have been investigated or prosecuted in international or national courts.²³³⁹

As mentioned above, unlike the subsidiarity rule between the primary state and the one exercising universal jurisdiction, there does not seem to be a sufficient international conventional or customary legal basis to affirm the application of the complementarity principle to states wishing to act solely on the basis of universal jurisdiction.²³⁴⁰ In this sense, state legislation or practice

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²³³⁵ Hall, *supra* note 2322, at 214.

²³³⁶ There were (and still are) of course other international criminal courts; these include the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), as well as the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon and the War Crimes of the Court of Bosnia and Herzegovina. However, these courts have a limited geographic and temporal jurisdiction. Most of them have either ceased to operate or will soon cease to operate. The ICTR and ICTY, for instance, clearly had primacy over the national courts of all states and could formally request any national court to defer to their jurisdiction.

²³³⁷ Hall, *supra* note 2322, at 214.

²³³⁸ *Ibid.*

²³³⁹ *Ibid.*, at 216.

²³⁴⁰ Supporting this view, see inter alia Kress, “Universal Jurisdiction over International Crimes and the *Institut de Droit International*”, 4 *Journal of International Criminal Justice* (2006), at 581. For the opposite view, see P. Benvenuti, “Complementarity of the International Criminal Court to National

that provides for double-subsidiarity, i.e. gives priority not only to the primary state(s) but also to the ICC, can be seen as more of a “(wise) policy choice”.²³⁴¹

Criminal Jurisdictions’, in Lattazi/Schabas (eds), *Essays on the Rome Statute of the International Criminal Court* (Ripa di Fagnano Alto: Editrice il Sirennite, 2000), at 48, and Hall, *supra* note 2322, at 220 ff.

²³⁴¹ See Kress, ‘Universal Jurisdiction over International Crimes and the *Institut de Droit International*, 4 *Journal of International Criminal Justice* (2006), at 581.

Chapter 4: The initiation of universal jurisdiction proceedings

I. Introductory remarks

An important issue with respect to the exercise of universal jurisdiction lies in the limitations provided for in national legislation regarding the initiation of such proceedings. There are two ways in which states can limit the initiation of universal jurisdiction proceedings. Firstly, in legal systems that allow victims to trigger criminal actions, states can restrict or completely eliminate this right of victims in cases where crimes were committed abroad by foreign nationals against foreign nationals. Section II of this chapter deals with the question of the role of private parties in the initiation of universal jurisdiction proceedings. It shows, through examples from a few selected countries, the recent trend among states to reduce the role of victims and NGOs, and discusses the issue of whether non-state actors should be able to initiate universal jurisdiction proceedings and the reasons why this should be the case. It also underlines the importance of the role of NGOs in the prosecution of international crimes under the universality principle.

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Secondly, states can control the initiation of universal jurisdiction proceedings and refrain from prosecuting international crimes, either by granting prosecutorial or executive authorities broad discretion in deciding whether to prosecute a universal jurisdiction case or not, or by requiring a special executive authorization before a prosecution can be brought on the basis of universal jurisdiction. If such discretion exists, the decisive issue is then whether it is guided by explicit legal criteria and whether any judicial review is available to victims (Section III).

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II. The role of private parties in the initiation of universal jurisdiction proceedings

A. Introductory remarks

In a number of states, the power to initiate proceedings is not only held by public prosecutors, but also by victims and other private parties. Mechanisms exist allowing victims to automatically trigger an investigation by an investigating judge or to trigger a prosecution or an arrest. This is, for instance, the case in Belgium and France with the "*plainte avec constitution de partie civile*". This is also the case of Spain with its "*acción popular*"; criminal procedure allows any Spanish citizen or organization, even if they are not victims, to act as

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prosecutors. Other states provide the possibility for a private party to act as a subsidiary prosecutor, i.e. they can request prosecution in cases where the public prosecutor has decided not to prosecute and not to open an investigation. This is, for instance, the case in Austria, Finland, Luxembourg,²³⁴² and Poland.²³⁴³ In some common law jurisdictions, like the United Kingdom and Ireland, any private individual can bring a “private prosecution” by presenting information to a magistrate asserting that a criminal offence occurred; the magistrate can then either issue a summons to the defendant to appear or an arrest warrant. One of the objectives of such a mechanism is to ensure that, in cases of urgency, a suspect does not escape from the jurisdiction.²³⁴⁴

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With regard to international crimes, as will be discussed in subsection D, state practice shows that victims have played an important role in the exercise of universal jurisdiction cases, either by simple denunciation or by the use of the mechanism of *constitution de partie civile* or an “*acción popular*”, when such mechanisms are available.²³⁴⁵ A number of high profile cases, including cases against former Vichy government officials in France, and against Augusto Pinochet and Hissène Habré, were initiated by victims.²³⁴⁶ Other examples of cases initiated by victims include the Chilean and Argentinean cases in Spain, the Rwandan Cases in France, and the many universal jurisdiction cases in Belgium.²³⁴⁷

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NGOs play an important role in supporting victims to bring actions before courts. In France, for instance, the *Fédération internationale des droits de l'homme* (FIDH) and the *Ligue des droits de l'homme* (LDH) have played a key role in a number of universal jurisdiction cases.²³⁴⁸ The Swiss organization TRIAL launches complaints before Swiss courts against suspects of international crimes who are present on Swiss territory.²³⁴⁹ A number of politically-sensitive cases were brought by victims before national courts with the help of NGOs. The

²³⁴² See FIFDH and Redress, *Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union*, December 2010, at 41.

²³⁴³ See Art. 55 para.1 Polish Penal Procedure Code.

²³⁴⁴ FIFDH and Redress, *supra* note 2342, at 43.

²³⁴⁵ See Reydam, *Universal Jurisdiction: International and Municipal Perspectives*, at 221; Van der Wilt, ‘Sadder but Wiser? NGOs and Universal Jurisdiction for International Crimes’, 13(2) *Journal of International Criminal Justice* (2015) 237-243.

²³⁴⁶ See R. Brody, ‘Bringing a Dictator to Justice: The Case of Hissène Habré’, 13 *Journal of International Criminal Justice* (2015) 209-217; B. McGonigle Leyh, ‘Victim-Oriented Measures at International Criminal Institutions: Participation and its Pitfalls’, 12 *International Criminal Law Review* (2012) 375-408.

²³⁴⁷ See O. Bekou, ‘Doing Justice for the Liberian Victims of Mass Atrocity: NGOs in Aid of Universal Jurisdiction’, *Journal of International Criminal Justice* (2015) 1-5.

²³⁴⁸ For instance, in the *Ould Dah* case and in the *Brazzaville Beach* case against Congolese officials.

²³⁴⁹ See TRIAL (website: <http://www.trial-ch.org/en/activities/litigation/trials-cases-in-switzerland.html>).

Center for Constitutional Rights – a non-profit legal organization based in the USA – has also brought many complaints against high-ranking US officials in Germany, France, Canada and Spain. NGOs played the most important role in Spain because of the “*acción popular*”. The *Comite de Apoyo al Tibet* and the *Fundación Casa del Tíbet* have, for instance, filed complaints against Chinese officials in Spain in the *Tibet* case²³⁵⁰ and *Falun Gong* case.²³⁵¹ In Belgium, NGOs such as The Global Justice and Research Project and Civitas Maxima, an association based in Geneva,²³⁵² have played a crucial role in bringing cases on behalf of Liberian victims before Belgian authorities.²³⁵³

However, in recent years, there has been a trend among states to restrict the civil party prosecution mechanism in universal jurisdiction cases, either by removing the ability of victims to initiate proceedings as civil parties or by subjecting the initiation of such proceedings to the consent of an authority like the Attorney General.²³⁵⁴ Such legislative changes generally occurred following the exercise of strong diplomatic pressure by states whose officials were the object of universal jurisdiction complaints brought by victims. According to the new Spanish law on universal jurisdiction, adopted in 2014, only public prosecutors and victims may initiate criminal proceedings under universal jurisdiction; other private individuals or groups may no longer do so.²³⁵⁵

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²³⁵⁰ On the *Tibet* case, see *infra* N 789.

²³⁵¹ On 2 September 2004, a complaint was filed with the Spanish National Court accusing senior Chinese official, including Jiamg Qinglin, former chairman of the Communist Party, for torture and persecution of persons who practice Falun Gong in China, when he served as the Secretary of Beijing Municipal Party Committee in 1997 and 2002. They were indicted by the Federal Court in 2010. See <http://www.genocidepreventionnow.org/GPNSearchResults/tabid/64/ctl/DisplayArticle/mid/400/aid/151/Default.aspx> (last visited 15 May 2016).

²³⁵² <http://civitas-maxima.org/about-us.php>.

²³⁵³ See Bekou, ‘Doing Justice for the Liberian Victims of Mass Atrocity: NGOs in Aid of Universal Jurisdiction’, 13(2) *Journal of International Criminal Justice* (2015) 219-227, at 3.

²³⁵⁴ See for instance, section 3(3) of the Criminal Code of Hungary 2012. See section 3(2)(a) of the Criminal Code of Hungary 2012, available in English at http://www.academia.edu/4602286/Criminal_Code_of_Hungary_2012.

²³⁵⁵ New para. 6 of Art. 23 LOPJ gives active legal standing regarding the offences in Art. 23 § 4 LOPJ only to victims and the Prosecutor, excluding the *actio popularis* – provided for in Art. 125 of the Spanish Constitution (CE) – to activate cases involving universal jurisdiction. Although such limitation follows what seems to be the general trend in the international practice, the constitutionality of this provision is debatable, according to some scholars. See R. A. A. Fernández, ‘The 2014 Reform of Universal Jurisdiction in Spain: From All to Nothing’, 13 *Zeitschrift für Internationale Strafrechtsdogmatik* (2014), available online at http://zis-online.com/dat/artikel/2014_13_883.pdf (last visited 1 August 2017), at 718. The 2009 reform had already introduced a set of limitations. Firstly, the exercise of universal jurisdiction was limited to cases where the alleged perpetrator was in Spain or to the existence of another relevant link connecting the offence with Spain. Secondly,

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This section begins by briefly presenting the debate on the role of private parties in the initiation of universal jurisdiction proceedings (subsection B). It then goes on to examine whether any international sources provide a way forward on this issue (subsection C), before turning to the different pieces of state legislation and practice on this matter (subsection D).

B. The debate

1. *Legal mechanisms allowing private parties to initiate universal jurisdiction proceedings: the debate*

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Some see the legal mechanisms allowing victims to automatically trigger an investigation or an arrest as “important safety valves when the ordinary system of public prosecution fails to act or acts too slowly”.²³⁵⁶ This is especially important in systems where the prosecutor has discretionary powers (see *infra* Section III). The prosecutor is often “mistrusted” and civil party petition can intervene to provide a balance.²³⁵⁷ As stated by one scholar, “the power of private prosecution is undoubtedly right and necessary in that it enables the citizen to bring even the police or government officials before the criminal courts, where the government itself is unwilling to make the first move”.²³⁵⁸ Bearing this in mind, it can convincingly be argued that if, according to national criminal procedure, victims can trigger proceedings for ordinary crimes, this should, even more so, be possible for victims of the most serious crimes, that is

subsidiarity of the Spanish jurisdiction was introduced. However, Organic Law 1/2009 did not achieve all the expected results. Indeed, the Spanish decision in November 2013 to issue international arrest warrants against several former Chinese officers (among whom former President Jiang Zemin and former Prime Minister Li Peng) provoked new diplomatic tensions. Responding to the pressure exerted by China, Art. 23 LOPJ was reformed again. See Fernández, ‘The 2014 Reform of Universal Jurisdiction in Spain: From All to Nothing’, 13 *Zeitschrift für Internationale Strafrechtsdogmatik* (2014) 717-727, at 718. According to the Preamble of the Ley Organica 1/2014, the purpose of the legal modification of Art. 23 LOPJ was “to clearly delimit – with full application of the principle of legality and strengthening legal security – the occasions where the Spanish jurisdiction can investigate and try offences committed outside the sovereign territory of Spain”. Translation provided by Fernández.

²³⁵⁶ FIFDH and Redress, *Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union*, December 2010, at 41.

²³⁵⁷ See *Rapport de Jean-Claude Magendie, Célérité et qualité de la justice : La gestion du temps dans le procès*, at 115 available online at http://associations-puyricard.fr/formation/documents_divers/celerite_et_qualite_de_la_justice.pdf (last visited 1 August 2017): “cette voie procédurale, véritable contrepoids, contrepartie nécessaire du pouvoir reconnu au parquet d’apprécier l’opportunité des poursuites est justifiée”.

²³⁵⁸ G. Williams, ‘The Power to Prosecute’, *Criminal Law Review* (1955), at 599.

international crimes, which often implicate state officials.²³⁵⁹ Indeed, as one scholar rightly underlines, such mechanisms are “important precisely in cases of extraterritorial crimes where the public prosecutor might hesitate to follow up on a complaint for reasons of political expediency”.²³⁶⁰

Moreover, the possibility of private prosecution is also a solution in cases where prosecutors may tend to decide not to begin investigations as a result, for instance, of inherent practical difficulties linked to the prosecution of universal jurisdiction crimes. A private party petition system can thus not only be justified in terms of the victims’ interest but also in terms of the interest of society, thus serving as an “informal review of discretionary powers”.²³⁶¹ In addition, with respect to international crimes, the territorial state is often unable or unwilling to conduct proceedings. Universal jurisdiction then becomes a crucial tool – and often the only tool – by which victims can obtain justice and redress.²³⁶² Proponents argue that it also helps to ensure an impartial and equal application of universal jurisdiction and increases the chances of universal jurisdiction becoming a viable tool to fight impunity.²³⁶³

Some go as far as to consider the request of victims or of other entities external to the state to commence proceedings, as a *requirement* for the exercise of universal jurisdiction.²³⁶⁴ Such a requirement would provide a guarantee against the use of universal jurisdiction for political ends. Investigations and prosecutions could not be used by prosecutors as tools against states that are hostile to the state asserting jurisdiction.²³⁶⁵

On the contrary, others argue that allowing private parties to initiate prosecutions or to obtain arrest warrants may generate the risk of over-

²³⁵⁹ See F. Bellivier and D. Chilstein, ‘La difficile mise en œuvre d’une compétence pénale universelle’, *Note N°5, Fondation Jean-Jaurès/Thémis – Observatoire justice et sécurité*, 16 January 2014, at 7, available online at <https://jean-jaures.org/sites/default/files/Note-5-Th%25C3%25A9mis-ObsJustice.pdf> (last visited 1 August 2017); see D. Vandermeersch, ‘Prosecuting International Crimes in Belgium’, 3 *Journal of International Criminal Justice* (2005) 400-421, at 410.

²³⁶⁰ Reydam, *Universal Jurisdiction: International and Municipal Perspectives*, at 108.

²³⁶¹ Law Reform Commission of Canada, ‘Criminal Law: Private Prosecutions, Working Paper 52’ (1986), at 23.

²³⁶² Human Rights Watch, *Basic Facts on Universal Jurisdiction, Prepared for the Sixth Committee of the UN GA*, 19 October 2009, available online at <http://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction>.

²³⁶³ FIDH, *Victims’ Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs*, 4 May 2010, at 13.

²³⁶⁴ See ICJ, *Arrest Warrant* case, Joint Separate Opinion of Judges Higgins et al., § 59.

²³⁶⁵ Colangelo, ‘The New Universal Jurisdiction: In Absentia Signaling over Clearly Defined Crimes’, 36 *Georgetown Journal of International Law* (2005) 578-602. For the opposite view, see A. Zemach, ‘Reconciling Universal Jurisdiction with Equality Before the Law’, (2011), 47(1) *Texas International Law Journal* (2011) 143-199, at 160.

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burdening the court systems with cases that they may be ill-equipped to handle.²³⁶⁶ In particular, governments have feared the risk of abuse by “people trying to obtain an arrest warrant for grave crimes on the basis of flimsy evidence to make a political statement or to cause embarrassment”.²³⁶⁷ They have argued that universal jurisdiction should be possible only on the basis of solid evidence, “otherwise there is a risk of damaging our ability to help in conflict resolution or to pursue a coherent foreign policy”.²³⁶⁸ They argue that requiring the consent of an authority such as the prosecutor or the Attorney General is thus a reasonable restriction.²³⁶⁹

2. *The Hissène Habré case*

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Our analysis of state legislation and case law has shown that victims and the NGOs working with them play a crucial role in the prosecution of universal jurisdiction crimes. A good example in this respect is the Hissène Habré case. In July 2015, the first universal jurisdiction case ever tried in Africa began in a Senegalese courtroom. It was also the first time that one country’s courts prosecuted the former ruler of another for alleged human rights crimes. The victims’ road to obtaining some form of justice was long and complicated. Hissène Habré was President of Chad from 1982 until 1990, when he was overthrown by Idriss Déby, the current President of Chad. Idriss Déby was Commander in Chief during part of the reign of Habré. In 1990, Habré fled to Senegal, where he has been living in exile ever since. In May 1992, a National Commission of Enquiry established by President Idriss Déby reported tens of thousands of enforced disappearances, assassinations and tortures committed during the reign of Hissène Habré. However, no action was taken by Senegal until 2000, when human rights groups filed a complaint on behalf of Chadian nationals against Habré before the Regional Tribunal of Dakar. A coalition was formed, which included victims, leading human rights groups in Chad and Senegal, Human Rights Watch and the FIDH.

