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The implementation of the universal jurisdiction over torture in European countries

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Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LLM (International Law) in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to lengths and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signed by candidate

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Tom Jean G. Coppée

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CHAPTER I

INTRODUCTION

Torture is viewed as one of the most heinous violations of human rights.[1] Article 1(1) of the UN Torture Convention (hereafter referred to as the 'Convention')[2] defines this crime of *jus cogens*[3] as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by oNr at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

In order to adequately prosecute the crime of torture, article 5(2) of the Convention obligates each State Party to establish universal jurisdiction over torture offenses in its domestic legislation. It seems appropriate that 30 years after the signature of the Convention, the implementation of article 5(2) of the Convention is evaluated. This dissertation presents an evaluation of universal jurisdiction over torture offenses. By doing so, it focuses on European States, in particular Belgium, France and the United Kingdom, all of which show a particular openness to prosecute torture offences on the basis of universal jurisdiction.

The dissertation comprises five chapters, including the introductory and concluding chapters.

Chapter two commences with a discussion of the meaning and history behind the concept of universal jurisdiction over torture. Thereafter, the focus is on the different ways in which European countries have implemented the obligation to establish universal jurisdiction in their own domestic legislation. It is argued that States that have in their domestic legislation a general statutory clause, which allows them to prosecute crimes for which international law requires the use of the universality principle, exercise the universal jurisdiction less effectively than States that have a specific provision authorising torture prosecution under the universality principle.

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[1] J H Brugers & H Danelius *The United Nations Convention against Torture. A Handbook on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (1988) 131.
[2] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 *UNTS* 85.
[3] J H Brugers & H Danelius op cit note 1 at 131.

Besides these general and specific methods to implement universal jurisdiction, the European prosecutors and courts face some legal problems in the prosecution of acts of torture via the universal jurisdiction over torture.

Chapter three therefore focuses on some of the legal problems that arise in respect of the application of domestic legislation, which implements the Convention. These include concerns about its scope, particularly *ratione temporis* and *ratione loci*. The two latter terms are defined and discussed in greater detail in the subsequent chapters. Indeed, what is controversial here is the non-retroactivity of the implemented legislation and the legality of the universal jurisdiction over torture over citizens of States not bound by the Convention.

Moreover, the concept of universal jurisdiction is something that has been debated frequently. Chapter four clarifies and applies within the context of torture the three most controversial aspects of the concept of universal jurisdiction. First, the interpretation of the 'presence of the offender requirement' in the State, which exercises the universal jurisdiction, that varies from one State to another. Secondly, the operation of a principle of subsidiarity continues to divide proponents and opponents. This principle of subsidiarity motivates a State ready to exercise universal jurisdiction over torture to defer the case to another State that has a stronger link with the crime and wants to prosecute it. Thirdly, some remaining obstacles (both practical and legal) are discussed that may prevent a successful prosecution.

The abovementioned chapters assess to what extent the universal jurisdiction over torture is implemented in European countries, in particular Belgium, France and the United Kingdom. In addition to summarising the discussion that precedes it, chapter five offers some recommendations as to how the principle can be better implemented.

CHAPTER II

THE CONCEPT OF UNIVERSAL JURISDICTION OVER TORTURE

A. Introduction

Chapter two commences with a discussion of the meaning and history of the concept of universal jurisdiction over torture. Thereafter, the chapter focuses on the different ways European countries have implemented the concept, and how their approaches result in different prosecutorial outcomes.

B. The meaning of the concept of universal jurisdiction over torture

There is no clear judicial definition of universal jurisdiction.[4] However, some internationally-respected scholars understand it as

> The principle that certain crimes are so heinous, and so universally recognized and abhorred, that a state is entitled or even obliged to undertake legal proceedings without regard to where the crime was committed or the nationality of the perpetrators or the victims.[5]

In other words, universal jurisdiction is based on the most heinous nature of the international law crimes.[6]

Nowadays, international law, both customary[7] and conventional,[8] recognises universal criminal jurisdiction over torture. Such concept may be related to armed conflict.[9] This

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[4] R O'Keefe 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735 at 744.

[5] Principle 1 of The Princeton Principles on Universal Jurisdiction (2001) available at *https://lapa.princeton.edu /hosteddocs/unive_jur.pdf*, accessed on 2 April 2015.

[6] Under Princeton Principle 2, such crimes include: piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture.

[7] The customary international law status of universal jurisdiction over torture is shared by most States and scholars. See above and D V Hoover 'Universal Jurisdiction not so Universal: A Time to Delegate to the International Criminal Court' (2011) 52 *Cornell Law School Inter-University Graduate Student Conference Papers* 1 at 5.

[8] The treaties cited in notes 9 and 10 oblige States parties to empower their criminal justice system to exercise universal jurisdiction. See Amnesty International *Universal jurisdiction: The duty of states to enact and enforce legislation* (2001) 4.

[9] International humanitarian law includes common articles 49 and 50 of the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 *UNTS* 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 *UNTS* 85; Convention (III) relative to the Treatment of Prisoners of War (12 August 1949) 75 *UNTS* 135; Convention (IV) relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 *UNTS* 287; art 85 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 *UNTS* 3; Council of the European Union *The AU-EU Expert Report on the Principle of Universal Jurisdiction* (2009) 7.

dissertation, however, lays aside humanitarian law considerations to focus on human rights law.[10]

Universal jurisdiction over torture offences is set forth in article 5(2) of the Torture Convention. It states that 'each State Party shall … 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'.

The above provision requires each State party to establish jurisdiction over torture offences that have no nexus with their territory, except the presence of the alleged offender. In other words, the mere presence of an alleged offender under a territory under the State's jurisdiction[11] is sufficient to oblige that State to exercise its jurisdiction over the offences.

However, States can avoid the above obligation by extraditing the offender to a State that claims jurisdiction on the basis of the three traditional principles for establishing jurisdiction, namely the territoriality principle, the active personality principle, and the passive personality principle.[12] These principles can be found in article 5(1) of the Torture Convention: paragraph (*a*) of the article allows States to prosecute a suspect, whatever his/her nationality, who committed an offence within their territory, while paragraph (*b*) enables States to prosecute an offence committed outside their territory if the suspect has the nationality of the State. Paragraph (*c*) authorizes States to prosecute extra-territorial offences if the non-national suspect has committed an offence against a victim that has the nationality of the State and if that State finds it 'appropriate'.[13]

Thus, the Torture Convention establishes a regime of obligatory universal jurisdiction over torture offences, which is based on the principle of *aut dedere aut judicare*. The latter

[10] International human rights law includes art 5(2) of the Torture Convention.

[11] The term 'any territory under its jurisdiction' must be interpreted as including all territories under the factual control of the State. See J H Brugers & H Danelius op cit note 1 at 131.

[12] However, States which not exercise jurisdiction are not obliged to extradite the offender to a State claiming universal jurisdiction. See below Chapter 3C.

[13] Article 5(1) of the Torture Convention states:

'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:

1. When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
2. When the alleged offender is a national of that State;
3. When the victim was a national of that State if that State considers it appropriate.'

These bases which permit States to exercise criminal jurisdiction are consecrated — as the universal jurisdiction — by customary international law. As to the extraterritorial offences, a third base is often identified as the protective principle which allows State to prosecute a non-national whose have threatened a vital interest of the State. Council of the European Union op cit note 9 at 11. T W Bennett & J Strug *Introduction to International Law* (2013) 50-56.

principle, as set forth in article 7(1) and (2) of the Torture Convention, obligates State parties either to prosecute the suspect present in its territory or to extradite him/her to a State which is willing to do so.[14] While it is often said that this obligation is conceptually distinct from the universal jurisdiction one,[15] the former obligation remains totally relevant to the latter issue. Indeed, article 7(1) and (2) of the Torture Convention obliges a State party to exercise the 'underlying' universal jurisdiction that the Torture Convention also obliges it to establish. Therefore, a State party is not only bound to enable its justice system to exercise universal jurisdiction, but also to exercise it by means of prosecution or extradition.[16]

Finally the necessary 'measures' to exercise universal jurisdiction includes not only legislative measures, but also executive and judicial steps as to arrest, investigate, prosecute, or extradite.[17]

C. The history of the concept of universal jurisdiction over torture

Based upon the *jus cogens* prohibition of torture in international law, the Torture Convention wanted to contribute to the universal reaction to one of the most heinous violations of human rights under criminal law. Accordingly, its general purpose is to make the torture prosecution possible in all situations.[18] Article 5(2) is thus the cornerstone of the Torture Convention.

The establishment of the universal jurisdiction system over torture is justified by several reasons.

Some of the reasons are practical. A prominent reason is the need to avoid impunity by preventing the alleged torturer from escaping the consequences of his/her acts by taking refuge in another country. Such situations are often attributable to a wilful failure (for instance, corruption or involvement of authorities, amnesties, lack of political will) or a lack of capacity (such as lack of inadequate legislation, lack of resources and security) of the

[14] Article 7(1) and (2) of the Torture Convention states:

'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. 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.'

[15] Indeed, the question of *aut dedere, aut judicare* arises logically after the establishment of jurisdiction *via* the vestment by the State of its courts with competence to try offence.

[16] Council of the European Union op cit note 9 at 10.

[17] J H Brugers & H Danelius op cit note 1 at 131.

[18] Ibid at 132.

territorial State to prosecute.[19] These situations tend to be frequent in this time of increasing transnational criminal activity, encouraged by open-borders and globalisation.[20] Other practical rationales are the absence of an exclusive international criminal court knowing all international law crimes,[21] as well as the use of universal jurisdiction as a 'catalyst' for States efforts to permit an effective prosecution of the responsible, or as a general deterrent to crimes under international law.[22]

Other reasons for the establishment of the universal jurisdiction over torture are legal, philosophical and moral. First, States, as subjects of international law, must pursue international law crimes that destabilize the international law framework.[23] Secondly, an unprosecuted suspect undermines the legal fabric where he/she is found, and discredits the State in its international relations.[24] Thirdly, the international or universal character of international law crimes enables all States to exercise universal jurisdiction.[25] Finally, torture is 'so grave' and 'of universal concern'[26] that it is seen as an attack on fundamental legal values shared by the whole international community, and, in some cases, on international peace and security.[27]

The last rationale refers to the origin given by many scholars to universal jurisdiction. The concept of universal jurisdiction is derived from *The Law of War and Peace* by Hugo Grotius, published in 1625. In his work, Grotius posed the right to freedom of navigation on the high seas. Since this right was applicable universally, it was concluded that pirates, *hostes*

[19] Ibid at 133; M T Kamminga *Final Report of the ILA Conference on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences* (2000) 564; C Ingelse *The UN Committee against Torture: an Assessment* (2001) 342; R Sifris *Reproductive Freedom, Torture and International Human Rights* (2014) 228.
[20] S Macedo 'Introduction' in S Macedo (ed) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (2006) 3.
[21] P Kirsch 'The International Criminal Court: Current Issues and Perspectives' (2001) 64 *Law & Cont. Probs* 3 at 4-5; M Robinson 'Preface' in S Macedo (ed) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (2006) 16.
[22] M T Kamminga op cit note 19 at 564; Amnesty International op cit note 8 at 24-26.
[23] M 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* (2000) 412.
[24] Amnesty International op cit note 8 at 32.
[25] The United Kingdom originally opposed the inclusion of the universal jurisdiction over torture in the UN Convention, because torture offence have not an enough 'obviously international character'. See J H Brugers & H Danelius op cit note 1 at 58.
[26] B Broomhall 'Universal Jurisdiction: Myths, Realities, and Prospects: Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law' (2001) 35 *New Engl L Rev* 399 at 402.
[27] Amnesty International op cit note 8 at 32; R Sifris op cit note 19 at 227.

human generis (enemies of the human race), must be punished universally. All States shall have total jurisdiction over universal enemies.[28]

More than three centuries later, the Torture Convention and the Apartheid Convention[29] remain the only human rights Conventions to ever provide for universal jurisdiction.[30] However, the universal jurisdictional system, including the obligation *aut dedere, aut judicare* (prosecution or extradition) of the Convention against Torture is identically modelled on earlier international law treaties.[31]

D. The different implementation of the concept of universal jurisdiction over torture in European domestic laws

All European States, including Belgium, France and the United Kingdom, have signed and ratified the Torture Convention. Nevertheless, they adjust the obligation of establishing universal jurisdiction in their domestic laws differently, which has led to different outcomes in prosecuting torture. Their methods for implementing article 5(2) can be classified into two main categories, which are the general statutory clause method and the specific provision method.

i) The general statutory clause method

The first method of implementation takes the form of a general statutory clause, which a State introduces or relies on in its domestic law. This clause enables the State - its courts and prosecutors - to exercise universal jurisdiction over any crime for which international treaty law obliges such prosecution. As observed above, this obligation arises in relation to torture. Indeed, article 5(2) of the Torture Convention requires that a State party 'take measures' to establish universal jurisdiction over the crime of torture.

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[28] C Bassiouni 'The History of Universal Jurisdiction and Its Place in International Law' in S Macedo (ed) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (2006) 43.

[29] Art 5 of the International Convention on the Suppression of the Crime of Apartheid (30 November 1973) 1015 *UNTS* 244.

[30] C Ryngaert 'Universal Criminal Jurisdiction over Torture: a State of Affairs after 20 years UN Torture Convention' (2005) 23/4 *Netherlands Quarterly of Human Rights* 571 at 571.

[31] Art 4 of the Convention for the Suppression of Unlawful Seizure of Aircraft (16 December 1970) 860 *UNTS* 105; art 5 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (23 September 1971) 974 *UNTS* 178; art 3 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (14 December 1973) 1035 *UNTS* 167; art 5 of the International Convention against the Taking of Hostages (18 December 1979) 1316 *UNTS* 205. See Amnesty International op cit note 8 at 4; C Ingelse op cit note 19 at 318.

Belgium included such a statutory clause in its article 12*bis* of the Preliminary Title of the Code of Criminal Procedure.[32] It states that

> the Belgian courts … have jurisdiction to try offences committed outside the territory of the Kingdom that are specified in rules of international law established by convention or custom or rules of European Union secondary law binding Belgium, when such rules require it, by whatever means, to bring the relevant case before the competent authorities to launch proceedings.

Accordingly, Belgian courts have jurisdiction over any torture offence[33] committed outside Belgium because international treaty law through article 5(2) of the Torture Convention obligates Belgium to prosecute the alleged torturer.[34]

However, States that rely on general enabling clauses tend to be more reluctant to prosecute torture offences. This is because the operation of the principle of legality,[35] especially its requirements of legal certainty and predictability, could hamper the inferring of universal jurisdiction over torture offences from the broadly formulated general statutory clauses. Sometimes, circumspection on the part of prosecutors may result in requalifying torture offences as other international crimes over which an explicit universal jurisdiction exists in domestic law.[36]

Belgium provides illustrations of the phenomenon of requalification. Indeed, Belgian courts and prosecutors have often qualified acts of torture as a crime against international

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[32] *Loi contenant le titre préliminaire du Code de procédure pénale* (18 April 1878) as amended in 2003 available at *www.ejustice.just.fgov.be,* accessed on 3 April 2015. Article 12*bis* was introduced by the law of 17 April 1986. This initial version did not permit Belgian courts to exercise universal jurisdiction over torture on basis of statutory permission. Indeed, universal jurisdiction was limited for crimes included in the Convention on the Safety of Nuclear Material. Then, the law of 18 July 2001 authorized universal jurisdiction over crimes required by international treaty law. The law of 7 Augustus 2003 extended such jurisdiction to the international customary law. The law of 22 December 2003 added the rules of European Union secondary law.
Compared with the early and important activism of Belgian jurisdictions in pursuing international humanitarian law crimes (see below), this absence of provision dealing with universal jurisdiction over torture until 2001 is surprising. See Belgium's report to the Committee against Torture 'Second Reports of States Parties under Article 19 of the Convention' (14 August 2007) available at *www.ohchr.org*, accessed on 10 April 2015 at para 1; W Kaleck 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008' (2009) 30 *Michigan Journal of International Law* 927 at 932-35; B Fridman & L Hennebel 'Translating Unocal: The Liability of Transnational Corporations for Human Rights Violations' in M K Sinah (ed) *Business and Human Rights* (2013) 248.

[33] The torture offence is criminalised in article 417*bis* of the Belgian Criminal Code (*Code pénal*) (18 June 1867) as amended in 2002 available at *www.ejustice.just.fgov.be,* accessed on 3 April 2015.

[34] This general statutory clause approach is particularly broader than, i.e., the Spanish one. While the former requires establishing universal jurisdiction for crimes required by international law (treaty and custom) and European law, the latter is limited to international treaty law. See article 23(4)(*g*) of the Organic Law of the Judicial Power (1 July 1985) available at *www.wipo.int/wipolex/en*, accessed on 2 April 2015.

[35] The principle of legality (*nullum crimen, nulla poena sine lege*) is a fundamental one in most domestic criminal law, and is really anchored in Belgium. According to the Belgian Constitution (17 February 1994) available at *www.dekamer.be*, accessed on 4 April 2015: 'no one can be prosecuted except in cases provided by law' (article 12) and 'no penalty may be imposed or applied except under the law' (article 14).

[36] C Ryngaert op cit note 27 at 577; F Kuty *Principes généraux du droit pénal belge: Tome I – La loi pénale* (2009) 71.

humanitarian law, particularly as a crime against humanity. This is because Belgium does not have a specific provision that confers universal jurisdiction over torture. However, it has a specific statute that provides for universal jurisdiction over international humanitarian law crimes.[37]

For example, in the *Pinochet* case,[38] an investigation was initiated in 1998 by a Belgian judge during Pinochet's provisory detention in the United Kingdom. While the House of Lords qualified similar acts of Pinochet as torture, the Belgian judge qualified some acts as crimes against humanity. Several reasons can be advanced for this. First, Belgium had not ratified the Torture Convention at that time,[39] unlike the United Kingdom, which has a specific provision for universal jurisdiction over torture but not for crimes against humanity.[40] Secondly, the Belgian non ratification of the Torture Convention could have been interpreted as a rejection of a norm of customary international law which has the same content than article 5(2) of the Torture Convention. Thirdly, crimes against humanity could have been seen as more heinous than torture and therefore more susceptible to universal jurisdiction than customary international law.[41]

Another example emerged after Belgium's ratification of the Torture Convention. In the *Habré* Case,[42] Chad's former President was charged with both torture and crimes against humanity. Subsequent proceedings concentrated on the latter, which could have lead to the application of the Belgian law granting universal jurisdiction over international humanitarian law, thereby avoiding a probable loss of jurisdiction had the proceedings been focused on torture.[43]

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[37] *Loi relative à la répression des violations graves de droit international humanitaire* (5 Augustus 1993). This law was amended by the law of 10 February 1999, and was repealed by the law of 5 Augustus 2003, overall because of pressures of the international community following the many complaints filled in Belgium by foreign victims against high-ranking officials. See Belgium's report to the Committee against Torture op cit note 32 at para 1; W Kaleck op cit note 32 at 932-35; B Fridman & L Hennebel op cit note 32 at 248. A similar approach is observed in Germany. See Human Rights Watch *The Legal Framework for Universal Jurisdiction in Germany* (2014) 1-7.

[38] *Pinochet* (6 November 1998) (Investigating Magistrate Brussels) (1999) 79 *Revue de Droit Pénal et de Criminologie* 278.

[39] Belgium ratified the Torture Convention on 9 June 1999, while it signed it on 4 February 1985.

[40] See below for the specific provision adopted by the United Kingdom.

[41] L Reydams 'In re Pinochet' (1999) 93 *American Journal of International Law* 700 at 700-703; D Vandermeersch 'Pinochet' in J Wouters (ed) *Bronnenboek Internationaal Recht* (2000) at 131; R A Falk 'Assessing the Pinochet Litigation' in S Macedo (ed) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (2006) at 97-121.

