

**The right and duty of States to prosecute torture committed
abroad amongst foreigners**

Universal jurisdiction over torture under customary international
law and the UN Convention against Torture

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Table of contents

<u>1 INTRODUCTION.....</u>	<u>1</u>
1.1 TOPIC	1
1.2 BACKGROUND AND PURPOSE	1
1.3 DELIMITATIONS	6
1.3.1 NO EXAMINATION OF IMMUNITY OR OTHER IMPEDIMENTS FOR PROSECUTION	6
1.3.2 TORTURE SEPARATE FROM OTHER CATEGORIES OF INTERNATIONAL CRIMES	7
1.3.3 ENFORCEMENT OF INDIVIDUAL LIABILITY, NOT STATE RESPONSIBILITY	7
1.3.4 ENFORCEMENT OF CRIMINAL, NOT CIVIL INDIVIDUAL LIABILITY	8
1.4 TERMINOLOGY	8
1.4.1 JURISDICTION	8
1.4.2 CONDITIONED UNIVERSAL JURISDICTION	9
1.4.3 ABSOLUTE UNIVERSAL JURISDICTION	10
1.4.4 DISTINCTION BETWEEN THE TERRITORIAL, NATIONAL AND CUSTODIAL STATE	10
1.5 SOURCES AND METHODOLOGY	11
1.5.1 INTRODUCTION	11
1.5.2 THE UN CONVENTION AGAINST TORTURE	11
1.5.3 CUSTOMARY INTERNATIONAL LAW	12
1.5.4 THE HIERARCHICAL STRUCTURE OF INTERNATIONAL LAW	14
1.6 OUTLINE	15
<u>2 THE PROHIBITION AGAINST TORTURE IN INTERNATIONAL LAW</u>	<u>16</u>
2.1 INTRODUCTION	16
2.2 RECOGNITION IN INTERNATIONAL DOCUMENTS	16
2.3 RECOGNITION AS CUSTOMARY LAW	18
2.4 THE MATERIAL DEFINITION OF TORTURE	19
2.5 THE PROHIBITION AGAINST TORTURE AS A <i>JUS COGENS</i> NORM	20
2.6 THE PROHIBITION AGAINST TORTURE AS AN <i>ERGA OMNES</i> OBLIGATION	22
2.7 TORTURE AS AN INTERNATIONAL CRIME	24
2.7.1 CONDITIONS FOR DEFINING TORTURE AS AN INTERNATIONAL CRIME	24
2.7.2 CRIMINALIZATION OF TORTURE UNDER INTERNATIONAL LAW	26
2.7.3 UNIVERSAL CONDEMNATION AND CONCERN OVER CRIMES OF TORTURE	28
2.7.4 CONCLUSION	29

<u>3</u>	<u>UNIVERSAL JURISDICTION IN DOCTRINE.....</u>	<u>30</u>
3.1	INTRODUCTION	30
3.2	THE TERRITORIAL STATE HAS AN EXCLUSIVE RIGHT TO PROSECUTE	30
3.3	THE CUSTODIAL STATE HAS A DUTY TO EXTRADITE OR PROSECUTE	32
3.3.1	ALL SERIOUS CRIMES	32
3.3.2	ONLY CRIMES AGAINST THE LAW OF NATURE OR OF NATIONS	32
3.3.3	THE MODERN TREATY OBLIGATION <i>AUT DEDERE AUT JUDICARE</i>	33
3.4	THE CUSTODIAL STATE HAS A RIGHT TO EXTRADITE OR PROSECUTE	33
3.4.1	RECOGNITION IN SCHOLARLY WORKS	33
3.4.2	NATURAL LAW THEORY VERSUS UNILATERAL POSITIVISM	34
3.5	THE CUSTODIAL STATE HAS A PRIMARY DUTY TO PROSECUTE	35
3.6	EVERY STATE HAS A SUBSIDIARY RIGHT TO PROSECUTE	37
<u>4</u>	<u>UNIVERSAL JURISDICTION OVER TORTURE UNDER CUSTOMARY LAW... </u>	<u>39</u>
4.1	INTRODUCTION	39
4.2	THE LEGAL PREMISES FOR UNIVERSAL JURISDICTION	40
4.2.1	INTRODUCTION TO THE LOTUS JUDGMENT	40
4.2.2	INTRODUCTION TO THE INDIVIDUAL OPINIONS TO THE ARREST WARRANT CASE	41
4.2.3	EXTRATERRITORIAL CRIMINAL JURISDICTION BASED ON TERRITORIAL SOVEREIGNTY	42
4.2.4	EXTRATERRITORIAL CRIMINAL JURISDICTION RECOGNIZED BY INTERNATIONAL LAW	47
4.2.5	THE DIFFICULT ASSESSMENT OF THE CURRENT STATUS OF CUSTOMARY LAW	49
4.3	UNIVERSAL JURISDICTION OVER TORTURE	54
4.3.1	INTRODUCTION	54
4.3.2	THE PRINCIPLE OF NON-INTERFERENCE IN THE DOMESTIC JURISDICTION OF STATES	54
4.3.3	THE <i>JUS COGENS</i> NATURE OF THE PROHIBITION AGAINST TORTURE	59
4.3.4	THE UNIVERSAL NATURE OF THE CRIME OF TORTURE	62
4.3.5	THE <i>ERGA OMNES</i> CHARACTER OF THE PROHIBITION AGAINST TORTURE	63
4.3.6	CAT	65
4.3.7	CONCLUDING OBSERVATIONS ON CONDITIONED UNIVERSAL JURISDICTION	69
4.3.8	CONCLUDING OBSERVATIONS ON ABSOLUTE UNIVERSAL JURISDICTION	70
<u>5</u>	<u>UNIVERSAL JURISDICTION OVER TORTURE UNDER CAT.....</u>	<u>72</u>
5.1	THE DUTY UNDER CAT TO ESTABLISH CONDITIONED UNIVERSAL JURISDICTION	72
5.1.1	INTRODUCTION TO THE TEXT OF ARTICLE 5 PARAGRAPH 2	72

5.1.2	THE SCOPE IN REGARD TO THE NATIONALITY OF THE ALLEGED OFFENDER	74
5.2	THE DUTY UNDER CAT TO EXERCISE CONDITIONED UNIVERSAL JURISDICTION	80
5.2.1	INTRODUCTION TO THE TEXT OF ARTICLE 7	80
5.2.2	THE TEMPORAL SCOPE OF ARTICLE 7	81
5.2.3	IS THE DUTY TO PROSECUTE SUBSIDIARY TO THE DUTY TO EXTRADITE?	83
5.2.4	THE EXERCISE OF PROSECUTORIAL DISCRETION	90
6	<u>CONCLUDING REMARKS AND EVALUATIONS <i>DE LEGE FERANDA</i></u>	95
6.1	THE RIGHT TO APPLY UNIVERSAL JURISDICTION OVER TORTURE	95
6.2	THE DUTY TO APPLY CONDITIONED UNIVERSAL JURISDICTION	96
6.3	CHAOS OR JUSTICE: EVALUATIONS <i>DE LEGE FERENDA</i>	96
7	<u>REFERENCES</u>	99
7.1	TABLE OF DOCUMENTS	99
7.1.1	INTERNATIONAL TREATIES WITH UNIVERSAL APPLICATION	99
7.1.2	INTERNATIONAL TREATIES WITH REGIONAL APPLICATION	99
7.1.3	GENERAL ASSEMBLY RESOLUTIONS	99
7.1.4	SECURITY COUNCIL RESOLUTIONS	100
7.1.5	OTHER UN DOCUMENTS	100
7.1.6	OTHER DOCUMENTS OF INTEREST	101
7.2	TABLE OF CASES	102
7.2.1	THE PERMANENT COURT OF INTERNATIONAL JUSTICE	102
7.2.2	THE INTERNATIONAL COURT OF JUSTICE	102
7.2.3	THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA	102
7.2.4	THE INTER-AMERICAN COURT OF HUMAN RIGHTS	103
7.2.5	THE EUROPEAN COURT OF HUMAN RIGHTS	103
7.2.6	THE NUREMBERG TRIBUNAL AND US MILITARY TRIBUNAL	103
7.2.7	NATIONAL COURTS	103
7.3	BIBLIOGRAPHY	104

1 Introduction

1.1 Topic

The topic of this thesis is whether States have subject matter jurisdiction over torture committed abroad amongst foreigners. If States have such jurisdiction, it is further of interest whether or to what extent they have an obligation to apply this jurisdiction.