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Following this complaint, Habré was indicted for aiding and abetting in the perpetration of crimes of torture and crimes against humanity, and placed under house arrest. However, on 4 July 2000, the Dakar Appeals Court quashed the indictment, on the assumption that the Penal Code ignored the charges brought against Habré, and that, pursuant to the Code of Criminal Procedure, Senegalese judges could not assert jurisdiction over acts of torture committed by a foreigner abroad. Habré was released from detention and kept under

²³⁶⁶ K. Coombes, ‘Universal Jurisdiction: A Means to End Impunity or A Threat to Friendly International Relations?’, 43 *George Washington International Law Review* (2011) 419-466.

²³⁶⁷ Ministry of Justice news release, ‘New rules on universal jurisdiction’, 22 July 2010.

²³⁶⁸ *Ibid.*

²³⁶⁹ Coombes, *supra* note 2366.

surveillance. On 20 March 2001, the Senegalese Court of Cassation upheld the appellate decision.²³⁷⁰ During the same period of time, victims launched complaints, with the help of Human Rights Watch,²³⁷¹ before Belgian courts. Human Rights Watch chose Belgium based on the legal system in place at the time. An investigation was launched in Belgium led by *Juge d'instruction* Daniel Fransen, who began examinations in Chad, with the collaboration of Chadian authorities. In 2005, after three years of thorough investigation, the investigative judge issued an international arrest warrant. Belgium filed an extradition request to Senegal. However, on 25 November 2005, the Dakar Court of Appeal ruled that it had no jurisdiction to rule on the extradition request.²³⁷² The Senegalese courts also denied several other extradition requests from Belgium. In the meantime, an association of Chadian victims lodged a complaint against Senegal before the Committee Against Torture for violations of Article 5, paragraph 2, and Article 7 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter "the Convention"), ratified by Senegal. On 19 May 2006, the Committee Against Torture concluded that Senegal had violated Articles 5(2) and 7 of the Torture Convention. Senegal turned to the African Union, which in July 2006 called on Senegal to prosecute Habré "on behalf of Africa". In 2013, the Extraordinary Chambers for war crimes, crimes against humanity and torture indicted Habré. His trial for war crimes, crimes against humanity and torture started in July 2015. Over 4000 victims are participating in the proceedings as civil petitioners and are represented by lawyers. It is undeniable that had it not been for the active role and perseverance of NGOs for some 16 years, he would not be on trial today.²³⁷³

²³⁷⁰ See *Sénégal, Cour de cassation, Hissène Habré*, 20 mars 2001, available online in French at www.icrc.org.

²³⁷¹ The Chadian Association for the Promotion and Defence of Human Rights asked Human Rights Watch to help Habré's victims to bring him to justice in his Senegalese exile. See Brody, 'Bringing a Dictator to Justice: The Case of Hissène Habré', 13(2) *Journal of International Criminal Justice* (2015) 209-217, at 210.

²³⁷² See 'L'avis de la Cour d'appel de Dakar sur la demande d'extradition de Hissène Habré (extraits)', Novembre 2005; On 20 March 2001, the Senegalese Court of Cassation confirmed the ruling of the Indictment Division, stating inter alia that "no procedural text confers on Senegalese courts a universal jurisdiction to prosecute and judge, if they are found on the territory of the Republic, presumed perpetrators of or accomplices in acts [of torture] ... when these acts have been committed outside Senegal by foreigners; the presence in Senegal of Hissène Habré cannot in itself justify the proceedings brought against him". See Committee Against Torture, Communication No. 181/2001.

²³⁷³ See Brody, 'Bringing a Dictator to Justice: The Case of Hissène Habré', 13(2) *Journal of International Criminal Justice* (2015) 209-217, at 217.

3. *The role of NGOs and other non-state actors*

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NGOs have played a crucial role in the prosecution of most universal jurisdiction cases for practical as well as legal policy reasons. Without the intervention of NGOs, many universal jurisdiction proceedings would never have been initiated. State practice shows that national authorities are reluctant to exercise universal jurisdiction. The truth-finding process in universal jurisdiction cases is fraught with difficulties and the state is dependent on cooperation from other states.²³⁷⁴ Such proceedings are costly, evidence is difficult to obtain, and hearing witnesses is complicated because states do not have the legal authority to summon witnesses residing abroad to appear before their national courts.²³⁷⁵ There is also risk of creating political tensions with other states and generating a deterioration of international relations. Furthermore, prosecuting authorities are themselves already overburdened and suffering from a lack of resources. There is thus also pressure not to overburden national criminal courts, which already generally have a backlog of cases and are fighting to preserve one of the central bases of the justice system, the guarantee of a speedy trial. Moreover, prosecuting authorities have a duty to prosecute only if there is a *prima facie* case. The daily activities of national prosecuting authorities are to deal with cases where the crime has been committed on their territory. The role of the prosecution is also to determine whether there is reasonable and probable cause for prosecution and to dismiss cases if this requirement is not fulfilled. Thus, considering the very particular context of crimes committed abroad not affecting the state's interests, its citizens or its residents, it is simply unrealistic to expect prosecuting authorities to open investigations in the absence of complaints filed by victims accompanied by statements and by real and documentary evidence submitted to them. The role of victims and NGOs in gathering evidence and submitting complaints to the competent authorities is therefore essential.

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In addition to their role in prosecutions, NGOs and other human rights organizations have played a key role in the current spread of contemporary universal jurisdiction over international crimes.²³⁷⁶ Amnesty International, for instance, played a key role during the drafting of the Torture Convention, in order to persuade states to accept the proposed provision that was later used in cases like Pinochet.²³⁷⁷ They have also played a crucial role in the adoption of universal jurisdiction provisions at the national level.

²³⁷⁴ See Van der Wilt, 'Sadder but Wiser?: NGOs and Universal Jurisdiction for International Crimes', 13(2) *Journal of International Criminal Justice* (2015) 237-243, at 242.

²³⁷⁵ *Ibid.*

²³⁷⁶ M. Langer, 'Universal Jurisdiction is Not Disappearing: The Shift from 'Global Enforcer' to 'No Safe Haven' Universal Jurisdiction', 13(2) *Journal of International Criminal Justice* (2015) 1-12, at 8.

²³⁷⁷ *Ibid.*

However, as we will see in the following section, NGO activism has also paradoxically led to the “fall” of universal jurisdiction²³⁷⁸ especially in Belgium and Spain. The filing of numerous claims against high-level political leaders such as US officials in Spain and Belgium have – to some extent – contributed to the very restrictive statutes adopted by said states following political pressure. The reason they amended their statutes is mainly because of the high political costs of universal jurisdiction prosecutions against “high-cost defendants”.²³⁷⁹ As one author rightly points out, human rights advocates and groups did not create this structure of incentives.²³⁸⁰ However, in our view, a clear distinction needs to be made between, on the one hand, the activities of lobbying, political activism, medialization and public awareness in which human rights associations are engaged and, on the other, the issuance of a formal criminal complaint. The basis of due process and human rights on which any criminal procedure at the national level is based is the presumption of innocence. In this respect, it therefore does not appear acceptable to publish on the Internet and largely mediatize criminal complaints that are filed on behalf of victims. While a trial is indeed public, the respect for the presumption of innocence is the essential foundation upon which all criminal systems are built. Without it, the entire credibility of the justice system is at stake. Furthermore, unlike the other activities mentioned above, the main goal of national criminal justice systems is to determine whether a suspect of a crime is guilty and, if this is the case, punish the author of this crime. A criminal complaint, the opening of investigations and the prosecution of suspects can and should only have the goal of convicting a person. Put differently, the criminal justice system cannot be a means to achieve a political goal or to promote the awareness of the general population. Its goal is to provide justice and where national law allows it, reparation to victims. It is our contention that when universal jurisdiction is used for purposes other than the prosecution and conviction of a person, the filing of complaints is counter-productive. For instance, if an NGO knows that another state official will never be prosecuted because they enjoy immunity, there is no sense in initiating a claim against that person. As will be shown below, before a complaint is filed, a careful examination of the legal conditions set out by state legislation is needed. It may sometimes merely be a matter of picking battles more carefully. Claims should not only be documented by sufficient credible evidence, but they should also only be filed if the forum state’s legal requirements are fulfilled, i.e. if the person doesn’t enjoy immunity, if he will be present at some point on the territory of the state, etc. Largely mediatized complaints against high-level political actors who enjoy immunity at the national level undermine the credibility of the criminal justice systems. Such accusations should remain in reports and in political arenas. If a case has no chances of going to trial because

²³⁷⁸ *Ibid.*

²³⁷⁹ *Ibid.*

²³⁸⁰ *Ibid.*

of legal impediments, rather than obtaining redress, victims may feel that they are merely being used as a political tool.

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Having said this, it is important to keep in mind that in all national systems, if victims or other private parties make politically motivated or flimsy applications not supported by evidence, judges will likely reject such claims. In the United Kingdom, for instance, arrest warrants are not issued by a judge unless there are “reasonable grounds to suspect” that an offence has been committed. Likewise, investigations will not be initiated in France, Belgium or Spain, unless there is sufficient evidence that a crime has been committed. As will be shown below, national judges have in fact rejected the vast majority of the claims made by victims on the basis of universal jurisdiction. It therefore appears that the recent trends restricting the private party initiation of universal jurisdiction proceedings are less of a response to what some have called “judicial tyranny”²³⁸¹ and rather a way for governments to exercise a form of control over the decisions of the judiciary, in order to preserve international relations.

C. The role of victims in universal jurisdiction proceedings according to international law

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The role of victims in the initiation of a universal jurisdiction prosecution mainly depends on national legislation. From an international viewpoint, the issue of private prosecutions in universal jurisdiction cases is mainly addressed from the perspective of the victims’ right to an effective remedy. Set out in Article 8 of the Universal Declaration of Human Rights, the right to an effective remedy was further developed in Article 2(3) of the ICCPR. According to this provision, victims have the right to have their claims determined by a competent authority.²³⁸² The Convention Against Torture also contains a specific provision according to which “Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible”. Article 4 of the Torture Convention requires state parties to “ensure that all acts of torture as well as attempts to commit torture and any act by any person which constitutes complicity or participation in torture” are offences under its criminal law. The right to an effective remedy implies the requirement

²³⁸¹ H. Kissinger, ‘The Pitfalls of Universal Jurisdiction’, *Foreign Affairs* (July/August 2001).

²³⁸² See Art. 14 of the Convention Against Torture. The rights of victims of international crimes are also enumerated in the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law. Under these principles, the victims’ rights include (i) equal and effective access to justice, (ii) adequate and effective reparation for harm suffered and (iii) access to information concerning the violation and the available reparation mechanism(s).

to investigate allegations of human rights violations in order to establish if a violation has occurred.²³⁸³

The rights of victims of international crimes are also enumerated in the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law. Under these principles, the victims' rights include (i) equal and effective access to justice, (ii) adequate and effective reparation for harm suffered, and (iii) access to information concerning the violation and the available reparation mechanism(s). They also include the duty to make appropriate provisions for universal jurisdiction (principle 5).²³⁸⁴

However, it is interesting to note that most international advisory documents on universal jurisdiction are silent on the role of private parties in the initiation of universal jurisdiction proceedings. They do however address most of the other issues and obstacles related to the exercise of universal jurisdiction – such as the presence requirement, the application of the subsidiarity principle, amnesties and immunities. Thus, for instance, neither the *Princeton Principles*, nor the *Resolution of the Institut de Droit International* addresses this matter. The recent *AU-EU Expert Report on the Principle of Universal Jurisdiction* makes no provision either.

Judges Higgins, Kooijmans and Buergenthal addressed the issue of the initiation of universal jurisdiction proceedings by victims in their joint separate opinion in the *Arrest Warrant* case. In this opinion, they underline the importance of the role of victims and appear to say that one of the conditions underpinning the exercise of universal jurisdiction is the request of the persons concerned, namely the victims.²³⁸⁵ According to the judges:

the desired equilibrium between the battle against impunity and the promotion of good inter-State relations will only be maintained if there are some special circumstances that do require the exercise of an international criminal jurisdiction and if this has been brought to the attention of the prosecutor or *juge d'instruction*. For example,

²³⁸³ R. Crawshaw and L. Holmström, *Essential Cases on Human Rights for the Police: Reviews and Summaries of International Cases* (Lediën: Martinus Nijhoff, 2006), at 9.

²³⁸⁴ See *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, New York, 16 December 2005, Audiovisual Library of International Law.

²³⁸⁵ See also Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case', 13(4) *European Journal of International Law* (2002) 853–875, at 856, footnote 8.

persons related to the victims of the case will have requested the commencement of proceedings.²³⁸⁶

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At the European level, France was unanimously convicted by the European Court of Human Rights on 8 June 2004 of violating Article 6, § 1 of the Convention – due to the excessive length of the proceedings – and Article 13 of the Convention – due to the lack of effective remedy, following a complaint lodged by one of the plaintiffs, Yvonne Mutimura, a Rwandan genocide victim.²³⁸⁷ The Court held that French courts had violated the plaintiff's right to be heard promptly. Indeed, nine years after the complaint was lodged against Wenceslas Munyeshyaka, a Rwandan priest suspected of participating in the genocide and residing in France since 1994, investigations in France were still not completed. In an "*Ordonnance de non-lieu*" of October 2015, the French judiciary decided to drop the case. There has been a strong outcry from the relevant civil parties, namely eleven individuals and five associations representing Rwandan victims including International Federation for Human Rights (FIDH), *Survie*, the Collective of Civil Parties for Rwanda (CPCR), the League for Human Rights, and the International League Against Racism and Antisemitism (Licra).²³⁸⁸

D. State practice

1. Introductory remarks

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The victims' access to justice through universal jurisdiction largely depends on the national system. In common law countries, the role of victims is generally limited to providing information or evidence of the crime. In some common law states, such as the United Kingdom, it is possible for the victim to initiate a private prosecution, but the victim bears the costs of the investigation, and potentially the costs of the prosecution, if it fails; this option is rarely used.²³⁸⁹ More generally, in systems that do not allow victims to participate as *parties civiles*, victims can file complaints and submit evidence but they generally have no way to challenge the decision of the prosecuting authorities not to investigate. In civil law countries, victims can sometimes initiate proceedings by becoming *parties civiles* and also have the possibility to pursue a complaint, thereby increasing the chances of having it investigated. This has been especially

²³⁸⁶ See ICJ, *Arrest Warrant* case, Joint Separate Opinion of Judges Higgins et al., § 59.

²³⁸⁷ See ECtHR, *Mutimura c. France*, No 46621/99, 8 June 2004.

²³⁸⁸ See CPCR, 'Affaire Munyeshyaka : et si le "Mécanisme" reprenait le dossier', available online at <http://www.collectifpartiescivilesrwanda.fr/affaire-munyeshyaka-et-si-le-mecanisme-reprenait-le-dossier/> (last visited 1 August 2017).

²³⁸⁹ FIDH, 'Victims' Rights Before the ICC', available online at https://www.fidh.org/IMG/pdf/4-CH-I_Background.pdf (last visited on 1 August 2017), at 10.

true in some European countries such as Belgium, France and Spain, where victims have the possibility to directly submit complaints on the basis of universal jurisdiction to a judge; this power has been essential to the initiation of prosecutions in Europe. Before the introduction of legal amendments limiting the ability of victims and other private parties to initiate universal jurisdiction proceedings, victims did not have to rely on the decision of the prosecuting authorities to pursue a complaint based on universal jurisdiction. The following section will examine four states to illustrate the debate regarding the role of victims in universal jurisdiction prosecutions.