[42] *Habré* (19 September 2005) (Investigating Magistrate Brussels) (unpublished).

[43] N Roht-Arriaza *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (2004) 181-86; S P Marks 'The Hissène Habré Case: the Law and Politics of Universal Jurisdiction' in S Macedo (ed) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (2006) 131-67.

If going by Belgium's approach, the qualification of torture acts as crimes against international humanitarian law ensures the observance of the principle of legality, it should be noted nevertheless, that the threshold of proof of the existence of the latter crimes is higher than the former. Indeed, torture crimes only require proof of one act consisting of 'severe pain or suffering, whether physical or mental, … intentionally inflicted on a person for … [some] purposes…'[44] International humanitarian law crimes diverge by requiring elements of organisation and intent: proving war crimes involves showing that the act is 'part of a plan or policy or as part of a large-scale commission of such crimes'.[45] Similarly, prosecuting crimes against humanity requires proof that the act is 'part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.[46] Likewise, genocide, another international humanitarian law crime, must be proved by showing 'intent to destroy, in whole or in part, a national, ethnic, racial or religious group'.[47]

Courts and prosecutors that qualify acts of torture as international humanitarian law crimes risk failure in their prosecution of such acts because of the higher threshold of proof that is required. As a result of such conduct by courts and prosecutors, a risk of implicating their State's responsibility for non adequate compliance with the Torture Convention can-not be excluded.[48] Indeed, according to the Committee against Torture, the obligation of article 2 of the Torture Convention to take effective measures to prevent torture includes the State party's obligation 'to eliminate any legal or other obstacles that impede the eradication of torture'. The differences between the definition of torture in the Torture Convention, its incorporation and application in domestic law can lead to impunity. The prosecution of an act of torture under another qualification would be a violation of the Torture Convention.[49] Despite that, identifying torture crimes 'will promote the Convention's aim, *inter alia*, by alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture.'[50] However, establishing a State party's responsibility for having requalified an act of torture seems difficult. Indeed, in relation to the Torture Convention, up to now, only

[44] Article 1 of the Torture Convention.
[45] Article 8 of the Rome Statute of the International Criminal Court (17 July 1998) 2187 *UNTS* 90.
[46] Ibid article 7.
[47] Ibid article 6.
[48] According to the International Law Commission 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) available at *http://www.refworld.org/docid/3ddb8f804.html*, accessed on 13 June 2015, the commission of an internationally wrongful act attributable to a State involves legal consequences, including cessation and non-repetition of the act (article 30), reparation (articles 31, 34–39) and countermeasures (articles 49–54).
[49] However, the Committee gives only the example of a qualification under ill-treatment, which differs from torture in the severity of pain and suffering and may not require proof of impermissible purposes.
[50] Committee against Torture 'General Comment 2, Implementation of article 2 by States Parties' (2007) available at *http://www1.umn.edu/humanrts/cat/general_comments/cat-gencom2.html*, accessed on 5 April 2015.

one State party's responsibility was concluded for having failed to establish universal jurisdiction over torture.[51] Nevertheless, the International Court of Justice found in a recent judgment that the violation of an international obligation under the Torture Convention is a wrongful act engaging the responsibility of the State party. As long as all measures necessary for the implementation of the obligation have not been taken, the State party remains in breach of its obligation.[52]

ii) The specific provision method

The second method of implementing article 5(2) of the Torture Convention consists of introducing a specific provision that recognises universal jurisdiction over torture in the domestic code of criminal procedure.

This approach was followed by France and the United Kingdom among others, although the French and English methods are distinguishable.

France implemented article 5(2) in article 689-2 of the *Code de procédure pénale* as follows:

> For the implementation of the Convention against Torture (…), any person guilty of torture in the sense of article 1 of the Convention may be prosecuted and tried in accordance with the provisions of Article 689-1.

The article does not include a direct link between substantive torture law and universal jurisdiction. It refers instead to article 689-1, which includes the general provision providing for universal jurisdiction if the perpetrator happens to be in France.[53] According to article 689-1:

> Perpetrators of or accomplices to offences committed outside the territory of the Republic may be prosecuted and tried by French courts either when French law is applicable under the provisions of Book I of the Criminal Code or any other statute, or when an international Convention gives jurisdiction to French courts to deal with the offence.

[51] *Guengueng et al v Senegal* (2001) (Committee against Torture) available at *http://www.bayefsky.com//pdf/senegal_t5_cat_181_2006.pdf*, accessed on 13 June 2015. The violation of article 5 (2) was established because of the failure to establish jurisdiction over the former President of Chad Hissène Habré.

[52] *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v Senegal) (20 July 2012) (International Court of Justice) *ICJ Reports 2012* paras 95 and 117.

[53] Art 689-1 and 689-2 of the French Code of criminal procedure (*Code de procédure pénale*) (1 January 1994) available in English (Official translation) at *www.legifrance.gouv.fr*, accessed on 2 April 2015. However, the previous version of art 689-2 (1 January 1986) directly linked substantive torture law to universal jurisdiction: 'Any person guilty of torture committed outside the Republic territory … may be prosecuted and tried by French courts if he is found in France.' See W Kaleck op cit note 32 at 936.

The use of the term 'may' in these articles leads to the conclusion that implementation of article 5(2) does not oblige French courts to exercise jurisdiction, but only enables them to do so.[54]

A different approach to the specific implementation of article 5(2) was adopted by the United Kingdom, where the codification of the universal jurisdiction over torture offences directly relates to universal jurisdiction and substantive torture law. Indeed, s. 134(1) of the Criminal Justice Act of 1988[55] states:

> 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.

It is observed that European State parties that have adopted a specific method of implementing article 5(2) of the Torture Convention tend to exercise universal jurisdiction more effectively. Indeed, the only known trials, in which alleged torturers were convicted under such jurisdiction, were conducted in those States.[56] In contrast, State parties with a general enabling clause encounter obstacles in torture prosecution, especially over the principle of legality. They prefer either not to prosecute, or to prosecute after qualifying with specific legislation acts of torture as crimes against international humanitarian law. To summarize, the application of universal jurisdiction is more effective if it is sustained by a specific legislation.

States that have specific universal jurisdiction over torture also 'recharacterise' torture as another international crime, as States with a general statutory clause do. Indeed, the difference of jurisdictional regime may be used by State parties and prosecutors, for example to dismiss a complaint.

In the *Munyeshyaka* case, following complaints by Rwandan genocide survivors, a priest living in France was arrested by French authorities under rules of universal jurisdiction and was charged *inter alia* with genocide and torture. In 1995, the Nîmes Court of Appeals ruled that 'the jurisdiction of the investigating judge should be exclusively assessed in view of the highest and most specific incrimination, that is, the crime of genocide'. While the *Code de procédure pénale* specifically provides for universal jurisdiction over torture (article 689-2;

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[54] B Stern 'La compétence universelle en France: le cas des crimes commis en ex-Yougoslavie et au Rwanda' (1997) 40 *German Yearbook of International Law* 280 at 280-89.

[55] S 134 of the Criminal Justice Act (1988) available at *www.legislation.gov.uk*, accessed on 2 April 2015.

[56] See below *Sébastien N* (7 April 2004) (Rotterdam District Court) (2004) 51 *Netherlands International Law Review* 444 at 444-49 (Netherlands); *Ely Ould Dah* (1 July 2005) (Gard Court of Assises) un-published (France); *R v Zardad* (18 July 2005) (Central Criminal Court) available at *www.redress.org/news/zardad%207% 20apr%202004.pdf*, accessed on 5 April 2005 (United Kingdom). See W Kaleck op cit note 32 at 931-58.

supra), it does not provides for such jurisdiction over genocide. Accordingly, France did not have jurisdiction to judge the crime of genocide committed abroad by a foreign national against other foreign nationals.[57] In 1998, the French Court of Cassation quashed the judgement of the Court of Appeals, which had violated the article 689-2 'by affirming that only the qualification of genocide applied in the case'.[58] The Court of Cassation ruled instead that French courts have jurisdiction from the moment 'the criminal acts may qualify, under French law, as acts provided for in article 689-2.' By this ruling, the Court wanted to prevent French courts to qualify torture acts as genocide in order to benefit from a discrepancy in international treaty law: genocide, regarded as the most heinous crime, is, pursuant to the 1948 Genocide Convention, subject to a less vigorous jurisdictional regime than the crime of torture. Accordingly, these courts could 'circumvent their authority or duty to exercise universal jurisdiction'.[59] The latter statement illustrates the difference between Belgium's and France's approach to universal jurisdiction over torture. While Belgian courts try acts of torture as international humanitarian law crimes, and not as torture crimes, French courts only try such acts under the latter qualification.

E. Conclusion

Since torture is one of the most heinous crimes in international law, the Torture Convention requires each State party to establish universal jurisdiction over torture in their domestic law. Thirty years after the signature of the Convention, two main methods of implementing this obligation in domestic law are observed.

The first method, adopted by Belgium, takes the form of a general statutory clause that enables the State to exercise universal jurisdiction over any crime for which international treaty law obliges such prosecution. However, the operation of the principle of legality makes States reluctant to prosecute torture offences and may result in requalifying torture offences as other international crimes.

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[57] *Dupaquier et al v Munyeshyaka* (20 March 1996) (Nîmes Court of Appeal) 4 *Revue Générale de Droit International Public* 1084. See A Cassese *International Law* (2005) 453.

[58] *Munyeshyaka* (6 January 1998) (Court of cassation) (1998) 102 *Revue Générale de Droit International Public* 827 at 827-28. A new investigation was opened but the delay in the proceedings results in the France condemnation by the European Court of Human Rights for having violated the rights of victims to be heard promptly and compensated. See *Mutimura v France* (8 June 2004) (European Court of Human Rights) available at *http://cmiskp. echr.coe.int*, accessed on 5 April 2015. In 2006, Munyeshyaka was sentenced *in absentia* to life imprisonment by a Rwandan Military Court. Another prosecution remains pending in France: the *Munyeshyaka* case was transferred to French courts by the International Criminal Tribunal for Rwanda in 2008. For more information on this case, see The Hague Justice Portal 'Munyeshyaka, Wenceslas (ICTR)' available at *http://www.haguejusti ceportal.net/index.php?id=10679*, accessed on 4 April 2015.

[59] C Ryngaert op cit note 30 at 579; W Kaleck op cit note 32 at 938.

The second method, adopted by France and the United Kingdom, introduces a specific provision that recognises universal jurisdiction over torture in the domestic code of criminal procedure. While this approach leads to a more effective prosecution of torture offences, States also experience the phenomenon of requalification, especially for the purpose of dismissing complaints. Moreover, within the numerous European States that have enacted laws, which provides explicitly for universal jurisdiction over torture,[60] only a few cases have applied it, and this limited - but increasing[61] - phenomenon began about 20 years after signing the Torture Convention.[62] In fact, European prosecutors and courts face practical obstacles and unclarified legal questions in the prosecution of acts of torture *via* the universal jurisdiction over torture. The following chapters focus on these difficulties that prevent States from achieving successful torture prosecutions.

CHAPTER III

THE PROBLEM OF THE SCOPE OF APPLICATION OF THE UN TORTURE CONVENTION

A. Introduction

This chapter focuses on some legal problems that arise in respect of the application of European domestic legislation that implement the Torture Convention. The problems include concerns about the scope of the Convention (both *ratione temporis* and *ratione loci*). Indeed, what is controversial here is the non-retroactivity of the above-mentioned implemented legislation and the legality of the universal jurisdiction over torture over citizens of States not bound by the Convention.

B. The scope of ratione temporis*: the non-retroactivity of the implementing legislation of the Torture Convention*

The Torture Convention was signed in 1984 and implemented by States Parties well thereafter. The question arises as to whether presumed offenders could, under universal jurisdiction, be prosecuted for torture offences committed before the implementation of the

[60] C Bassiouni op cit note 28 at 44.
[61] A H Butler 'The Growing Support for Universal Jurisdiction in National Legislation' in S Macedo (ed) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (2006) 67.
[62] C Bassiouni op cit note 28 at 44.

Torture Convention. If the response of some national supreme courts and the International Court of Justice were that such prosecutions were not possible, the reverse could also be argued if it is established that there was a rule of customary international law authorising universal jurisdiction over torture, and that such rule existed before the implementation of the Torture Convention.

The United Kingdom's House of Lords[63] was the first Supreme Court judgment to refuse the retroactivity of the implementing legislation of the Torture Convention. As mentioned in the previous chapter, the *Pinochet* case dealt with a request by Spain for the extradition of the former Chilean President Augusto Pinochet for torture offences committed by him between 1973 and 1990. The House of Lords held that he was not extraditable for such offences committed before the entry into force of s. 134 of the abovementioned Criminal Justice Act of 1988. The majority opinion stated that acts of torture committed abroad were not punishable in the United Kingdom if they had occurred before the implementation of the Torture Convention that introduced the substantive crime of torture and created universal jurisdiction for English courts over it.[64] This statement was based on the Extradition Act of 1989,[65] which allows extradition for conduct that would constitute an extraterritorial offence under the law of the United Kingdom in force at the time of the commission of the offence.

The Dutch Supreme Court followed suit in the *Bouterse* case.[66] In the latter case, the Hoge Raad refused to apply the Dutch Torture Convention Implementation Act of 1989[67] to acts of torture allegedly committed in 1982 by Surinam commander Desi Bouterse (and thus before the Act came into force). According to the Hoge Raad, Dutch criminal law neither criminalised nor provided for universal jurisdiction over acts of torture in 1982.[68]

The International Court of Justice (ICJ) continued this trend in the *Habré* case.[69] While the ICJ concluded that Senegal had violated its obligation to prosecute or extradite Habré under the Torture Convention, it stated that the obligation did not apply to acts alleged to have been committed before the Convention had been entered into force by Senegal in

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[63] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others* (*ex parte* Pinochet) (24 March 1999) (House of Lords) 38 *ILM* 3 at 581.
[64] Ibid at 585-88.
[65] S 1(3)(c) of the Extradition Act (1989) available at *www.legislation.gov.uk*, accessed on 15 June 2015.
[66] *Wijngaarde et al v Bouterse* (20 November 2000) (Amsterdam Court of Appeals) available at *http://ljn.rechtspraak.nl*, accessed on 20 August 2015.
[67] Torture Convention Implementation Act (1989) available at *www.legislation.gov.uk*, accessed on 15 June 2015.
[68] N Blokker & N J Schrijver *Netherlands Yearbook of International Law* (2001) 287.
[69] *Questions Relating to the Obligation to Prosecute or Extradite Belgium Senegal* supra note 52.

1987.[70] The ICJ based its decision on article 28 of the Vienna Convention on the Law of Treaties,[71] which provides that unless a different intention appears, the treaty does 'not bind a party in relation to any act or fact that took place or any situation that ceased to exist before the date of the entry into force of that treaty'. In this case, however:

> nothing in the Convention against Torture reveals an intention to require a State party to criminalize, under Article 4, acts of torture that took place prior to its entry into force for that State, or to establish its jurisdiction over such acts [namely universal jurisdiction] in accordance with Article 5.[72]

Some justification could, nevertheless, be found to prosecute torture offences committed before the implementation of the Torture Convention in the late 1980s. To this end, Ryngaert argued that it should be demonstrated that there was a rule of customary international law authorising universal jurisdiction over torture, and that such rule existed before the implementation of the Torture Convention.[73]

A rule of customary international law authorising the exercise of universal jurisdiction over torture committed before the end of the 1980s would be based on the *jus cogens* nature of the prohibition against torture in international law.[74] Some cases confirm this position. First, the *Furundzija* case 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.[75]

Secondly, Lord Millett added in the abovementioned *Pinochet* case that while the jurisdiction of the English courts is usually statutory, it is supplemented by the common law. Therefore, English courts 'have and always have had extraterritorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law [which is part of common law]', including 'the systematic use of torture on a large scale and as an instrument of State policy'.[76] Lord Millett considered that by 1973 torture was included in international crimes of universal jurisdiction. Thus, English courts had universal jurisdiction over crimes of torture committed by Pinochet before the English implementation of the Torture Convention

[70] Ibid para 102.
[71] Vienna Convention on the Law of Treaties (23 May 1969) 1155 *UNTS* 331.
[72] *Questions Relating to the Obligation to Prosecute or Extradite Belgium Senegal* supra note 52 at para 100.
[73] C Ryngaert op cit note 30 at 585.
[74] Ibid.
[75] *Prosecutor v Furundzija* (10 December 1998) (International Criminal Tribunal for the former Yugoslavia) 38 *ILM* 346 at para 156.
[76] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others* supra note 63 at 650.

in 1988. However, Lord Millett conceded that the rest of the House of Lords recognised that there was jurisdiction only when the United Kingdom had ratified the Torture Convention.[77]

Thirdly, in the *Bouterse* case, the Amsterdam Court of Appeals stated that the Torture Convention had a declaratory nature, and that, at the time of the alleged commission (1982), customary international law considered torture as a crime, and authorised universal jurisdiction over it.[78] The Hoge Raad, however, quashed the judgment on the ground that customary international law — which criminalised torture — could not prevail over contrary domestic law — which had not already criminalised torture in 1982.

The view propounded in the above three cases could be justified and defended by the exception to the principle of non-retroactivity[79] included in article 7(2) of the European Convention on Human Rights[80] and article 15(2) of the International Covenant on Civil and Political Rights.[81] Pursuant to these articles, the principle of non-retroactivity

> shall [not] prejudice the trial and punishment of any person for any act … which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

In view of both this international approach of the principle of non-retroactivity and the domestic principle of legality that prohibits the retroactivity application of law, Blokker & Schrijver argue that the principle of legality does not apply to procedural rules, including jurisdictional ones.[82] Accordingly, the inclusion of universal jurisdiction in an act after the commission of a torture offence would be insignificant (procedural rule). The existence of the offence in law at the moment of the commission would be sufficient (substantive rule). A later extension of the domestic jurisdiction rule to universal jurisdiction would not make the 'legal situation' of the presumed torturer more prejudicial than it was at the time of the commission.[83]

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[77] A Bianchi 'Immunity versus Human Rights' (1999) 10 *EJIL* 2 at 244.

[78] *Wijngaarde et al v Bouterse* (20 November 2000) (Amsterdam Court of Appeals) available at *http://ljn.rechtspraak.nl*, accessed on 20 August 2015. As seen above, this judgment was quashed by the Hoge Raad: as to these arguments, it held that customary international law, unlike binding treaties, could not prevail over contrary domestic law. Ibid at 287-92.

[79] C Ryngaert op cit note 30 at 586.

[80] Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 *UNTS* 221.

[81] International Covenant on Civil and Political Rights (16 December 1966) *999 UNTS 171.*

[82] N Blokker & N J Schrijver op cit note 68 at 106-107.

[83] This approach was adopted by the Spanish Supreme Court, which states that the 1985 jurisdictional law which provides for universal jurisdiction 'is not a substantive provision of criminal law' as it 'does not define or criminalise any act or omission.' The law's effect 'is limited to proclaiming Spain's jurisdiction for trying offences defined and punished in other laws. … The procedural rule in question applies no unfavourable sanction, nor does it restrict individual rights.' *Order affirming Spain's Jurisdiction to Try Crimes of Genocide and Terrorism Committed During the Chilean Dictatorship* (5 November 1998) (Criminal Chamber of the

The argument excluding the application of the principle of legality to rules extending jurisdiction is, however, criticised by Ryngaert on the grounds that the presumed offender could not have foreseen — on the basis of laws applicable at the time of the commission — that he would be prosecuted under universal jurisdiction. He could not, therefore, decide on whether or not to commit the acts in an informed manner. His situation would be prejudiced by this extension of jurisdiction. Accordingly, the legal uncertainty and unpredictability that arises from the extended jurisdiction could lead to the violation of the principle of legality.[84] However, one could critically wonder whether ignorance of the law is a valid defence, especially in the light of the Latin maxim *nemo censetur ignorare legem* (nobody is thought to be ignorant of the law). The Belgian Constitutional Court heard Ryngaert's argument in the *Erdal* case.[85] The Court held that a provision extending the scope *ratione loci* of the existing substantive criminal law is a substantive provision of criminal law, to which the principle of non-retroactivity applies. On that basis, the Court annulled a 2003 provision that provided for universal jurisdiction over some terrorist offences which, at the time of the alleged commission (1996), were not amenable to universal jurisdiction.[86] The Belgian Constitutional Court did not, however, consider terrorism as an international crime that could have justified the application of the abovementioned international human rights exception to the principle of non-retroactivity.[87]

Ultimately, due to the lack of State practice and *opinio juris*, it seems difficult to deduce the existence of a customary international law rule authorising and *a fortiori* compelling (as the article 5(2) of the Torture Convention requires) universal jurisdiction over torture.[88] Moreover, the judicial branch (per Lords Millet and the Amsterdam Court of Appeals), by authorizing universal jurisdiction over torture before the ratification of the Torture Convention, seems to be overstepping the limits of the separation of powers principle.