In the terminology of international criminal law, the jurisdiction examined in the thesis is referred to as universal jurisdiction. The place where the crime is committed and the nationality of the offender and the victim are irrelevant factors. In other words, the crime does not have to be committed within the State's own territory or by a national of the prosecuting State.¹

The thesis will examine the existence of universal jurisdiction over torture under customary international law and the UN Convention against torture.²

1.2 Background and purpose

Torture is documented all over the world every day. It is committed in peace time and in war time; in 'democratic' States as well as in 'non-democratic' States. Regular allegations of torture come e.g. from the occupied territories in Gaza and the West Bank, from the prisons in Brazil and Turkey, and from the US controlled camp at Guantanamo Bay.³

The perpetrators are State officials or others acting in an official capacity. Even though torture mostly is conducted by lower State officials, acts of torture are often tolerated, encouraged or directly ordered by the State elite. Heads of State may accordingly be complicit in torture, even though they themselves seldom physically engage in the crime.⁴

The purpose of subjecting individuals to torture is in general to control, punish and extract information. The application of torture can be traced back to the beginning of

¹ See subsections 1.3.2 and 1.3.3 for further nuances.

² The UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York 10 December 1984, entered into force 26 June 1987.

³ Documentation of torture is easily attainable on the web sites of Amnesty International and Human Rights Watch; see <http://web.amnesty.org/> and <http://www.hrw.org/> (visited 06.04.04).

⁴ See section 2.4 for the material definition of torture.

civilization and has most commonly been applied to coerce the victim to confess or make allegations against other alleged criminals and political opponents.⁵

Common to the great majority of these acts of torture today is denial on the part of the State. If the State does not deny the commission of the acts, their classification as torture is contended. When the competent authorities also fail to investigate and prosecute allegations of torture, the perpetrators are not held responsible for their actions. The losses of the victims are furthermore not redressed.

If no legal consequences are attributed to perpetrators of criminal acts, the State where a crime has been committed fails to enforce a rule of law. Impunity for the most serious crimes raises then the question of whether other States can and should initiate criminal proceedings, either as individual States or through the United Nations (hereafter *UN*). By prosecuting the responsible individuals through international tribunals or foreign domestic courts, a 'universal' rule of law could combat the impunity which often prevails on the domestic level.

The question of whether the UN or individual States have a right or duty to prosecute torture is nonetheless complex, both legally and politically. The complexity is based on a potential conflict with the fundamental principle of State sovereignty. The interpretation and application of State sovereignty is accordingly crucial for the discussion on whether, or to what extent, State A can or should prosecute crimes of torture committed in State B when State B is unable or unwilling to prosecute the crime itself.

Under the main principle on State jurisdiction, the territorial sovereignty of State B provides territorial jurisdiction over persons present within the State's territory and acts committed within the State's territory. If a crime has been committed within the territory by a national of State C, this State can be recognized to have an equal interest in the prosecution on the basis of this State's personal jurisdiction over its own nationals. If the crime has been committed in the territory of State B by a national of State B, as mostly is the case with torture, State B has both territorial and personal jurisdiction. If State B argues that the prosecution of torture is a matter within the State's exclusive domestic jurisdiction, other States claiming jurisdiction must provide evidence that the prosecution of torture not is an internal affair and that their prosecution is lawful under international law.

Despite the controversial nature of prosecution which cannot be based on the traditional principles of territorial and personal jurisdiction, international law has evolved

⁵ For an elaboration of the history of torture, see e.g. Peters, *Torture* (1996).

significantly post World War Two in order to create universal mechanisms for enforcement of individual criminal liability. Of greatest importance is the establishment of international criminal tribunals with jurisdiction over individuals accused of the crime of genocide, crimes against humanity and war crimes. Of current importance are the International Criminal Court (hereafter *ICC*),⁶ the International Criminal Tribunal for the Former Yugoslavia (hereafter *ICTY*)⁷ and the International Criminal Tribunal for Rwanda (hereafter *ICTR*).⁸

The mere existence of these tribunals, and the recognition of their practice, is evidence that the international community regards itself endowed with the legal capacity to create international bodies with competence to adjudicate violations of humanitarian law committed in States. Acts of torture committed in peace time *can* be covered by the jurisdiction of the international tribunals, but only if they have a nexus to a widespread and systematic attack on a population.⁹ In these situations, acts of torture constitute *crimes against humanity* and not torture as an individual crime.

Current international tribunals do not have competence to try torture as an individual crime, i.e. single acts of torture committed in peace time. The individual crime of torture was included in the International Law Commission's Draft Statute for an International Criminal Court,¹⁰ but the crime was not included in the final Statute. Criminal tribunals with a mixture of national and international elements have been established in Sierra Leone¹¹ and East Timor,¹² but only the Court in East Timor is provided with jurisdiction over the individual crime of torture.¹³ Thus, if these crimes of torture are to be prosecuted, other individual States have to prosecute them in their own *domestic courts*.

Certain States have extended their jurisdiction to cover torture committed abroad by foreigners when their own nationals are *victims*. This form of jurisdiction is based on the

⁶ See the Rome Statute of the International Criminal Court, adopted in Rome 17 July 1998, entered into force 1 July 2002.

⁷ See the Statute of the International Tribunal for the Former Yugoslavia, adopted 25 May 1993, last amended 17 May 2002.

⁸ See the Statute of the International Criminal Tribunal for Rwanda, adopted 8 November 1994, last amended 14 August 2002.

⁹ See article 7 of the ICC Statute, article 3 of the ICTR Statute and article 5 of the ICTY Statute.

¹⁰ See Report of the International Law Commission, *The International Law Commission's Draft Statute for an International Criminal Court* (1994), pp. 141 ff.

¹¹ See the Statute of the Special Court of Sierra Leone, established 16 January 2002.

¹² See United Nations Transitional Administration in East Timor, *On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, adopted 6 June 2000.

¹³ *Ibid.*, article 7. A mixed tribunal is further to be established in Cambodia, but individual crimes of torture are not included in the proposed jurisdiction of the tribunal, see the Draft agreement between the United Nations and the Government of Cambodia on the Khmer Rouge trials, adopted 13 May 2003.

so-called passive personality principle. Other States have in stead or in addition extended their jurisdiction to cover torture committed abroad without requiring any personal link to the crime. This jurisdiction is based on the universality principle and referred to as universal jurisdiction. The two basis of jurisdiction may be applied in conjunction, as done by Israel in the case against Eichman,¹⁴ but universal jurisdiction may also form the sole basis for jurisdiction. While States earlier have been unwilling to *exercise* jurisdiction only on the basis of the universality principle, recent State practice provide evidence that States now are prepared to do so in the case of torture.

In connection with the landmark case against the Chilean ex-dictator Pinochet in 1998 and 1999,¹⁵ Spain, France, Switzerland and Belgium all raised extradition claims towards the UK for the purpose of criminal prosecution of Pinochet.¹⁶ The claims for extradition were based on universal jurisdiction.¹⁷ After the Pinochet case, a case was filed in Belgium courts against the Chadian ex-dictator Hissène Habré for alleged crimes of torture committed in Chad in the period from 1982 until 1990.¹⁸ Furthermore, as late as 7 April 2004, a Dutch court convicted the former Congolese military officer Sebastian Nzapali of torture committed in the Congo in 1995 and 1996.¹⁹

A case of importance has also erupted between France and the Congo, registered by the International Court of Justice (hereafter ICJ) as the Case Concerning Certain Criminal proceedings in France.²⁰ The factual background is that France in 2002 initiated investigations regarding the responsibility of high ranking Congolese State officials for crimes of torture committed in the Congo against individuals of Congolese nationality. A warrant for immediate appearance has been issued in the case of General Norbert Dabira, who is Inspector-General of the Congolese Armed Forces. This warrant can be enforced if Dabira appears in France, where he has a residence. The Congo has strongly opposed the measures of investigation and prosecution taken by France, and has brought the case to the

¹⁴ The fact of the case is presented in subsection 4.2.3.2.