2. *Belgium*

The first State to limit the ability of private parties to initiate universal jurisdiction proceedings was Belgium. In 2003, following the filing of complaints against US and Israeli political leaders and the considerable diplomatic pressure that ensued, Belgium amended its law to eliminate the ability of victims and other organizations to initiate proceedings as civil parties. Under ordinary Belgian procedural law, investigative judges are charged with investigations of serious offences,²³⁹⁰ which may be initiated either at the request of a prosecutor or at the request of victims. As in other civil law countries, the possibility of civil party petition is one of the basic tenets of Belgian criminal procedure.²³⁹¹ Under the 1993 law, victims of international crimes had the right of civil party petition in the same way as victims of common crimes. Until 2003, victims made an extensive use of this right by filing numerous complaints before the investigative judges. In fact, most of the universal jurisdiction proceedings which took place in Belgium after 1993 were the result of complaints filed by civil petitioners; notwithstanding, the prosecution did join the civil petitioners in a number of cases.²³⁹²

However, since the enactment of the 2003 Act, the decision as to whether to initiate a case for crimes committed by foreign nationals outside of Belgium rests solely in the hands of the Federal Attorney General. On the appeal of two Belgian human rights organizations against the 2003 Act, the Belgian Constitutional Court (*Cour d'arbitrage*) rendered a decision on 23 March 2005, in which it ruled that this difference in treatment between victims of international crimes and victims of "ordinary crimes" was not contrary to the Belgium Constitution or the European Convention on Human Rights, because the

²³⁹⁰ See Art. 55 of the Belgium *Code d'instruction criminelle*.

²³⁹¹ C. Ryngaert, 'Belgian Constitutional Court partially annuls downsized War Crimes Act', case commentary for the Institute of International Law, available online at <http://www.law.kuleuven.be/iir/nl/onderzoek/opinies/CR23032005.pdf> (last visited 1 August 2017).

²³⁹² See Vandermeersch, 'Prosecuting International Crimes in Belgium', 3 *Journal of International Criminal Justice* (2005) 400-421, at 409.

legislator was allowed to limit universal jurisdiction prosecutions in the country.²³⁹³

3. France

809 In France, like in Belgium, investigative judges are charged with investigations of serious offences, but cannot themselves initiate investigations. There are two ways in which an investigative judge may be prompted to initiate a formal investigation.²³⁹⁴ Firstly, prosecutors may make such requests at their own discretion (see *infra* on prosecutorial discretion). Secondly, investigative judges can initiate proceedings if a victim²³⁹⁵ or an association²³⁹⁶ lodges a complaint. Article 2-4 of the Code of Criminal Procedure allows associations whose goal is to combat crimes against humanity or war crimes and to exercise the rights granted to the civil party in respect of said crimes. However, in 2010, the French Senate inserted Article 689-11 into the Code of Criminal Procedure, which states *inter alia* that prosecution in universal jurisdiction cases can only take place at the request of the prosecutor. Victims and associations can therefore no longer trigger universal jurisdiction proceedings.

810 It is interesting to note that a filter mechanism was already established in 2007 in order to avoid abusive complaints from civil petitioners and to ensure the speediness of French criminal justice in general.²³⁹⁷ Private complainants had to prove that the prosecutor had expressly stated that he would not institute proceedings or that there has been a three-month period since the complaint was made.²³⁹⁸ However, this mechanism is specifically limited to misdemeanors (*délits*) and is not applicable to crimes. Critics have considered it to be illogical that just a few years later the possibility for victims of the most serious crimes to initiate prosecution directly was removed in French law, granting a monopoly over prosecutions to the public prosecutor.²³⁹⁹

²³⁹³ See Belgium, Constitutional Court (*Cour d'arbitrage*), Arrêt n°62/2005 du 23 mars 2005, B.7.1.-B.7.4.

²³⁹⁴ Art. 10 of *Titre préliminaire du Code de procédure pénale*.

²³⁹⁵ See Art. 1 of the French Code of Criminal Procedure according to which "prosecution may also be initiated by the injured party under the conditions determined by the present Code" and Art. 85, § 1 of the French Code of Criminal Procedure.

²³⁹⁶ See Arts 2-1 to 2-20 of the French Code of Criminal Procedure.

²³⁹⁷ See France, *Assemblée Nationale, Rapport de la commission des lois sur le projet de loi tendant à renforcer l'équilibre de la procédure pénale* (n°3393) (M. Guy Geoffroy), N° 3505, 6 December 2006, at 172 : "le projet de loi propose des dispositions propres à lutter contre les recours dilatoires et les plaintes avec constitution de partie civiles abusives".

²³⁹⁸ See Art. 21 de la *Loi n° 2007-291 du 5 mars 2007 tendant à renforcer l'équilibre de la procédure pénale* and Art. 85, § 2 of the French Code of Criminal Procedure.

²³⁹⁹ See *Coalition française pour la Cour pénale internationale*, 'Those Accused of International Crimes Must Be Tried in France at Last', available online at <http://www.iccnw.org/documents/>

Adopted in 2010, Article 689-11 expressly states that the prosecution of universal jurisdiction cases concerning crimes of genocide, crimes against humanity and war crimes, can only take place at the request of the prosecutor; victims cannot trigger proceedings as *parties civiles*.²⁴⁰⁰ As one commentator stated, such a monopoly constitutes a “radical break with French penal and legal tradition”.²⁴⁰¹ Furthermore, it is victims of crimes who have initiated most of the universal jurisdiction cases investigated in France. This was the case for instance in the *Ould Dah* case, that will be discussed *infra*. The *Khaled Ben Saïd* case is another universal jurisdiction case that was tried in France with the help of the *Ligue française des droits de l’Homme et du Citoyen* (LDH) and the *Fédération internationale des Ligues des droits de l’Homme* (FIDH), both of which, alongside the victim, initiated proceedings as *parties civiles*. In May 2001, a Tunisian national living in France lodged a complaint against Khaled Ben Saïd, a former head of the police in Djendouba, Tunisia, for acts of torture committed against her in 1996. The complaint was lodged after she learned that Khaled Ben Saïd was on French soil in his capacity as Vice-Consul of the Tunisian Delegation in Strasbourg.²⁴⁰² On 16 January 2002, a formal investigation was opened against Ben Saïd for torture and, since he was not found at the family home, an international arrest warrant was issued against him on 15 February 2002; the Tunisian authorities did not execute the arrest warrant. It was only on 16 February 2007 that the French *Cour d’assises* delivered an *ordonnance de mise en accusation*, formally accusing him of acts of torture in respect of Articles 222-1 and 222-3 of the French Penal Code and the Torture Convention.²⁴⁰³ With regard to the presence requirement, the decision stated that the presence of the suspect at the moment when the complaint was lodged is sufficient to exercise universal jurisdiction.²⁴⁰⁴ Khaled Ben Saïd was convicted *in absentia* on 15 December 2008 for torture and was sentenced to eight years’ imprisonment.²⁴⁰⁵ The prosecutor, who had requested an acquittal, lodged an appeal based on the lack of sufficient evidence in the case. The *Meurthe-et-Moselle Cour d’assises* raised the sentence to twelve years’ imprisonment on 24 September 2010.

Those_accused_of_international_crimes_must_be_tried_in_France_at_last.pdf (last visited 1 August 2017).

²⁴⁰⁰ See Art. 8 of the *Loi d’adaptation à la Cour pénale internationale*, adopted on 9 August 2010 and Art. 689-11 of the French Code of Criminal Procedure.

²⁴⁰¹ *Coalition française pour la Cour pénale internationale*, *supra* note 2399.

²⁴⁰² FIDH, ‘The Conviction of Khaled Ben Saïd: A victory against impunity in Tunisia’, at 5.

²⁴⁰³ France, *Tribunal de Grande Instance de Strasbourg, Ordonnance de mise en accusation, Affaire Ministère public c/ Khaled Ben Saïd*, 16 February 2007.

²⁴⁰⁴ *Ibid.*

²⁴⁰⁵ France, *Cour d’assises du Bas-Rhin, Arrêt criminel par défaut, Affaire Ministère public c/ Khaled Ben Saïd*, 15 December 2008.

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A great number of individuals suspected in the Rwandan genocide fled to France post-1994 and have lived there ever since, generally under false identities. There are some 25 genocide-related cases currently pending before French authorities. Although some suspects had previously been arrested and indicted, it was only in 2014 – 20 years after the genocide – that a suspect was actually put on trial. Pascal Simbikangwa, a former Rwandan army and intelligence chief, was accused of arming and instructing the extremist militias and the Rwandan army at roadblocks in Rwanda during the genocide. He faced charges of complicity in genocide and complicity in crimes against humanity, and was condemned to 25 years in prison as an instigator and author of the Rwandan genocide. The trial is of major significance – judicially and diplomatically, but also symbolically – for France, which has been criticized for its role in the genocide and for harboring its perpetrators in the 20 years since, largely because it has systematically refused to extradite suspects to Rwanda. This achievement is predominantly due to a long and hard-fought campaign initiated by a coalition of NGOs to bring justice to the victims of what is considered to be one of the most horrible genocides of the 20th century.

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The National Consultative Commission of Human Rights (*“Commission nationale consultative des droits de l’homme”*) has stated that the monopoly accorded to the public prosecutor constitutes a violation of the victims’ rights to an effective remedy.²⁴⁰⁶ It has also been argued that it constitutes a violation of the principle of equality of citizens before the law, because under current French law, while victims of torture have access to a judge on the basis of Article 689 of the French Code of Criminal Procedure, victims of genocide and crimes against humanity do not.²⁴⁰⁷

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Despite these criticisms, the new proposed Article 689-11 of the French Code of Criminal Procedure – adopted by the French Senate on 26 February 2013 but not yet adopted by the National Assembly – maintains the monopoly held by the public prosecutor.²⁴⁰⁸ One of the reasons invoked for this approach is the possible risk of abusive procedures that would affect international relations.

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If this restriction is to be maintained, the 2011 law would come to have important practical consequences, as thus far, it is the victims who have initiated all universal jurisdiction cases investigated in France. In fact, one commentator has recently noted that no complaint has ever been made in France against a

²⁴⁰⁶ *Commission nationale consultative des droits de l’homme, Avis sur la loi portant adaptation du droit pénal à l’institution de la Cour pénale Internationale*, 6 November 2008.

²⁴⁰⁷ *Coalition française pour la Cour pénale internationale*, ‘Those Accused of International Crimes Must be Tried in France at Last’.

²⁴⁰⁸ See *Assemblée nationale, Proposition de loi adoptée par le Sénat tendant à modifier l’article 689-11 du code de procédure pénal relatif à la compétence territoriale du juge français concernant les infractions visées par le statut de la Cour pénale internationale*, 26 February 2013, available online at <http://www.assemblee-nationale.fr/14/pdf/propositions/pion0741.pdf> (last visited 20 May 2017).

suspect of international crimes on the initiative of a prosecutor.²⁴⁰⁹ According to the *Coalition française pour la Cour pénale internationale*, “one cannot fail to notice that French public prosecutors have not played, in this respect, their role as defenders of public interest, notably by refusing to initiate prosecution for crimes of which the seriousness affects the core of humanity itself”.²⁴¹⁰

Indeed, the two famous cases that have led to convictions in France based on universal jurisdiction were initiated by private petitioners. The first case concerned an intelligence officer, Captain Ely Ould Dah, accused of committing acts of torture against black African members of the military of the former French colony of Mauritania. He was arrested and indicted following the complaints of two NGOs. Mauritania responded by expelling French military advisers, recalling Mauritanian officers undergoing training in France and imposing visa requirements on French citizens. After the French authorities released Ould Dah, he fled the country and was finally convicted *in absentia* by the French courts. The second is the case of Khaled Ben Saïd discussed above.

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Conversely, despite the presence of many suspected Rwandan *génocidaires* in France, the country where many fled in 1994, it was only in 2014 that the very first trial of a Rwandan genocide suspect took place in France. Pascal Simbikangwa was the former head of the Rwandan *Service Central de Renseignement* and captain of the Presidential Guard and had been living in France since 1995.²⁴¹¹ He was convicted for complicity in genocide and complicity in crimes against humanity and sentenced to 25 years in prison.

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Another Rwandan case has however outraged a number of associations including the FIDH and LDH.²⁴¹² On 2 October 2015, the French courts dismissed the *Munyeshaka* case, in respect of which the European Court of Human Rights had convicted France for lack of evidence. Munyeshaka had been indicted by the ICTR in 2005 but the Court decided to refer the case to the French courts. Munyeshaka was charged in France with genocide, crimes against humanity and acts of torture and barbaric acts committed in 1994. As underlined by a scholar, the suppression of the possibility for victims to trigger proceedings in cases of international crimes provided by the 2010 Statute “*prive*,

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²⁴⁰⁹ See F. Bellivier, ‘Compétence universelle : De quoi nos gouvernants ont-ils peur ?’, in Bellivier/Chilstein, *La difficile mise en œuvre d’une compétence pénale universelle (Note N°5, Fondation Jean-Jaurès/Thémis – Observatoire justice et sécurité*, 16 January 2014), at 7.

²⁴¹⁰ See *Coalition française pour la Cour pénale internationale*, ‘Those Accused of International Crimes Must Be Tried in France at Last’.

²⁴¹¹ On this case, see *supra* N 779.

²⁴¹² See FIDH, ‘The Wenceslas Munyeshyaka case dismissed – The victims deserve a trial!’, available online at <https://www.fidh.org/en/region/Africa/rwanda/the-wenceslas-munyeshyaka-case-dismissed-the-victims-deserve-a-trial> (last visited 1 August 2017).

en pratique, la compétence universelle de son efficacité à l'égard des crimes les plus graves".²⁴¹³

4. Spain

819 In Spain, as in Belgium and France, investigating judges are in charge of investigations of serious offences including international crimes. There are three ways in which a Spanish investigating judge may initiate an investigation. Firstly, the prosecutor may request the investigative judge to investigate an offence. Secondly, the investigation can be initiated on the investigative judge's own motion, through his direct knowledge of the facts.²⁴¹⁴ Finally, any private party, who expresses his or her will to participate in the proceedings (*querrela*), can initiate proceedings.²⁴¹⁵ In addition to the victim of the crime, every Spanish citizen – or association²⁴¹⁶ – has the right to initiate criminal proceedings, even if they are not directly affected by the offence.²⁴¹⁷ This so-called "*acción popular*" (popular action or people's action) is provided for in the Spanish Constitution.²⁴¹⁸ The private party has the right to obtain a written decision from the investigating judge. Thus, the public prosecutor does not have a monopoly over prosecution even in cases concerning international offences. Every Spanish citizen, in addition to the victim of the crime (who does not need to be a Spanish citizen), can therefore situate himself as the accusing party.²⁴¹⁹

820 In order to limit the complaints – since persons who do not have a link to the offence can lodge complaints – the person exercising an *acción popular* must

²⁴¹³ De La Pradelle, 'La compétence universelle', in Ascencio et al. (s.l.d.), *Droit international pénal* (Paris: Pedone, 2000) 905 ff., at 1007 ff.

²⁴¹⁴ L. Bachmaier and A. del Moral García, 'Spain', in Verbruggen/Franssen, *International Encyclopaedia of Criminal Law*, Criminal Law – Suppl. 46 (October 2012), at 219, § 434.

²⁴¹⁵ Art. 270 and ff. of the Spanish Code of Criminal Procedure.

²⁴¹⁶ See Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes', 105(1) *The American Journal of International Law*, (January 2011) 1-49, at 33, and Spanish Constitutional Court, Judgment, 241/1992, 21 December 1992.

²⁴¹⁷ According to Art. 270 of the Spanish Code of Criminal Procedure, "*Todos los ciudadanos españoles, hayan sido o no ofendidos por el delito, pueden querellarse, ejercitando la acción popular establecida en el artículo 101 de esta Ley.*"

²⁴¹⁸ See Art. 125 of the Spanish Constitution; see also Art. 101 of the Spanish Code of Criminal Procedure.