Spanish Audencia Nacional) available in English in R Brody & M Ratner *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (2000) 99.

[84] C Ryngaert 'Universal Jurisdiction over Genocide and Wartime Torture in Dutch Courts: An Appraisal of the Afghan and Rwandan cases' (2007) 2 *Hague Justice Journal* at 21.

[85] *Erdal v Conseil des Ministres* (20 April 2005) (Belgian Constitutional Court) *Moniteur belge of 3 May 2005* at 25.

[86] C Ryngaert 'Het arrest Erdal van het Arbitragehof: eindelijk duidelijkheid over de onrechtmatigheid van de retroactieve toepassing van extraterritoriale rechtsmachtuitbreidingen' (2005) *Tijdschrift voor Strafrecht* at 345 and 349.

[87] P Martens *Rapport de la Cour d'Arbitrage* (2005) 42.

[88] Y S Kraytman 'Universal Jurisdiction – Historical Roots and Modern Implications' (2005) 2 *Brussels Journal of International Studies* 94 at 117; C Ryngaert op cit note 84 at 21; S Laciner, M Ozcan & I Bal *USAK Yearbook of International Politics and Law* (2008) 133.

Indeed, universal jurisdiction affects foreign relations in an important way, a matter usually belonging to the legislative and executive branches of government.[89]

While the previous developments deal with the issue of the non-implementation of universal jurisdiction in domestic laws before the commission of the torture offence, in the French *Ely Ould Dah* case,[90] the universal jurisdiction clause was already inserted into article 689-1 of the Code of Criminal Procedure (*Code de procédure pénale*) before the alleged commission of the torture offences (1990). However, the substantive torture provision in article 222-1 of the Criminal Code (*Code pénal*) was introduced only in 1994. The Court of Cassation held that universal jurisdiction over torture was not retroactively applied, thereby not violating the legality principle. Indeed, the torture offence is defined in an international convention (the Torture Convention ratified by France in 1985 and entered into force in 1987)[91] which prevails over domestic law.[92] Moreover, if torture was not an autonomous offence before 1990, it was already an aggravating circumstance of other offences of the *Code pénal*. The European Court of Human Rights confirmed that the French trial of Ely Ould Dah had not violated the European Convention of Human Rights' prohibition on retroactivity.[93] Indeed, at the time of the commission, torture had been expressly provided for in the Criminal code (*Code pénal*). The Court stated that the fact that this offence only took the form of aggravating circumstances, and not separate offences is not decisive:

> The perpetrator of a crime or major offence 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.

Apart from a possible subsequent crystallisation of a customary international law rule authorising universal jurisdiction over torture, it is clear at this time that presumed offenders could not be prosecuted under universal jurisdiction for torture offences committed before the implementation of the universal jurisdiction clause of the Torture Convention. Such a prosecution would violate the prohibition of the retroactive application of law. In contrast, if the jurisdictional provision is implemented, the establishment of torture as an autonomous substantive offence is not required at the time that the torture was committed, as illustrated in

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[89] C Ryngaert op cit note 30 at 585-87.
[90] *Ely Ould Dah* (23 October 2002) (Court of Cassation) available at *www.legifrance.gouv.fr*, accessed on 13 June 2015.
[91] See the definition of torture in Chapter 1.
[92] Article 55 of the French Constitution (4 October 1958) available at *www.assemblee-nationale.fr*, accessed on 14 June 2015 asserts the primacy of ratified treaties over domestic laws.
[93] *Ely Ould Dah v France* (17 March 2009) (European Court of Human Rights) available at *http://hudoc.echr.coe .int*, accessed on 13 June 2015.

the *Ely Ould Dah* case. If the issue of the scope for *ratione temporis* of the Torture Convention seems settled, it is far from being the case as regards the scope for *ratione loci*.

C. *The scope of* ratione loci*: the legality of the universal jurisdiction over torture over citizens of States not bound by the Torture Convention*

If the number of State Parties to the Torture Convention continues to increase,[94] the status of the relationship of these States with non State Parties remains unclear. The most controversial issue concerns the possibility for State Parties, pursuant to article 5(2), to exercise universal jurisdiction over nationals of non State Parties, which are not bound by article 5(2).[95]

International treaty law *prima facie* refuses the possibility for State Parties, pursuant to article 5(2), to exercise universal jurisdiction over nationals of non State Parties, which are not bound by article 5(2). Indeed, the principle *pacta tertiis nec nocent nec prosunt* states that 'a treaty does not create either obligations or rights for a third State without its consent'.[96] Each State is sovereign and free to decide to be (un)bound by a treaty.[97] Accordingly, because article 5(2) of the Torture Convention applies only to State Parties, some scholars argue that it is not a basis for 'universal jurisdiction *stricto sensu*'.[98]

In contrast, some scholars argue that treaty law is not violated by a State's exercise of universal jurisdiction under article 5(2) over the nationals of non State Parties. Indeed, the Torture Convention does not impose obligations on non State Parties by providing for jurisdiction over their nationals. Moreover, no non State Parties' rights are infringed upon by the exercise of universal jurisdiction over their nationals.[99] Accordingly, under the Lotus Principle, which allows a State to exercise its jurisdiction on any matter so long as such jurisdiction is not prohibited by any international law rule,[100] State Parties have a legitimate

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[94] As of 13 June 2015, the Torture Convention gathers 158 States Parties. The number of Parties is available at *https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=fr*, accessed on 13 June 2015.

[95] S R Ratner & J S Abrams *Accountability for Human Rights Atrocities in International Law* (2001) 162.

[96] Article 34 of the Vienna Convention on the Law of Treaties (23 May 1969) 1155 *UNTS* 331. Pursuant to article 35, the consent must be written as to an obligation.

[97] S Laciner, M Ozcan & I Bal op cit note 88 at 133.

[98] K Randall 'Universal Jurisdiction Under International Law' (1988) 66 *Tex. L. Rev.* 785 at 788-89; R Higgins *Problems and Process, International Law and How We Use It* (1994) 63-64; Y S Kraytman op cit note 88 at 117.

[99] M P Scharf 'Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States' (2001) 35 *New England Law Review* 2 at 376-79; D Duquette *Universal Human Rights: Moral Order in a Divided World* (2005) at 183.

[100] *S.S. Lotus* (France v Turkey) (7 September 1927) (Permanent Court of International Justice) *PCIJ Series A No. 10* at 18 stated that 'restrictions upon the independence of States cannot … be presumed' and that international law leaves to States 'a wide measure of discretion which is only limited in certain cases by prohibitive rules.'

interest in exercising universal jurisdiction over the nationals of non State Parties.[101] Following the same Lotus Principle, other scholars argue that neither the Torture Convention nor its domestic implementing legislation limit the application of article 5(2) to offences committed by the nationals of State Parties.[102]

However, the European rejection of the retroactivity of the Torture Convention developed in the previous section seems opposed to the application of treaty-based universal jurisdiction over the nationals of non State Parties.[103] The presumed offender would be prosecuted for an offence that did not constitute a recognised crime in his/her State of nationality or even in the State in whose territory the offence was committed. Nevertheless, some scholars argue against this view and support the exception — few endorsed by State practice —[104] to the prohibition of non-retroactivity for the crime of *ius cogens*.[105] Similarly, Cassese submits that universal jurisdiction on the basis of an *aut dedere aut judicare* provision does not cover offences committed by nationals of non State Parties, 'unless the crime is indisputably prohibited by customary international law' or 'the national of a noncontracting State engages in prohibited conduct in the territory of a State party, or against nationals of that State'.[106]

As to international customary law, the existence of a rule authorising State Parties to exercise universal jurisdiction over citizens of non State Parties on the basis of an *aut dedere aut judicare* provision is controversial. Some scholars argue that such an existence is unclear,[107] or sustained by human rights activists without relevant analyses of state practice and *opinion juris*.[108] In contrast, other scholars confirm the existence of a customary international law rule authorising State Parties to exercise universal jurisdiction over torture

[101] M P Scharf op cit note 99 at 373.
[102] P Burns & S Mc Burney 'Impunity and the CAT' in C M Scott *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001) 281.
[103] See above Chapter 3B.
[104] S Laciner, M Ozcan & I Bal op cit note 88 at 133.
[105] See above Chapter 3B; M Morris '*High Crimes and Misconceptions: The ICC and Non-Party States'* (2001) 64 *Law and Contemporary Problems* 13 at 64; M P Scharf op cit note 99 at 374; K Parlett 'Universal Civil Jurisdiction for Torture' (2007) 4 *European Human Rights Law Review* 385; R Sourani 'Universal Jurisdiction Key Note Speech in XVII Congress of IADL' (2009) available at *http://www.iadllaw.org*, accessed on 13 June 2015.
[106] A Cassese 'Is the Bell Tolling for Universality?' (2003) 1 *Journal of International Criminal Justice* 589 at 594.
[107] See above Chapter 3B; C Ryngaert op cit note 30 at 586.
[108] Y S Kraytman op cit note 88 at 117.

against citizens of non State Parties.[109] Their main argument is the *ius cogens* character of the torture offence, as illustrated in the above-mentioned *Furundzija* case.[110]

As to state practice, the International Law Commission lists two cases in which the presumed torture offender — who has the nationality of a non State Party to the Torture Convention — was prosecuted by a State Party on the basis of article 5(2).[111] First, in the *Ely Ould Dah* case,[112] French courts tried a citizen of Mauritania. Secondly, in the *Mahgoub* case,[113] a Sudanese doctor was prosecuted under s. 134 of the 1988 English Criminal Justice Act[114] which implemented universal jurisdiction over torture. However, two cases are not sufficient to support a claim that there is a customary international law rule authorising State Parties to exercise universal jurisdiction over citizens of non State Parties on the basis of article 5(2) of the Torture Convention. Instead, the State practice should have been both 'extensive and virtually uniform' to conclude about the establishment of such a rule of customary international law.[115] Other scholars can see the existence of a growing State practice by drawing a parallel with the Convention Against the Taking of Hostages (CATH),[116] which includes a similar provision to article 5(2) of the Torture Convention.[117] The fact that in the domestic terrorism case law, the presumed offender's States of nationality did not object to such a similar provision to article 5(2) could accelerate the development of custom, provided there is sufficient State practice.[118]

In the *Congo v France* case,[119] the ICJ missed the opportunity to pronounce itself on the application of the UN Torture Convention to nationals of non State Parties.[120] Congo protested against the French prosecution of Congolese officials, especially because France

[109] International Law Association 'Final Report of the London Conference on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences' (2000) at 8 available at *http://www.ila-hq.org*, accessed on 15 June 2015.
[110] See above Chapter 3B; *Prosecutor v Furundzija* supra note 75 at para 156.
[111] International Law Association op cit note 109 at 28.
[112] *Ely Ould Dah* (23 October 2002) (Court of Cassation) available at *www.legifrance.gouv.fr*, accessed on 13 June 2015; *Ely Ould Dah* (1 July 2005) (Gard Court of Assises) un-published. See above Chapter 3B & below Chapter 4B.
[113] Charges were finally dropped, because for lack of evidence. See M Lattimer & P Sands *Justice for Crimes Against Humanity* (2003) 367.
[114] Criminal Justice Act (1988) available at *www.legislation.gov.uk*, accessed on 2 April 2015.
[115] *North Sea Continental Shelf cases* (Federal Republic of Germany v Denmark and the Netherlands) (20 February 1969) (International Court of Justice) *ICJ Rep 1969* para 75.
[116] Op cit note 31.
[117] In the Dutch case *Public Prosecutor v SHT* (1987)74 *ILR* 162, the Court confirmed that it had jurisdiction over a Palestinian (non State Party to the Hijacking Convention). See also the abundant US case law in M P Scharf op cit note 99 at 380-82.
[118] M Morris op cit note 105 at 64.
[119] *Certain Criminal Proceedings in France* (Republic of Congo v France) (9 December 2002) (International Court of Justice) available at *www.icj-cij.org*, accessed on 15 June 2015.
[120] C Ryngaert *Jurisdiction in International Law* (2008) 106.

had violated the principle of sovereign equality by exercising universal jurisdiction over Congolese citizens. France could not invoke article 5(2) of the Torture Convention because Congo, unlike France, was not a Party.[121] However, Congo withdrew its application in 2010 and requested the Court to record the discontinuance of the proceedings.[122]

To summarise, the legality for State Parties to the Torture Convention to exercise universal jurisdiction over nationals of non State Parties under article 5(2) remains controversial without a clear position by the ICJ on this issue. As to international treaty law, the arguments relating to pro-legality are based on the application of the Lotus principle and the prohibition of the non-retroactivity for the crime of *ius cogens*. In contrast, the counter-arguments are based on the *pacta tertiis nec nocent nec prosunt* and non-retroactivity principles. The existence of a customary international law rule authorising State Parties to exercise universal jurisdiction over citizens of non State Parties on the basis of an *aut dedere aut judicare* provision is also controversial. The proponents invoke the *ius cogens* character of the torture offence, while the opponents argue the lack of relevant State practice. To answer the question about the legality for State Parties to exercise universal jurisdiction over nationals of non State Parties under article 5(2) without considering legal developments, a practical aspect may be taken into account. Since torture is often committed by nationals of States that endorse torture and have not ratified the Torture Convention, limiting the application of the Convention to nationals of State Parties would considerably weaken its effectiveness.[123] Accordingly, the issuance of clear guidelines from an international body such as the United Nations International Court of Justice, General Assembly, Security Council, Committee Against Torture, Human Rights Committee and International Law Commission authorizing universal jurisdiction over nationals of non State Parties to the Torture Convention would be suitable.

D. Conclusion

This chapter illustrates some legal problems that arise in respect of the scope of *ratione temporis* and *ratione loci* contained in the Torture Convention. State Parties must face the controversial issues relating to the non-retroactivity of the legislation implementing the Convention and the legality of the universal jurisdiction over the torture of citizens of non

[121] *Certain Criminal Proceedings in France* (Republic of Congo v France) (9 December 2002) (International Court of Justice) (Application instituting proceedings) available at *www.icj-cij.org*, accessed on 15 June 2015.
[122] *Certain Criminal Proceedings in France* (Republic of Congo v France) (17 November 2010) (International Court of Justice) (Press Release) available at *www.icj-cij.org*, accessed on 15 June 2015.
[123] M Halberstam 'Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety' (1988) 82 *AM. J. INT'L L.* 269 at 272.

State Parties. The first issue relating to the non-retroactivity of the legislation implementing the Convention seems to have received an affirmative answer from European courts. Accordingly, presumed offenders could not, under universal jurisdiction, be prosecuted for torture offences committed before the implementation of the Torture Convention. In contrast, the second controversy relating to the legality of the universal jurisdiction over the torture of citizens of non State Parties is far from being settled. However, the existence of customary international law rules authorising universal jurisdiction over torture before the implementation of the torture Convention and authorising universal jurisdiction over nationals of non States Parties under article 5(2) is not established. Indeed, the status of customary international law for these two rules is only argued by some scholars without a precise analysis of the State practice and *opinion juris*.

The scope of the Torture Convention is nevertheless not the only source of problems with regard to the prosecution of acts of torture via the universal jurisdiction over torture. The following chapter focuses on more specific problems stemming from the concept of universal jurisdiction.

CHAPTER IV

SPECIFIC PROBLEMS OF THE UNIVERSAL JURISDICTION OVER TORTURE

A. Introduction

As noted previously, the concept of universal jurisdiction is something that has been debated frequently. Chapter four discusses within the context of torture the three most controversial aspects of the concept of universal jurisdiction. First, the interpretation of the 'presence of the offender requirement' in the State that exercises the universal jurisdiction, which varies from one State to another. Secondly, the operation of the principle of subsidiarity, which continues to divide proponents and opponents. The principle of subsidiarity motivates a State that is ready to exercise universal jurisdiction over torture, to defer the case to another State that has a stronger link with the crime and wants to prosecute it. Thirdly, practical and legal obstacles that may prevent a successful prosecution.

B. The presence of the offender in the State that exercises the universal jurisdiction over torture

According to article 5(2) of the Torture Convention, a State Party must exercise universal jurisdiction over torture offences 'in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him'. The interpretation of the 'presence of the offender requirement' in the State that exercises the universal jurisdiction over torture is controversial. The most debated question concerns the exercise of universal jurisdiction over torture *in absentia*, that is in the absence of the presumed offender. After the concept of universal jurisdiction over torture *in absentia* is clarified and the arguments *pro* and *contra* its exercise are addressed, the positions taken by European national courts are analysed below.

As stated above, the concept of universal jurisdiction *in absentia* is highly controversial. In the *Arrest Warrant* case,[124] the ICJ judges presented contrasting views on this issue. While Van den Wyngaert J declared that it is not prohibited under international conventional and customary laws,[125] Guillaume P and Ranjeva J held *contra* that international conventional law does not know such a jurisdiction.[126] Moreover, the two latter judges, together with Rezek J, understood 'universal jurisdiction *in absentia*' as a separate form of jurisdiction less acceptable than universal jurisdiction *per se*.[127] This view resonates with some scholars such as Reydams and Cassese.

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[124] *Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v Belgium) (14 February 2002) (International Court of Justice) *ICJ Rep 2002* at 3.

[125] *Arrest Warrant of 11 April 2000* (dissenting opinion of Van den Wyngaert J) paras 54, 55 and 58.

[126] *Arrest Warrant of 11 April 2000* (separate opinion of Guillaume P) para 9 states that no convention including a provision similar to article 5(2) of the Torture Convention has contemplated 'establishing jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question. Universal jurisdiction *in absentia* is unknown to international conventional law'.
Arrest Warrant of 11 April 2000 (declaration of Ranjeva J) para 9 declares 'that application of the principle *aut judicare aut dedere* is conditional or the alleged offender having first been arrested … These legal developments [of the universal jurisdiction] did not result in the recognition of jurisdiction *in absentia*'.