¹⁵ Regina v. Bow Street Metropolitan Stipendiary Magistrate and others, parte Pinochet Ugarte (No. 3), 1999, 2 All ER 97.

¹⁶ See Brody, "The case of Augusto Pinochet" (2000), p. 18.

¹⁷ In the case of Pinochet, Spanish citizens were among the victims. Spain itself claimed nonetheless jurisdiction on the basis of universal jurisdiction as Spain law does not recognize jurisdiction on the basis that a Spanish citizen is a victim of an act committed abroad, see Reydams, *Universal jurisdiction. International and Municipal Legal Perspectives* (2003), pp. 183-8.

¹⁸ For up to date information on this case, see <http://www.hrw.org/justice/habre/> (visited 28.11.2003).

¹⁹ See e.g. Human Rights Watch, "Netherlands: Congolese Torturer Convicted. "King of Beasts" Trial a Milestone" (2003). At the time of writing, the judgment is only available in Dutch and comments in English are only available in non-academic articles.

²⁰ See General List of ICJ, No. 129.

ICJ. The ICJ has so far rejected a request for the indication of a provisional measure and fixed the time limits for the filing of written pleadings.²¹

Since Pinochet, Habré, Nzapali and Dabira all have been accused of bearing responsibility for torture committed in their own countries, mainly against their own citizens, these cases illustrate that certain States not only are willing, but also regard themselves *authorized* to prosecute torture committed abroad amongst foreigners. The objections raised by e.g. the Congo in the Case Concerning Certain Criminal proceedings in France illustrates at the same time that not all States welcome this form of international enforcement of criminal liability.²²

Another State which clearly has expressed its discontent with universal prosecution is the USA. The dissatisfaction with the Belgium law on universal jurisdiction made the USA threatened to move the NATO Headquarters out of Brussels unless the Belgium 1993 Act Concerning the Punishment of Grave Breaches of International Humanitarian law was repealed.²³ Although the law did not establish universal jurisdiction over torture as an individual crime, the response from the USA illustrates that universal jurisdiction is a form of criminal jurisdiction which is highly controversial. The objections from the USA were put forward after lawsuits were filed in Belgium courts against foreign high profiled politicians. The most serious claims were raised against the Israeli Prime Minister Ariel Sharon, but complaints were also filed against General Tommy Franks, the commander of US troops in Iraq,²⁴ the US President George W. Bush and the UK Prime Minister Tony Blair.²⁵ The Belgian law on universal jurisdiction was last repealed in August 2003, but the new law did not affect a limited number of cases that had already begun to move forward. The case against Hissène Habré is among these.²⁶

The widespread political disagreement in the international community regarding universal jurisdiction creates certain urgency for clarifying the *legal* premises for this kind of criminal jurisdiction. The question of universal jurisdiction must thereafter be assessed individually in regard to each category of crimes. This thesis examines only the question of

²¹ The order on the request for the indication of a provisional measure was given 17 June 2003; a summary of the order is available at <http://212.153.43.18/icjwww/idocket/icof/icofsummaries/icofsummary20030617.html> (visited 08.04.04). The order of the court regarding time-limits for the filing of written pleadings was given 11 July 2003. The time limits are 11 December 2003 for the memorial and 11 May 2004 for the counter memorial.

²² The arguments raised by the Congo are presented in the summary referred to in note 19.

²³ See BBC News, "US attacks Belgium war crimes law" (2003).

²⁴ See BBC News, "US general 'war crimes' case filed" (2003).

²⁵ See BBC News, "Belgium amends war crimes law" (2003).

²⁶ See Human Rights Watch, "Belgium: Universal Jurisdiction Law Repealed" (2003).

universal jurisdiction over individual crimes of torture, but as long as the practice and the impunity persist for these crimes, this will remain a contentious and important issue in international law. The political aspect of the topic should not be undermined, but the focus of this thesis is the legal questions of relevance.

The scope of the thesis will now be further delimited in section 1.3. Section 1.4 elaborates thereafter on the main terminology of the study, while section 1.5 presents methodological issues of special importance. An outline of the rest of the thesis is provided in section 1.6.

1.3 Delimitations

1.3.1 No examination of immunity or other impediments for prosecution

Even though a State has subject matter jurisdiction under international law, prosecution in a given case may be barred by other rules of international or domestic law. Of greatest practical importance in the case of torture is the validity of international immunity claims; in particular claims related to functional immunity of sitting and former State officials. An analysis of this issue requires a separate and thorough examination, which unfortunately can not be included in the present thesis without violating its fixed limitations in regard to length.²⁷

Other grounds which may be invoked as impediments for prosecution are the principle of *nullum crimen sine lege*, statutes of delimitation, the prohibition against double jeopardy, and domestic amnesties. Their relevance will in most cases depend on the status, application and recognition of the domestic law of the State where torture has been committed. Due to the fixed limitations of the study, these issues will not be addressed in the thesis, except from the principle of *nullum crimen sine lege*, which is of relevance also for the categorization of torture as an international crime.²⁸

²⁷ Additional literature on the relevance of immunity should therefore be consulted, see e.g. Cassese, *International Criminal Law* (2003), pp. 264-73 and 321-2, Ruud, *The Pinochet case and customary international law: Immunity for former heads of State* (2002), and Broomhall, *International Justice & the International Criminal Court: Between Sovereignty and the Rule of Law* (2003), pp. 128-50.

²⁸ The principle of *nullum crimen sine lege* is explored in section 2.7. For additional literature in regard to statutes of delimitation, the prohibition against double jeopardy, and domestic amnesties, see e.g. Cassese (2003), pp. 312-21. For a somewhat alternative and more nuanced analysis of the relevance of domestic amnesties, see Boed, "The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations" (2000), pp. 297-329.

The focus of the thesis is accordingly the issue of subject matter jurisdiction over torture when committed abroad amongst foreigners. Conditions which may block prosecution in a given case are not analysed.

1.3.2 Torture separate from other categories of international crimes

The term ‘torture’ refers as a rule to single acts of torture, independent on whether they are committed in peace time or war time. As mentioned in section 1.2, acts of torture may also be prohibited by international humanitarian law as war crimes, crimes against humanity and as elements of the crime of genocide if the acts meet additional requirements.

When the study is limited to an examination of universal jurisdiction over torture as an individual crime, the chief explanation is that torture as part of humanitarian law is covered by the jurisdictions of the ICC,²⁹ the ICTY,³⁰ and the ICTR.³¹ Were universal jurisdiction over these crimes to be discussed, the rules governing the jurisdiction of international tribunals would have to be explored in addition to the rules governing domestic courts. The numerous differences between these sets of rules would unduly widen the scope of the analysis and make it difficult to elaborate in depth on the central questions. Universal jurisdiction over acts of torture constituting war crimes, crimes against humanity and elements of the crime of genocide will accordingly not be addressed in the study.

1.3.3 Enforcement of individual liability, not State responsibility

The legal conceptualization of the crime of torture follows a model of dual responsibility. Both the individual offender and the State *per se* are viewed as responsible. While the individual bears responsibility through his or her violation of criminal law, the State is responsible through the violation of the international human right to be free from torture.³²

The two models of responsibility are enforced through different procedural regimes. While individuals can be tried in foreign domestic courts, States *per se* are in principle immune from the jurisdiction of other States.³³ The discussion on whether States have universal jurisdiction over torture is therefore relevant for the enforcement of

²⁹ See the Rome Statute of the ICC articles 5-8.

³⁰ See the Statute of the International Criminal Tribunal of the Former Yugoslavia articles 2, 4 and 5.

³¹ See the Statute of the ICTR articles 2-4.

³² The relevant human rights provisions are briefly presented in section 2.2.