²⁴¹⁹ See Art. 270 of the Spanish Code of Criminal Procedure states: "*Todos los ciudadanos españoles, hayan sido o no ofendidos por el delito, pueden querellarse, ejercitando la acción popular establecida en el artículo 101 de esta Ley. También pueden querellarse los extranjeros por los delitos cometidos contra sus personas o bienes o las personas o bienes de sus representados, previo cumplimiento de lo dispuesto en el artículo 280, si no estuvieren comprendidos en el último párrafo del 281.*"

make a deposit for the legal costs proportionate to the allegation made.²⁴²⁰ This provision does not apply to the victims of international crimes.²⁴²¹ Moreover, Article 20(3) of the Law on the Judiciary specifies that “[g]uarantees or deposits shall not be required when, due to their inappropriateness, they prevent the exercise of a class action, which will always be free”.²⁴²² The Constitutional Court has held that the amount of the indemnity must be proportionate to the assets of the people.²⁴²³ It must be noted that if a case is finally dismissed for lack of evidence or because the alleged conduct does not constitute a crime, the “private” and “public” complainants can be criminally prosecuted.²⁴²⁴

The analysis of Spanish practice shows that while private claimants have brought hundreds of universal jurisdiction cases before the judiciary, a large majority of them did not go to trial. In fact, one of the few people who have actually faced trial in Spain on the basis of universal jurisdiction is Adolfo Scilingo, a former Argentine Navy Officer convicted for crimes against humanity committed in Argentina between 1976 and 1983.²⁴²⁵ A number of cases were ongoing since before the 2009 and 2014 legislative amendments. With regard to practice before the legislative amendments, one commentator underlines that, in practice, the Spanish public prosecutor did not generally file complaints regarding international crimes; rather he limited himself to supporting proceedings in respect of such crimes, as initiated by private citizens.²⁴²⁶

The 2009 amendment to Spanish law narrowed the application of the universality principle by limiting it to cases in which Spain has a relevant connecting link. However, unlike other states, the amendment did not restrict the rights of private parties to initiate investigations. The most recent amendment, adopted by Spain in 2014, however, considerably restricts the exercise of universal jurisdiction, not only by limiting it to cases in which the defendant is a Spanish citizen or resident, but also by excluding the ability of a private party to initiate proceedings – the “*acción popularis*” – on the basis of the universality principle. It is noteworthy that this reform was proposed by the government just two months after a Spanish court issued international arrest

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²⁴²⁰ Rojo, ‘National Legislation Providing for the Prosecution and Punishment of International Crimes in Spain’, 9 *Journal of International Criminal Justice* (2011) 699-728, at 710; Art. 280 of the Spanish Code of Criminal Procedure states: “*El particular querellante prestará fianza de la clase y en la cuantía que fijare el Juez o Tribunal para responder de las resultas del juicio.*”

²⁴²¹ rt. 281 of the Spanish Code of Criminal Procedure.

²⁴²² The original Spanish text of Art. 20(3) of the Law on the Judiciary states: “No podrán exigirse fianzas que por su inadecuación impidan el ejercicio de la acción popular, que será siempre gratuita.”

²⁴²³ See Langer, *supra* note 2416, at 33, note 211 and the decisions cited.

²⁴²⁴ Rojo, *supra* note 2420, at 710.

²⁴²⁵ See *supra* N 370 ff.

²⁴²⁶ Rojo, *supra* note 2420, at 709.

warrants against former Chinese President Jiang Zemin and other senior Chinese officials over alleged acts of genocide, crimes against humanity, torture and terrorism committed in Tibet in the 1980s and 1990s. The alleged crimes included massive campaigns of sterilization, the transfer of Chinese migrants into Tibet, control over religious activities, arbitrary detention and torture of dissidents (the “*Tibet case*”).²⁴²⁷ Indeed, the new bill applies not only to future but also to current investigations. There were some 12 cases under the 2009 universal jurisdictional provision pending in Spanish courts,²⁴²⁸ and presumably they will all be dismissed or “disappear” under this new amendment; this would include the politically sensitive cases concerning China's former leaders.²⁴²⁹

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On 23 June 2014, the Criminal Chamber of the Spanish National Court dismissed the *Tibet case*, considering that under the new Spanish legislation, Spanish courts did not have jurisdiction to investigate and judge the crimes committed in Tibet because the defendants were neither Spanish nationals or residents nor foreigners whose extradition had been denied by the Spanish authorities.²⁴³⁰ The “*Comite de Apoyo al Tibet*”, the organization that led the initial complaint in 2005, along with the plaintiffs, lodged an appeal based on charges of terrorism – given that terrorism was not one of the crimes affected by the Spanish legal reform – and based on the Spanish nationality of one of the victims.

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On the contrary, on 21 May 2014, the Spanish National Court found that the *Guatemalan genocide case* – concerning the killing and enforced disappearances between 1960 and 1996 of some 200,000 people belonging to the “Mayan” population – could proceed before the Spanish courts based on the charges of terrorism that had been brought.

5. *England and Wales*

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In England and Wales, prior consent of the Attorney General – a government minister – is required before the prosecution of serious offences, including universal jurisdiction offences, can go ahead. One of the rationales underlying

²⁴²⁷ See TRIAL, *Universal Jurisdiction Annual Review 2015*, p. 35.

²⁴²⁸ See Duane W. Krohnke, ‘Amending Spain’s Universal Jurisdiction Statute’, *Dwkcommentaries*, 14 February 2014, available online at <http://dwkcommentaries.com/2014/02/14/amending-spains-universal-jurisdiction-statute/>.

²⁴²⁹ A group of seventeen human rights organizations have sent a letter to the Spanish parliament urging them to reject the bill; ‘Spanish Lawmakers Should Reject Proposal Aimed at Closing the Door on Justice for the Most Serious Crimes’, 10 February 2014, available online at http://www.hrw.org/sites/default/files/related_material/NGO_joint_statement_UJreform_Spain%20%28EN%29.pdf (last visited 1 August 2017).

²⁴³⁰ See TRIAL, *Universal Jurisdiction Annual Review 2015*, at 35.

this rule is the prevention of “abuse or bringing the law into disrepute, because the offence is a kind which may result in vexatious private prosecutions” and to “ensure that prosecution decisions take account of important considerations of public policy or international nature”.²⁴³¹ However, according to section 25 of the Prosecution of Offences Act 1985, the absence of the Attorney General’s consent does not prevent the arrest of an individual or the remand of a person charged with an offence.²⁴³² Thus, until 2011 (when legislative amendments were introduced), while a universal jurisdiction case could not go to trial without the Attorney General’s consent, private individuals could nevertheless trigger arrest warrants as long as magistrates agreed.²⁴³³ The ability of private individuals to obtain arrest warrants from members of the judiciary therefore lessened the extent of government control over these proceedings.²⁴³⁴

An arrest warrant was issued in 2005 against Doron Almog, a former Major General in the Israel Defense Forces, following an application by Palestinian victims, based on section 25 of the Prosecution of Offences Act 1985, for alleged war crimes committed in Gaza in 2002. Similarly, in 2009, a British Court issued an arrest warrant against Israeli Foreign Affairs Minister Tzipi Livni for alleged war crimes. Following strong political pressure from Israel and the degradation of relations between the United Kingdom and Israel after the issuance of the arrest warrant, the UK government expressed its concern “about the implications for the United Kingdom’s relations with other States”.²⁴³⁵ The Ministry of Justice thus suggested legislating in order to restrict the right to prosecute universal jurisdiction offences to the Crown Prosecution Service only, thereby removing the right of private prosecutors to directly obtain arrest warrants from magistrates.

On 15 September 2011, the “Police Reform and Social Responsibility Act” was enacted, which inter alia requires the consent of the United Kingdom’s Director of Public Prosecutions – who is the head of the United Kingdom’s Crown Prosecution Service – before a UK court can issue a privately sought arrest warrant for universal jurisdiction offences. The enactment of the “Police Reform and Social Responsibility Act” drew a distinction between universal jurisdiction proceedings and proceedings for ordinary crimes. In the latter case, while the consent of the Attorney General is required for prosecution, arrests

²⁴³¹ See The Crown Prosecution Service, ‘Consents to Prosecute’, available online at http://www.cps.gov.uk/legal/a_to_c/consent_to_prosecute/ (last visited 1 August 2017).

²⁴³² See online at <http://www.parliament.uk/documents/documents/upload/arrest-warrant-universal-jurisdiction.pdf>.

²⁴³³ Langer, ‘The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes’, 105(1) *The American Journal of International Law*, (January 2011) 1-49, at 16.

²⁴³⁴ *Ibid.*

²⁴³⁵ Ministry of Justice, ‘Written Ministerial Statement: Arrest warrants – universal jurisdiction’.

are possible without such consent. In the former case however, the consent of the United Kingdom's Director of Public Prosecutions must be obtained before a UK court can issue a privately sought arrest warrant.

6. *United States*

828 The United States have statutory jurisdiction to prosecute perpetrators for torture, genocide, or use of child soldiers committed abroad by a non-United States citizen against a non-United States citizen.²⁴³⁶ However, it is not possible, due to lack of statutory jurisdiction, to bring criminal proceedings for war crimes unless the crimes were committed against a US citizen within the United States. Criminal prosecutions based on universal jurisdiction have been extremely rare and the United States have a preference for using immigration laws to remove suspects of serious international crimes from the country. However, the Alien Tort Statute – a provision in the 1789 Judiciary Act – gives US courts jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”.²⁴³⁷

829 In the landmark case *Filartiga v. Peña-Irala*, a US court held that two Paraguayan citizens could sue another Paraguayan citizen for acts of torture committed in Paraguay.²⁴³⁸ Following this decision, US courts have ordered a number of foreign defendants to pay damages to foreign victims of international crimes committed abroad. However, in the recent 2013 decision, rendered in the *Kiobel v. Royal Dutch Petroleum Co.* case, the Supreme Court ruled that US courts could only hear cases that “touch and concern” the United States with “sufficient force”.²⁴³⁹ This decision puts an end to the practice that allowed foreign victims with no connection to the United States to claim damages on the basis of universal jurisdiction.

E. Concluding remarks

830 Studies of universal jurisdiction proceedings initiated around the world show that – prior to recent reforms – the exercise of universal jurisdiction over gross human rights violations was “primarily victim driven”.²⁴⁴⁰ Indeed, many of the

²⁴³⁶ According to 18 U.S. Code (hereafter U.S.C.), section 2340A, US courts have jurisdiction over acts of torture committed outside the United States, “if (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender”. See also War Crimes, 18 U.S.C. § 2441 (a) – (b) (2006); Genocide, 18 U.S.C. § 1091 (e) (2009); Recruitment or Use.

²⁴³⁷ 28 U.S.C. §1350.

²⁴³⁸ *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

²⁴³⁹ *Kiobel v. Royal Dutch Petroleum Co.*

²⁴⁴⁰ Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (2003), at 221.

universal jurisdiction cases brought over the past fifteen years were initiated by victims, leading to the case law that we have today.

Some critics of universal jurisdiction have rightly denounced selectivity and double standards in the application of this principle.²⁴⁴¹ Indeed, state practice shows that one of the dangers of universal jurisdiction lies in the risk of it becoming an instrument utilized by developed countries to exercise a modern form of colonialism over developing countries.²⁴⁴² The African Union, in particular, has denounced “the political nature and abuse of universal jurisdiction” which – like the ICC – unfairly targets African leaders. In this regard, it is true that – to some extent – universal jurisdiction proceedings in criminal cases launched by victims “stand for a higher level of universality”²⁴⁴³ than cases launched by state authorities, since many complaints have been aimed at acting and former government officials and military officers of powerful states, and not only at African leaders or former leaders of states with which they have strong diplomatic ties. However, in order to avoid overwhelming national justice systems with numerous complaints and unnecessary international tensions with cases having no chance of prosecution – because the suspect enjoys immunity for instance –, NGOs working with victims should ensure that the complaints filed are based on sufficient evidence and have a chance of being prosecuted, especially since states are already reluctant to prosecute in such circumstances. This implies the need for a careful examination, before the complaint is filed, of the legal conditions relating to the exercise of universal jurisdiction and of the criminal law obstacles in the forum state. For instance, as it stands today, personal immunities of sitting heads of state still persist at the horizontal inter-state level.²⁴⁴⁴ A complaint launched against such a person in a third state legally has no chance of leading to a conviction and can therefore appear to be a purely “politically-motivated claim”. Criminal law impediments must be taken into account by NGOs. In our view, this would contribute to limiting the possibilities for state authorities to advance legal impediments as a pretext to conceal political “unwillingness” to proceed.²⁴⁴⁵

The place of victims in criminal proceedings is a delicate issue for a number of reasons including the problems and costs entailed by large number of victims

²⁴⁴¹ See United Nations, General Assembly, ‘Principle of ‘Universal Jurisdiction’ Again Divides Assembly’s Legal Committee Delegates; Further Guidance Sought from International Law Commission’, 12 October 2011.

²⁴⁴² See the Belgium cases against Rwandans, the Spanish cases against South America, etc.

²⁴⁴³ Kaleck, ‘From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008’, 30 *Michigan Journal of International Law*, (2008-2009) 927-980, at 931.

²⁴⁴⁴ Van der Wilt, ‘Sadder but Wiser? NGOs and Universal Jurisdiction for International Crimes’, 13(2) *Journal of International Criminal Justice* (2015) 237-243, at 240.

²⁴⁴⁵ *Ibid.*, at 243.

participating in a national trial. Many of the interesting issues concerning the participation of victims in criminal proceedings fall outside the scope of the present study. However, it should nevertheless be underlined that simply allowing victims to file complaints and giving them the right to appeal in case the prosecutor decides not to open an investigation does not necessarily mean that victims will be allowed to participate in criminal proceedings. It is however, in our view, essential – especially in the context of universal crimes committed abroad – that victims be allowed to file complaints and submit evidence and, in particular, have the right to appeal the decision of the prosecuting authorities not to file a complaint. Indeed, state practice shows that it has largely been through victims and NGOs that universal jurisdiction cases have been brought before national courts. Furthermore, to our knowledge, no “politically-motivated complaint” lacking evidence has ever led to a conviction where a national court of final instance has heard the case based on universal jurisdiction. On the contrary, state practice shows that national justice systems should and can be trusted to reject complaints which are flimsy or which lack evidence and so forth. Indeed, contrary to what some opponents to universal jurisdiction assert, state practice shows that the vast majority of complaints in which private parties had either sought arrest warrants or the initiation of an investigation were in fact rejected by the courts, on the basis of the evidence provided.²⁴⁴⁶ In any event, if the main concern justifying the restriction of victims’ rights actually lies in the decisions of national judges, it would seem more appropriate to ensure that national courts are well-equipped to deal with criminal proceedings regarding universal crimes as opposed to making exceptions to victims’ rights in precisely the context in which such rights are the most important.

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As a result of the recent restrictions on civil party initiation, prosecutors have been given the sole power to decide whether or not to exercise universal jurisdiction. The following section discusses this prosecutorial discretion and how it constitutes an obstacle to the exercise of universal jurisdiction.

²⁴⁴⁶ For instance, applications for arrest warrants in respect of Henry Kissinger and Bo Xilai were refused by the courts of the United Kingdom.

III. The role of the prosecutor, prosecutorial discretion, and judicial intervention

A. The debate

In principle, it would be desirable for a state to exercise its judicial jurisdiction over all crimes within its jurisdiction,²⁴⁴⁷ including universal jurisdiction where the possibility is provided for by national law, which – as shown in Part II – is now the case in many states; a failure to do so may be seen as a breach of a state’s duty to protect its citizens and, from an international perspective, a violation of its obligation under international law to provide an “effective remedy”.²⁴⁴⁸ Nevertheless, in some national systems, prosecutors have the discretion to decide not to prosecute in cases he deems the prosecution would not serve the “public interest” or the “interests of justice”.²⁴⁴⁹ The degree of discretion that the prosecutor possesses varies from one country to another.²⁴⁵⁰ However, there are generally limits to the degree prosecutorial discretion can be and is actually exercised, a result of the need to ensure consistency, uniformity and to avoid arbitrariness. Depending on the nature of the legislation, the methods used to regulate prosecutorial discretion include (i) providing objective criteria in the law to guide the prosecutor’s decision; (ii) requiring that the prosecuting authority give reasons for its decision not to prosecute;²⁴⁵¹ and/or (iii) subjecting the decision not to prosecute to judicial review in order to control the exercise of discretion and ensure it has been made in good faith and in an equal manner (see Section C).

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With respect to ordinary crimes, one factor typically informing the decision not to prosecute is the lack of gravity of the crime; in some cases, it is not in the public interest to prosecute when the crime committed is minor or has caused minimal damage.²⁴⁵² In exercising universal jurisdiction over international

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²⁴⁴⁷ J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Leiden/Boston: Martinus Nijhoff Publishers, 2008), at 351.

²⁴⁴⁸ *Ibid.*

²⁴⁴⁹ *Ibid.*

²⁴⁵⁰ D. N. Nsereko, ‘Prosecutorial Discretion before National Courts and International Tribunals’, 3 *Journal of International Criminal Justice* (2005) 124-144.

²⁴⁵¹ This is the case for instance in Belgium or in South Africa. According to section 5(5) of the Implementation of the Rome Statute of the International Criminal Court Act, 2002, “if the National Director declines to prosecute a person under the Act, he or she must provide the Central Authority with full reasons for his or her decision and the Central Authority must forward that decision, together with the reasons, to the Registrar of the Court”. This is also provided for in Belgian legislation.