[127] *Arrest Warrant of 11 April 2000* (separate opinion of Guillaume P) para 16 states that 'international law does not accept universal jurisdiction; still less does it accept universal jurisdiction *in absentia*'.
Arrest Warrant of 11 April 2000 (separate opinion of Ranjeva J) paras 5 and 6 declares that 'the Belgian legislation establishing universal jurisdiction *in absentia* for serious violations of international humanitarian law adopted the broadest possible interpretation of such jurisdiction … it affords for exercising universal jurisdiction in the absence of any connection between Belgium and the subject-matter of the offence, the alleged offender or the relevant territory … . [S]everal States have invoked universal jurisdiction to prosecute persons suspected of crimes under humanitarian law; unlike Mr. Yerodia, however, the individuals in question had first been the subject of some form of proceedings or had been arrested … Under international law, the same requirement of a connection *ratione loci* again applies to the exercise of universal jurisdiction'.
Arrest Warrant of 11 April 2000 (separate opinion of Rezek J) para 10 states that 'the Belgian domestic court lacks jurisdiction to conduct criminal proceedings, in the absence of any basis of jurisdiction other than the

Reydams distinguishes three universality principles: the 'co-operative general' principle, which concerns extradition impossibilities, as per article 5(2) of the Torture Convention; the 'co-operative limited' principle, which is limited to international crimes; and the 'unilateral limited' principle, which authorises any States to launch an investigation unilaterally, even *in absentia*. While the 'co-operative general' and the 'co-operative limited' principles are predicated on the presence of the offender, the 'unilateral limited' principle does not require it.[128]

Likewise, Cassese opposes 'conditional' and 'absolute' universal jurisdictions.[129] The former is illustrated by article 5(2) of the Torture Convention: the exercise of universal jurisdiction is conditional on the decision not to extradite as well as the presence of the offender in the territory under the *forum* State jurisdiction. The latter requirement is an application of the *forum deprehensionis* principle, according to which the presence of the presumed offender on the territory of the State is required 'for determining the ambit of application of criminal law (and therefore of legislative universal jurisdiction), and as a consequence it amounts to a requirement for the act to be considered a crime under the legislation of the State'.[130] Thus, no investigation — let alone prosecution — can take place as long as the presumed offender is not in the territory, because the criminal law of the *forum* State is not applicable.[131] In contrast, under 'absolute' universal jurisdiction, a State may prosecute a presumed international crime offender regardless whether or not he/she is present in the *forum* State.[132]

Thus, according to Reydams and Cassese, article 5(2) of the Torture Convention, as part of international conventional law, cannot authorise the exercise of 'universal jurisdiction *in absentia*', which is seen as a distinct category of jurisdiction and independent of universal jurisdiction *per se*.

However, other scholars do not agree with the above view. For O'Keefe and Blanco Cordero, any consideration of the existence of an 'universal jurisdiction *in absentia*' where lawfulness has to be established as a distinctive category of jurisdiction, conflates a State's 'jurisdiction to prescribe' its criminal law with the logically independent 'jurisdiction to

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principle of universal jurisdiction and failing, in support of that principle, the presence on Belgian territory of the accused, whom it would be unlawful to force to appear'.

[128] L Reydams *Universal Jurisdiction. International and Municipal Law Perspectives* (2003) 38 and 224.

[129] A Cassese *International Criminal Law* (2013) 279.

[130] Ibid at 279.

[131] Ibid.

[132] Ibid.

enforce' that law.[133] In other words, universal jurisdiction as a head of prescriptive jurisdiction beside territoriality, as well as active and passive personality principles, must be distinguished from the strictly territorial enforcement *in personam* or *in absentia* of this head of prescriptive jurisdiction. Accordingly, the lawfulness of the prescription is independent of the enforcement.[134] As to enforcement and from an international law point of view, investigations, the issuance of a warrant, or the pursuance of a trial *in absentia* is argued to be lawful[135] because it is adopted in domestic law (generally based on a civil-law tradition).[136] The lawfulness of investigations, the issuance of a warrant, or the pursuance of a trial *in absentia* is not ruled by international jurisdiction law, but by domestic principles and possibly by human rights standards.[137]

Higgins, Kooijmans and Buergenthal J confirm that the desirability of the enforcement *in absentia* is a question separate from its permissibility.[138] There is no breach of the right of a fair trial by the enforcement *in absentia*,[139] while the contrary is often argued.[140] The Lotus principle allows States to enforce universal jurisdiction *in absentia* because a prohibitive rule does not exist.[141]

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[133] R O'Keefe op cit note 4 at 749. See also I Blanco Cordero 'Compétence universelle' (2008) 1 *Revue internationale de droit pénal* 79 para 14 who similarly distinguishes 'compétence normative' and 'compétence d'exécution'.

[134] R O'Keefe op cit note 4 at 750.

[135] Institute of International Law 'Resolution concerning universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes' (2005), available at *http://www.idi-iil.org*, accessed on 7 July 2015, confirms 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.'

[136] In contrast, they are often *in personam* in the common-law tradition; R O'Keefe op cit note 4 at 741-42.

[137] C Ryngaert op cit note 30 at 591.

[138] *Arrest Warrant of 11 April 2000* (separate opinion of Higgins, Kooijmans and Buergenthal JJ) para 56 states that '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'.

[139] I Blanco Cordero op cit note 133 at note 112.

[140] See *inter alia* article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (4 November 1950) 213 *UNTS* 221.

Amnesty International *Universal Jurisdiction: Questions and Answers* (2001) 4 states that a trial *in absentia* should not take place: as 'the accused should be present during a trial to hear the full prosecution case, to put forward a defence or assist their counsel in doing so'.

R Rabinovitch 'Universal Jurisdiction *in Absentia*' (2005) 28 *Fordham Int'l L J* 500 at 528-29 argued against trials *in absentia* because juries may 'draw the inappropriate inference that because the accused may be absent he or she is a fugitive and therefore probably guilty', and that the presence of the presumed offender is essential to the adversarial criminal justice system and his/her eventual punishment.

In the Belgian *Sharon* case, the Prosecutor held that 'it might be a violation of the defendant's right to due process'. See C Mallat 'Sharon trial: 12 February 2003 decision of Belgian Supreme Court explained' (2003) available at *https://electronicintifada.net*, accessed on 10 July 2015.

[141] *S.S. Lotus* supra note 100 at 18. See Chapter 3; S Yee 'Universal jurisdiction: Concept, Logic, and Reality' (2011) 10 *Chinese J Int'l L* 503 at 525.

Guillaume P and Ranjeva J confuse this permissibility with what is mandatory when they state that international conventional law does not know the exercise *in absentia* of universal jurisdiction.[142] In contrast to their views, conventional mandatory provisions for establishing universal jurisdiction — as with article 5(2) of the Torture Convention — design the territorial precondition as the lowest common denominator to guarantee the largest participation in the convention.[143] Thus, the general unavailability of enforcement *in absentia* in common-law States is taken into account.

Moreover, Van den Wyngaert J adds that these Conventions establishing universal jurisdiction include a provision that 'does not exclude any criminal jurisdiction exercised in accordance with national law'.[144] In the case of the Torture Convention, such a provision is found in article 5(3). Accordingly, domestic law could provide for the exercise of universal jurisdiction *in absentia*.[145]

The European State practice is poor and contradictory with regard to the interpretation of the requirement of the presence of the offender under article 5(2) of the Torture Convention. The time of assessment of the presence of the offender to exercise universal jurisdiction varies from one State to another.

French courts strictly interpret the presence requirement to be fulfilled if the presumed offender is in the French territory when the proceedings are initiated. In the *Congo Beach* case, the Paris Court of Appeals[146] held that article 689-2 of the Code of criminal procedure (*Code de procédure pénale*), which implements article 5(2) of the Torture Convention, requires the presumed torture offenders to be present at the time of deliverance of the *réquisitoire introductif*.[147] By this legal act, the investigating magistrate (*juge d'instruction*) is seized of the case by the prosecutor (*procureur de la République*). The name of the presumed offender must be included in the *réquisitoire* to guarantee his/her presence under the French territory, so that the investigating magistrate cannot initiate proceedings against persons

[142] C Ingelse op cit note 19 at 320.
[143] R O'Keefe op cit note 4 at 751.
[144] *Arrest Warrant of 11 April 2000* (dissenting opinion of Van den Wyngaert J) para 61.
[145] C Ryngaert op cit note 30 at 591.
[146] *Congo Beach* (3 April 2004) (Paris Court of Appeals) un-published. In this judgment, the entire proceedings against high-ranking Congolese officials *inter alia* for the torture of nationals were cancelled. See Fédération Internationale des Droits de l'Homme 'France, Compétence universelle' (2005) available at *www.fidh.org*, accessed on 10 July 2015.
[147] This position was confirmed by the French Court of Cassation: *Congo Beach* (9 April 2008) and *Ung Boun Ohr* (21 January 2009) (French Court of Cassation), available at *www.courdecassation.fr*, accessed on 11 July 2015.

outside France.[148] Thus, as the investigating judge can-not use investigatory acts to establish the presence of the presumed offender, the 'perverse effect' of a strict application of the presence requirement is that torture prosecutions led by such a judge will be hard, unless the presence of the presumed offender is initially clear.[149]

Ryngaert argues that while the Court in the above case only pronounced on the legality of the investigations by investigating magistrates, the strict interpretation of the presence requirement also applies to preliminary investigations by prosecutors. Indeed, the presence requirement of the jurisdictional provision on which the Court pronounced must be applied by all magistrates. Accordingly, the filing of a complaint with the prosecutor in the hope that he/she would want to pursue the case, is likely to be a no more effective way for them to influence the prosecution than would be a civil party petition (*constitution de partie civile*) presented before the investigating judge.[150]

The Paris Court of Appeals, by rejecting the initiation by investigating magistrates and prosecutors of any proceedings in the absence of the presumed offender in France, including investigations precisely aimed at establishing their presence, urges a return to an obsolete French judicial system. In this old system, the Court of Cassation had decided that France had no jurisdiction over torture offences if there was no 'objective and material connecting element consisting of the presence' of the presumed torturer on French territory.[151] Accordingly, it was the complainants — not the authorities after an investigation — who had to prove the presence of the alleged offender.[152] In the *Munyeshyaka* case, for instance, victims had to provide some indication that the alleged offender was present in France.[153]

The above limitations to the exercise of universal jurisdiction *in absentia* are highly criticised in relation to the previous arguments in favour of such an exercise. Indeed, as indicated above, it is unthinkable that law enforcement authorities could not have the powers to locate and catch in their territory a presumed offender who could legally be prosecuted under domestic law, no matter where the alleged crime had been committed.[154]

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[148] I Blanco Cordero op cit note 133 para19.
[149] C Ryngaert op cit note 30 at 597.
[150] Ibid at 598.
[151] *Javor* (26 March 1996) (French Court of Cassation) (1996) 100 *Revue Générale de Droit International Public* 1083.
[152] C Ryngaert op cit note 30 at 598.
[153] They included in their complaint a newspaper article that mentioned his name in connection with a local event. See Human Rights Watch 'France' (2006) available at *www.hrw.org*, accessed on 8 August 2015.
[154] R Rabinovitch op cit note 140 at 517.

If it is the initiation of the proceedings that is relevant to evaluate the presence requirement, a subsequent absence after the proceedings' initiation — at which the alleged offender was present — would not affect a later trial.[155] Article 379-2 of the French Code of Criminal Procedure (*Code de procédure pénale*) confirms the legality of trials *in absentia*.[156] In the *Ely Ould Dah* case, the Mauritanian torturer was present in France when proceedings were initiated. However, he took advantage of his freedom under judicial control to leave France and return to Mauritania. He was meanwhile formally accused by the *juge d'instruction*, referred to the Court of Assises, which tried and sentenced him to ten years prison in his absence for having committed torture in the 'Jreida death camp'.[157] Similarly, in the *Khaled Ben Saïd* case, two NGOs assisted a victim to file a complaint for torture against a former Tunisian police chief, who become a diplomat posted to France. He left France after the opening of a judicial investigation and after having been informed of the charges. The case continued in his absence whereupon the Court of Assises convicted him of complicity in torture and sentenced him to eight years' imprisonment.[158]

Dutch courts adopt a similar approach to the French courts. In the *Bouterse* case, the Hoge Raad[159] limited the exercise of universal jurisdiction over torture *in absentia*, basing itself on the Act implementing the Hague and Montreal Hijacking Conventions,[160] which provides that Dutch courts have universal jurisdiction over hijacking offences 'where the suspect is in the Netherlands'. Nevertheless, as in France, a subsequent absence of the alleged offender during the proceedings was allowed if he was initially present in the territory.[161]

The law of Belgium, as opposed to that of France and the Netherlands,[162] allows prosecution under its general universal jurisdiction clause, even if the alleged offender is not

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[155] J Sulzer 'Implementing the Principle of Universal Jurisdiction in France' in W Kaleck (ed) *International Prosecution of Human Rights Crimes* (2007) 132; REDRESS & FIDH 'Extraterritorial Jurisdiction in the European Union' (2010) available at *www.fidh.org*, accessed on 8 August 2015 at 132.

[156] This article states that 'an accused who fails to attend the opening of his or her trial without a valid excuse shall be tried in absentia. … The same shall apply where the accused is recorded absent during the proceedings and it is not possible to stay the proceedings pending his or her return' (author's translation).

[157] *Ely Ould Dah* (1 July 2005) (Gard Court of Assises) un-published. He is currently serving in Mauritania in the national army. See W Kaleck op cit note 32 at 937.

[158] *Khaled Ben Saïd* (15 December 2008) (Bas-Rhin Court of Assises) un-published. His culpability was confirmed on appeal and his prison sentence increased to 12 years. See *Khaled Ben Saïd* (24 September 2010) (Meurthe et Moselle Court of Assises) un-published. He is currently working freely in a ministry in Tunisia. See Fédération Internationale des droits de l'Homme 'Condamnation de Khaled Ben Saïd. Une victoire contre l'impunité en Tunisie' (2010) available at *www.fidh.fr*, accessed on 18 June 2015.

[159] N Blokker & N J Schrijver op cit note 68 at 296; R Van Elst 'Universele rechtsmacht over foltering: Bouterse en de Decembermoorden' (2002) 27 *NJCM-Bulletin* 208 at 222.

[160] Article 4(7) of the Act implementing the Hague and Montreal Hijacking Conventions (10 May 1973) *Stb.* 228.

[161] W Kaleck op cit note 32 at 943.

[162] I Blanco Cordero op cit note 133 paras 50-53.

present in the territory.[163] In any event, the presence of the alleged offender in the territory is not required for the prosecutor to launch a preliminary investigation prior to initiating the prosecution.[164] However, as all offences under universal jurisdiction, prosecution and investigation can only be launched at the discretion of the federal prosecutor (*procureur fédéral*) who evaluates, especially taking in account the presence or absence of the alleged offender in the Belgian territory if it is in the interests of justice to pursue the matter.[165] Moreover, as described above, it is argued that universal jurisdiction over torture should not be exercise *in absentia* because article 5(2) of the Torture Convention, which is applied in Belgium *via* the general statutory universal jurisdiction clause, clearly provides only for obligatory jurisdiction if the suspect is present in the *forum* State.[166] Such a view disregards the domestic dimension of the enforcement of universal jurisdiction *in absentia*.[167]

Belgium, like France, allows for trials *in absentia*.[168] The Belgian and French systems permits the proceedings to continue, thus preventing from lapses of time or legal issues regarding reasonable delay if the allowed offender has either fled after his release from pre-trial detention or does not present himself in due time, or is not duly represented by a lawyer during the follow-up stages of the procedure.[169]

It must be noted that an automatic link is often drawn between the civil law tradition and the acceptance of a trial *in absentia*[170]. Such a links seems erroneous: Germany and Spain *inter alia*, while belonging to the civil law tradition, do not allow for the absence of the

[163] Art 12(5) of the Belgian Preliminary title of the Code of criminal procedure (*Titre préliminaire du Code de procédure pénale*) states that 'the prosecution of offences … [committed outside the territory of the Kingdom] only takes place if the charged offender is found in Belgium, except in the cases referred in … article 12*bis* [(the universal jurisdiction general clause)]' (author's translation).
[164] Article 24 and 28*bis* of the Belgian Code of criminal procedure (*Code d'instruction criminelle*) (17 November 1808) available at *www.ejustice.just. fgov.be,* accessed on 3 April 2015.
[165] Art 12*bis* (2) of the Belgian Preliminary title of the Code of criminal procedure (*Titre préliminaire du Code de procédure pénale*) states that prosecutions, including investigation, can only be launched under the federal prosecutor's request, which appreciates the possible complaints' (author's translation).
[166] C Ryngaert op cit note 30 at 580.
[167] In this sense, see J Spreutels 'Position of the prosecution in the *Bush* case' (2003) available at *www.haguejustice portal.net/Docs/NLP/Belgium/Bush_Cassation_24-9-2003.pdf*, accessed on 8 August 2003.
[168] Council of Europe 'Questionnaire concerning judgments *in absentia* and the possibility of retrial Summary and Compilation of Replies' (2014) available at *www.coe.int/tcj*, accessed on 30 July 2015 at 20.
[169] For the trials before the *tribunal correctionnel*, article 186 of the Belgian Code of criminal procedure (*Code d'instruction criminelle*) states that 'if the summoned person, or the counsel who representates him, does not appear on the day and at the time fixed by the summon, he will be judged *in absentia*'. Similarly, for the trials before the Court of Assises, article 286 of the same Code states that 'if, at the date fixed for the openness of debates, the accused who is not in detention does not appear in person or has a counsel representing him, the president of the Court of Assises immediately makes an order stating that this accused will be judged *in absentia*' (author's translations).
[170] Princeton Principles on Universal Jurisdiction op cit note 5 at 54; R O'Keefe op cit note 4 at 741-42.

alleged offender during the main proceedings, namely the trial. Investigation is only permitted without the presence of the alleged offender.[171]

However, the exercise of universal jurisdiction *in absentia* is generally rejected in the common-law tradition.[172] The accused person must appear, be arraigned and eventually be sentenced in person, whether or not he is represented by a lawyer. English courts nevertheless have discretionary power, which is exercised with great caution,[173] to permit the commencement or the continuance of a trial in the absence of the defendant.[174] Moreover, the 'reasonable prospect' of the presence of the suspect in the territory is sufficient to initiate an investigation.[175]

Trials *in absentia* may be compatible with the principle of *audi alteram partem* **(**'hear the other side')[176] provided that the rights of the defendant are strictly observed, including that he/she is informed sufficiently in advance and is kept informed of further proceedings.[177] He/she must have unequivocally waived the right to appear and to defend him/herself, unless he/she was seeking to evade justice.[178] The latter exception is particularly relevant because the presumed offender subject to universal jurisdiction proceedings often tries to escape justice.

To summarise, the concept of universal jurisdiction *in absentia* is controversial and the object of much debate. While some authorities raise it as an independent category of jurisdiction, others reduce the allowance of proceedings *in absentia* to the domestic choice of enforcement of an international prescriptive jurisdiction. European State practice seems to be consistent with the latter view. One the one hand, European courts have not recognised 'universal jurisdiction *in absentia*' as a distinct category of jurisdiction.[179] On the other hand, each State has developed its own enforcement regime of universal jurisdiction over torture. Preliminary proceedings (investigation) *in absentia* are allowed by some (Belgium, Spain, Germany, the United Kingdom), and rejected by others (France, the Netherlands). Similarly,

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[171] W Kaleck op cit note 32 at 959; I Blanco Cordero op cit note 133 paras 8 and 20.
[172] R Rabinovitch op cit note 140 at 528; I Blanco Cordero op cit note 133 paras 49 and 53.
[173] *R v Jones* (16 October 2003) (House of Lords) (Lord Bingham's opinion) *1 A.C. 1* para 13.
[174] Council of Europe op cit note 168 at 43, 123 and 131; I Blanco Cordero op cit note 133 para 8.
[175] REDRESS & FIDH op cit note 155 at 260.
[176] Art 14 of the International Covenant on Civil and Political Rights; art 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms.
[177] UN Human Rights Committee 'CCPR General Comment 32' (2007) paras 11 and 36 available at *www1.umn.edu/humanrts/gencomm/hrcom32.html*, accessed on 25 October 2015; art 14(3)(a) of the International Covenant on Civil and Political Rights.
[178] *Sejdovic v Italy* (1 March 2006) (European Court of Human Rights) available at *http://cmiskp .echr.coe.int*, accessed on 25 October 2015, paras 58, 82 and 105.
[179] R O'Keefe op cit note 4 at 749.

the exercise of the main proceedings (trial) *in absentia* has both proponents (France, the Netherlands, Belgium, the United Kingdom) and opponents (Germany, Spain).