³³ The immunity of States in regard to torture is discussed by the European Court of Human Rights in *Al Adsani v. U.K.*, App. No. 35763/97, §§ 60-61 (hereafter *the Al Adsani case*). The case is briefly presented in section 2.5.

individual liability, not State responsibility. Whether domestic courts have jurisdiction to enforce State responsibility for torture will thus not be subjected to discussion.³⁴

1.3.4 Enforcement of criminal, not civil individual liability

As torture traditionally has been thought of as a crime rather than a civil tort, this thesis focuses on jurisdictional questions regarding the enforcement of *criminal* individual liability, not civil. It should be noted, however, that US courts since the 1980s have proved that civil litigation might serve as an expedient alternative to criminal prosecution. By applying the 1789 Alien Tort Claims Act on acts of torture, for the first time in the landmark case *Filartiga v. Peña-Irala*,³⁵ US courts were given subject matter jurisdiction in cases they did not have criminal jurisdiction to try. The establishment of torture as an international tort and the enforcement civil individual liability through tort litigation is a promising case of legal innovation. At present, though, there are few signs that other countries are adopting this legal model.³⁶

1.4 Terminology

1.4.1 Jurisdiction

The term *jurisdiction* has been attributed various meanings in international and domestic law. It refers in essence to the distribution of authority, as distinguished from the exercise of power, among different legal institutions and separate political entities.³⁷

An important distinction is drawn between legislative, judicial and enforcement jurisdiction. Legislative jurisdiction gives the State authority to make binding laws. Judicial jurisdiction concerns the competence of the State's courts to try a case. Enforcement jurisdiction regards the right of the State to ensure compliance with the law through executive acts. These three forms of jurisdiction refer to the three branches of State authority and have their legal basis in the sovereignty of the State. To 'exercise' jurisdiction means in the terminology of the International Court of Justice to apply either judicial or enforcement jurisdiction.³⁸

³⁴ For a critical discussion on the relationship between State immunity and human rights violations, see Bröhmer, *State Immunity and the Violation of Human Rights* (1997).

³⁵ *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir.1980) (hereafter *the Filartiga case*).

³⁶ For a thorough analysis and discussion of the topic, see Scott (ed.), *Torture as Tort. Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001).

³⁷ See Falk, *The Role of Domestic Courts in the International Legal Order* (1964), p. 21.

³⁸ See Judgment No. 9, *The Case of the Steamship "Lotus"*, P.C.I.J. Series A No. 10, 1927, p. 5 of the part referred to as "The Law" in the version enclosed in the Annex.

Another important distinction in regard to State jurisdiction under international law is the distinction between jurisdiction over acts committed *within* and *outside* the territory of the legislative State. The term *territorial jurisdiction* applies to acts that are committed within the territory of the State. In these cases, the jurisdiction to legislate, adjudicate and enforce is limited to the territory of the State.

The term *extraterritorial jurisdiction* applies to acts committed outside the territory of the State. In these cases, only the jurisdiction to legislate extends beyond the borders of the legislative State. Judicial and enforcement jurisdiction is exercised *within* the territory of the legislative State.³⁹

When there is a need to specifically address the establishment of extraterritorial jurisdiction in domestic law, as distinct from the later exercise of this jurisdiction, the term *extraterritorial legislative jurisdiction* will be applied.

1.4.2 Conditioned universal jurisdiction

The term *conditioned universal jurisdiction* resembles a narrow conception of the principle of universal jurisdiction.⁴⁰ This form of jurisdiction covers crimes that have taken place outside the territory of the legislating State, by foreigners with effect on foreigners, when the alleged offender is present within the territory of the legislating State by his or her own free will. This jurisdiction gives no right to initiate criminal investigations, issue international arrest warrants or extradition claims in cases where an alleged perpetrator is present in the territory of *another* State.

Alternative terms for this jurisdiction are e.g. ‘quasi-universal jurisdiction’,⁴¹ jurisdiction based on the ‘co-operative limited universality principle’⁴² and ‘jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events’.⁴³ Since the presence of the alleged perpetrator is a necessary condition for the existence of jurisdiction, the term ‘conditioned universal jurisdiction’ is preferred in this thesis.

³⁹ See e.g. Reydams (2003), p. 5.

⁴⁰ See Cassese (2003), p. 285-6.

⁴¹ See Shaw, *International Law* (2003), p. 597-8.

⁴² See Reydams (2003), pp. 35-8.

⁴³ See § 42 of the Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal to the Judgement of the International Court of Justice in the Case of the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), 14 February 2002, General List No. 121 (hereafter *the Arrest Warrant case*).

1.4.3 Absolute universal jurisdiction

The term *absolute universal jurisdiction* encompasses a broad notion of the universality principle.⁴⁴ This term refers to jurisdiction over crimes committed outside the territory of the legislating State, by foreigners with effect on foreigners, independent of whether the alleged offender is present in the territory of the legislating State. This jurisdiction includes the right to initiate criminal investigations, issue international arrest warrants and extradition claims in cases where an alleged perpetrator is present in the territory of *another* State. The jurisdiction does *not* include the right to exercise jurisdiction outside the legislative State's territory by abduct an alleged perpetrator present in another State.

It is a general requirement of fair trial that a defendant has the right to be present during criminal proceedings.⁴⁵ Exceptions to this rule should have justified reasons,⁴⁶ as the presence is necessary for an effective exercise of the right to defend oneself. In order not to violate this rule, an alleged offender can in principle only be subjected to prosecution, on the basis of absolute universal jurisdiction, if the person is extradited from the State where he or she is present.

Alternative terms for this jurisdiction are e.g. 'universal jurisdiction *in absentia*',⁴⁷ jurisdiction based on 'the unilateral limited universality principle'⁴⁸ and 'universal jurisdiction properly so called'⁴⁹ or 'universal jurisdiction *strictu sensu*'.⁵⁰ Since this form of subject matter jurisdiction *requires no nexus* what so ever between the State claiming jurisdiction and the crime, the term 'absolute universal jurisdiction' is preferred in this thesis.

1.4.4 Distinction between the territorial, national and custodial State

When crimes are covered by universal jurisdiction, several States have competing jurisdiction over the same act. It is accordingly useful to apply a terminology which clearly signifies the status of a State in regard to the crime.

The term *territorial State* refers in the following to the State in whose territory a crime has been committed. The term *national State* refers to the State of nationality of an

⁴⁴ See Cassese (2003), pp. 286-91.

⁴⁵ See e.g. article 14 paragraph 3 *litra d* of the International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976.

⁴⁶ See e.g. the Human Rights Committee's General Comment No. 13 on ICCPR article 14, § 11, issued 13 April 1984.

⁴⁷ See the Separate opinion of President Guillaume to the Arrest Warrant case, e.g. § 9.

⁴⁸ See Reydams (2003), pp. 38-42.

⁴⁹ See the Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, e.g. §§ 45 and 51.

alleged perpetrator. The term *custodial State* refers to the State in whose territory an alleged offender is present. It does not imply that the offender is arrested or taken into custody by the State, only that the alleged offender can be found within the borders of the State.⁵¹

1.5 Sources and methodology

1.5.1 Introduction

As explained above, the question of study is whether States have subject matter jurisdiction, and possibly a duty to exercise this jurisdiction, over torture committed abroad amongst foreigners. The study will concentrate on the international rules of relevance, and will be based on the sources and methodology of public international law, as applied by the International Court of Justice (hereafter ICJ).⁵²

The most authoritative statement of international sources is found in article 38 paragraph 1 in the Statute of the ICJ.⁵³ The primary sources are international treaties, customary law and general principles of law recognized by civilized nations. The thesis will concentrate on an examination of treaty and customary law as primary sources.⁵⁴ Methodological issues of importance for their interpretation will be introduced in the following.

1.5.2 The UN Convention against torture

The convention of chief interest for the topic at hand is the UN Convention against torture (hereafter *CAT*). The Inter-American Convention for the Prevention and Punishment of Torture has a similar content,⁵⁵ but since *CAT* is universal rather than regional, the present study is limited to an examination of *CAT*.

⁵⁰ See Higgins, *Problems and Process: International Law and How We Use It* (1994), p. 64.

⁵¹ The terms territorial and custodial State are also used in Reidams (2003), pp. 5-6.

⁵² For a general elaboration on the sources and methodology of public international law, see Brownlie, *Principles of Public International Law* (2003), pp. 3-29, Shaw (2003), pp. 65-119 and Malanczuk, *Akehurst's modern introduction to international law* (1997), pp. 35-62.