²⁴⁵² See for instance Art. 8, § 1 of the Swiss Code of Criminal Procedure in relation to Art. 52 of the Swiss Penal Code.

crimes, the gravity of the crime is obviously not the factor that can justify a decision not to prosecute. However, other factors are also taken into consideration; these include the unavailability of witnesses and other evidence, the lack of any prospect of success in the case or the fact that the suspect is not present on state territory.²⁴⁵³ In cases reflecting this last situation, it may be considered – especially in states not permitting *in absentia* proceedings – that the undertaking of investigations would be a waste of both time and resources because the prospects of conviction are remote.

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A much more controversial situation arises when prosecutorial discretion is exercised to dismiss a case because it might injure the state's relations with others, notably those with the state in which the events occurred or the state of the defendant's nationality.²⁴⁵⁴ The critical questions here concern the degree of desirable prosecutorial discretion and control held by the executive branch in the exercise of universal jurisdiction over international crimes,²⁴⁵⁵ and the determination of the legitimate criteria that may justify a decision not to prosecute.

B. The legality and opportunity maxims

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The *legality maxim* or principle of mandatory prosecution (*principe de la légalité des poursuites*) provides that the prosecutor is under a strict legal obligation to investigate and to advance charges in each crime for which there is sufficient evidence and in respect of which no legal hindrances prohibit prosecution.²⁴⁵⁶ In these circumstances, the prosecuting authority does not have any discretion in the determination of whether to prosecute a case. On the contrary, the *opportunity maxim* grants discretion to the prosecution not to investigate and not to bring charges, if there is no public interest in prosecution, even in cases where there is “a high probability that the accused will be convicted of a crime if tried”.²⁴⁵⁷ Unlike the opportunity maxim, the legality maxim is thus said to ensure the independence of the prosecutor, “whose legal obligation to prosecute

²⁴⁵³ See German Code of Crimes Against International Laws.

²⁴⁵⁴ See Nseroko, *supra* note 2451, at 131; Steiner, ‘Three Cheers for Universal Jurisdiction - Or Is It Only Two’, 5(1) *Theoretical Inquiries in Law* (2004) 199-236, at 209.

²⁴⁵⁵ Langer, ‘The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes’, 105(1) *The American Journal of International Law* (January 2011) 1-49, at 46.

²⁴⁵⁶ D. Kyprianou, ‘Comparative Analysis of Prosecution Systems (Part II): The Role of Prosecution Services in Investigation and Prosecution Principles and Policies’ (2008), at 14; V. Röben, ‘The Procedure of the ICC: Status and Function of the Prosecutor’, in Von Bogdandy and Wolfrum (eds.), *7 Max Planck Yearbook of United Nations Law* (2003), at 522.

²⁴⁵⁷ Röben, *supra* note 2457, at 522.

shields him from political pressure not to take certain cases".²⁴⁵⁸ In theory at least, it also ensures equality before the law and upholds the general concept of deterrence: every offence will be punished.²⁴⁵⁹

The principle of opportunity is typical of the common law tradition and is applied for instance in Australia, the United Kingdom and the United States. On the contrary, most continental countries follow the principle of mandatory prosecution, which is enshrined as such in the law; this is the case for example in Germany, Spain and Italy. Some continental countries do however operate according to the "opportunity principle" (*principe de l'opportunité*); this is the case for example in France, Belgium, the Netherlands, and Denmark.²⁴⁶⁰

However, even in countries where prosecution is mandatory, "the obligation is offset by other considerations".²⁴⁶¹ Typically, exceptions to mandatory prosecutions are listed in the law. In Germany, for instance, while the principle of mandatory prosecution is applicable,²⁴⁶² the law allows prosecutors to decide not to prosecute crimes committed abroad under certain specific circumstances.²⁴⁶³ The prosecutor may for instance dismiss the case if the perpetrator's guilt is considered to be of a minor nature and if there is no public interest in the prosecution,²⁴⁶⁴ if the conduct of proceedings would be seriously detrimental to Germany, or if any other important public interests present an obstacle to prosecution.²⁴⁶⁵ A special provision has for instance been adopted in the case of crimes pursuant to the Code of Crimes Against International Law. Thus, on the one hand, section 1 of this Act expressly extends German jurisdiction to genocide, crimes against humanity and war crimes even when these crimes are committed outside the German territory and have no link to Germany.²⁴⁶⁶ On the other hand, section 153f of the German Code of Criminal Procedure provides that the prosecutor may dismiss a case if the suspect is not a resident in Germany and is not expected to be in the future.²⁴⁶⁷ The dismissal on these grounds is possible at any stage, even after formal proceedings have been launched. In practice, the prosecuting authority has interpreted the legal

²⁴⁵⁸ *Ibid.*, at 523.

²⁴⁵⁹ Kyprianou, *supra* note 2457, at 14.

²⁴⁶⁰ See sections 721-722 of the Danish Administration of Justice Act no. 1053 of 29 October 2009; See Ministry of Foreign Affairs, 'The Scope and Application of the Principle of Universal Jurisdiction', at 3.

²⁴⁶¹ Council of the European Union, *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, Brussels, 16 April 2009, at 13.

²⁴⁶² See section 152 of the German Code of Criminal Procedure.

²⁴⁶³ See section 153a of the German Code of Criminal Procedure.

²⁴⁶⁴ Section 153 of the German Code of Criminal Procedure on "Non-Prosecution of Petty Offences".

²⁴⁶⁵ Section 153d of the German Code of Criminal Procedure.

²⁴⁶⁶ Fischer-Lescano, 'Introductory Note to the Decision of the General Federal Prosecutor: Center for Constitutional Rights v. Rumsfeld', 45 (1) *International Legal Materials* (January 2006) 115-118.

²⁴⁶⁷ Section 153f of the German Code of Criminal Procedure.

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exception related to the suspect's absence from German territory very broadly in order to dismiss cases. In 2006, for example, the German Federal Prosecutor dismissed a complaint against the former Minister of Internal Affairs of Uzbekistan for acts of torture and crimes against humanity committed in Uzbekistan, notwithstanding that the suspect was in fact in Germany to receive medical treatment prior to the filing of the complaint.²⁴⁶⁸ More recently, the Federal Prosecutor declined to open investigations following a complaint against US officials, including Donald Rumsfeld,²⁴⁶⁹ because the suspects were not in Germany and were not expected to be.²⁴⁷⁰

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In common law countries, prosecutorial discretion may manifest itself as the need to obtain approval from the Attorney General – as is the case in countries such as Australia,²⁴⁷¹ Botswana, Canada, Israel, Kenya, Lesotho, Namibia, New Zealand,²⁴⁷² Seychelles, Sierra Leone, Swaziland, Tanzania and Zimbabwe – or from the Director of Public Prosecutions – as is the case for instance in Malawi, Uganda and the United Kingdom – before universal jurisdiction proceedings can proceed.²⁴⁷³ The government official, whose consent is necessary, will generally take into account various interests, such as the impact of the prosecution on the state's relations with other states.²⁴⁷⁴ As underlined by the Australian government in its report on universal jurisdiction, “[i]n exercising discretion as to whether the prosecution should proceed, the Attorney General may have regard to matters including considerations of international law, practice and comity, prosecution action that is being, or might be brought, in a foreign country and other matters of public interest”.²⁴⁷⁵ Likewise, in its submissions to the United Nations, Israel explains that “the

²⁴⁶⁸ See S. Zappala, 'The German Federal Prosecutor's Decision not to Prosecute a Former Uzbek Minister Missed Opportunity or Prosecutorial Wisdom?', 4 *Journal of International Criminal Justice* (2006) 602-622.

²⁴⁶⁹ On this case, see *infra* N 795.

²⁴⁷⁰ See Prosecutor General at the Federal Supreme Court, 'Criminal Complaint against Donald Rumsfeld et al.', 3 ARP 156/06-2, 5 April 2007, available online in English at <http://ccrjustice.org/files/ProsecutorsDecision.pdf> (last visited 1 August 2017).

²⁴⁷¹ For genocide, crimes against humanity, war crimes and torture, see sections 268.121 and 274.3 of the Australian Criminal Act 1995.

²⁴⁷² For international crimes, see section 13 of the International Crimes and International Criminal Court Act which states that proceedings may not be instituted in any New Zealand court without the consent of the Attorney General. An arrest warrant was issued by a district judge against General Ya'aron of Israel who was visiting New Zealand. However, the Attorney General declined to give his consent and the prosecution was permanently stayed.

²⁴⁷³ A. La Rosa and G. Chavez Tafur, 'Where do we stand on universal jurisdiction? Proposed points for further reflections and debate', 54(2) *Politorbis* (2012) 31-40, at 37.

²⁴⁷⁴ Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (2012), at 26.

²⁴⁷⁵ 'Australian Views on the Scope and Application of the Principle of Universal Jurisdiction'.

requirement of the Attorney General's prior consent, was specifically intended to provide a mechanism for careful filtering in matters where foreign relations implications and special evidentiary difficulties arise, and which necessarily require special discretion and oversight in the general interest of the public and the State".²⁴⁷⁶

Ultimately, the two principles lead to similar results. In systems that follow the opportunity principle, prosecution will take place when "appropriate" and that decision will be subject to judicial review.²⁴⁷⁷ In the mandatory prosecution system, there is prosecution unless some legal exception is found. The prosecutor, however, generally has some discretion in deciding whether the situation falls within a legal exception. In our view, in order to limit the situation arising whereby the prosecution of universal jurisdiction is dependent on political considerations rather than legal ones, clear criteria must be established in the law setting out the circumstances in which a prosecuting authority may decide not to prosecute a case. In our view, there is no reason why different legal criteria should be introduced in the case of universal jurisdiction proceedings. As mentioned above, such special legislation, which is justified by a fear of "judicial tyranny", is not justified. The issue of the role of a political authority as well as the issue of prosecutorial discretion will be discussed below in subsection C. It will then go on to explain why it is essential that a decision of the prosecuting authority not to prosecute is subject to judicial review.

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C. The status of the prosecutor, prosecutorial discretion and judicial review

1. Prosecutorial discretion at the international level

Article 7(2) of the Convention Against Torture provides that, when a person alleged of committing torture is found on a state's territory, the authorities shall "take their decision [with regard to the establishment and exercise of criminal jurisdiction] in the same manner as in the case of any ordinary offence under the law of the State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1".²⁴⁷⁸ Some argue that this provision leaves some room for prosecutorial

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²⁴⁷⁶ Permanent Mission of Israel to the United Nations, 'Information and Observations on the Scope and Application of the Principle of Universal Jurisdiction', 3 May 2010.

²⁴⁷⁷ Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (2008), at 352.

²⁴⁷⁸ According to Art. 5, "1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that

discretion.²⁴⁷⁹ The ICJ, in its landmark decision in the *Belgium v. Senegal* case, stated that “[t]he obligation to submit the case to the competent authorities for the purpose of prosecution [...] was formulated in such a way as to leave it to those authorities to decide whether or not to initiate proceedings, thus respecting the independence of States parties’ judicial systems”.²⁴⁸⁰ However, if this provision allows for some prosecutorial discretion, according to the dominant view, it also requires that state parties exercise *the same level of prosecutorial discretion they exercise in prosecuting any domestic crimes*.²⁴⁸¹ This seems to mean that if the exercise of prosecutorial discretion is possible under national law for ordinary crimes, it is also possible for cases involving torture.²⁴⁸² Conversely, it also implies that states should not grant greater prosecutorial discretion in universal jurisdiction proceedings involving torture than they do in those concerning ordinary crimes.

843 Likewise, Article 7 of the 1970 Hague Convention states that the competent authorities “shall take their decision [regarding prosecution] in the same manner as in the case of any ordinary offence of a serious nature under the law of that State”.

844 The Geneva Conventions, however, are silent on the question of prosecutorial discretion.²⁴⁸³ The commentary to Article 9 of the 1996 Draft Code of Crimes Against the Peace and Security of Mankind provides that “[t]he national laws of various States differ concerning the sufficiency of evidence required to initiate a criminal prosecution or to grant a request for extradition. The custodial State would have an obligation to prosecute an alleged offender in its territory when there was sufficient evidence for doing so as a matter of national law unless it decided to grant a request received for extradition”.

State; (b) When the alleged offender is a national of that State; (c) When the victim is a national of that State if that State considers it appropriate. 2. 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article”.

²⁴⁷⁹ See Weiss, ‘Somebody Else’s Problem: How the United States and Canada Violate International Law and Fail to Ensure the Prosecution of War Criminals’, 45 Case Western Reserve Journal of International Law (2012) 579-609, at 598.

²⁴⁸⁰ ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, § 90.

²⁴⁸¹ See Weiss, *supra* note 2480, at 598; L. Wendland, *A Handbook on State Obligations under the UN Convention Against Torture* (Geneva: May 2002), at 46.

²⁴⁸² K. Jon Heller, ‘Does CAT Require the Prosecution of Torturers?’, *Opinio Juris*, 19 January 2009, available online at <http://opiniojuris.org/2009/01/19/does-cat-require-the-prosecution-of-torturers/> (last visited 1 August 2017).

²⁴⁸³ Zgonec-Rožej and Foakes, ‘International Criminals: Extradite or Prosecute?’, *International Law*, IL BP 2013/01, at 9.

In their joint separate opinion in the *Arrest Warrant* case, judges Higgins, Kooijmans and Buergenthal held that one of the conditions for exercising universal jurisdiction is that “charges [...] be laid by a prosecutor or a *juge d’instruction* who acts in full independence, without links to or control by the government of that State”.²⁴⁸⁴ The idea behind this safeguard is to prevent charges being brought solely for political motives.²⁴⁸⁵

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Surprisingly international instruments on universal jurisdiction, including the *Princeton Principles* and the Resolution of the *Institut de Droit International*, are silent on the issue of prosecutorial discretion. Other international instruments do however address this issue. Principle 7 of the *Amnesty International Principles* entitled “No Political Interference” states that “[d]ecisions to start or stop an investigation or prosecution of grave crimes under international law should be made only by the prosecutor, subject to appropriate judicial scrutiny which does not impair the prosecutor’s independence, based solely on legal considerations, without any outside interference”.²⁴⁸⁶ The *UN Guidelines on the Role of Prosecutors* provide that “[i]n countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution”.²⁴⁸⁷

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2. *State practice: case studies*

a. *Introductory remarks*

While most states have a public prosecuting authority, the prosecutor’s institutional position differs greatly from one country to another.²⁴⁸⁸ In some countries, the prosecutor is completely independent from the executive branch, and in others, it is subordinated to it. The issue of prosecutorial discretion in the exercise of universal jurisdiction is linked to the status of the prosecutor and his relationship with the executive branch. Indeed, if the prosecuting authority is an independent magistrate, he will be subject to a lesser degree of political

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²⁴⁸⁴ See ICJ, *Arrest Warrant* case, Joint Separate Opinion of Judges Higgins et al., § 59; See also Cassese, ‘When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case’, *European Journal of International Law* (2002), vol. 13(4), p. 853–875, at 856, footnote 8.

²⁴⁸⁵ Colangelo, ‘The New Universal Jurisdiction: In Absentia Signaling over Clearly Defined Crimes’, 36 *Georgetown Journal of International Law* (2005) 578–602, at 560.

²⁴⁸⁶ Amnesty International, *Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction*, N° IOR 53/001/1999, 30 April 1999.

²⁴⁸⁷ Art. 17 of the Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, UN doc. A/CONF.144/28,1990.

²⁴⁸⁸ P. Mageean, *The Role and Independence of Prosecutors*, Northern Ireland, 17th May 2005, at 3.

pressure than if his authority is directly supervised by the Federal Minister of Justice. This is the case, for instance, in Germany²⁴⁸⁹ and France. This subsection will provide a brief overview of the status of the prosecutorial authority in certain states and his relationship with the government. It will also address the extent of the discretion held by this authority and the existing legal criteria – if any – to guide his decision to prosecute a universal jurisdiction case or not. Finally, it will examine whether the prosecutorial authority must give reasons for his decision not to prosecute and whether this decision is subject to review. The possibility to review the exercise of prosecutorial discretion is especially important if it is not possible for victims to initiate proceedings as private prosecutors. In most states, some type of review of the prosecutor's decision is available;²⁴⁹⁰ it may be judicial or administrative.²⁴⁹¹ In other states, the discretion of the prosecutor to decide whether or not to prosecute a crime committed abroad is not reviewable.

b. Belgium

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In Belgium, the King appoints and removes prosecutors.²⁴⁹² The prosecutor has discretion over whether to initiate an investigation, but he must give reasons for his decision not to prosecute.²⁴⁹³ Since the adoption of the 2003 Grave Breaches Act, the decision of whether to initiate a case for international crimes committed outside of Belgium no longer rests with regional prosecutors, but is one for the Federal Prosecutor (*procureur fédéral*).²⁴⁹⁴ In Belgium, discussions have taken place concerning the relationship between the public prosecution service and the Ministry of Justice, and more specifically about whether the prosecution service is independent or subordinated to the latter.²⁴⁹⁵ In this context, it must be noted that while Article 151 of the Belgian Constitution states that the public prosecutor is independent from the government in conducting investigations and prosecutions, the Constitution also provides that this is without prejudice

²⁴⁸⁹ See section 147 of the German Courts Constitution Act.