From a practical point of view, strictly requiring the presence of the offender reduces the possibilities of a successful prosecution. The first aim of universal jurisdiction, which is to avoid impunity by preventing the alleged torturer from escaping the consequences of his/her acts by taking refuge in another country, cannot be effectively pursued without its exercise *in absentia.* Delaying the trial in the absence of the defendant increases the possibilities of lapses of time and the risk of legal issues regarding reasonable delay. Prohibiting investigation before the alleged offender is in the territory prevents any gathering of anticipative information and evidence,[180] so that bringing him/her before a court would be *quasi* impossible because an alleged offender does not often stay in the territory in which he/she might be prosecuted.[181] Such a lack of state investment often places on the victims' shoulders the responsibility of the investigation and assembling of the criminal dossier.[182] A system of international cooperation with regard to information sharing should be established to allow prosecutors and investigating magistrates to benefit from information held by other states.[183] However, it is still unclear if, under international law, the exercise of universal jurisdiction *in absentia* is compatible with the principles of sovereign equality and non-interference in domestic affairs.[184]

C. The principle of subsidiarity

A second, much debated issue about the concept of universal jurisdiction is the operation of a supposed 'principle of subsidiarity', which motivates a state, ready to exercise universal jurisdiction over torture, to defer the case to another state that has a stronger nexus to the case and has the ability and willingness to prosecute it.[185] In other words, universal jurisdiction

[180] W Kaleck op cit note 32 at 943.
[181] Ibid at 960; C Ryngaert op cit note 30 at 590.
[182] N Roht-Arriaza op cit note 43 at 192-93.
[183] Such an initiative has been launched by the Council of Ministers of the European Union which sets up the European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes. It especially 'exchanges information, best practices and experiences on investigations and prosecutions of core international crimes'. See European Network for Investigation and Prosecution of Genocide, Crimes Against Humanity and War Crimes 'Combating impunity' available at *http://www.eurojust.europa.eu*, accessed on 21 July 2015.
[184] C Ryngaert op cit note 30 at 591; S Yee op cit note 141 at 530.
[185] Ibid at 600.

would be merely a 'secondary mechanism' and should be exercised only if the territorial or national states are unable or unwilling to exercise their jurisdiction.[186]

At the time of the negotiation of the Torture Convention, Italy initially suggested that priority be given to the traditional grounds for jurisdiction. It later withdrew that proposal.[187] It cannot, however, be inferred from the current text of article 5 of the Torture Convention that the traditional grounds for jurisdiction (contained in article 5(1)) are prioritised in relation to universal jurisdiction (per article 5(2)).[188] Thus, the state on whose territory torture is committed or whose national committed or suffered from such an offence, while being entitled to establish its jurisdiction, does not enjoy a primary right to do so. If another state finds the alleged offender in its territory, it has an equal right to exercise its universal jurisdiction (per article 5(2)), regardless whether or not the territorial or national states are also willing to exercise their traditional jurisdiction (contained in article 5(1)).[189] Accordingly, the custodial state is not obliged to waive the right to exercise universal jurisdiction by accepting an extradition request.[190]

Some arguments have been advanced to develop the idea of subsidiary universal jurisdiction over torture.

First, from a practical point of view, territorial or national states have better proximity to the evidence, the accused, the victims, and the circumstances of the offence.[191]

Secondly, the idea of subsidiarity is ingrained in the rationale of universal jurisdiction. Such jurisdiction was established to permit developed States that have an entrenched system of law to prevent gaps of enforcement by developing States that historically have weak judicial systems.[192] Universal jurisdiction is thus supposed to only be exercised to reduce impunity, not on other grounds.[193]

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[186] M Takeuchi 'Modalities of the Exercise of Universal Jurisdiction in International Law' (2014) available at *htt p://theses.gla.ac.uk/5472*, accessed on 8 August 2015, at 128.
[187] J H Brugers & H Danelius op cit note 1 at 58.
[188] Council of the European Union op cit note 9 at 11.
[189] C Ryngaert op cit note 30 at 600.
[190] Ibid.
[191] D Orentlicher 'Whose justice? Reconciling universal jurisdiction with democratic principles' (2004) 92 *Georgetown L J* 1057 at 1132.
[192] A K Short 'Is the alien tort statute sacrosanct? Retaining forum non conveniens in human rights litigation' (2001) 33 *N Y U J Int'l L & Pol* 1001 at 1072-77.
[193] European Center for Constitutional and Human Rights 'Concurring Criminal Jurisdictions under International Law' (2010) at 6, available at *www.ecchr.eu*, accessed on 5 August 2015.

Thirdly, the concept of subsidiarity protects state sovereignty by promoting non-interference in internal affairs, as well as the protection of domestic remedies.[194]

Fourthly, establishing a hierarchy of grounds of jurisdiction prevents normative conflicts from occurring.[195]

Fifthly, some ICJ judges in the *Arrest Warrant* case have upheld the subsidiarity idea. Guillaume J, referring to article 4(2) of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, which establishes the same universal jurisdiction clause as contained in the Torture Convention,[196] described it as a 'compulsory, albeit subsidiary, universal jurisdiction'.[197] Moreover, Higgins, Kooijmans and Buergenthal JJ stated 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 itself to act upon the charges concerned'.[198]

Finally, with reference to the principle of complementarity applied by the International Criminal Court, which allows the Court to exercise complementary jurisdiction when a state is unable or unwilling to prosecute,[199] Coombes argued that the principle of complementarity, which is based on the notion of vertical subsidiarity involving a relationship between a supranational institution and a state could be extended to a horizontal milieu involving a relationship between states, with one bystander willing to exercise universal jurisdiction over torture committed elsewhere, and when the victim and offender are not nationals.[200]

The development of the above arguments has resulted in the growing support that scholars,[201] academics[202] and states[203] have given for subsidiarity to become a 'guiding principle' in the exercise of universal jurisdiction.

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[194] REDRESS & FIDH op cit note 155 at 25; C Ryngaert 'Subsidiary and the Law of Jurisdiction' (2014) at 2, available at *https://unijuris.sites.uu.nl*, accessed on 5 August 2015,.

[195] C Ryngaert op cit note 194 at 2.

[196] Op cit note 31.

[197] *Arrest Warrant of 11 April 2000* (separate opinion of Guillaume J) para 7.

[198] *Arrest Warrant of 11 April 2000* (joint separate opinion of Higgins, Kooijmans and Buergenthal JJ) para 54.

[199] Article 17 of the Rome Statute of the International Criminal Court (17 July 1998) 2187 *UNTS* 90. France enshrined this principle of complementarity in Article 689-11 of the Code of criminal procedure (*Code de procédure pénale*).

[200] K Coombes 'Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations?' (2011) 43 *Geo Wash Int'l L Rev* 419 at 463; C Ryngaert op cit note 194 at 5.

[201] A Cassese op cit note 106 at 593; C Kreß 'Universal Jurisdiction over International Crimes and the Institut de Droit international' (2006) 4 *JICJ* 561 at 580; F Lafontaine 'Universal Jurisdiction – the Realistic Utopia' (2012) 10 *JCIJ* 1277-86; M Takeuchi op cit note 186 at 128.
Contra A Poels 'Universal Jurisdiction *In Absentia*' (2005) 23 *Netherlands Quarterly of Human Rights* 65 at 83 who argues that priority should be given to the State exercising universal jurisdiction *in absentia*, because 'the

However, as demonstrated in the next paragraph, the European states' practice shows that some states already apply the principle of subsidiarity in their prosecution of international crimes, including torture.[204]

First, some states apply the subsidiarity test as a statutory matter.[205] For instance, article 12*bis* of the Belgian Preliminary title of the Code of Criminal Procedure (*Titre préliminaire du Code de procédure pénale*) states that the Federal Prosecutor can refuse to initiate proceedings if

> the specific circumstances of the case show that, in the interest of the proper administration of justice and in order to honor Belgium's international obligations, [the] case should be brought either before the international courts, or before the court of the place in which the acts were committed, or before the court of the State of which the perpetrator is a national, or the court of the place in which he can be found, and to the extent that said court is independent, impartial, and fair, as may be determined from the international commitments binding on Belgium and that State.[206]

The above provision can be seen as an application of the subsidiarity principle or of the *forum non conveniens* doctrine, according to which prosecutors and courts only intervene if no more appropriate adjudicative *fora* can be found.[207] The provision can be criticised for three reasons. First, the general independence, impartiality and fairness of foreign courts are the only requirement needed to defer the case to a state with a narrower nexus. It is not required that 'in the given case', the courts should also be able and willing to judge in an equitable way.[208] Secondly, the assessment of the ability of foreign courts is determined by the easily satisfied criterion of 'international commitments binding on Belgium and that

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subsequent commencement of investigations and prosecutions by the other State on the basis of the territoriality or personality principle will probably be concurrent with political pressure and judicial bias'.

[202] The International Law Institute states that '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.' See article 3(c) of the Resolution concerning universal criminal jurisdiction op cit note 135.
Similarly, the African Union and the European Union report on Universal Jurisdiction considers that 'the exercise of universal jurisdiction as an important measure of last resort … whenever the state where the crime has allegedly been committed and the state(s) of nationality of the suspect and victims are manifestly unwilling or unable to prosecute.' See Council of the European Union op cit note 9 at 37.
Finally, the African Union National Model on Universal Jurisdiction states that 'a Court 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.' See African Union 'African Union Model National Law on Universal Jurisdiction over International Crimes' (2012) available at *http://legal.au.int*, accessed on 4 August 2015.

[203] Eleven States (Norway being the only European one) have stated that primacy should be given to the territorial State. See General Assembly of the United Nations 'Summary record of the 12th and 13th meetings of the Sixth Committee' (17 and 18 October 2012) available at *http://daccess-dds-ny.un.org*, accessed on 5 August 2015.

[204] REDRESS & FIDH op cit note 155 at 3.

[205] That is also the case in Spain and Switzerland. See C Ryngaert op cit note 194 at 7.

[206] Author's translation.

[207] E David 'La compétence universelle en droit belge' (2004) *Annales de Doit de Louvain* at 125.

[208] C Ryngaert op cit note 194 at 12.

State'.[209] Thirdly, the Federal Prosecutor, who autonomously decides whether or not to launch proceedings against international crimes,[210] has wide discretion to evaluate the criteria.[211] Accordingly, he/she could easily give up a case, thereby avoiding a difficult or internationally embarrassing situation. Therefore, the aforementioned type of a subsidiarity provision could lead to impunity.[212] Practice has shown that the subsidiarity principle is invoked only when the case is effectively submitted to a foreign court; the theoretical competence of another court does not suffice.[213]

The second European state practice illustrating the subsidiarity principle relates to states that apply the subsidiarity test as a jurisprudential matter. French prosecutors and investigating judges defer the case to the territorial state or the state whose national is the alleged offender if that state has finalised the prosecution. [214] There is no clear limit on the time in which French authorities must exercise their jurisdiction.[215] It is nevertheless clear that they must wait for the alleged offender to be present in the French territory before starting the proceedings.[216] The application of the principle of subsidiarity by France was discussed by Congo in the *Congo Beach* case.[217] Congo argued that article 5(2) of the Torture Convention, which includes the universal jurisdiction clause, gives primacy to traditional grounds of jurisdiction, particularly the territorial state, by referring to article 5(1) of the Torture Convention.[218] However, it is apparent that there was a weakness in the Congo argument: article 5(2) only requires that the custodial state *either* prosecute *or* extradite the alleged offender to a state with a stronger nexus to the case (as per article 5(1)). This does not prevent the custodial state from prosecuting if the territorial state is doing so.[219] Unfortunately, the

[209] See the widely ratified International Covenant on Civil and Political Rights (16 December 1966) 999 *UNTS* 171. See C Ryngaert op cit note 30 at 603.
[210] Unlike under general criminal procedure, where victims can launch proceedings via a civil party petition (*constitution de partie civile*) before the investigating judge (*juge d'instruction*). See M Franchimont, A Jacobs & A Masset *Manuel de procédure pénale* (2009) 211.
[211] The Federal Prosecutor's application of the subsidiarity principle is not subject to judicial review. See *Ligue des droits de l'homme* (23 March 2005) (Belgian Constitutional Court) available at *www.arbitrage.be*, accessed on 9 August 2015, para B7.7.
[212] C Ryngaert op cit note 194 at 12.
[213] REDRESS & FIDH op cit note 155 at 79.
[214] That is also the case in Austria. See C Ryngaert op cit note 194 at 7.
[215] Ibid at 11.
[216] See above, Chapter 4B.
[217] *Certain Criminal Proceedings in France* (Republic of Congo v France) (9 December 2002) (International Court of Justice) (Application instituting proceedings) available at *www.icj-cij.org*, accessed on 5 August 2015.
[218] Ibid at 9.
[219] C Ryngaert op cit note 30 at 605.

out-of-court settlement reached by France and Congo prevented the ICJ from pronouncing on the existence of a subsidiarity principle in international law.[220]

Finally, some states apply the subsidiarity test as a guideline for the exercise of prosecutorial discretion.[221] While the principle of subsidiarity is not enshrined in the United Kingdom laws referring to international law crimes, prosecutors who make decisions about whether or not to prosecute, have already applied the subsidiarity principle in favour of the territorial state, for instance in some cases involving the Rwandan genocide.[222]

Despite the different views among the abovementioned scholars, academics and states relating to the subsidiary principle, all at least give primacy to the territorial state. This approach is coherent as the state where the alleged offence was committed often has the strongest connection with the offence.[223]

For some scholars, the development of the subsidiarity principle has crystallised into a rule of customary international law.[224] On the contrary, others hold the view that the attribution of jurisdiction in international law is not developed enough.[225] Accordingly, the current support for the idea of subsidiarity must be understood only as a policy consideration to facilitate universal jurisdiction.[226] In other words, the principle of subsidiarity could only be used as an informal standard in the exercise of prosecutorial discretion, in conformity with the principle of comity in international relations.[227]

Despite the success of the subsidiarity principle, some criticism remains. Human rights activists fear the increase of impunity because the territorial state or the state of the offender, as directly involved, often does its best to avoid the prosecution of the alleged offender.[228] The behaviour of Congo in the above-mentioned *Congo Beach* case is relevant in this

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[220] As seen in Chapter 3C, the ICJ has also missed the opportunity to pronounce itself on the application of the UN Torture Convention to nationals of non States Parties to it.
[221] That is also the case in Denmark, Norway and Sweden. See C Ryngaert op cit note 194 at 8.
[222] REDRESS & FIDH op cit note 155 at 262.
[223] C Ryngaert op cit note 194 at 5.
[224] A Sanchez Legido 'Spanish Practice in the Area of Universal Jurisdiction' (2001-2002) 8 *Spanish Yearbook of International Law* 17 at 41; N Strapatsas 'Universal jurisdiction and the International Criminal Court' (2002) 29 *Manitoba L J* 1 at 31; M Cosnard 'La compétence universelle en matière pénale' in C Tomuschat & J-M Thouvenin (eds) *The Fundamental Rules of the International Legal Order*. *Jus Cogens and Obligations Erga Omnes* (2006) 359; C Ryngaert op cit note 30 at 606.
[225] C Kreß op cit note 201 at 579-80.
[226] C Ryngaert op cit note 30 at 6; A Colangelo 'Universal Jurisdiction as an International "False Conflict" of Laws' (2009) 30 *Mich J Int'l L* 881 at 900; H Van Der Wilt 'Universal Jurisdiction under Attack An Assessment of African Misgivings towards International Criminal Justice as Administered by Western States' (2011) 9 *JICJ* 1043 at 1050; M Takeuchi op cit note 186 at 128.
[227] F Lafontaine op cit note 201 at 1290-91.
[228] W Kaleck op cit note 32 at 960; REDRESS & FIDH op cit note 155 at 26.

instance. To guarantee a successful prosecution, priority should thus be given to the first state that prosecutes.[229] Moreover, to ensure fairer proceedings, it seems more appropriate to make the subsidiary test the responsibility of a judicial rather than a prosecutorial authority, because of the wide discretion that prosecutors enjoy.[230] Finally, applying the principle of subsidiarity at the starting point of the investigation limits the possibilities of a successful prosecution. Thus evaluating the subsidiarity test after having investigated the offence would permit investigations to be held simultaneously in different states, and consequently a sharing of the results and evidence collected. This will be to the benefit of the forum state of prosecution, as well as in the fight against impunity.[231]

D. The remaining obstacles to successful prosecutions

Besides the issues of the interpretation of the 'presence of the offender requirement' in the state that exercises the universal jurisdiction over torture, and the operation of a principle of subsidiarity, other legal and practical questions are also often debated as they may prevent a successful torture prosecution under the universal jurisdiction.

i) The legal problems

Remaining legal obstacles to successful prosecution are high.[232] Some of the most problematic issues are described below.

First, the strict rules of evidence in domestic criminal procedures are often criticised. States with a common law tradition have often adopted such strict rules. In particular, the right to cross-examination, that is, the possibility for the opponent to interrogate a witness,[233] could threaten the successful outcome of a torture trial.[234] Torture convictions under universal jurisdiction in common law systems nevertheless do occur, but often with the support of law enforcement authorities.[235] States with a civil law tradition, however, have adopted a system of free evaluation of evidence, which render them more amenable to international criminal trials.[236] In France and Belgium, such offences are often judged before the Court of Assises — the criminal court hearing the most serious offences — in which the trial is based only on

[229] REDRESS & FIDH op cit note 155 at 26.
[230] Ibid at 27.
[231] European Center for Constitutional and Human Rights op cit note 193 at 6.
[232] C Ryngaert op cit note 30 at 609.
[233] A Dreier *Strategy, Planning & Litigating to Win* (2012) 79-85.
[234] UK Home Office 'Review of extra-territorial jurisdiction' (1996) *Steering Committee Report* at 20-21.
[235] See below, Chapter 4D(ii).
[236] C Ryngaert op cit note 30 at 610.

the oral presentation of evidence, and not on its written nature (*oralité des débats*).[237] Thus, evidentiary rules may also be restrictive in civil law.[238]

Secondly, the failure to define the crimes in domestic law according to international law is a particular problem. While France[239] and Belgium[240] have adopted in domestic law a definition of torture similar to that in the Torture Convention, the United Kingdom has chosen a more restrictive definition. Section 134 of the UK Criminal Justice Act[241] limits the scope of torture and thus, the possibilities of torture qualification, by requiring further, that torture was committed 'in the performance or purported performance of official duties'.[242] Moreover, while Belgium[243] has, in accordance with the Torture Convention,[244] prohibited a superior order as a defence, France[245] and the United Kingdom[246] permit it, thereby limiting the possibilities of successful prosecution.

Thirdly, another obstacle due to inadequate legislation is the numerous bilateral treaties regulating mutual legal assistance. Only a few multilateral treaties on this matter exist, but often with limited scope.[247] All of these treaties create complex and differentiated regimes. Moreover, the many grounds of assistance refusal (double criminality requirement, *ne bis in idem* prohibition, statutes of limitation…; see below) left to political discretion prevents the efficient gathering of evidence abroad.[248] Accordingly, the establishment of an international monitoring mechanism for mutual legal assistance is asked.[249]

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[237] A Blanc 'La preuve aux assises : entre formalisme et oralité, la formation de l'intime conviction' (2005) *Actualité Juridique Pénale* at 271 ; F Kuty *L'impartialité du juge en procédure pénale: De la confiance décrétée à la confiance justifiée* (2005) 156.

[238] I Cameron 'Jurisdiction and Admissibility Issues under the ICC Statute' in D McGoldrick, P Rowe & E Donnelly (eds) *The Permanent International Criminal Court. Legal and Policy Issues* (2004) 81; A Blanc op cit note 221 at 271; F Kuty op cit note 237 at 156.

[239] Article 222-1 of the French Criminal code (*Code pénal*) criminalises torture offence, but do not define it. However, it is admitted that it refers to the definition of the Torture Convention. See C E Clesse *La traite des êtres humains* (2013) 748.

[240] Article 417*bis* of the Belgian Criminal code (*Code pénal*).

[241] UK Criminal Justice Act (1988).

[242] Amnesty International op cit note 8 at 3.