⁵³ The Statute of the International Court of Justice, adopted in San Francisco 26 June 1945, entered into force 24 October 1945.

⁵⁴ General principles are mainly consulted as a primary source when treaty and customary law are silent on an issue; see Shaw (2003), pp. 92-9 with further references.

⁵⁵ Adopted in Cartagena de Indias, Colombia, 12 September 1985, entered into force 28 February 1985. For up to date information on ratifications, see <http://www.oas.org/juridico/English/Sigs/a-51.html> (visited 16.03.04).

International treaties are interpreted on the basis of the customary rules codified in the 1969 Vienna Convention on the Law of Treaties (hereafter *the Vienna Convention*).⁵⁶ According to the main rule in article 31, treaties should be interpreted in good faith in accordance with the ordinary meaning of the text, in the light of the context and purpose of the treaty.

Supplementary sources are as a main rule according to article 32 only relevant if they confirm an interpretation based on the ordinary meaning of the treaty. Only if the ordinary meaning provides an ambiguous or unreasonable result can supplementary sources be invoked in support of an alternative interpretation. Supplementary sources of main relevance are the preparatory work of the treaty, judicial decisions, and legal theory.⁵⁷

State practice is primarily important for the assessment of customary law, but it may also be a source of relevance when interpreting treaty law.⁵⁸ State practice will accordingly be referred to when it provides interesting illustrations and examples of how State Parties have chosen to fulfil their treaty obligations. References to State practice will mainly be based on second hand sources.

1.5.3 Customary international law

While treaties only bind State Parties, customary law is in principle equally binding on all States. Customary law determines accordingly whether Non-Party States to CAT and the Inter-American Convention have a right or a duty to apply universal jurisdiction over torture, and, of relevance for this thesis, whether State Parties to CAT have a wider right and duty than under CAT.

A further consequence of customary law is that it may limit the interpretation and application of treaty provisions. If a *prima facie* interpretation of CAT leads to a result that infringes upon the sovereign rights of Non-Party States, the interpretation has to be modified so as to not interfere with the rights of Non-Party States under customary law.⁵⁹

Customary law is composed by consistent State practice and *opinio juris*. State practice is the objective evidence that the States regard themselves bound by an obligation. *Opinio juris* refers to the States' subjective perception of a legal obligation.⁶⁰ Since the

⁵⁶ Adopted in Vienna 23 May 1969, entered into force 27 January 1980. For further references to the customary status of the Vienna Convention, see Shaw (2003), p. 839.

⁵⁷ See article 38 paragraph 1 litra d of the ICJ Statute.

⁵⁸ Subsequent practice which establishes an *agreement* among the parties shall be taken into account together with the context of the treaty according to article 31. In regard to the topic at hand, no such agreement exists.

⁵⁹ See article 34 of the Vienna Convention.

⁶⁰ See e.g. Shaw (2003), pp. 68-72, Brownlie (2003), pp. 6-10, and Higgins (1994), p. 18.

availability of State practice and *opinio juris* often is scarce and not representative of all States, subsidiary sources of interpretation is important for the determination of customary law.

International tribunals are in practice regarded as the most authoritative interpreters of customary law.⁶¹ International judgments constitute therefore the point of departure for the legal analysis of customary law. Judgments of special relevance are the judgment of the Permanent Court of International Justice (hereafter *PCIJ*) in the Lotus case from 1927 and the judgment of the ICTY in the Furundzija case from 1998.⁶² The Lotus judgment is important as it provides the only authoritative discussion on extraterritorial criminal jurisdiction in *current* international jurisprudence.⁶³ The Furundzija case is significant as the judgment explicitly discusses the international recognition of torture under customary law and the consequences attached to this recognition.

Common for both judgments is that the statements of relevance are given as *obiter dicta* and not as part of the *ratio decidendi*. This means that they are not necessary for the result of the cases. According to the traditional doctrine of precedent, an *obiter dictum* is not part of the decision which is binding for future cases and has less weight than a *ratio decidendi*. Since many domestic systems have adopted the doctrine of precedent, it is worth noticing that the doctrine is not formally recognized in international law,⁶⁴ even though international judgment are important for the interpretation and application of international law. The fact that the interpretations of customary law are given as *obiter dicta* should therefore not be decisive for their weight and authority. Of importance is rather the fact that they are delivered by an international tribunal. Whether they should be accepted as correct assessments of customary law should be assessed on the basis of the background, circumstances and subsequent developments of the interpretations.⁶⁵

Separate and dissenting opinions to the Arrest Warrant case, adjudicated by the ICJ in 2002, are also of interest for the topic. While the judgement itself is silent on the issue of universal jurisdiction, individual judges elaborate on the topic in individual opinions. The opinions are relevant as subsidiary sources, but the question is how their weight is to be evaluated. Even though these opinions represent the view of individual judges and not the

⁶¹ The importance of judicial decisions is e.g. addressed in Shaw (2003), p. 103 and Brownlie (2003), pp. 19-23.

⁶² The Prosecutor v. Anto Furundzija, Case No. 17-95-17/1-T, Trial Chamber, Judgment 10 December 1998.

⁶³ The ICJ has not yet discussed the subject matter of the Case Concerning Certain Criminal Proceedings in France, see note 21 with accompanying text.

⁶⁴ See article 59 of the ICJ Statute.

ICJ, their weight is arguably on a level above regular legal theory. Greater weight should be attributed to these opinions due to the experience of their authors as judges of the International Court of Justice and their influence on future decisions by the ICJ.

Domestic judicial decisions form another subsidiary source of importance. It is nonetheless difficult to determine to what extent a single decision from a domestic court should influence the interpretation of customary international law. A domestic decision *may* represent both State practice and *opinio juris* of a State, but it can also be questioned whether one single judgment should be assessed as authoritative evidence of State practice and *opinio juris*. The weight of an interpretation expressed in a domestic judgment should depend on the extent to which the interpretation is supported by international tribunals, other domestic decisions and publicists of international law.

Another subsidiary source of interpretation is legal theory. Interpretations by publicists are never regarded as *authoritative*, but they may influence the *development* of customary law. As in the case of domestic judicial decisions, their significance increases when supported by other publicists or other sources of international law. The study refers mainly to legal theory published in English. Texts originally published in other languages are only referred to when they have been translated into English.⁶⁶

The Restatement of the Foreign Relations Law of the United States is in the study referred to as legal theory.⁶⁷ The Restatement is frequently referred to as an authoritative source of international law, especially by publicists from common law countries, but the publication is not an official document or an authoritative statement issued by the USA. It is an academic publication sponsored by the Government of the USA, with the purpose to describe that State's application of international law in regard to its foreign relations. It is authoritative in the sense that it represents the prevailing interpretation of international law in the USA.

1.5.4 The hierarchical structure of international law

Current international law recognizes certain international rules as more significant than others. These norms form a hierarchy of international law, organized through the concepts of *jus cogens* norms, *erga omnes* obligations and international crimes.⁶⁸ The scope and

⁶⁵ See Ragazzi, *The Concept of international obligations erga omnes* (2000), p. 6.

⁶⁶ This is relevant mainly for chapter 3. The main reference is the writer responsible for the translation.

⁶⁷ The American Law Institute, *Restatement of the Law (Third), The Foreign Relations Law of the United States* (1987) (hereafter *the Restatement*).

⁶⁸ The concepts are elaborated on in sections 2.5-2.7.

practical consequences of these categories have long been debated, and it has been questioned whether universal jurisdiction applies to crimes violating the relevant norms. To be studied is whether torture pertains to any or all of these categories, and whether this classification provides States with subject matter jurisdiction over torture committed abroad amongst foreigners.

1.6 Outline

After the above presentation of the topic and scope, chapter two moves on to examine the international recognition of the prohibition against torture. The chapter includes an elaboration of its status as a rule of customary law, a *jus cogens* norm, an obligation *erga omnes* and an international crime. This recognition is linked to the hierarchical structure of international law and is important for the further discussion on universal jurisdiction.