²⁴⁹⁰ FIFDH and Redress, *Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union*, December 2010, at 44.

²⁴⁹¹ In the Netherlands, a complainant may seek judicial review of a prosecutor's decision not to prosecute before the appeal court.

²⁴⁹² See Art. 153 of the Belgian Constitution. According to the original French text, "*Le Roi nomme et révoque les officiers du ministère public près des cours et des tribunaux*".

²⁴⁹³ According to Art. 28quater of the Belgian Code d'instruction Criminel, "*le procureur du Roi juge de l'opportunité des poursuites. Il indique le motif des décisions de classement sans suite qu'il prend en la matière*".

²⁴⁹⁴ See Art. 7 of the *Loi du 23 avril 2003 modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l'article 144ter du Code judiciaire*.

²⁴⁹⁵ See Euro Justice, 'The Relationship Between the Public Prosecutor and the Minister of Justice', available online at <http://www.eurojustice.org/>.

to the right of the competent minister to order prosecutions and to prescribe binding directives on criminal policy, including on policy relating to investigations and prosecutions.²⁴⁹⁶ Moreover, the Judicial Code expressly states that the Federal Prosecutor acts under the authority of the Ministry of Justice.²⁴⁹⁷

With regard to the decision not to prosecute, the public prosecutor is legally bound to submit the case to the investigating judge except in the four following cases: 1) when the complaint is clearly without merit, (2) when the facts listed in the complaint do not correspond to a definition of the international offence, (3) when an admissible criminal prosecution cannot arise from the complaint or (4) if there is a more appropriate forum.²⁴⁹⁸ Article 28 of the Belgian Code of Criminal Procedure reiterates that the public prosecutor must give reasons for any decision to dismiss a case. In its 2004 decision, the Belgian Constitutional Court (*Cour d'arbitrage*) pointed out that the Federal Prosecutor does not have a discretionary power not to prosecute, because he is legally bound to act except in the above-mentioned cases.²⁴⁹⁹ However, as has been correctly asserted by a commentator, this obligation remains largely theoretical if the complainant is not entitled to seek judicial review of the prosecutor's decision.²⁵⁰⁰

Under the new Belgian Law of August 2003, the decision of the Federal Prosecutor not to prosecute international crimes committed abroad was not subject to any review. However, in its decision of 23 March 2005, the Belgian Constitutional Court (*Cour d'arbitrage*) partially annulled the new Act, in so far as it provided for the impossibility of judicial review of the Federal Prosecutor's decision not to open an investigation.²⁵⁰¹ Belgian legislation was therefore amended to provide a means for the review of the prosecutor's decision by the indicting chamber (*chambre des mises en accusation*).²⁵⁰² However, it must be

²⁴⁹⁶ See Art. 151, § 1 of the Belgian Constitution. According to the original French text, "*Le ministère public est indépendant dans l'exercice des recherches et poursuites individuelles, sans préjudice du droit du ministre compétent d'ordonner des poursuites et d'arrêter des directives contraignantes de politique criminelle, y compris en matière de politique de recherche et de poursuite*".

²⁴⁹⁷ See Art. 143, para. 3 of the Judicial Code.

²⁴⁹⁸ Belgium's Amendment to the Law of June 15, 1993 (As Amended by The Law of February 10, 1999 and April 23, 2003) Concerning The Punishment of Grave Breaches of Humanitarian Law, 'Article 16'.

²⁴⁹⁹ Constitution Court (*Cour d'arbitrage*), Judgment, 23 March 2005, § B-7.7, available in French at http://competenceuniverselle.files.wordpress.com/2011/07/arrt_de_la_cour_constituti.pdf (last visited 1 August 2017).

²⁵⁰⁰ See Ryngaert, 'Belgian Constitutional Court partially annuls downsized War Crimes Act', case commentary for the Institute of International Law, available online at <http://www.law.kuleuven.be/iir/nl/onderzoek/opinies/CR23032005.pdf> (last visited 1 August 2017).

²⁵⁰¹ See *Cour d'arbitrage*, Judgment, 23 March 2005, n° 62/2005, § B. 9, and Ryngaert, *supra* note 2501.

²⁵⁰² See Art. 10 of the *Titre préliminaire du Code de procédure pénale*. According to the current text of Arts 10, § 1bis and 12bis (4) and (5) of the Preliminary Title of the Code of Criminal Procedure

noted that the Court allowed the Federal Prosecutor to remain the sole authority responsible in respect of the fourth ground on which a case might be dismissed (as referred to in Articles 10 and 12bis), that is, the application of the subsidiarity principle. According to the Court, “it is not unreasonable to determine that the federal prosecutor, whose means allows him to make the needed verifications, have the sole responsibility of deciding that the case should not be brought before Belgian courts, because it can brought either before an international tribunal or before an independent and impartial national judge”.²⁵⁰³ The Court went on to say that “such dismissals [based on the subsidiarity principle] prevent complaints from being filed before the Belgian judicial authorities so as to artificially spark a political debate which compromises prominent foreign figures”.²⁵⁰⁴

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A number of concerns thus remain. In respect of the first three grounds upon which a case might be dismissed, it is up to the Federal prosecutor himself – and not a complaining party – to seize the judge. There is no verification of the prosecutor’s decision and this may lead to “outright abuse by the federal prosecutor”.²⁵⁰⁵ The law specifies that only the prosecutor is heard, which essentially means that the victims cannot take part in review proceedings. Finally, the decision on whether to transfer the case to another state (according to the principle of subsidiarity) continues to fall at the sole discretion of the Federal Prosecutor, without any kind of review.

(inserted by the Law of 22 May 2006): “*Si le procureur fédéral est d’avis qu’une ou plusieurs des conditions énoncées à l’alinéa 3, 1°, 2° et 3° sont remplies, il prend devant la chambre des mises en accusation de la cour d’appel de Bruxelles des réquisitions tendant à faire déclarer, selon les cas, qu’il n’y a pas lieu à poursuivre ou que l’action publique n’est pas recevable. Le procureur fédéral est seul entendu.*”

²⁵⁰³ See France, Constitutional Court (*Cour d’arbitrage*), Jugement n°62/2005, 23 March 2005, § B. 9 § B.7.7, translation by the author. The original French text states : “*Il n’est pas déraisonnable de prévoir que le procureur fédéral, qui dispose de moyens d’investigation permettant de faire les vérifications utiles, puisse décider, sous sa seule responsabilité, que l’affaire ne doit pas être traitée par les juridictions belges parce qu’elle peut l’être, soit devant une juridiction internationale, soit devant un juge national indépendant et impartial.*”

²⁵⁰⁴ See France, Constitutional Court (*Cour d’arbitrage*), Jugement n°62/2005, 23 March 2005, § B. 9 § B.7.7; translation by the author. The original French text states : “*De tels classements, qui ne préjugent pas du fondement de la plainte, répondent au souci d’écarter, avant même toute mesure d’instruction, des plaintes déposées devant les autorités judiciaires belges dans le but de susciter artificiellement un débat politique mettant en cause des personnalités étrangères.*”

²⁵⁰⁵ Ryngaert, *supra* note 2501.

c. France

In the French system, investigating judges are charged with investigations of serious offences.²⁵⁰⁶ An investigating judge may begin investigations in two ways. Firstly, this can be done at the request, determined on the discretion, of the prosecutor. According to Article 40 of the Code of Criminal Procedure, “[t]he district prosecutor receives complaints and denunciations and decides how to deal with them”. Thus, unlike other European countries, including Italy and Spain, the French system is governed by the principle of opportunity. It should be noted that while they are magistrates, like investigating judges and trial judges, French prosecutors are hierarchically accountable to the Minister of Justice, that is, to the government.²⁵⁰⁷ According to Article 5 of the *Ordonnance n° 58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature*, “[l]es magistrats du parquet sont placés sous la direction et le contrôle de leurs chefs hiérarchiques et sous l’autorité du garde des sceaux, ministre de la justice”.²⁵⁰⁸ The prosecutor’s decision to not open a case is not subject to judicial review. It is clear that, in France, the executive branch exercises a high level of control. As in Germany, Belgium and the UK, since 2011, the decision to conduct an investigation in universal jurisdiction cases is centralized and falls to a single high prosecuting authority: the *procureur de la République*.²⁵⁰⁹

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The second way in which an investigating judge may begin an investigation for a crime arises when a victim or an organization representing certain interests files a complaint (*action civile*) directly to the investigating judge and asks to be a civil party to a criminal case.²⁵¹⁰ According to the legislation implementing the ICTY and ICTR statutes, victims of crimes under the Statutes may also initiate proceedings by making a complaint and becoming *parties civiles* as provided for by Articles 85 ff. of the Code of Criminal Procedure.²⁵¹¹ To limit this right of victims to bring an *action civile*, the Code of Criminal Procedure provides a number of disincentives that may persuade victims and NGOs not to file

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²⁵⁰⁶ See Art. 79 of the French Code of Criminal Procedure.

²⁵⁰⁷ See Art. 5 of the *Ordonnance n° 58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature*.

²⁵⁰⁸ The independence of the French Prosecutor was called into doubt by the European Court of Human Rights in a decision of 23 November 2010. In this case, the Court held that “*les membres du ministère public, en France, ne remplissent pas l’exigence d’indépendance à l’égard de l’exécutif, qui, selon une jurisprudence constante, compte, au même titre que l’impartialité, parmi les garanties inhérentes à la notion autonome de « magistrat » au sens de l’article 5 § 3*”.

²⁵⁰⁹ Art. 628-1 of the French Code of Criminal Procedure.

²⁵¹⁰ Arts 1 ff and 85 ff of the Code of Criminal Procedure; Langer, ‘The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes’, 105(1) *The American Journal of International Law* (January 2011) 1-49, at 20.

²⁵¹¹ See Art. 2, para. 2 of the *Loi no 95-1 du 2 janvier 1995* and *Loi no 96-432 du 22 mai 1996*, available online at <http://www.legifrance.com>.

claims.²⁵¹² Firstly, the investigative judge may request that the civil party deposit an amount (*consignation*)²⁵¹³ at the request of the district prosecutor. Secondly, he may, in a reasoned decision, impose a fine if he feels that the constitution as civil party was excessive or dilatory,²⁵¹⁴ and thirdly, if the case is dismissed, the persons targeted by the complaint may seek damages from the complainant.²⁵¹⁵

854 As mentioned above,²⁵¹⁶ Article 689-11, adopted in 2010, expressly states that the prosecution of universal jurisdiction cases concerning crimes of genocide, crimes against humanity and war crimes, can only take place at the request of the prosecutor; victims cannot trigger proceedings as *parties civiles*.²⁵¹⁷

855 The new Article 689-11, adopted by the French Senate on 26 February 2013,²⁵¹⁸ deletes only two of the four conditions that had been inserted in 2010: the requirement of the suspect's residence in France and the double criminality requirement. The reasons invoked for maintaining the *monopoly* of the *public* prosecutor in the initiation of criminal proceedings concerned the risk of abusive procedures that might affect international relations and the steps recently taken by France to ensure the independence of the Public Prosecutor's office, notably the *Circulaire* of 19 September 2012 to strengthen its independence and to put an end to the possibility for the *Garde des Sceaux* to give individual instruction in cases.²⁵¹⁹ An illustration of the risk of political interference is the *Ould Dah* case. In 1999, a criminal complaint was lodged in 1999 by the *Fédération internationale des ligues des droits de l'homme* (hereafter "FIDH") and the *Ligue des droits de l'homme* against Ely Ould Dah, an intelligence officer, who was accused of torturing black African members of the military in the former French colony of Mauritania in 1990 and 1991. On 14 June 1993, an amnesty law was passed in favor of members of the armed forces and security forces who had committed offences between 1 January 1989 and 18 April 1992.²⁵²⁰ According to this law, no proceedings could be brought against Ould Dah. In 1998, Ould Dah, then a captain in the Mauritanian army, travelled to

²⁵¹² Langer, *supra* note 2511, at 20.

²⁵¹³ Art. 88 of the Code of Criminal Procedure.

²⁵¹⁴ See Art. 177-2 of the French Code of Criminal Procedure.

²⁵¹⁵ See Art. 91 of the French Code of Criminal Procedure.

²⁵¹⁶ See *supra* N 776.

²⁵¹⁷ See Art. 8 of the *Loi d'adaptation à la Cour pénale internationale*, adopted on 9 August 2010, and Art. 689-11 of the French Code of Criminal Procedure.

²⁵¹⁸ It has not yet been adopted by the *Assemblée nationale*.

²⁵¹⁹ France, *Sénat, Exposé général, "Proposition de loi tendant à modifier l'article 689-11 du code de procédure pénale relative à la compétence territoriale du juge français concernant les infractions visées par le statut de la Cour pénale internationale"*, Rapport n° 353 (2012-2013) de M. Alain Anziani, 13 février 2013.

²⁵²⁰ ECHR, *Ould Dah v. France*.

France for military training. On 8 June 1999, the criminal complaint was launched against him. The investigative judge placed Ould Dah in pretrial detention until 28 September 1999.²⁵²¹ His release is said to have been ordered as a result of the Mauritanian authorities' decision to cease military cooperation with France following the arrest. A note from the French Minister of Affairs underlining the importance of diplomatic and economic relations between France and Mauritania appears to have been sent to the prosecutor.²⁵²²

Following his release, Ould Dah fled the country. On 6 March 2002, the Investigation Division of the Nîmes Court of Appeal committed the applicant for trial before the Gard Assize Court. In its decision, the Nîmes court considered that Articles 689 ff. of the Code of Criminal Procedure, as well as Article 7(2) of the Torture Convention, gave France jurisdiction to try the case and "override an amnesty law passed by a foreign State where application of that law would result in a breach of France's international obligations and render the principle of universal jurisdiction totally ineffective".²⁵²³

On 23 October 2002, the Court of Cassation dismissed the applicant's appeal, confirming France's jurisdiction, notwithstanding the foreign amnesty law.²⁵²⁴ On 30 June 2005, the trial was held before the Gard Assize Court in the defendant's absence; Ould Dah was sentenced *in absentia* to ten years' imprisonment on 1 July 2005.²⁵²⁵ In a second judgment, the Court awarded damages to the various civil parties.²⁵²⁶

d. Germany

In Germany, as in Belgium, the Federal Prosecutor in charge of deciding whether to open an investigation under the Code of Crimes Under International Law is part of the executive branch, and is therefore not independent from the Federal Government.²⁵²⁷

²⁵²¹ See France, Cour d'appel de Montpellier, *Ordonnance de mise en accusation devant la Cour d'assises et de non-lieu partiel et ordonnance de prise de corps*, 25 May 2001.

²⁵²² See F. Beauge, 'Un militaire mauritanien mis en examen pour tortures a réussi à fuir la France', *Le Monde*, 9 April 2000.

²⁵²³ ECtHR, *Ould Dah v. France*, at 2.

²⁵²⁴ France, Cour de cassation, Chambre criminelle, N° 02-85379, 23 octobre 2002. According to the Court, "l'exercice par une juridiction française de la compétence universelle emporte la compétence de la loi française, même en présence d'une loi étrangère portant amnistie".

²⁵²⁵ Cour d'assises du département du Gard, *Arrêt de condamnation*, 1 July 2005.

²⁵²⁶ Cour d'assises du département du Gard, *Arrêt sur l'action civile*, 1 July 2005.

²⁵²⁷ Kress, Claus, 'Universal Jurisdiction over International Crimes and the *Institut De Droit International*, 4(3) *Journal of International Criminal Justice* (2006) 561-585, at 584.