[243] Article 417*ter* (3) of the Belgian *Code pénal* states that '[a]n order from a superior officer or authority can not justify the offence …'.

[244] Article 2(3) of the Torture Convention states that '[a]n order from a superior officer or a public authority may not be invoked as a justification for torture'.

[245] Article 122-4(2) of the French *Code pénal* states that '[i]s not criminally liable the person who performs an act ordered by legitimate authority unless that act is manifestly unlawful'.

[246] Article 134(4) of the UK Criminal Justice Act 1988 provides that '[i]t shall be a defence for a person charged with an offence under this section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct'.

[247] European Convention on Mutual Assistance in Criminal Matters (20 April 1959) 72 *UNTS* 185.

[248] See above, Chapter 4C.

[249] B Broomhall 'Towards the development of an effective system of universal jurisdiction for crimes under iInternational law' (2001) 35 *New Eng L Rev* 399 at 412-14.

Fourthly, domestic legislation attributing amnesties, pardons or similar measures to international law crime offenders are inapposite and prohibited under international law, especially because they allow for impunity and deny victims their right to justice.[250] Accordingly, they should not prevent any prosecution or investigation of the alleged offender.[251] As to torture, the primacy of the prosecution or investigation on amnesties was confirmed in the *Furundzija*[252] and *Ould Dah*[253] cases, referring to the *jus cogens* nature of the offence. Moreover, article 7(1) of the Torture Convention[254] imposes an absolute duty on t State Party to prosecute an alleged torturer if the State Party does not extradite him/her. Finally, the Human Rights Committee[255] and the Committee against Torture[256] criticised the use of amnesties for torture.

Fifthly, domestic provisions setting the maximum time limit when legal proceedings may be initiated after the commission of international law crimes, including torture, are

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[250] Amnesty International op cit note 8 at 31; M Robinson op cit note 21 at 17; N Roht-Arriaza & L Gibson 'The developing jurisprudence on amnesty' (1998) 20 *Human Rights Quarterly* 843 at 843.
These measures have been rejected by all United Nations bodies.
First, the UN General Assembly 'Resolution 3074 (XXVIII) on the Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity' (1973) para 8, available at *www.un.org*, accessed on 15 August 2015 states that 'States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity'.
Secondly, the World Conference on Human Rights 'Vienna Declaration and Programme of Action' (12 July 1993) *UN Doc A/CONF157/23* para 60, states that 'States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law'.
Thirdly, the UN bodies rejected the amnesty provision in the Sierra Leone Peace Accord (1999) *UN Doc S/1999/777* as extended to serious crimes of international law. See UN Secretary-General 'Seventh Report of the Observer Mission in Sierra Leone' (30 July 1999) *UN Doc S/1999/836* para 7; UN Security Council 'Resolution 1315 on the situation Sierra Leone' (2000) available at *www.un.org*, accessed on 15 August 2015; UN Commission on Human Rights 'Resolution on the situation in Sierra Leone' (18 April 2000) *UN Doc E/CN.4/RES/2000/24* para 2.
[251] Amnesty International op cit note 8 at 32.
[252] *Prosecutor v Furundzija* supra note 75 para 155 states that '[i]t would be senseless to argue, on the one hand, that on account of the jus cogens value of the prohibition on 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. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision … would not be accorded international legal recognition'.
[253] *Ely Ould Dah v France* (17 March 2009) (European Court of Human Rights) available at *http://hudoc.echr.coe .int*, accessed on 13 June 2015. The Court considered that the Mauritanian amnesty law did not prevent France from trying Ely Ould Dah because of the *jus cogens* nature of the torture prohibition.
[254] That provision requires, without exceptions, that every State Party 'in the 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'.
[255] Human Rights Committee 'General Comment No. 20' (7 April 1992) *UN Doc No CCPR/C/21/Rev.1./Add.3* para 4 states that 'amnesties are generally incompatible' with the right to a remedy and the prohibition of torture.
[256] See ie Committee against Torture 'Conclusions and recommendations concerning the initial report of Azerbaijan' (17 November 1999) *UN Doc A/55/44* para 69 (c) states that '[i]n order to ensure that perpetrators of torture do not enjoy impunity, the State party … ensure that amnesty laws exclude torture from their reach'.

generally accepted as prohibited under customary international law.[257] Moreover, similar to the case of amnesties, article 7(1) of the Torture Convention admits no exception to the State Party duty to prosecute torture in the case of no prosecution.[258] The Inter-American Court of Human Rights has criticised the use of time limitations when legal proceedings may be initiated after the commission of torture.[259] States with a common law tradition have generally followed this prohibition. In the common law system, crimes are not subject to 'statutes of limitation', unless specific statutory provisions explicitly indicate so. The United Kingdom has not included such a 'statute of limitation' concerning international crimes.[260] In contrast, in states like France[261] and Belgium[262] that have a civil law tradition, crimes including torture, are subject to 'periods of prescription', unless a specific provision explicitly excludes their application. Neither France nor Belgium have such an exclusion to torture.[263]

Sixthly, the principle *ne bis in idem* prohibits the prosecution of a person more than once for the same criminal behaviour.[264] This fundamental guarantee of the right of defence is generally applied only at the national level and not to actions of different sovereigns states.[265] Indeed, states remain reluctant to recognise the principle *ne bis in idem* for foreign *res judicata*. Accordingly, they often start new proceedings, thereby admitting a second prosecution or conviction for the same facts.[266] However, some states explicitly recognise a *res judicata* effect or the validity of foreign judgments. Such recognition may take place in

[257] It is *inter alia* referred to article 29 of the Rome Statute of the International Criminal Court (17 July 1998) 2187 *UNTS* 90, which states that '[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations'. See L Reydams op cit note 41 at 703.
[258] Amnesty International op cit note 8 at 6.
[259] *Barrios Altos* (Chumbipuma Aguirre and others v Peru) (Inter-American Court of Human Rights) (14 March 2001) *2001 IACHR 13* para 41 stated that 'it is unacceptable to use … statutes of limitations … as a means of preventing the investigation and punishment of … torture'.
[260] Amnesty International op cit note 8 at 32.
[261] Article 7 of the French Code of criminal procedure (*Code de procédure pénale*) states that '[f]or crimes the right to prosecute lapses after the expiration of ten years starting on the day of the commission of the crime'.
[262] According to article 21 of the Belgian Preliminary title of the Code of criminal procedure (*Titre préliminaire du Code de procédure pénale*), the applicable statutory limitation depends of the *correctionalisation* of the torture crime, that is the admission of extenuating circumstances (trial before a *tribunal correctionnel*; statutory limitation of five years), or not (trial before a *cour d'assises*; statutory limitation of ten years, or fifteen years if the offence was committed against a minor or if it is accompanied by a homicide).
[263] However, articles 136*bis*, 136*ter* et 136*quater* of the Belgian Criminal Code (*Code pénal*) explicitly exclude the applicability of the periods of prescription to international crimes of genocide, war crime, and crimes against humanity. Moreover, article 213-5 of the French Criminal Code (*Code pénal*) does the same as to crimes against humanity. See R Alberdina Kok 'Statutory Limitations in International Criminal Law' (2007) at 31, available at *http://dare.uva.nl*, accessed on 16 August 2015.
[264] This principle comes from the civil-law tradition, and is similar to the 'double jeopardy' doctrine in common-law. A A Reed 'Double jeopardy law made simple' (1997) 943 *Yale Faculty Scholarship Series* 1807 at 1807.
[265] See ie article 14(7) of the International Covenant on Civil and Political Rights (16 December 1966) *999 UNTS 171* which states that '[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'.
[266] I Blanco Cordero op cit note 133 para 81.

the context of a treaty. For instance, the 26 European state members of the Convention of Schengen[267] (including France and Belgium) apply this principle *ne bis in idem* to each other within their borders. However, the principle is now binding and applicable throughout the EU and even in certain non-EU countries such as the United Kingdom.[268] Moreover, the recognition of the *ne bis in idem* effect for all foreign *res judicata*, regardless of the state of origin, may also take place in domestic legislation, as in France and Belgium.[269] Amnesty International asks for the non-applicability of the principle *ne bis in idem* in relation to international crimes, because sham or unfair foreign proceeding could prevent a real trial from taking place.[270]

Seventhly, the principle of double criminality requires that the crime must constitute a criminal offence both in the territorial state and in the state exercising jurisdiction.[271] It is argued that such a requirement limiting the possibilities of prosecution does not apply to international crimes, but only to crimes of 'domestic concern'.[272] The United Kingdom follows suit and has no double criminality requirement for the exercise of extraterritorial jurisdiction.[273] Moreover, in Belgium, double criminality is required under the general extraterritorial jurisdiction provisions,[274] but not in the special provisions for the prosecution of crimes under international law. In contrast, France obliges such a requirement for international crimes against humanity, genocides or war crimes.[275]

Finally, immunity of certain officials could limit the exercise of universal jurisdiction. In the *Arrest Warrant* case, the ICJ held that the official position of an alleged international

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[267] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (22 September 2000) *Official Journal L 239* 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'. Ibid para 77.

[268] European Commission 'Green Paper on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings' (23 December 2005) available at *http://eur-lex.europa.eu*, accessed on 15 August 2015.

[269] Article 360 of the Belgian Code of criminal procedure (*Code d'instruction criminelle*) states that '[t]he accused who has been acquitted by a court of assize cannot be prosecuted again for the same facts, regardless of their legal description'. Article 368 of the French Code of criminal procedure (*Code de procédure pénale*) states that '[n]o legally acquitted person may be retaken or accused for the same facts, even under a different qualification' (author's translations).

[270] Amnesty International *Universal jurisdiction: a preliminary survey of the legislation around the world* (2012) 11.

[271] Ibid; A Cassese *International Criminal Law* (2003) 283.

[272] REDRESS & FIDH op cit note 155 at 32.

[273] Ibid at 262.

[274] Articles 7 and 10(5) of the Belgian Preliminary title of the Code of criminal procedure (*Titre préliminaire du Code de procédure pénale*).

[275] Article 689-11 of the French Code of criminal procedure (*Code de procédure pénale*).

crime offender is not a defence, nor a basis to deny his/her criminal responsibility, even if the crime was committed in the course of his/her official duties.[276] However, certain officials of foreign governments such as accredited diplomats, current heads of state/government or foreign ministers enjoy a temporary procedural immunity from the criminal jurisdiction of foreign state, for his/her period of exercise.[277] States nevertheless generally broaden the scope of the officials enjoying immunity beyond international law.

In the United Kingdom, the State Immunity Act[278] confirmed the immunity of head of States or government. In the *Pinochet* case, The House of Lords confirmed the right of heads of States to immunity from criminal prosecution during their terms of office for any crime regardless whether it was committed under official functions or not.[279] Moreover, former heads of State enjoy immunity to acts carried out in an official capacity. The majority of the House of Lords rejected Pinochet's immunity for acts of torture.[280] In addition to heads of States or government, the United Kingdom seems to apply immunity to a wider range of officials than those referred in the *Arrest Warrant* case, which attributes immunity to a limited number of officials because of the nature of their functions, including visiting ministers, armed forces, high commissioners and their diplomatic staff.[281] Accordingly, an arrest warrant was neither delivered against Israeli Defence Ministers Mofaz in 2004 and Barak in 2009, nor against the Chinese Minister for Trade, Bo Xilai, in 2005.[282]

Belgium's legislation offers immunity to all persons by virtue of treaty or customary international law. These would include heads of States and government and foreign ministers as long as they carry out their public functions. Furthermore, according to international law, no legal action can be taken against persons officially invited to Belgium by Belgian

[276] *Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v Belgium) op cit note 124 paras 60-61. Similarly, article 27 of the Rome Statute of the International Criminal Court (17 July 1998) 2187 *UNTS* 90 specifies that '[t]his Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'.

[277] *Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v Belgium) op cit note 124 paras 53-55.

[278] Article 14(1) of the State Immunity Act (1978) available at *www.legislation.gov.uk*, accessed on 15 August 2015.

[279] *Regina v Bartle and the Commissioner of Police for the Metropolis and Others* (25 November 1998) (House of Lords) *1998 3 WLR 1456*.

[280] REDRESS & FIDH op cit note 155 at 262.

[281] Ibid at 263.

[282] L Arimatsu 'Universal jurisdiction for international Crimes: Africa's hope for justice?' (2010) available at *www.chathamhouse.org.uk*, accessed on 10 August 2015.

authorities or an international organisation established in Belgium and with which Belgium has a headquarter agreement.[283]

France, in contrast, has no specific provision concerning the immunity of alleged international crime offenders. Thus, French practice refers to customary international law, whereby interpretation of immunity rules is effected by the magistrate granting immunity. Such interpretation can, however, vary from one case to another, as they are based on a French foreign minister's discretionary opinion.[284] This raises the concern that political rather than legal criteria are applied in the determination of immunity.[285] In the 2008 *Rumsfeld* case, a French prosecutor dismissed a torture complaint and granted immunity to the alleged offender, on account of the French foreign minister's opinion that argued that he was a former US Secretary of Defence.[286]

To summarise, legal obstacles against successful prosecution under universal jurisdiction remain high and varied. The *forum* State often has primary responsibility (by having *ne bis in idem* [B, F] or strict evidentiary [UK, B, F] legislation; or by leaving the complex and inadequate systems of mutual legal assistance to political discretion [UK, F, B]), thereby sometimes denying the international law position (by failing to define the international crimes consistently in domestic law [UK, F]; by granting amnesties; or broad immunities [UK, F, B]; or by having double criminality requirements, except for torture [B, F]).

Not all of the legal obstacles noted above can be suppressed. Indeed, the fight against impunity can-not be the pretext for giving up fundamental rights of defence such as evidentiary rules or the *ne bis in idem* principle that have been established for the benefit of a peaceful society. Indeed, the prosecution of an international crime must be conducted with the greatest regard for the rights of the accused, even more than for 'classic' proceedings. First, the presumption of innocence of the alleged offender will be abused due to the intense publicity given to international criminal proceedings. Secondly, the legitimacy and acceptability of the decision is subject to the appearance and reality of fair, independent and impartial proceedings.[287]

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[283] Article 1*bis* of the Belgian Preliminary title of the Code of criminal procedure (*Titre préliminaire du Code de procédure pénale*).
[284] REDRESS & FIDH op cit note 155 at 133.
[285] Human Rights Watch *Universal Jurisdiction in Europe* (2006) 27.
[286] REDRESS & FIDH op cit note 155 at 133.
[287] Amnesty International op cit note 8 at 23.

Obstacles against the successful prosecution of crimes that fall under the universal jurisdiction over torture do not only have a legal characteristic. Some problems are also of a practical nature as discussed below.

ii) The practical problems

In addition to the legal obstacles described above, practical obstacles to successful torture prosecutions under the universal jurisdiction remain abundant.

The location of evidence abroad is a recurrent problem.[288] Investigating judges and detectives often have to go to the territorial state to gather evidence. [289] Such a task, as well as the verification of the authenticity of evidence, its transfer and interpretation, is often arduous — *a fortiori* if the territorial state is involved — and expensive.[290] In many cases, and despite their obligation to cooperate in the investigation and prosecution of torture,[291] the territorial state refuses on-site investigations, or allows them to be conducted only by their own authorities.[292] This process could, however, be facilitated by the notoriety of the facts,[293] and by the action of NGOs.[294] In the *Zardad* case,[295] evidence of torture in Afghanistan, gathered by Scotland Yard detectives in Afghanistan, permitted the conviction of a militia commander before an English court.[296]

The location of witnesses abroad is a similar problem. The gathering of foreign witnesses is, like evidence, often laborious and expensive. Accordingly, the assistance given by victims' groups and NGOs is often relied on to find foreign witnesses.[297] Once found, detectives or investigating judges have to convince foreign witnesses to testify. Foreign witnesses often do not agree to testify when territorial authorities lead investigations.[298] If the foreign witnesses agree to testify, their appearance in person during the trial is often requested

[288] W Kaleck op cit note 32 at 961.
[289] C Ryngaert op cit note 30 at 608.
[290] R Rabinovitch op cit note 140 at 526; W Kaleck op cit note 32 at 961.
[291] Article 9 of the Torture Convention states that 'States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them'.
[292] Amnesty International op cit note 8 at 20.
[293] D Vandermeersch 'Prosecuting international crimes in Belgium' (2005) 3 *Journal of International Criminal Justice* 400 at 411.
[294] Amnesty International op cit note 8 at 23.
[295] *R v Zardad* (19 July 2005) (Central Criminal Court) available at *www.redress.org/news/zardad%207% 20apr%202004.pdf*, accessed on 5 April 2005.
[296] UK Home Office op cit note 218 at 27.
[297] Amnesty International op cit note 8 at 25.
[298] Ibid at 20.

by courts.[299] The transfer of witnesses from abroad, however, also faces many obstacles, especially due to high costs. As a remedy, forum states' governments sometimes grant financial assistance to foreign witnesses. In the *Pinochet* case, such assistance from the French Treasury permitted the transfer of French witnesses from Chile to France. This kind of remedy nevertheless seems conditional on the witnesses' possession of the nationality of the forum state.[300]

Finally, if the witness is able to give testimony, a programme of protection[301] may be established by the forum state.[302] Such a programme includes security and relocation, as well as the provision of new identities for the witness and his/her family.[303]

All of the abovementioned difficulties linked to a foreign witness may be attenuated by remote testimony, such as giving anonymity[304] or broadcasting the testimony through live or recorded video.[305] In the above-mentioned *Zardad* case, for instance, Afghan witnesses' testimony to the court was transferred through a live video link with the British Embassy in Kabul. Such methods are criticised because of their high cost, the slow transmission of data, the difficulty to compel a witness and to bring an action for perjury.[306] However, the cost is less than the witness' transfer and it can be a compromise for witnesses refusing to transfer to the forum state.[307]

Besides the problems linked to the location of evidence and witnesses abroad, a successful torture prosecution under universal jurisdiction is also limited by problems of a more institutional nature. Criminal justice practitioners, while pursuing the first aim of

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[299] C Ryngaert op cit note 30 at 608.
[300] W Bourdon 'Prosecuting the perpetrators of international crimes: What role may defence counsel play?' (2005) 3 *Journal of International Criminal Justice* 434 at 442.
[301] Article 23 of the UK Youth Justice and Criminal Evidence Act (1999) available at *www.legislation.gov.uk*, accessed on 10 August 2015. Belgian programme of protection may take place only if the witness resides in Belgium. It may also apply to relative and other persons in situation of danger; articles 102-11 of the Belgian Code of criminal procedure (*Code d'instruction criminelle*). There is no specific legislation on witnesses' protection in France.
[302] UK Home Office op cit note 218 at 20; M T Kamminga 'Lessons learned from the exercise of universal jurisdiction in respect of gross human rights offences' (2000) 23 *Human Rights Quarterly* 940 at 959-60.
[303] Amnesty International op cit note 8 at 26.
[304] Articles 75*bis*, 86*bis*, 86*ter*, 294 and 296 of the Belgian Code of criminal procedure (*Code d'instruction criminelle*); articles 706-58 of the French Code of criminal procedure (*Code de procédure pénale*); sections 86 to 98 of the English Coroners and Justice Act (2009) available at *www.legislation.gov.uk*, accessed on 10 August 2015 ; UK Crown Prosecution Service 'Guidance on Witness Anonymity by Director of Public Prosecutions' (2009) available at *www.cps.gov.uk*, accessed on 10 August 2015.
[305] Articles 91*bis*, 112(2), 112*bis*, 158*bis*(6), 158*ter*(5), 298, 299, 497, 498 and 499 of the Belgian Code of criminal procedure (*Code d'instruction criminelle*); sections 23-30 of the UK Youth Justice and Criminal Evidence Act (1999).
[306] UK Home Office op cit note 218 at 26.
[307] Amnesty International op cit note 8 at 26.

universal jurisdiction by fighting against impunity, nevertheless contribute to this laxity through their lack of competence, organisation, and funding.