Chapter three presents an historical outline of the conceptual development of universal jurisdiction. The presentation focuses on the variations in scope and rationale reflected in doctrine. The different theories on universal jurisdiction have influenced the development of international law and the chapter seeks to prepare the reader for the legal analysis following in chapter four and five.

Since customary law has relevance for the interpretation of CAT, customary law is examined in chapter four. The chapter is divided in two sections. The first section discusses the legal premises for criminal extraterritorial jurisdiction and applies it to universal jurisdiction. The second section examines whether, and to what extent, international customary rules recognizes universal jurisdiction over torture.

Chapter five examines the application of conditioned universal jurisdiction over torture under CAT. This chapter is also divided in two sections, where the first elaborates on the right and duty to *establish* and the second on the right and duty to *exercise* universal jurisdiction over torture.

The sixth and last chapter provides concluding remarks with respect to the main questions discussed in the thesis. The chapter ends with a *de lege ferenda* evaluation of the topic, focusing on the political benefits and dangers of universal jurisdiction over torture.

2 The prohibition against torture in international law

2.1 Introduction

As mentioned in the outline, the nature of the international prohibition against torture is relevant for the discussion on whether States have competence to prosecute torture committed abroad amongst foreigners. To be explored in this chapter, after having presented international documents recognizing the prohibition against torture, is the prohibition's status under *customary* international law. Since torture is extensively abused it is important first to examine whether the prohibition against torture in itself is accepted as a rule of customary law, before its status as a *jus cogens* norm, an *erga omnes* obligation and an international crime is examined. The possible legal *consequences* of its status under international law will be examined further in chapter 4.

2.2 Recognition in international documents

The prohibition against torture has attained a widespread recognition in international law. The basic norm was first formulated in article 5 of the Universal Declaration on Human Rights:⁶⁹

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment”.

The prohibition against torture has later been adopted in a number of international legal instruments as a human right from which no derogation can be made: articles 7 and 4 paragraph 2 of the International Covenant on Civil and Political Rights (hereafter *ICCPR*),⁷⁰ articles 3 and 15 paragraph 2 of the European Convention for the protection of Human Rights and Fundamental Freedoms (hereafter *ECHR*),⁷¹ article 5 paragraph 2 of the

⁶⁹ Adopted and proclaimed by the UN General Assembly 10 December 1948.

⁷⁰ See note 41.

⁷¹ Adopted in Rome 4 November 1950, entered into force 3 September 1953, revised through the adoption of Protocol 11, which entered into force 1 November 1998.

American Convention on Human Rights (hereafter *ACHR*)⁷² and article 5 of the African Charter on Human and Peoples' Rights.⁷³

The prohibition against torture was further elaborated in the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁷⁴ followed up by the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (*CAT*). Two regional conventions addressing the prevention of torture have also been adopted; the Inter-American Convention to Prevent and Punish Torture⁷⁵ and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereafter *ECPT*).⁷⁶

As mentioned above in section 1.4.2, *CAT* and the Inter-American Convention address the responsibility of States to criminalize torture and investigate and prosecute alleged offenders. In addition, *CAT* creates a special committee; the Torture Committee. This body has authority to examine regular State reports in order to make recommendations for improvements.⁷⁷ The *ECPT* also provides for the establishment of a committee, but the committee has a different type of mandate. Its function is to conduct visits to State Parties in order to examine the fulfilment of their obligation to refrain from torture.⁷⁸

The prohibition against torture has finally been incorporated in several soft law documents on the treatment of prisoners.⁷⁹

⁷² Adopted in San José, Costa Rica, 22 November 1969, entered into force 18 July 1978.

⁷³ Adopted in Banjul, the Gambia, 27 June 1981, entered into force 21 October 1986.

⁷⁴ Adopted and proclaimed by the UN General Assembly 9 December 1975.

⁷⁵ See note 46.

⁷⁶ Adopted 26 November 1987, amended according to the provisions of Protocols No. 1 and No. 2, the latest entered into force on 1 March 2002.

⁷⁷ See *CAT* articles 17, 19 and 20. In the case of the Inter-American Convention, according to article 17, the Inter-American Commission on Human Rights is given the competence to analyze the endeavours of the State Parties to prevent and eliminate torture in its annual report.

⁷⁸ See *ECPT* article 2. An optional protocol to *CAT*, adopted 18 December 2002, creates a similar competence for an international inspection committee, but it has not yet entered into force.

⁷⁹ See the Standard Minimum Rules for the Treatment of Prisoners, adopted 30 August 1955, and approved by the Economic and Social Council 31 July 1957 and 13 May 1977; Basic Principles for the Treatment of Prisoners, adopted and proclaimed by the General Assembly 14 December 1990; Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly 18 December 1982; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly 9 December 1988; and The Robben Island Guidelines to Prohibit Torture in Africa, adopted by the African Commission on Human and Peoples' Rights in Banjul, the Gambia, in October 2002.

2.3 Recognition as customary law

As mentioned in section 1.4.3, customary law is normally identified through consistent State practice and *opinio juris*. In the case of torture, consistent State practice is lacking due to the widespread *de facto* application of torture.⁸⁰ This raises the question of whether the prohibition against torture could be accepted as customary law, and whether this in fact has happened.

Because it is difficult to discern whether a particular practice is the result of social usage, practical considerations, morality or lack of morality, evidence of *opinio juris* is important. According to the practice of the ICJ, the perception of a legal obligation may be of even greater importance than the actual practice if the practice is concealed or its existence denied. This was especially stressed by the ICJ in the Nicaragua case:

“If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attribute is to confirm rather than to weaken the rule.”⁸¹

In the case of torture, States take care to state, in an almost ritual fashion, a principled respect for the norm prohibiting torture. This is apparent from the content of the international and domestic political discourse, in particular the widespread formal recognition of international treaties and the proliferation of policy documents restating the prohibitive norm.⁸² Furthermore, no political regime is known to have objected to the rule prohibiting torture or claimed to be unbound by the customary rule.⁸³

When States are accused of torture by domestic or international actors, they often rebut the accusations, present excuses or refer to justifications contained in the rule itself. An illustration of this point is provided by the US response to allegations of torture and inhuman treatment in the US camp at Guantanamo Bay.⁸⁴ Another illustration is provided by the argumentation of Israel in regard to their use of ‘moderate physical pressure’.⁸⁵ Israel did not argue that ‘torture’ was lawful, but by defining torture narrowly, the acts were not covered by the Israeli definition.

⁸⁰ See note 3.

⁸¹ See the Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.A.), Merits, ICJ Reports 1986, p. 98, § 185.

⁸² See section 2.2.

⁸³ See Rodley, *The Treatment of Prisoners Under International Law* (1999), pp. 65-7.

⁸⁴ See the Guardian, “Detainee tells of Guantanamo ‘torture’” (2004), and “US embassy rebuts Guantánamo torture claims” (2004).

On the basis of the rationale that the strong and evident demonstration of *opinio juris* replaces some of the traditional requirements of *de facto* State practice,⁸⁶ the ICTY and the ECHR have recognized the prohibition against torture as a rule of customary law.⁸⁷ The customary status of the prohibition against torture has further been confirmed by American and British domestic courts⁸⁸ and recognized in legal theory.⁸⁹ These sources of international law, in particular when considered jointly, provide substantial support for the conclusion that the prohibition against torture is recognized as a norm under customary international law.

2.4 The material definition of torture

The definition of torture given in CAT article 1 paragraph 1 is considered to incorporate the customary elements of the material prohibition against torture.⁹⁰ According to this definition, the term ‘torture’ means:

“...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 or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

An act of torture is accordingly identified by three interdependent elements: 1) the act inflicts severe pain or suffering, whether physical or mental, 2) it is inflicted with the consent or acquiescence of the State authorities and 3) it is inflicted for a specific purpose, such as gaining information or confession, punishment or intimidation. The material

⁸⁵ See e.g. Forrest, “‘Moderate Physical Pressure’ in Israel” (2000).

⁸⁶ See the Furundzija case, § 138, and the Nicaragua case, pp. 113-4, § 218.