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As mentioned above,²⁵²⁸ although German procedural law is governed by the general principle of mandatory prosecution (*Legalitätsprinzip*), the legislator incorporated the principle of opportunity in the Code of Criminal Procedure in order to allow the prosecutor to exercise some discretion in determining whether to prosecute foreign suspects for crimes committed abroad, in particular “if the suspect is not present in Germany and not expected to be”.²⁵²⁹ However, according to German law, it is not possible to refrain from prosecuting international crimes due to foreign policy reasons; this is contrary to the approach adopted in respect of crimes against the state.²⁵³⁰

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In his study, Langer points out that this approach has led Germany to open formal proceedings only against low-cost defendants.²⁵³¹ Indeed, a number of complaints against high-profile suspects were dismissed on the basis of their supposed absence from the country. For example, in 2005, after a complaint was lodged against Chinese officials for crimes committed against members of Falun Gong, the Federal Prosecutor refused to initiate investigations, on the grounds that it was not expected that the suspects would visit Germany in the nearby future.²⁵³² Likewise, the prosecutor refused to initiate proceedings following a complaint lodged by the Center for Constitutional Rights and other organizations against Donald Rumsfeld and other US citizens. The prosecutor based his decision on the fact that prosecution can be refused if a perpetrator is neither present in the country nor expected to be present.²⁵³³ The Court of Appeal considered that the prosecutor had exercised his discretion within the framework of Section 153(f) without committing any errors of law. Thus, despite its principle of mandatory prosecution, Germany is an example of a very broad exercise of discretionary powers, exceptionally given to the prosecutor by

²⁵²⁸ See *supra* N 432.

²⁵²⁹ See *supra* N 839; See sections 153c and 153f of the German Code of Criminal Procedure. According to section 153f(1) of the Code of Criminal Procedure, “the public prosecution office may dispense with prosecuting [...] in particular if the accused is not resident in Germany and is not expected to so reside.”.

²⁵³⁰ See Section 153d of the German Code of Criminal Procedure; See T. Beck and C. Ritscher, ‘Do Criminal Complaints Make Sense in (German) International Criminal Law? A Prosecutor’s Perspective’, *Journal of International Criminal Justice* (2015), 229-235, at 230.

²⁵³¹ Langer, ‘The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes’, 105(1) *The American Journal of International Law* (January 2011) 1-49, at 12.

²⁵³² Hess et al., ‘Implementation of the Rome Statute in Germany’, XVI *Finnish Yearbook of International Law* (2005) 133-161, at 147.

²⁵³³ Prosecutor General at the Federal Supreme Court, ‘Criminal Complaint against Donald Rumsfeld et al.’, 3 ARP 156/06-2, 5 April 2006, available online at [http://www.ccrjustice.org/files/Prosecutors Decision.pdf](http://www.ccrjustice.org/files/Prosecutors%20Decision.pdf) (last visited 1 August 2017).

procedural law because of practical and political concerns.²⁵³⁴ On the one hand, the legal criteria are defined by law under Section 153f entitled “Dispensing with Prosecution of Criminal Offences of under the Code of Crimes against International Law”.²⁵³⁵ The idea is that the costs generated by unnecessary investigations ought to be avoided and only cases with realistic chances of success ought to be prosecuted.²⁵³⁶ However, Section 153d of the German Code of Criminal Procedure, which allows the prosecutor to refrain from prosecution if the proceedings pose a risk of serious detriment to Germany, does not apply to international crimes, unlike situations of crimes against the state.²⁵³⁷ In other words, there is only prosecutorial discretion for the exercise of universal jurisdiction when there is no link with Germany.²⁵³⁸ Some have thus argued that, as a matter of law, a criminal complaint is not needed to initiate the prosecution of international crimes.²⁵³⁹ The War Crimes Unit of the German Federal Prosecutor General conducts a “monitoring process” by collecting and analyzing available information on potentially relevant situations of international criminal law, from publicly available sources such as media reports, internet publications, etc., as well as information from police investigations, immigration authorities and NGO reports.²⁵⁴⁰ However, criminal complaints are nevertheless very useful because they provide additional important information and for instance reveal a link with Germany, which can serve as a starting point for investigations.²⁵⁴¹ This link might arise because the suspect is present in Germany or because the victims are present and can therefore be questioned regarding the international crimes. Furthermore, in some ways, it is more useful for NGOs to submit criminal complaints, while keeping some information secret from the public. Indeed, by essentially referring to publicly available sources and cases with high media coverage as evidence for criminal complaints, chances are that the suspect will be aware and warned of potential investigations. Like any other type of criminal proceeding, undercover investigations can be used for the purpose of gathering information

²⁵³⁴ Zappala, “The German Federal Prosecutor’s Decision not to Prosecute a Former Uzbek Minister Missed Opportunity or Prosecutorial Wisdom?”, 4 *Journal of International Criminal Justice* (2006) 602-622, at 603; See also Ambos, ‘Prosecuting Guantanamo in Europe: Can and Shall the Masterminds of the “Torture Memos” Be Held Criminally Responsible on the Basis of Universal Jurisdiction?’, 42 *Case Western Reserve Journal of International Law* (2009-2010) 405-448, at 422.

²⁵³⁵ As mentioned above, according of the law, Section 153f of the German Code of Criminal Procedure applies if the suspect “is not present in Germany and not expected to be”.

²⁵³⁶ Ambos, *supra* note 2534, at 426.

²⁵³⁷ See Section 153 stop; See Beck and Ritscher, *supra* note 2531, at 230.

²⁵³⁸ See Beck and Ritscher, *supra* note 2531, at 230.

²⁵³⁹ *Ibid.*, at 231.

²⁵⁴⁰ *Ibid.*, at 233.

²⁵⁴¹ *Ibid.*

and may lead to a successful prosecution, but only if criminal complaints are filed with information submitted in line with the required confidentiality.²⁵⁴²

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Some state practice has shown that the legal criteria have not always been applied as clearly as they appear to be set out in the law. In cases where the suspect is present in Germany or expected to be present, the principle of mandatory prosecution should apply. One could argue that in above-mentioned cases – where the suspects had been present in Germany or were expected to be – prosecution was mandatory and the prosecutor did not in fact have any discretion to dismiss the cases. However, the Federal Prosecutor provides a very broad interpretation of the terms “not present or expected to be”, understanding them to require an ongoing presence; this allowed him to dismiss these politically sensitive cases.

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Currently, however, the German Federal Prosecutor is leading a number of ongoing investigations of crimes under the Code of Crimes against International Law committed in Syria and Irak. There have been some convictions, mostly against German nationals but also against foreigners who committed international crimes abroad.²⁵⁴³

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In Germany, the question of the review of a prosecutor’s decision is somewhat controversial. According to Langer, the prosecutor’s discretion in universal jurisdiction decisions cannot be reviewed.²⁵⁴⁴ For instance, in its first decision in the case against Rumsfeld et al., the Stuttgart Appeals Court held that appeals against the Federal Prosecutor’s decision under Section 172 were inadmissible.²⁵⁴⁵ As one commentator rightly argues, the traditional view that prosecutorial decisions terminating proceedings based on the opportunity principle are not open to judicial review is not convincing.²⁵⁴⁶

e. Spain

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In Spain, while the Public Prosecution Service does not depend on the executive,²⁵⁴⁷ the King appoints the Attorney General – who is the head of the

²⁵⁴² *Ibid.*, at 234.

²⁵⁴³ P. Kroker and A. L. Kather, “Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany”, *EJIL: Talk!*, 12 August 2016.

²⁵⁴⁴ Langer, ‘The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes’, 105(1) *The American Journal of International Law*, (January 2011) 1-49, at 12; See section 172(2) of the German Code of Criminal Procedure; See also Ambos, *supra* note 2535.

²⁵⁴⁵ Higher Regional Court (Oberlandesgericht) Stuttgart, *Rumsfeld et al.*, 13 September 2005, available online at http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Germany/Rumsfeld_Decision_Stuttgart_13-9-2005.pdf (last visited 1 August 2017).

²⁵⁴⁶ Ambos, *supra* note 2535, at 429.

²⁵⁴⁷ Bachmaier and del Moral García, ‘Spain’, at 223, § 443.

Public Prosecution Service – at the proposal of the government.²⁵⁴⁸ Unlike in other European countries, the Spanish public prosecutor's role during criminal investigations is limited. He can request the investigating judge to initiate an investigation but he does not himself assume the function of investigating. The investigating judge, who normally intervenes at an early stage of the process, generally conducts the inquiry,²⁵⁴⁹ while the public prosecutor, for example, can try to prevent the pre-trial case from being prolonged unnecessarily and request from the judge that investigative acts he deems necessary are performed.²⁵⁵⁰

It is the Central Investigating Judges (*Juzgados Central de Instrucción*) who deal with the investigation of offences that fall under the jurisdiction of the national court (*Audiencia Nacional*).²⁵⁵¹ The judge, and not the prosecutor, has the final say as to the opening of criminal proceedings to investigate an offence.²⁵⁵² The judicial inquiry begins with a formal judicial decision ordering the initiation of proceedings (*auto de incoación de la instrucción*).²⁵⁵³

Like in Germany, Spanish criminal procedure embraces the principle of mandatory prosecution.²⁵⁵⁴ The formal decision of the investigating judge to initiate proceedings is thus not subject to discretionary powers, but is the result of the application of the legality principle.²⁵⁵⁵ The grounds on which a case can be dismissed are listed and limited in the law to those situations in which: (i) there is no evidence that the crime has been committed; (ii) the act does not amount to a criminal offence; and (iii) the accused is not criminally liable.²⁵⁵⁶ Thus, normally, the judge may only dismiss a plaintiff's complaint (*querrela*)²⁵⁵⁷ if the alleged facts do not constitute a crime or if he determines that he or she

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²⁵⁴⁸ Art. 124(4) of the Spanish Constitution.

²⁵⁴⁹ L. Bachmaier and A. del Moral García, *Criminal Law in Spain* (Austin: Wolters Kluwer, 2010), at 30.

²⁵⁵⁰ Bachmaier and del Moral García, 'Spain', § 427; See Art. 311 of the Spanish Code of Criminal Procedure.

²⁵⁵¹ See Arts 65(1)(e) and 88 of the Law on the Judiciary.

²⁵⁵² Bachmaier and del Moral García, 'Spain', at 219, § 434.

²⁵⁵³ *Ibid.*

²⁵⁵⁴ Art. 105 of the Spanish Code of Criminal Procedure states: "*Los funcionarios del Ministerio Fiscal tendrán la obligación de ejercitar, con arreglo a las disposiciones de la Ley, todas las acciones penales que consideren procedentes, haya o no acusador particular en las causas, menos aquellas que el Código Penal reserva exclusivamente a la querrela privada.*"

²⁵⁵⁵ Bachmaier and del Moral García, 'Spain' (2012), at 205-318, § 434.

²⁵⁵⁶ See Art. 637 of the Spanish Code of Criminal Procedure: "*Procederá el sobreseimiento libre: 1.º Cuando no existan indicios racionales de haberse perpetrado el hecho que hubiere dado motivo a la formación de la causa. 2.º Cuando el hecho no sea constitutivo de delito. 3.º Cuando aparezcan exentos de responsabilidad criminal los procesados como autores, cómplices o encubridores.*"

²⁵⁵⁷ Art. 270 ff. of the Spanish Code of Criminal Procedure.

lacks jurisdiction.²⁵⁵⁸ However, as mentioned above,²⁵⁵⁹ following the 2014 amendments concerning the exercise of universal jurisdiction, only public prosecutors and victims may initiate criminal proceedings under universal jurisdiction; other private individuals or groups (*acusaciones populares*) may not do so. However, bearing in mind that the state prosecutor does not generally initiate proceedings regarding international crimes the chances that new universal jurisdiction cases will be initiated in Spain are very slim.

f. *United Kingdom (England and Wales)*

867 In England and Wales, as noted above, the prior consent of the Attorney General – a government minister – is required before the prosecution for serious offences, including universal jurisdiction offences, can go ahead. Thus, as Langer notes, “the government has the monopoly over determining who can be prosecuted for international crimes under jurisdiction”.²⁵⁶⁰ In addition, the decision rests only in the hands of one centralized entity: The Attorney General.

868 As noted above, following the issuance of arrest warrants against Doron Almog in 2005 and the Israeli opposition leader, Tzipi Livni, alleged to have committed war crimes when she was Foreign Minister of Israel,²⁵⁶¹ in 2009, and since the enactment of the Police Reform and Social Responsibility Act on 15 September 2011, the consent of the United Kingdom’s Director of Public Prosecutions – who is the head of the United Kingdom’s Crown Prosecution Service – is needed before a UK court can issue a privately-sought arrest warrant for universal jurisdiction offences.²⁵⁶²

g. *Canada*

869 It is interesting to note that, unlike other states, Canada has a very broad universal jurisdiction legislation, which does not contain the numerous limitations provided for in most of the other national legislations, namely the presence or residence requirement. However, according to the Canadian Crimes

²⁵⁵⁸ Langer, “The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes”, 105(1) *The American Journal of International Law* (January 2011) 1-49, at 33; Art. 313 of the Spanish Code of Criminal Procedure which states: “*Desestimará en la misma forma la querrela cuando los hechos en que se funde no constituyan delito, o cuando no se considere competente para instruir el sumario objeto de la misma. Contra el auto a que se refiere este artículo procederá el recurso de apelación, que será admisible en ambos efectos.*”

²⁵⁵⁹ See *supra* N 40.

²⁵⁶⁰ Langer, *supra* note 2558, at 16.

²⁵⁶¹ The warrant was issued on 12 December and revoked on 14 December 2009, after it was revealed that Livni had not entered British territory.

²⁵⁶² See section 153 of the Police Reform and Social Responsibility Act 2011.

Against Humanity and War Crimes Act, no set of proceedings may commence without the consent of the Attorney General of Canada.²⁵⁶³

h. United States

In 2007, the United States enacted the Genocide Accountability Act, which provides for jurisdiction over acts of genocide committed by foreign nationals present in the United States.²⁵⁶⁴ Furthermore, in 2010, the Crimes Against Humanity Act was enacted giving the United States jurisdiction over crimes against humanity committed by any foreign national residing in the United States. Under the title “limitation on prosecution”, the provision specifies that a prosecution may not be undertaken unless: (1) the Attorney General certifies in writing that a prosecution by the United States “is in the public interest and necessary to secure substantial justice” and (2) “the Secretary of State, the Secretary of Defense and the Director of National Intelligence do not object to the prosecution”.²⁵⁶⁵

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D. Concluding remarks and critical assessment

One of the main concerns of universal jurisdiction supporters relates to the impact that political control might have over its exercise. In most states, the exercise of universal jurisdiction over international crimes is subject either to the consent of a “political” authority before proceedings can be initiated²⁵⁶⁶ or to some form of prosecutorial discretion, operating either via the application of the opportunity principle or as a result of legal exceptions that allow prosecutors to not investigate.²⁵⁶⁷ The reason behind this approach is to ensure that “extra-judicial considerations”, other than the gravity of the crime, are taken into account in the determination of whether or not to initiate proceedings.²⁵⁶⁸ These considerations include the potential effects of the prosecution on the relationship between the state exercising jurisdiction and the territorial state or the national state, as well as issues of national interest and national security.²⁵⁶⁹

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²⁵⁶³ See section 9(3) of the Crimes Against Humanity and War Crimes Act (S.C. 2000, c. 24).

²⁵⁶⁴ See 18 U.S. Code § 1091 (e).

²⁵⁶⁵ See 18 U.S. Code § 519 (e) (1).

²⁵⁶⁶ This is the case for instance of England. In Norway, see section 65 of the 1981 Criminal Procedure Act which was amended to introduce a new section 65(4), under which the power to institute prosecutions in cases concerning foreign nationals who are not resident in Norway rests with the Director of Public Prosecutions.

²⁵⁶⁷ This is the case of Germany.

²⁵⁶⁸ La Rosa and Chavez Tafur, 'Where do we stand on universal jurisdiction? Proposed points for further reflections and debate', *Politorbis* (2012), vol. 54(2), p. 31-40, at 37.

²⁵⁶⁹ *Ibid.*

This results in the exercise of politically-motivated selectivity in the exercise of universal jurisdiction.²⁵⁷⁰

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Critics of this politically-motivated selectivity have argued that as politically-sensitive cases are dismissed, a kind of “jurisdictional imperialism” has emerged whereby powerful states only exercise universal jurisdiction with regard to crimes committed in less powerful states.²⁵⁷¹ To counter this risk, it has been suggested that decisions to investigate or not should be taken by an independent judge rather than by an executive authority.²⁵⁷² If – as is the case in most civil law countries – the decision to prosecute international crimes lies with a prosecuting authority, a judicial review of his decision should always be available.²⁵⁷³ As we have seen, most states provide for some form of administrative or judicial review of a prosecutor’s decision not to prosecute. However, regrettably, an increasing number of states have introduced a provision into their legislation which requires the consent of a “political” authority before universal jurisdiction proceedings may be carried out.²⁵⁷⁴

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It is also important to limit the degree to which prosecutorial discretion can be exercised and to clearly define the manner in which it is exercised in order to ensure transparency in approach and consistency in results. In many EU states, the rules in relation to prosecutorial discretion for prosecutions based on extraterritorial jurisdiction are different from those operating for ordinary domestic or “territorial” crimes. As one NGO rightly noted, this “added layer of prosecutorial and/or executive discretion opens the way for political interference and decisions being made on grounds of policy and politics rather than justice”.²⁵⁷⁵

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Interestingly, certain universal jurisdiction proponents advocate that some level of political control over the decision to prosecute universal jurisdiction cases is necessary. The idea underpinning this argument is that the introduction

²⁵⁷⁰ Kress, ‘Universal Jurisdiction over International Crimes and the *Institut de Droit International*, 4(3) *Journal of International Criminal Justice* (2006), at 584.