First, criminal justice practitioners sometimes lack experience and knowledge in international law, proceedings abroad, interviews, witness protection, languages, negotiation with other enforcement authorities among others, thereby making it difficult for them to succeed in proceedings under universal jurisdiction.[308] Moreover, prosecutors and investigating judges' motivation to pursue such proceedings are sometimes barred by political pressure.[309] Indeed, politicians and members of the public are not always aware of the objective of universal jurisdiction, or in contrast, voluntarily ignore the benefits of enforcing international criminal law against the real costs that may result in respect of their state's political relationships, security and trade.[310] For instance, doubts arose about the decision of an English prosecutor to drop charges against a Sudanese doctor just before trial because of lack of evidence, even though victims provided substantial evidence.[311] Moreover, in the United Kingdom, proceedings under universal jurisdiction require the approval of the General Attorney who is a political official.[312] In the *Pinochet* case, the General Attorney rejected on suspected political and non-legal grounds the prosecution of the former Chilean president during his presence in the United Kingdom.[313] In France, the government was suspected to have helped the former Algerian defence minister Nezzar to escape from France by airplane after a preliminary inquiry (*enquête*) had been opened.[314] Given the political discretion in deciding whether or not to launch proceedings and in order to limit non legal considerations, some states like the United Kingdom have adopted some guidelines that the prosecution has to follow when deciding to prosecute.[315]

Secondly, the organisation of prosecution under universal jurisdiction is often qualified as defective. Clear and competent domestic programmes to investigate and prosecute international crimes are generally still lacking. Some states have nevertheless

[308] Ibid at 17; C Ryngaert op cit note 30 at 609.
[309] M T Kamminga op cit note 302 at 959-60; C Ryngaert op cit note 30 at 610.
[310] M Byers 'The law and politics of the Pinochet case' (2000) 10 *Duke J Comp & Int'l L* 415 at 421; Amnesty International op cit note 14 at 8-10; D Scheffer 'Opening address, Universal jurisdiction conference, December 2000' (2001) 35 *New Eng L Rev* 233 at 234.
[311] Amnesty International op cit note 8 at 10.
[312] Article 135 of the UK Criminal Justice Act (1988).
[313] Amnesty International op cit note 8 at 13.
[314] Fédération Internationale des Droits de l'Homme 'Paris dans l'embarras après le départ du général Nezzar' (2001) available at *www.fidh.imaginet.fr*, accessed on 10 August 2015.
[315] UK Crown Prosecution Service 'Director's Guidance on the handling of cases where the jurisdiction to prosecute is shared with prosecuting authorities overseas' (2013) available at *www.cps.gov.uk*, accessed on 10 August 2015.

developed specialised units dealing with such crimes.[316] While being generally underdeveloped and underfunded,[317] Belgian, French, German and Dutch specialised units have nowadays achieved at least 15 convictions.[318] In contrast, states without specialised units give priority to prosecution and investigation of domestic cases, thereby neglecting international ones. The Crown Prosecution Service in the United Kingdom, for instance, in the absence of a specialised unit, has prosecuted only one alleged offender. [319]

Unfortunately, international criminal prosecution is often limited to the domestic level and its establishment of the abovementioned units. However, given the numerous foreign characteristics of international crimes, prosecution should take place in parallel at the international level,[320] *a fortiori* in this time of increasing transnational criminal activity, encouraged by open borders and globalisation.[321] Thus, European States' cooperation has been recently improved by the establishment of a network of contact points in respect of persons responsible for international crimes[322] as well as the commitment to increase cooperation between national units.[323] These are first steps of international cooperation,[324] which the European Union has to pursue, having in the last few years prioritised its assistance to the ICC and international humanitarian law issues, instead of international crimes within its borders.[325] Amnesty International has recommended that the United Nations establish an international body to conduct investigations of international crimes and to assist domestic authorities during their investigations. A United Nations body would be more acceptable to some domestic authorities than investigators from certain other states.[326]

Finally, at the international level, there is no effective monitoring of state enforcement

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[316] As of 14 August 2015, the following countries have adopted a specialised unit: Croatia, Belgium, France, Germany, The Netherlands, Sweden, Canada, Norway, Switzerland, United States. See REDRESS, FIDH, ECCHR & TRIAL 'Faire progresser la justice: les victimes de crimes internationaux graves dans l'UE' (2014) at 10, available at *www.redress.org*, accessed on 14 August 2015.
[317] For instance, the French unit employs three officers and has more than twenty cases pending; REDRESS & FIDH op cit note 155 at 133. *Contra*: the Dutch unit; W Kaleck op cit note 32 at 962.
[318] A Schüller 'The role of national investigations in the system of international criminal justice – Developments in Germany' (2013) 4 *Security and Peace* 226 at 227.
[319] REDRESS, FIDH, ECCHR & TRIAL op cit note 316 at 11.
[320] W Kaleck op cit note 32 at 962.
[321] S Macedo op cit note 20 at 3.
[322] European Council 'Decision setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes' (13 June 2002) available at *http://eur-lex.europa.eu*, accessed on 14 August 2015.
[323] European Council 'Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes' (8 May 2003) available at *http://eur-lex.europa.eu*, accessed on 14 August 2015.
[324] W Kaleck op cit note 32 at 962.
[325] REDRESS & FIDH op cit note 155 at 12.
[326] Amnesty International op cit note 8 at 26.

of international criminal law.[327] As to torture, the Committee against Torture monitors the implementation of the Torture Convention by States Parties. Unfortunately, it rarely strictly recommends to the Parties that they resolve their failures and comply with their obligations.[328]

To summarise, the practical obstacles which impede the exercise of universal jurisdiction can be classified in two categories: the problems linked to the location of the crime abroad, and those relating to the organisation of proceedings. However, all share a financial dimension: gathering evidence and witnesses abroad, transferring and protecting them in the *forum* State, forming members of criminal justice, developing specialised prosecution and investigation units, as well as international cooperation programmes and effective monitoring organ. Solving these problems as regards the prosecution in universal jurisdiction will only be possible if sufficient funds are made available at both domestic and international levels. These are critically needed due to the increasing occurrence of transnational criminality.[329]

E. Conclusion

The concept of universal jurisdiction is something that has been debated frequently since its establishment. However, some issues seem to have been progressively resolved in international law and endorsed by European state practice. First, the allowance of proceedings *in absentia* would only be a domestic choice of enforcement of an international prescriptive (universal) jurisdiction. Secondly, the principle of subsidiarity would give primacy jurisdiction at least to the territorial state that wants and is able to prosecute. The allowance of proceedings in absentia and the principle of subsidiarity are respectively beneficial for the fight against impunity by permitting broader possibilities of proceedings, and by prioritising proceedings in the state that possesses all the elements necessary for a successful prosecution. However, these two issues always face some criticism, and have not already achieved a customary international law status. Finally, remaining practical and legal obstacles may also prevent a successful prosecution. Despite the opposition of international law to some of those obstacles and their possible suppression by states, complex problems remain inherent to all situations of prosecution of crimes committed abroad.

[327] Ibid at 57.
[328] Ibid at 58.
[329] Ibid at 25.

V. CONCLUSION

The aim of this dissertation was to consider the following question: 'To what extent is the universal jurisdiction over torture implemented in European countries'? It has been demonstrated that these countries, in particular Belgium, France, and the United Kingdom, have complied with the obligation set out in article 5(2) of the Torture Convention to establish universal jurisdiction over torture offences in their domestic legislation. They were, moreover, the first countries to conduct torture trials on this ground. However, 30 years after the signature of the Convention, such trials rarely occur. The rationale advanced for universal jurisdiction over torture was the suppression of obstacles leading to impunity of one of the most serious international crimes namely, torture. This dissertation has demonstrated that, since the establishment of the concept of universal jurisdiction over torture, European prosecutors and courts face both practical and legal problems in bringing the process of justice to a successful conclusion.

First, article 5(2) is implemented by Belgium in its domestic law by means of a general statutory clause that enables the state to exercise universal jurisdiction over any crime for which international treaty law obliges such prosecution. This method should be ignored as it leads to a less effective prosecution of torture offences than occurs in France and the United Kingdom. Article 5(2) has been implemented in France and the United Kingdom by a specific provision that recognises universal jurisdiction over torture in their domestic codes of criminal procedure. Indeed, the operation of the legality principle can hamper the inference of universal jurisdiction over torture offences from the broadly formulated general statutory clauses. However, irrespective of the method of implementation, courts and prosecutors from Belgium, France and the United Kingdom often characterise an act of torture in a way that minimises difficulties arising from prosecution. The Committee Against Torture should make states liable for breach of the Convention if the characterisation of an act of torture with another international crime leads to the failure of prosecution because of the higher threshold of proof that is required.

Moreover, States Parties must face the controversial issue of the scope of *ratione temporis* and *ratione loci* in the Convention. The question as to the non-retroactivity of the implemented legislation currently seems to have been answered in the affirmative by European courts. Thus, presumed offenders could not, under universal jurisdiction, be

prosecuted for torture offences committed before the implementation of the Convention. In contrast, the second question relating to the legality of the universal jurisdiction over the torture of citizens of non States Parties is far from being settled. The frequent commission of torture by nationals of such states should help to settle the controversy between pro-legality — sustained by the Lotus principle and the prohibition of non-retroactivity for the crime of *ius cogens* — and its opponents — applying the *pacta tertiis nec nocent nec prosunt* and non-retroactivity principles.

Finally, some problems stem from the concept of universal jurisdiction itself. International law, endorsed by European state practice, seems to have affirmatively solved the issues of legality with regard to the proceedings in the absence of the offender — as a domestic choice and not as an independent category of universal jurisdiction — and with regard to the operation of a principle of subsidiarity that would give primacy jurisdiction at least to the territorial state that wants and is able to prosecute. Both solutions, if implemented seriously by states, benefit in the fight against torture impunity.

Other obstacles also remain for a successful prosecution under universal jurisdiction. Some are legal such as the *ne bis in idem* prohibition, strict evidentiary legislation, and complex and political systems of mutual legal assistance, which sometimes deny the international law position. Some obstacles are practical and are linked either to the location of the crime abroad (gathering, utilisation, protection and transfer of evidence and witnesses abroad) or to the organisation of proceedings (incompetence of criminal practitioners, underdeveloped specialised prosecution units, and lack of international cooperation programmes and an effective monitoring organ).

While the concept of the universal jurisdiction of torture is something that has been debated since its establishment, some issues have been solved progressively in international law and endorsed by European state practice. That is the case *inter alia* for the non-retroactivity of the Convention, the principle of subsidiarity, the proceedings *in absentia* and the prohibition of amnesties. None of these solutions have achieved the status of customary international law.

Despite some progress, some scholars continue to qualify the development of universal jurisdiction over torture as ‘disparate’, ‘incoherent’ and ‘poorly understood’.[330] The main reason is that each state often solves issues about universal jurisdiction over torture or

[330] M Robinson op cit note 21 at 19.

tries to do so in a vacuum. Accordingly, the judicial and political characteristics of each state system lead to a different application of universal jurisdiction from one state to another, and even in certain cases to a forum shopping phenomenon.

The suppression of such supposed differences of treatment should be addressed through cooperation between states in respect of all of the abovementioned legal and practical issues. Indeed, it is recognised that at the inter-state level, a multitude of problems can presently be resolved.[331] As far as the European Union is concerned, legal harmonisation has already begun with *ne bis in idem,* or mutual assistance legislation. In addition, practical cooperation has recently taken place through a network of contact points in respect of persons responsible for international crimes as well as a commitment to increase cooperation between domestic specialised units dealing with international crimes. The recent acts of terrorism in Europe will probably accelerate the cooperation between European States.

Regional solutions are the first steps toward international common responses to torture on the ground of universal jurisdiction. To definitively solve unclarified questions and stop differentiated applications, international guidelines concerning the use of universal jurisdiction over torture should be adopted. For instance, such guidelines should precise the notion of universal jurisdiction over torture, its scopes of application, the requirements to exercise it, the rules in case of concurrent jurisdictions, the possibility of proceedings *in absentia*... United Nations bodies seem the most appropriate for this task, including the International Court of Justice, the General Assembly, the Security Council, the Committee against Torture, the Human Rights Committee and the International Law Commission.

The harmonisation of applications of universal jurisdiction over torture are unfortunately not enough to achieve successful prosecutions, while the elevation of the Committee against Torture as an efficient organ for monitoring of state enforcement of the Convention is a necessity.

In conclusion, the forum state is identified as having primary responsibility for the existence of obstacles to successful universal jurisdiction over torture. This is so especially because so few trials are conducted due to inadequate domestic legislation and organisational defects. The lack of initiative on the part of the international community as well as of the above-mentioned UN bodies is also responsible for the obstacles to successful universal jurisdiction over torture — all must be taken into account to explain the lack of satisfactory

[331] Scientific Network on Globalisation and Development *Mondialisation. Les mots et les choses* (1999) 63.

outcomes under universal jurisdiction over torture. Accordingly, states and international bodies have both responsibilities to assess the implementation of universal jurisdiction over torture and to correct the abovementioned legal and practical problems.

Finally, prosecuting universal jurisdiction over torture presents challenges that are inseparable from the complex prosecution of crimes committed abroad, such as drug trafficking or terrorism cases. Successful prosecution would thus primarily devolve to the prosecution and the police service's motivation to solve those legal and practical problems. The importance of the criminal practitioners' motivation should not be an excuse to provide them with a suitable working context that has clear legislation and guidelines over universal jurisdiction over torture, and an adequately financed specialised unit for international crimes. In contrast, a static situation would lead to negatively affect the criminal practitioners' dedication, which is particularly required to give the full expression for the rationale of universal jurisdiction over torture — the fight against impunity — in this time of increasing occurrence of transnational criminality.

BIBLIOGRAPHY

A. Primary sources

i) International statutes

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 *UNTS* 85.

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 *UNTS* 31.

Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 *UNTS* 85.

Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 *UNTS* 221.

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (23 September 1971) 974 *UNTS* 178.

Convention for the Suppression of Unlawful Seizure of Aircraft (16 December 1970) 860 *UNTS* 105.

Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (22 September 2000) *Official Journal L 239*.

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (14 December 1973) 1035 *UNTS* 167.

Convention (III) relative to the Treatment of Prisoners of War (12 August 1949) 75 *UNTS* 135.

Convention (IV) relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 *UNTS* 287.

European Convention on Mutual Assistance in Criminal Matters (20 April 1959) 72 *UNTS* 185.

International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171.

International Convention against the Taking of Hostages (18 December 1979) 1316 *UNTS* 205.

International Convention on the Suppression of the Crime of Apartheid (30 November 1973) 1015 *UNTS* 244.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 *UNTS* 3.

Rome Statute of the International Criminal Court (17 July 1998) 2187 *UNTS* 90.

Vienna Convention on the Law of Treaties (23 May 1969) 1155 *UNTS* 331.

ii) Domestic statutes

- Belgium

Code d'instruction criminelle (17 November 1808) available at *www.ejustice.just.fgov.be,* accessed on 3 April 2015.

Code pénal (18 June 1867) as amended in 2002 available at *www.ejustice.just.fgov.be,* accessed on 3 April 2015.

Constitution belge (17 February 1994) available at *www.dekamer.be*, accessed on 4 April 2015.

Loi contenant le titre préliminaire du Code de procédure pénale (18 April 1878) available at *www.ejustice.just.fgov.be,* accessed on 3 April 2015.

Loi relative à la répression des violations graves de droit international humanitaire (5 Augustus 1993), as repealed by the law of 5 Augustus 2003, available at *www.ejustice.just.fgo v.be,* accessed on 3 April 2015.

- France

Constitution française (4 October 1958) available at *www.assembleenationale.fr*, accessed on 14 June 2015.

Code de procédure pénale (1 January 1994) available in English (Official translation) at *www.legifrance.gouv.fr*, accessed on 2 April 2015.

- Spain

Organic Law of the Judicial Power (1 July 1985) available at *www.wipo.int/wipolex/en*, accessed on 2 April 2015.

- The Netherlands

Act implementing the Hague and Montreal Hijacking Conventions (10 May 1973) *Stb. 228*.

- The United Kingdom

Coroners and Justice Act (2009) available at *www.legislation.gov.uk*, accessed on 10 August 2015.

Criminal Justice Act (1988) available at *www.legislation.gov.uk*, accessed on 2 April 2015.
Extradition Act (1989) available at *www.legislation.gov.uk*, accessed on 15 June 2015.

State Immunity Act (1978) available at *www.legislation.gov.uk*, accessed on 15 August 2015.

Torture Convention Implementation Act (1989) available at *www.legislation.gov.uk*, accessed on 15 June 2015.

Youth Justice and Criminal Evidence Act (1999) available at *www.legislation.gov.uk*, accessed on 10 August 2015.

iii) International cases

Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) (14 February 2002) (International Court of Justice) *ICJ Rep 2002*.

Barrios Altos (Chumbipuma Aguirre and others v Peru) (Inter-American Court of Human Rights) (14 March 2001) *2001 IACHR 13*.

Certain Criminal Proceedings in France (Republic of Congo v France) (9 December 2002) (Interational Court of Justice) (Application instituting proceedings) available at *www.icj-cij.org*, accessed on 15 June 2015.

Ely Ould Dah v France (17 March 2009) (European Court of Human Rights) available at *http://hudoc.echr.coe .int*, accessed on 13 June 2015.

Guengueng et al v Senegal (17 May 2006) (Committee against Torture) available at *http://ww w.bayefsky.com//pdf/senegal_t5_cat_181_2006.pdf*, accessed on 13 June 2015.

Mutimura v France (8 June 2004) (European Court of Human Rights) available at *http://cmiskp .echr.coe.int*, accessed on 5 April 2015.

North Sea Continental Shelf cases (Federal Republic of Germany v Denmark and the Netherlands) (20 February 1969) (International Court of Justice) *ICJ Rep 1969*.

Prosecutor v Furundzija (10 December 1998) (International Criminal Tribunal for the former Yugoslavia) 38 *ILM* 346.

Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (20 July 2012) (International Court of Justice) *ICJ Reports 2012*.

Sejdovic v Italy (1 March 2006) (European Court of Human Rights) available at *http://cmiskp .echr.coe.int*, accessed on 25 October 2015.

S.S. Lotus (France v Turkey) (7 September 1927) (Permanent Court of International Justice) *PCIJ Series A No. 10*.

iv) Domestic cases

- Belgium

Erdal v Conseil des Ministres (20 April 2005) (Belgian Constitutional Court) *Moniteur belge of 3 May 2005*.

Habré (19 September 2005) (Investigating Magistrate Brussels) (unpublished).

Ligue des droits de l'homme (23 March 2005) (Belgian Constitutional Court) available at *www.arbitrage.be*, accessed on 9 August 2015.

Pinochet (6 November 1998) (Investigating Magistrate Brussels) (1999) 79 *Revue de Droit Pénal et de Criminologie* 278.

- France

Congo Beach (9 April 2008) (Court of Cassation), available at *www.courdecassation.fr*, accessed on 11 July 2015.

Congo Beach (3 April 2004) (Paris Court of Appeals) un-published.

Dupaquier et al v Munyeshyaka (20 March 1996) (Nîmes Court of Appeals) 4 *Revue Générale de Droit International Public* 1084.

Ely Ould Dah (23 October 2002) (Court of Cassation) available at *www.legifrance.gouv.fr*, accessed on 13 June 2015.

Ely Ould Dah (1 July 2005) (Gard Court of Assises) un-published.

Javor (26 March 1996) (Court of Cassation) (1996) 100 *Revue Générale de Droit International Public* 1083.

Khaled Ben Saïd (15 December 2008) (Bas-Rhin Court of Assises) un-published.

Khaled Ben Saïd (24 September 2010) (Meurthe et Moselle Court of Assises) un-published.

Munyeshyaka (6 January 1998) (Court of cassation) (1998) 102 *Revue Générale de Droit International Public* 827.