⁸⁷ See the ICTY in the Prosecutor v. Delalic and Others, Case No. IT-96-21-T, Trial Chamber, Judgment 16 November 1998, §§ 452-454 (hereafter *the Delalic case*), the Furundzija case §§ 144-147 and the Prosecutor v. Kuranac and Others, Case No. IT-96-23-T, Trial Chamber, Judgment 22 February 2001, § 466 (hereafter *the Kuranac case*). See the ECHR in Al Adsani case, §§ 60-61.

⁸⁸ See the US courts in the Filartiga case, Part II, and in Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Circuit 1992) (hereafter *the Siderman case*), Part II litra A. See the British House of Lords in the Pinochet case, pp. 12-3 of the version available at <http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm> (visited 08.04. 04).

⁸⁹ See e.g. the *Restatement* (1987), Vol. I, p. 161, § 702 (d); Shaw (2003), p. 257; and Higgins (1994), p. 20.

⁹⁰ See the ICTY in the Delalic case, §459 and the ECHR in the Al Adsani case, E. § 29. This definition has also been referred to as the most authoritative definition of torture in Ratner and Abrams, *Accountability for Human Rights Atrocities in International Law. Beyond the Nuremberg Legacy* (2001), p. 117.

definition of torture raises several difficult questions, but for the purpose of the present study it is not necessary to address these issues.⁹¹

2.5 The prohibition against torture as a *jus cogens* norm

International law recognizes the existence of peremptory norms of general international law, so called *jus cogens* norms, from which no derogation is permitted.⁹² The concept of *jus cogens* is argued to originate both in municipal law and natural law theory, but it was first explicitly adopted as a concept of international law in the 1969 Vienna Convention.⁹³ Jus Cogens was here referred to in article 53, 64, 66 and 71, where article 53 is most important in this context. The article is titled “Treaties conflicting with a peremptory norm of general international law (*jus cogens*)” and reads:

“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

Article 53 is directly applicable only in relation to treaties, but it is based on the presumption that *jus cogens* norms already exist. Further, if *jus cogens* norms only were to have relevance in the case of treaty law, States could act contrary to the norms as long as customary norms remained un-codified. A logical consequence of the non-derogability of peremptory norms is therefore that they also invalidate or make unlawful any unilateral state act or customary rule.⁹⁴

In the *Furundzija* case, the ICTY elaborated on the effects of a *jus cogens* norm under customary international law. The ICTY supported here the conclusion that *jus cogens* norms also applies to customary law:

“The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or

⁹¹ For a thorough discussion of the material content of the prohibition, see Rodley (1999), pp. 75-106.

⁹² See e.g. Shaw (2003), pp. 115-9; and Hannikainen, *Peremptory Norms (Jus Cogens) in International Law. Historical Development, Criteria, Present Status* (1988), pp. 1-19.

⁹³ The question of origin was left unaddressed in the Vienna Convention and the definition adopted in the Convention has been criticised for its circular argumentation. For further elaboration on its origin, see Seiderman, *Hierarchy in International law. The Human Right Dimension* (2001), pp. 36-40; and Sztuki, *Jus Cogens and the Vienna Convention on the Law of Treaties. A Critical Appraisal* (1974), pp. 12-22.

⁹⁴ See Shaw (2003), p. 117.

local or special customs or even general customary rules not endowed with the same normative force.”⁹⁵

The main question in the case was whether Furundzija, a local commander, was guilty of torture and rape under ‘the Laws or Customs of War’. Even though the crimes adjudicated in the case were categorized as war crimes, the ICTY stressed that they at the same time violated the customary norm prohibiting torture independent of all other circumstances. Due to the States’ recognition of the paramount significance of the prohibition against torture, the ICTY concluded that the prohibition against torture had attained the status of a *jus cogens* norm:

“...the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules.”⁹⁶

This passage was also cited by the ECHR in the Al Adsani case. This case was raised by a dual British-Kuwaiti citizen against the United Kingdom, where the main question was whether Al Adsani had the right to institute civil proceedings in the United Kingdom against the government of Kuwait for torture and ill-treatment by Kuwaiti officials. The Kuwaiti government was found to be immune from the jurisdiction of the United Kingdom, but the Court agreed with the ICTY that the prohibition against torture is a *jus cogens* norm:

“...the Court accepts, on the basis of these authorities, that the prohibition against torture has achieved the status of a peremptory norm in general international law...”⁹⁷

The UN Human Rights Committee (hereafter *Human Rights Committee*) has further acknowledged the *jus cogens* status in its General Comment to article 41 of the ICCPR:

“...some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms, are also of this character - the prohibition of torture and arbitrary deprivation of life are examples.”⁹⁸

In 1986 the United Nations Special Rapporteur on torture P. Kooijmans expressed a similar view in his report to the Human Rights Committee.⁹⁹

⁹⁵ See the Furundzija case, § 153.

⁹⁶ Ibid.

⁹⁷ See the Al Adsani case § 61. Of relevance is also §§ 30-31 and 60.

Support for this view is also found in judicial decisions from domestic courts. The Siderman case from 1992 is of special relevance in this regard. The case was raised by an Argentinean Jew who fled torture and confiscation of his wealth in Argentina. On this basis he initiated civil proceedings against the Argentinean government in US courts. The parties settled in the end, but in the proceedings leading up to the settlement, the 9th Circuit Court of Appeals gave a thorough examination of the international recognition of the prohibition against torture. After the examination, the Court concluded:

“Given this extraordinarily consensus, we conclude that the right to be free from torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*.”¹⁰⁰

The *jus cogens* status of the prohibition against torture has further been recognized in the Restatement¹⁰¹ and by individual publicists such as Lauri Hannikainen,¹⁰² M. Cherif Bassiouni,¹⁰³ Kenneth C. Randall,¹⁰⁴ Chris Ingelse¹⁰⁵ and Ian Seiderman.¹⁰⁶

On the basis of these interpretations of international law it seems reasonable to conclude that the prohibition against torture now has been included in the body of peremptory norms, from which no derogation is permitted under international law. It is not clear though, what the legal implications of the *jus cogens* status are for the enforcement of a norm. This aspect of the prohibition against torture will be examined more in detail when analyzing the right and duty of States to exercise universal jurisdiction over torture.¹⁰⁷

2.6 The prohibition against torture as an *erga omnes* obligation

The concept of *erga omnes* obligations was first established by the ICJ in their judgment in the Barcelona Traction case from 1970.¹⁰⁸ The case concerned the question of whether Belgium could raise a case against Spain on behalf of Belgian shareholders in a Canadian company. The company operated in Spain, which was accused of violating its obligations towards the company. When Canada ended their exercise of diplomatic protection,

⁹⁸ See General comment No. 24, § 10, issued on 4 November 1994.

⁹⁹ See Report by the Special Rapporteur on Torture, P. Koojimans, 19 February 1986, p. 1, § 3.

¹⁰⁰ See p. 18 of the version available at <http://www.derechos.org/nizkor/arg/ley/siderman.html> (visited 05.04.04). Reference is here made to further US case law in support of this conclusion.

¹⁰¹ See the Restatement (1987), p. 167, § 702, Comment n. and Reporter’s note 11.

¹⁰² See Hannikainen (1988), pp. 499-513.

¹⁰³ See Bassiouni (2001-2002), p. 108, with further reference in note 92.

¹⁰⁴ See Randall, “Universal Jurisdiction Under International Law” (1987-1988), p. 830.

¹⁰⁵ See Ingelse, *The UN Committee against Torture: An assessment* (2001), p. 325.

¹⁰⁶ See Seiderman (2001), p. 119.

¹⁰⁷ See subsection 4.3.3.

Belgium wanted to exercise diplomatic protection in order to protect the interests of the Belgium shareholders. The ICJ rejected the claim as it regarded diplomatic protection only to provide a legal interest for the State identified with the injured party, in this case Canada.