²⁵⁷¹ International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, at 19-20.

²⁵⁷² See La Rosa and Chavez Tafur, *supra* note 2568, at 37; see Ryngaert, ‘Belgian Constitutional Court partially annuls downsized War Crimes Act’, case commentary for the Institute of International Law, available online at <http://www.law.kuleuven.be/iir/nl/onderzoek/opinies/CR23032005.pdf> (last visited 1 August 2017).

²⁵⁷³ See Ryngaert, *supra* note 2572.

²⁵⁷⁴ This is for instance the case in England and in Norway; See section 65 of the 1981 Criminal Procedure Act which was amended to introduce a new section 65(4), under which the power to institute prosecutions in cases concerning foreign nationals who are not resident in Norway rests with the Director of Public Prosecutions.

²⁵⁷⁵ FIFDH and Redress, *Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union*, at 27.

of such a control “might probably [...] safeguard universal jurisdiction from decline and outright rejection”.²⁵⁷⁶ Langer, for instance, argues that “supporters of universal jurisdiction have generally assumed that the less prosecutorial discretion the better, in hope of avoiding political calculations in universal jurisdiction cases”. However, “if [...] prosecutorial discretion is only one of the tools used by political branches to control universal jurisdiction, supporters would be well-advised to weigh the potential advantages and disadvantages of statutory rules in comparison to prosecutorial discretion”.²⁵⁷⁷ The argument appears to be that if a higher level of prosecutorial discretion exists, states may be encouraged to adopt broader universal jurisdiction statutes and reduce statutory obstacles, such as the requirement of a close link to the forum state or the double-criminality requirement. This pragmatic view, which recognizes that the intervention of political branches into the universal jurisdiction regime is “an unavoidable fact”,²⁵⁷⁸ is, in our view, not convincing. As state practice shows, the risk with this approach is that legal obstacles to the exercise of universal jurisdiction, such as the residence requirement, are brought in through the back door; for example, prosecuting authorities might dismiss politically-sensitive cases because the high-profile suspect is not always present on state territory, notwithstanding that the national legislation merely requires the presence of the suspect. Furthermore, there are distinctions as to how the freedom of the prosecuting authority might operate between those systems, like Germany and France, where the prosecutor is subordinated to the executive branch, and those where he is theoretically independent from the executive branch. Even in the latter case, prosecuting authorities are always to some extent influenced by extra-legal considerations, be they political or pragmatic, such as the cost and considerable amount of work that the prosecution of a universal jurisdiction case implies.

In many of the states examined, the decision as to whether or not to prosecute rests in the hands of one centralized authority. As seen above, this authority is generally subject to a certain amount of control by the government. Whether the state is governed by the opportunity principle or the principle of mandatory prosecution, the legal criteria allowing prosecuting authorities to not prosecute a case should be clear and should not defer from other ordinary cases. In our view, adopting special criteria for the conviction is contrary to international law, and especially to Article 7(2) of the Torture Convention. Indeed, in the situation where there is a lack of credible evidence or where the

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²⁵⁷⁶ LaFontaine, ‘Universal Jurisdiction – the Realistic Utopia’, 10 *Journal of International Criminal Justice* (2012) 1277-1302, at 1283.

²⁵⁷⁷ Langer, ‘The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes’, 105(1) *The American Journal of International Law*, (January 2011) 1-49, at 46.

²⁵⁷⁸ *Ibid.*

chances of bringing a suspect to trial appear very slim, it is the very role of the prosecuting authority to decide not to investigate a case. However, as one commentator underlines, prosecutorial discretion has become a popular device to block universal jurisdiction cases before they even get to the courts.²⁵⁷⁹ It is therefore essential for victims to be given the right to the judicial review of the determination made by the prosecuting authority in light of his discretion, not only because this greatly increases the transparency and legitimacy of decisions not to prosecute, but also because it is “a way of promoting consistency in decision about whether to prosecute international crimes”.²⁵⁸⁰

²⁵⁷⁹ Colangelo, 'Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory', 86 *Washington University Law Review* (2009) 769-885, at 831.

²⁵⁸⁰ Human Rights Watch, 'Universal Jurisdiction in Europe: The State of the Art', 18(5D) *Human Rights Watch* (2006), at 31.

General conclusions

I. Summary

The exercise by national courts of universal jurisdiction over international crimes requires a workable legal framework. This is all the more true because of the complex political issues that universal jurisdiction involves. The first part of this thesis explained that states may only establish and exercise universal jurisdiction if international law allows them to do so. It also specified that for certain international crimes, namely core crimes and torture, they have an obligation to do so. As established in the second part, the crimes subject to universal jurisdiction vary greatly from the legislation implemented in one state to that provided for in another. On the one hand, the “unilateral” universal jurisdiction, where states decide which crimes they will prosecute under universal jurisdiction, is not compatible with the need to respect the sovereignty of other states. On the other hand, national legislation that does not provide for universal jurisdiction over core crimes and torture generates a violation of obligations under international law. The second part of this thesis showed however that a growing number of pieces of national legislation provides for universal jurisdiction. The legal conditions nevertheless continue to be somewhat unclear. This uncertainty continues to contribute to the culture of impunity.

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The third Part of this thesis has presented and discussed four legal conditions to the exercise of universal jurisdiction. Chapter 1 underlined the importance of respecting the principle of legality and the general principle of the rule of law. This fundamental principle – on which all state action should be based – is especially important in the context of criminal prosecutions, which may lead to the most significant infringement of the right to freedom. With regard to substantive legal provisions on international crimes, while it is highly desirable that states expressly provide for definitions of criminal conduct with a corresponding penalty, reliance by national courts on international *jus cogens* and international customary law is compatible with the legality principle as long as the following considerations are satisfied; namely, that the acts constituted an offence under domestic law at the time of the judgment, that the offence was punishable under international and national law at the time of its commission, and that the imposed penalty is not heavier than the one that would have been imposed at the time of commission of the acts according to the domestic legal provisions applicable at the time. If these conditions are fulfilled, there is no legal justification for states to refuse prosecution based on the absence of domestic legislative provisions implementing and defining core crimes.

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In contrast, universal jurisdiction cannot be asserted in the absence of domestic law which provides for it. Establishing and exercising criminal jurisdiction on the basis of unwritten *jus cogens* or international customary norms or on the basis of provisions of international treaties on universal jurisdiction which are addressed to states and are not self-executing (such as the Articles of the Geneva Convention and the Torture Convention), is not acceptable in the realm of national criminal law. Indeed, in this context, the jurisdiction and the procedural rules and the penalty must be established before a person is put on trial, potentially facing a life-long prison sentence. In a similar vein, the definition of crimes cannot be widened *a posteriori*.

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The issue of the retroactive application of domestic provisions on universal jurisdiction is more controversial. It is interesting to note that it is often dismissed in the legal literature, where jurisdictional rules are considered as procedural rules. As we have explained in the conclusions of Chapter 1, it is not satisfactory to consider universal jurisdiction rules either as merely procedural or merely substantive. In fact, this distinction is not of great relevance. It has been submitted that the issue that should in fact be examined is whether universal jurisdiction over that crime was allowed by international law at the time of commission of the acts.

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Chapter 2 argues that the exercise of universal jurisdiction does not necessarily require a link with the state exercising it. Subjecting the exercise of universal jurisdiction over core crimes to the residence of the suspect or the victim is not compatible with the international obligations of states. Many international conventions and most domestic laws subject the exercise of universal jurisdiction to the presence of the suspect on the state's territory. This is also the position defended by most legal scholars. While states are under an obligation to prosecute a suspect present on their territory, Chapter 2 shows that this does not mean that presence is a legal requirement that must be satisfied to launch an investigation or to issue an international arrest warrant against a suspect. Likewise, the fact that a person leaves a state's territory does not mean that the state no longer has jurisdiction.

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Chapter 3 explains that subsidiarity to the territorial state is a legal condition for the exercise of universal jurisdiction over international crimes. This view is not only the most compatible with the principle of non-interference, but also justifies the existence and legitimacy of universal jurisdiction, that is, to prevent an impunity gap, where the territorial state does not prosecute crimes committed on its territory. It has also been argued that the subsidiarity principle should constitute a legal rule, subject to strict criteria and judicial review. State practice has shown that applying subsidiarity as a policy has often led states to decide its application depending on whether there are political and/or economic interests at stake. Most domestic laws provide for subsidiarity in their legislation. It is suggested that subsidiarity should be interpreted as providing

two obligations to the state. Firstly, a state must exercise universal jurisdiction only if the territorial does not (correctly) prosecute and try the suspect. This can be referred to as the “negative obligation” or the obligation to refrain. The authorities would thus be obliged to examine whether the territorial authorities are conducting or plan to conduct effective proceedings.²⁵⁸¹ Secondly, if the territorial state is unable or unwilling to prosecute violations of core crimes effectively, the state has the *obligation* to exercise universal jurisdiction over these crimes. This can be defined as the “positive obligation” of subsidiarity or the obligation to act.

Chapter 3 has then attempted to define and attribute precise content to the subsidiarity rule. Firstly, the subsidiarity principle should always be applicable to a specific case and not to a situation in general. Secondly, as a legal rule, it should only be applicable to the territorial state. This does not prevent states from extraditing suspects to the national state or to a state with a closer link as long as this state is willing and able to prosecute the suspect effectively. In any case, and with a view to limiting interference in state sovereignty, it is submitted that the forum state should inform the concerned state(s) and offer them the case. Exceptions to this rule exist when there are clear indicators – such as the passing of an amnesty law – that the state will not investigate and prosecute. Furthermore, in the absence of an independent international scrutiny mechanism, it is up to the forum state to determine whether a state has the ability and willingness to initiate criminal proceedings. Administrative or civil proceedings are not sufficient to prevent criminal proceedings based on universal jurisdiction by the custodial state.

Chapter 3 concludes by explaining that there does not seem to be a sufficient international conventional or customary legal basis to affirm that the complementarity principle as provided in the ICC Statute applies to states wishing to act on the basis of universal jurisdiction.

Finally, in the first part of Chapter 4, we have argued that states should allow victims to initiate criminal proceedings and to be able to appeal the decision of the prosecuting authorities not to prosecute. State practice shows

²⁵⁸¹ An interesting example, mentioned by Ryngaert ('Complementarity in Universality Cases: Legal-Systemic and Legal Policy Considerations', in M. Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes* (Oslo: Torkel Opsahl Academic EPublisher, 2010) 165-200), and which provides support for the notion of subsidiarity as a legal requirement, is the *Gusmisiriza* case. In 2008, a Spanish investigative judge issued an indictment, charging 40 current or former Rwandan military officials with genocide, crimes against humanity, war crimes and terrorism. Strangely, the indictment did not inquire as to whether investigations or prosecutions of the alleged crimes had been initiated by the national courts. In the meantime, the Rwandan proceedings had been initiated and were on-going against one of the accused, Wilson Gumisiriza, after the case had been transferred to Rwanda by the ICTR; Commentator, 'The Spanish Indictment of High-ranking Rwandan Officials', 6(5) *Journal of International Criminal Justice* (2008) 1003-1011, at 1008-1009.

that it has largely been through victims and NGOs that universal jurisdiction cases have been brought before national courts. However, such organizations should avoid overwhelming national justice systems with numerous complaints and unnecessary international tensions with cases that have no chance of being prosecuted; this might be the case, for instance, because the suspect enjoys immunity or because other legal conditions are not fulfilled. In the second part of Chapter 4, it has been submitted that to counter the risk of “extra-judicial considerations” be taken into account in the determination of whether or not to initiate proceedings based on universal jurisdiction, and the decisions as to whether to investigate or not should be taken by an independent judge rather than by an executive authority. If – as is the case in most civil law countries – the decision to prosecute international crimes lies with a prosecuting authority, a judicial review of his decision should always be available. Moreover, the legal criteria allowing prosecuting authorities to not prosecute a case should be clear and should not be different from other ordinary cases.

II. The way forward

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When exercising universal jurisdiction, states are acting as agents of the international community enforcing international law, and not as representative of states where the crimes have been committed or of any other state concerned by the crimes in question. This type of jurisdiction does remain national jurisdiction however and is not international. In order to ensure an effective functioning of this type of jurisdiction, it must be fully integrated into national justice systems, whose goals and challenges are different from those of international criminal justice. Indeed, the goals of international justice are “more ambitious” than those of national justice.²⁵⁸² The goals of international courts include contributing to reestablishing peace and security as well as to achieving national reconciliation in the affected state(s), through a truth-seeking process, where victims relate their experiences and obtain some degree of satisfaction.²⁵⁸³ The goal of national justice is essentially retribution, that is, to determine if a person, who is presumed innocent, is guilty of a crime or not, and if he is, to impose a penalty. In many states, most of which are adversarial, victims do not participate in criminal proceedings and the criminal process is a “contest” between the prosecution and the defence counsel.²⁵⁸⁴ Even in states where

²⁵⁸² See M. Damaška, ‘The International Criminal Court between Aspiration and Achievement’, 14 *UCLA Journal of International Law and Foreign Affairs* (2009) 19-35, at 20.

²⁵⁸³ V. Thalmann, ‘The Role of the Judge and the Parties in Pre-Trial Proceedings’, in Kolb/Scalia, *Droit international penal* (2nd ed., Basel: Helbing Lichtenhahn, 2012), at 463.

²⁵⁸⁴ *Ibid.*

victims are allowed to participate, their role has become more and more secondary.

As we have seen in this study, universal jurisdiction has often been used as a tool for victims of international crimes to be heard and to obtain remedy and reparation. It is true that victims and NGOs have played a crucial role in initiating universal jurisdiction proceedings, either by simple denunciation, by the use of the mechanism of *constitution de partie civile* or an “*acción popular*” and/or contesting the decision of the prosecuting authorities not to investigate. However, it is our contention that national criminal justice systems are not the right fora for victims to obtain redress and reparation. Their role during criminal proceedings at the national level will and should remain at best secondary. This is not only because the goals of national criminal justice are necessarily different from those of international criminal justice, but also because national criminal justice systems are already overloaded with cases of persons who have committed crimes on their territory. Moreover, a criminal procedure will only lead to a conviction in common law systems if the prosecutor demonstrates to the court that the accused is guilty and that there can be no doubt concerning his innocence, and in traditional civil law systems on the basis of the judge’s “*intime conviction*” that the accused is guilty without a shadow of a doubt.²⁵⁸⁵ This high standard is inherent to the severe consequences deriving from a criminal conviction and affecting a person’s most basic human rights, that is, each individual’s right to liberty.

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In parallel to universal criminal jurisdiction and in order to address the legitimate concerns about granting appropriate and effective reparation for the harm suffered by the victims of international crimes, universal civil jurisdiction appears to constitute the step that should be taken to avoid the above-mentioned problems, while also avoiding the situation where victims of international crimes are deprived of the opportunity to obtain reparation of the harm suffered.²⁵⁸⁶ Universal civil jurisdiction can be defined as the principle under which civil proceedings may be brought in a domestic court irrespective of the location of the unlawful conduct and irrespective of the perpetrator or the victim, on the grounds that the unlawful conduct is a matter of international concern. In its recent Resolution on Universal Civil Jurisdiction with regard to Reparation for International Crimes, the *Institut De Droit International* has proposed that victims should have effective access to justice to claim reparation, which does not depend on any criminal conviction of the author of the crime. It has noted that while universal criminal jurisdiction is a means of preventing the commission of serious crimes under international law (such as genocide, torture

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²⁵⁸⁵ K. M. Clermont & E. Sherwin, ‘A Comparative View of Standards of Proof’, 50 *American Journal of Comparative Law* (2002), at 251.

²⁵⁸⁶ See *Justitia et Pace*, Institut De Droit International, First Commission, *Universal Civil Jurisdiction with Regard to Reparation for International Crimes*, 30 August 2015.

and other crimes against humanity, and war crimes) and a means of avoiding impunity, the prosecution of the authors of international crimes and their punishment provides only a partial satisfaction to the victims. Domestic laws explicitly enabling courts to exercise jurisdiction on this basis are very rare. The promotion of such an approach is perhaps a next step that the international community can be encouraged to take.

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