Ung Boun Ohr (21 January 2009) (Court of Cassation), available at *www.courdecassation.fr*, accessed on 11 July 2015.

- Spain

Order affirming Spain's Jurisdiction to Try Crimes of Genocide and Terrorism Committed During the Chilean Dictatorship (5 November 1998) (Criminal Chamber of the Spanish Audencia Nacional) available at *http://www.derechos.org/nizkor/chile/juicio/audi.html*, accessed on 15 June 2015.

- The Netherlands

Public Prosecutor v SHT (1987) 74 *ILR* 162.

Sébastien N (7 April 2004) (Rotterdam District Court) (2004) 51 *Netherlands International Law Review* 444.

Wijngaarde et al v Bouterse (20 November 2000) (Amsterdam Court of Appeals) available at *http://ljn.rechtspraak.nl*, accessed on 20 August 2015.

- The United Kingdom

R v Jones (16 October 2003) (House of Lords) *1 A.C. 1*.

R v Zardad (19 July 2005) (High Court) available at *www.redress.org/news/zardad%207% 20apr%202004.pdf*, accessed on 5 April 2005.

Regina v Bartle and the Commissioner of Police for the Metropolis and Others (24 March 1999) (House of Lords) 38 *ILM* 3.

Regina v Bartle and the Commissioner of Police for the Metropolis and Others (25 November 1998) (House of Lords) *1998 3 WLR 1456*.

B. Secondary sources

African Union 'African Union Model National Law on Universal Jurisdiction over International Crimes' (2012) available at *http://legal.au.int*, accessed on 4 August 2015.

Alberdina Kok, Ruth 'Statutory Limitations in International Criminal Law' (2007) available at *http://dare.uva.nl*, accessed on 16 August 2015.

Amnesty International *Universal jurisdiction: a preliminary survey of the legislation around the world* (2012) Amnesty International Publication, London.

Amnesty International *Universal Jurisdiction: Questions and Answers* (2001) Amnesty International Publication, London.

Amnesty International *Universal jurisdiction: The duty of states to enact and enforce legislation* (2001) Amnesty International Publication, London.

Arimatsu, Louise 'Universal jurisdiction for international crimes: Africa's hope for justice?' (2010) available at *www.chathamhouse.org.uk*, accessed on 10 August 2015.

Bassiouni, Cherif 'The History of Universal Jurisdiction and Its Place in International Law' in S Macedo (ed) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (2006) University of Pennsylvania Press, Philadelphia.

Belgium's report to the Committee against Torture 'Second Reports of States Parties under Article 19 of the Convention' (14 August 2007) available at *www.ohchr.org*, accessed on 10 April 2015.

Bennett, T W & J Strug, *Introduction to International Law* (2013) Juta, Cape Town.

Bianchi, Andrea 'Immunity versus Human Rights' (1999) 10 *EJIL* 2.

Blanc, Alain 'La preuve aux assises : entre formalisme et oralité, la formation de l'intime conviction' (2005) *Actualité Juridique Pénale*.

Blanco Cordero, Isidoro 'Compétence universelle' (2008) 1 *Revue internationale de droit pénal* 79.

Blokker, Niels & N J Schrijver, *Netherlands Yearbook of International Law* (2001) Asser Press, The Hague.

Bourdon, William 'Prosecuting the perpetrators of international crimes: What role may defence counsel play?' (2005) 3 *Journal of International Criminal Justice* 434.

Broomhall, Bruce 'Towards the development of an effective system of universal jurisdiction for crimes under international law' (2001) 35 *New Eng L Rev* 399.

Broomhall, Bruce 'Universal Jurisdiction: Myths, Realities, and Prospects: Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law' (2001) 35 *New Engl L Rev* 399.

Brugers, J. Herman & Hans Danelius, *The United Nations Convention against Torture-A Handbook on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (1988) Martinus Nijhoff Publishers, Dordrecht/Boston/London.

Brody, Reed & Michael Ratner, *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (2000) at 99. The Hague, Kluwer Law International.

Burns, Peter & Sean Mc Burney 'Impunity and the CAT' in Craig M Scott *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001) Hart Publishing, Oxford and Portland.

Butler, Hays A 'The Growing Support for Universal Jurisdiction in National Legislation' in S Macedo *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (2006) University of Pennsylvania Press, Philadelphia.

Byers, Michael 'The law and politics of the Pinochet case' (2000) 10 *Duke J Comp & Int'l L* 415.

Cameron, Iain 'Jurisdiction and Admissibility Issues under the ICC Statute' in D McGoldrick, P Rowe & E Donnelly (eds) *The Permanent International Criminal Court. Legal and Policy Issues* (2004) Hart-Oxford, Portland-Oregon.

Cassese, Antonio *International Criminal Law* (2013) Oxford University Press, London.

Cassese, Antonio *International Criminal Law* (2003) Oxford University Press, London.

Cassese, Antonio *International Law* (2005) Oxford University Press, New York.

Cassese, Antonio 'Is the Bell Tolling for Universality?' (2003) 1 *Journal of International Criminal Justice* 589.

Clesse, Charles-Eric *La traite des êtres humains* (2013) Larcier, Bruxelles.

Colangelo, Anthony 'Universal Jurisdiction as an International "False Conflict" of Laws' (2009- 30 *Mich J Int'l L* 881.

Coombes, Karinne 'Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations?' (2011) 43 *Geo Wash Int'l L Rev* 419.

Committee against Torture 'Conclusions and recommendations concerning the initial report of Azerbaijan' (17 November 1999) *UN Doc A/55/44*.

Committee against Torture 'General Comment 2, Implementation of article 2 by States Parties' (2007) available at *http://www1.umn.edu/humanrts/cat/general_comments/cat-gencom2.html*, accessed on 5 April 2015.

Cosnard, Michel 'La compétence universelle en matière pénale' in C Tomuschat & J-M Thouvenin (eds.) *The Fundamental Rules of the International Legal Order*. *Jus Cogens and Obligations Erga Omnes* (2006) Martinus Nijhoff, Leiden-Boston.

Council of Europe 'Questionnaire concerning judgments *in absentia* and the possibility of retrial Summary and Compilation of Replies' (2014) available at *www.coe.int/tcj*, accessed on 30 July 2015.

Council of the European Union *The AU-EU Expert Report on the Principle of Universal Jurisdiction* (2009) UE Doc. 8672/1/09, Brussels.

David, Eric 'La compétence universelle en droit belge' (2004) *Annales de Doit de Louvain*.

A S Dreier *Strategy, Planning & Litigating to Win* (2012) Conatus, Boston 79-85.

Duquette, David e.a. *Universal Human Rights: Moral Order in a Divided World* (2005) Rowman and Littlefield Publishers, Oxford.

Dreier, Andrew *Strategy, Planning & Litigating to Win* (2012) Conatus, Boston.

European Center for Constitutional and Human Rights 'Concurring Criminal Jurisdictions under International Law' (2010) available at *www.ecchr.eu*, accessed on 5 August 2015.

European Commission 'Green Paper on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings' (23 December 2005) available at *http://eur-lex.europa.eu*, accessed on 15 August 2015.

European Council 'Decision setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes' (13 June 2002) available at *http://eur-lex.europa.eu*, accessed on 14 August 2015.

European Council 'Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes' (8 May 2003) available at *http://eur-lex.europa.eu*, accessed on 14 August 2015.

European Network for Investigation and Prosecution of Genocide, Crimes Against Humanity and War Crimes 'Combating impunity' available at *http://www.eurojust.eu ropa.eu*, accessed on 21 July 2015.

Falk, Richard A 'Assessing the Pinochet Litigation' in S Macedo (ed) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (2006) University of Pennsylvania Press, Philadelphia.

Fédération Internationale des droits de l'Homme 'Condamnation de Khaled Ben Saïd. Une victoire contre l'impunité en Tunisie' (2010) available at *www.fidh.fr*, accessed on 18 June 2015.

Fédération Internationale des Droits de l'Homme 'France, Compétence universelle' (2005) available at *www.fidh.org*, accessed on 10 July 2015, at 18-24

Fédération Internationale des Droits de l'Homme 'Paris dans l'embarras après le départ du général Nezzar' (2001) available at *www.fidh.imaginet.fr*, accessed on 10 August 2015.

Franchimont, Michel ; Ann Jacobs & Adrien Masset *Manuel de procédure pénale* (2009) Larcier, Bruxelles.

Fridman, Benoit & Ludovic Hennebel, 'Translating Unocal: The Liability of Transnational Corporations for Human Rights Violations' in Manoj Kunar Sinah (ed) *Business and Human Rights* (2013) Sage Law, London.

General Assembly of the United Nations 'Summary record of the 12th and 13th meetings of the Sixth Committee' (17 and 18 October 2012) available at *http://daccess-dds-ny.un.org*, accessed on 5 August 2015.

Halberstam, Malvina 'Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety' (1988) 82 *AM. J. INT'L L.* 269.

Henzelin, Marc *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* (2000) Helbing-Lichtenhahn-Bruylant, Bâle-Genève-Munich-Bruxelles.

Higgins, Rosalyn *Problems and Process, International Law and How We Use It* (1994) Oxford University Press, New York.

Hoover, Dalila V 'Universal Jurisdiction not so Universal: A Time to Delegate to the International Criminal Court' (2011) 52 *Cornell Law School Inter-University Graduate Student Conference Papers* 1.

Human Rights Committee 'General Comment No. 20' (7 April 1992) *UN Doc No CCPR/C/21/Rev.1./Add.3*.

Human Rights Watch 'France' (2006) available at *www.hrw.org*, accessed on 8 August 2015.

Human Rights Watch *The Legal Framework for Universal Jurisdiction in Germany* (2014) Human Rights Watch Publication, New York.

Human Rights Watch *Universal Jurisdiction in Europe* **(**2006) Human Rights Watch Publication, New York.

Institute of International Law 'Resolution concerning universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes' (2005), available at *http://www.idi-iil.org*, accessed on 7 July 2015.

International Law Association 'Final Report of the London Conference on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses' (2000) available at *http://www.ila-hq.org*, accessed on 15 June 2015.

International Law Commission 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) available at *http://www.refworld.org/docid/3ddb8f804.html*, accessed on 13 June 2015.

Kaleck, Wolfgang 'From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008' (2009) 30 *Michigan Journal of International Law* 927.

Kamminga, Menno T 'Lessons learned from the exercise of universal jurisdiction in respect of gross human rights offences' (2000) 23 *Human Rights Quarterly* 940.

Kamminga, Menno T *Final Report of the ILA Conference on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences* (2000) Committee on International Human Rights Law and Practice - International Law Association, London.

Kirsch, Philippe 'The International Criminal Court: Current Issues and Perspectives' (2001) 64 *Law & Cont. Probs* 3.

Kraytman, Yana Shy 'Universal Jurisdiction – Historical Roots and Modern Implications' (2005) 2 *Brussels Journal of International Studies* 94.

Kreß, Claus 'Universal Jurisdiction over International Crimes and the Institut de Droit international' (2006) 4 *JICJ* 561.

Kuty, Franklin *L'impartialité du juge en procédure pénale: De la confiance décrétée à la confiance justifiée* (2005) Larcier, Bruxelles.

Kuty, Franklin *Principes généraux du droit pénal belge: Tome I – La loi pénale* (2009) Larcier, Bruxelles.

Laciner, Sedat; Mehmet Ozcan & Ihsan Bal *USAK Yearbook of International Politics and Law* (2008) International Research Organization , Ankara.

Lafontaine, Fannie 'Universal Jurisdiction – the Realistic Utopia' (2012) 10 *JCIJ* 1277.

Lattimer, Mark & Philippe Sands, *Justice for Crimes Against Humanity* (2003) Hart Publishing, Portland.

Macedo, Stephen 'Introduction' in S Macedo (ed) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (2006) University of Pennsylvania Press, Philadelphia.

Mallat, Chibli 'Sharon trial: 12 February 2003 decision of Belgian Supreme Court explained' (2003) available at *https://electronicintifada.net*, accessed on 10 July 2015.

Martens, Paul *Rapport de la Cour d'Arbitrage* (2005) Vanden Broele, Bruges.

Marks, Stephen P 'The Hissène Habré Case: the Law and Politics of Universal Jurisdiction' in S Macedo (ed) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (2006)University of Pennsylvania Press, Philadelphia.

Morris, Madeline '*High Crimes and Misconceptions: The ICC and Non-Party States'* (2001) 64 *Law and Contemporary Problems* 13.

O'Keefe, Roger 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735.

Orentlicher, Diane 'Whose justice? Reconciling universal jurisdiction with democratic principles' (2004) 92 *Georgetown L J* 1057.

Parlett, Kate 'Universal Civil Jurisdiction for Torture' (2007) 4 *European Human Rights Law Review* 385.

Poels, A 'Universal Jurisdiction *In Absentia*' (2005) 23 *Netherlands Quarterly of Human Rights* 65.

Rabinovitch, Ryan 'Universal Jurisdiction *In Absentia*' (2005) 28 *Fordham Int'l L J* 500.

Randall, Kenneth 'Universal Jurisdiction Under International Law' (1988) 66 *Tex. L. Rev.* 785.

Ratner, Steven R & Jason S Abrams, *Accountability for Human Rights Atrocities in International Law* (2001) Oxford University Press, New York.

REDRESS & FIDH 'Extraterritorial Jurisdiction in the European Union' (2010) available at *www.fidh.org*, accessed on 8 August 2015.

REDRESS, FIDH, ECCHR & TRIAL 'Faire progresser la justice: les victimes de crimes internationaux graves dans l'UE' (2014) available at *www.redress.org*, accessed on 14 August 2015 at 10.

Reed Amar, Akhil 'Double jeopardy law made simple' (1997) 943 *Yale Faculty Scholarship Series* 1807.

Reydams, Luc 'In re Pinochet' (1999) 93 *American Journal of International Law* 700.

Reydams, Luc *Universal Jurisdiction. International and Municipal Law Perspectives* (2003) Oxford University Press, Oxford-New York.

Robinson, Mary 'Preface' in S Macedo (ed) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (2006) University of Pennsylvania Press, Philadelphia.

Roht-Arriaza, Naomi *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (2004) University of Pennsylvania Press, Philadelphia.

Roht-Arriaza, Naomi & Lauren Gibson 'The developing jurisprudence on amnesty' (1998) 20 *Human Rights Quarterly* 843.

Ryngaert, Cedric 'Het arrest Erdal van het Arbitragehof: eindelijk duidelijkheid over de onrechtmatigheid van de retroactieve toepassing van extraterritoriale rechtsmachtuitbreidingen' (2005) *Tijdschrift voor Strafrecht*.

Ryngaert, Cedric *Jurisdiction in International Law* (2008) Oxford University Press, New York.

Ryngaert, Cedric 'Subsidiary and the Law of Jurisdiction' (2014) available at *https://unijuris.sites.uu.nl*, accessed on 5 August 2015.

Ryngaert, Cedric 'Universal Criminal Jurisdiction over Torture: a State of Affairs after 20 years UN Torture Convention' (2005) 23/4 *Netherlands Quarterly of Human Rights* 571 at 571.

Ryngaert, Cedric 'Universal Jurisdiction over Genocide and Wartime Torture in Dutch Courts: An Appraisal of the Afghan and Rwandan cases' (2007) 2 *Hague Justice Journal* 21.

Sanchez Legido, Angel 'Spanish Practice in the Area of Universal Jurisdiction' (2001-2002) 8 *Spanish Yearbook of International Law* 17.

Scharf, Michael P 'Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States' (2001) 35 *New England Law Review* 2.

Scheffer, David 'Opening address, Universal jurisdiction conference, December 2000' (2001) 35 *New Eng L Rev* 233.

Schüller, Andreas 'The role of national investigations in the system of international criminal justice – Developments in Germany' (2013) 4 *Security and Peace* 226.

Scientific Network on Globalisation and Development *Mondialisation. Les mots et les choses* (1999) Karthala, Paris.

Short, A K 'Is the alien tort statute sacrosanct? Retaining forum non conveniens in human rights litigation' (2001) 33 *N Y U J Int'l L & Pol* 1001.

Sifris, Ronly *Reproductive Freedom, Torture and International Human Rights* (2014) Routledge, New York-Axon.

Sourani, Raji 'Universal Jurisdiction Key Note Speech in XVII Congress of IADL' (2009) available at *http://www.iadllaw.org/files/Raji%20Sourani%20Accountability%20for%20International%20Crimes.doc*, accessed on 13 June 2015.

Spreutels, Jean 'Position of the prosecution in the *Bush* case' (2003) available at *www.haguejusticeportal.net/Docs/NLP/Belgium/Bush_Cassation_24-9-2003.pdf*, accessed on 8 August 2003.

Stern, Brigitte 'La compétence universelle en France: le cas des crimes commis en ex-Yougoslavie et au Rwanda' (1997) 40 *German Yearbook of International Law* 280.

Strapatsas, Nicolaos 'Universal jurisdiction and the International Criminal Court' (2002) 29 *Manitoba L J* 1.

Sulzer, Jeanne 'Implementing the Principle of Universal Jurisdiction in France' in W Kaleck (ed) *International Prosecution of Human Rights Crimes* (2007) Springer, Berlin.

Takeuchi, Mari 'Modalities of the Exercise of Universal Jurisdiction in International Law' (2014) available at *htt p://theses.gla.ac.uk/5472*, accessed on 8 August 2015.

The Hague Justice Portal 'Munyeshyaka, Wenceslas (ICTR)' available at *http://www.haguejusticeportal.net/index.php?id=10679*, accessed on 4 April 2015.

The Princeton Principles on Universal Jurisdiction (2001) available at *https://lapa.princeton.edu /hosteddocs/unive_jur.pdf*, accessed on 2 April 2015.

United Kingdom Crown Prosecution Service 'Director's Guidance on the handling of cases where the jurisdiction to prosecute is shared with prosecuting authorities overseas' (2013) available at *www.cps.gov.uk*, accessed on 10 August 2015.

United Kingdom Crown Prosecution Service 'Guidance on Witness Anonymity by Director of Public Prosecutions' (2009) available at *www.cps.gov.uk*, accessed on 10 August 2015.

United Kingdom Home Office 'Review of extra-territorial turisdiction' (1996) *Steering Committee Report*.

UN Commission on Human Rights 'Resolution on the situation in Sierra Leone' (18 April 2000) *UN Doc E/CN.4/RES/2000/24*.

UN General Assembly 'Resolution 3074 (XXVIII) on the Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity' (1973) available at *www.un.org*, accessed on 15 August 2015.

UN Human Rights Committee 'CCPR General Comment 32' (2007) available at *www1.umn.edu/humanrts/gencomm/hrcom32.html*, accessed on 25 October 2015.

UN Sierra Leone Peace Accord (1999) *UN Doc S/1999/777*.

UN Secretary-General 'Seventh Report of the Observer Mission in Sierra Leone' (30 July 1999) *UN Doc S/1999/836*.

UN Security Council 'Resolution 1315 on the situation Sierra Leone' (2000) available at *www.un.org*, accessed on 15 August 2015.

Vandermeersch, Damien 'Pinochet' in J Wouters *Bronnenboek Internationaal Recht* (2000) Intersentia, Antwerpen.

Vandermeersch, Damien 'Prosecuting international crimes in Belgium' (2005) 3 *Journal of International Criminal Justice* 400.

Van Der Wilt, Harmen 'Universal Jurisdiction under Attack An Assessment of African Misgivings towards International Criminal Justice as Administered by Western States' (2011) 9 *JICJ* 1043.

Van Elst, Richard 'Universele rechtsmacht over foltering: Bouterse en de Decembermoorden' (2002) 27 *NJCM-Bulletin* 208.

World Conference on Human Rights 'Vienna Declaration and Programme of Action' (12 July 1993) *UN Doc A/CONF157/23*.

Yee, Sienho 'Universal jurisdiction: Concept, Logic, and Reality' (2011) 10 *Chinese J Int'l L* 503.