Of importance for this thesis is the nuance stressed by the ICJ between obligations owed towards one specific State and obligations owed towards the international community of States. As opposed to the duty to protect the rights of foreign investments or nationals admitted into a State's territory, the ICJ maintained that an obligation *erga omnes* was an obligation that was owed to the international community as a whole and provided every State with a legal interest in its fulfilment.¹⁰⁹

The ICJ did not explicitly enlist the prohibition against torture as an *erga omnes* obligation, but neither did the Court give an exhaustive inventory of these obligations. The relevant statement on the identification of *erga omnes* obligations was formulated in a rather general manner:

“Such obligations derive, *for example*, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and *rules concerning the basic rights of the human person*, including protection from slavery and racial discrimination (emphasis added).”¹¹⁰

While it is argued that only a limited number of customary norms have this character, a counter argument proposes that in fact most customary international norms have obtained this character.¹¹¹ In this respect it must be emphasized that obligations *erga omnes*, contrary to *jus cogens* norms, are not distinguished by the importance or non-derogability of the right, but rather the identity of the subject to whom the right is addressed.

Since the freedom from torture is recognized as one of the most fundamental human rights, an interpretation of the phrase “*rules governing the basic rights of the human person*” indicates that the prohibition against torture is included in the category. This was also confirmed by the ICTY in the Furundzija-case:

¹⁰⁸ Case Concerning the Barcelona Traction; Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain), Second Phase, Judgment, ICJ Reports 1970.

¹⁰⁹ Ibid., § 33, cited in section 4.3.5.

¹¹⁰ Ibid., § 34.

¹¹¹ Seiderman has adopted the position that human rights in general are obligations *erga omnes*, see Seiderman (2001), p. 9.

“Furthermore, the prohibition against torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right”¹¹²

Torture has also been categorized as an *erga omnes* obligation in the literature by e.g. Malcom. N. Shaw,¹¹³ Randall¹¹⁴ and Ingelse.¹¹⁵

The sources referred to above provide substantial support for the conclusion that respect for the prohibition against torture is an *erga omnes* obligation under international law. Of relevance for the present thesis is whether the legal interest conferred by the *erga omnes* character provides a duty for the territorial State to prosecute torturers and possible also a right of other States to prosecute extraterritorial crimes of torture. These issues will be examined in connection with the customary status of universal jurisdiction over torture.¹¹⁶

2.7 Torture as an international crime

2.7.1 Conditions for defining torture as an international crime

Individual criminal responsibility under international law was first enforced by the Nuremberg Tribunal after World War Two. In the Nuremberg trial, the Court stated:

“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”¹¹⁷

The crimes investigated and prosecuted by the Nuremberg Tribunal were war crimes and crimes against humanity. These crimes are now defined in international treaties as international crimes with individual liability.¹¹⁸ Individual crimes of torture committed in peace time are not defined as international crimes in any international treaty. They are instead prohibited by human rights law, which imposes direct liability upon States only. The fact that torture not explicitly is defined as an international crime of its own raises the question of whether such acts of torture imposes individual criminal liability under international law.

¹¹² See the *Furndzija* case, § 151.

¹¹³ See Shaw (2003), p. 116.

¹¹⁴ See Randall (1987-1988), p. 830.

¹¹⁵ See Ingelse (2001), p. 325.

¹¹⁶ See subsection 4.3.2 and 4.3.5.

¹¹⁷ See *Trials of the Major War Criminals Before the International Military Tribunal (1947)*, Vol. I, p. 223.

¹¹⁸ See notes 29-31.

The main requirements for defining a crime as international have not been explicitly formulated by an international court. These criteria can still be identified on the basis of domestic judgments and legal theory. The description of an international crime given by the US Military Tribunal in the Hostages case after World War Two provides a starting point for the examination:

“An international crime is such act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances.”¹¹⁹

This statement emphasizes important requirements for recognizing a crime as international. The act has to be universally condemned as a serious crime, the crime has to be of international concern, and there has to be a valid ground for other States to prosecute the act.

An additional important requirement is the condition that the crime is explicitly defined and criminalized under international law. This requirement is part of the principle of legality, and it is based on the principle of *nullum crimen sine lege*, no crime without law.¹²⁰ According to this principle, no one can be held responsible for a crime which was not proscribed by law at the time it was committed.¹²¹ Since a person may be held criminally responsible on the basis of *international law*,¹²² it is a prerequisite that the international definition of the crime of torture and its prohibition is sufficiently clear. The requirement of criminalization will thus be examined prior to character of the universal condemnation and concern for torture.

A further aspect of the principle of legality is the principle of *nullum poena sine lege*, no punishment without law. Under this principle, widely recognized in domestic criminal systems, the penalty for a transgression of the stated norm must be clear and publicly known in order for the punitive provision to be lawful. Nevertheless, under international law, no fixed penalty is available for international crimes. The principle appears therefore to have significance primarily in regard to ‘ordinary’ crimes and will not be discussed.¹²³

¹¹⁹ See the Trial of Wilhelm List and others, United Nations War Crimes Commission, Law Reports of Trials of War Criminals. Volume VIII, 1949, Case No. 47, p. 54 (hereafter *the ‘Hostages’ case*).

¹²⁰ The principle of legality and its importance under international law is elaborated on in the ‘Hostages’ case at p. 53.

¹²¹ See ICCPR article 15 paragraph 1.

¹²² See ICCPR article 15 paragraph 2.

¹²³ The content of the principle of *nullum poena sine lege* can be identified in ICCPR article 1, but the consequence of this principle is seemingly limited by the wording of paragraph 2: “Nothing in the article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was

2.7.2 Criminalization of torture under international law

Bruce Broomhall and Guy S. Goodwin-Gill are among those who are skeptical towards defining torture as an international crime. In their opinion, torture is ‘only’ a serious crime of international concern.¹²⁴ Their main rationale is that international crimes have to be explicitly defined as such in international treaties; since no international instruments define torture as an individual international crime, torture has not yet been recognized as one.

As stressed above, it is correctly observed that under international law with universal application, individual crimes of torture are only legally defined in CAT article 1. According to CAT, State Parties are obliged to criminalize and prosecute torture on the basis of *domestic* law. However, the fact that torture *per se* not is defined as an international crime in treaty law should not be decisive for the assessment of whether torture *is* an international crime under customary law. It is of interest in this context that article 1 of the ICC Statute stipulates that the Court only shall have jurisdiction over “the most serious crimes of international concern”. This formulation suggests that there *are* international crimes which are not covered by the jurisdiction of the ICC. Whether torture is an international crime, despite the fact that it is not defined as such in the ICC Statute should depend on whether torture fulfils the main requirements for international crimes.

The requirement in regard to the principle of *nullum crimen sine lege* is that the criminalization of torture is so clear under international law that a potential violator can predict individual criminal liability for single acts of torture committed in peace time.

The fact that the definition of torture in CAT generally is accepted as customary law supports the conclusion that the prohibition against torture *does* have a clear content under customary law.¹²⁵ As long as the material definition is accepted as international law, it could be argued that the nature of CAT as a ‘suppression’ convention, aimed at domestic enforcement, is irrelevant for the status of torture as an international crime.

Furthermore, as long as torture is *unlawful* under domestic law in most States, is *unlawful* under international law in peace time when committed with a nexus to a widespread and systematic attack on a population¹²⁶ and is *unlawful* under international

committed, was criminal according to the general principles of law recognized by the community of nations”. Paragraph 2 does not stress that the *punishment* shall be defined under international law, only that the act shall be “criminal under international law and”.

¹²⁴ See Broomhall (2003), pp. 9-10 and 12-4; and Goodwin-Gill, “Crime in International Law: Obligations *Erga Omnes* and the Duty to Prosecute” (1999), pp. 207-8.

¹²⁵ See section 2.4.

¹²⁶ See the definition of crimes against humanity, e.g. in the ICC statute article 7.

law in war time, it is difficult to argue that single acts of torture in peace time can be calculated to be *lawful* by a potential perpetrator.¹²⁷

The status of torture as an international crime has not been explicitly expressed by an international tribunal. The ICTY came nonetheless close to it in the Furundzija case, when elaborating on the relationship between State responsibility and individual responsibility for torture:

“In international human rights law, which deals with State responsibility rather than individual criminal responsibility, torture is prohibited as a criminal offence to be punished under national law; in addition, all States Parties to the relevant treaties have been granted, and are obliged to exercise, jurisdiction to investigate, prosecute and punish offenders. Thus, in human rights law too, the prohibition of torture extends to and has a direct bearing on the criminal liability of individuals.”¹²⁸

Even though the ICTY not explicitly referred to torture as an international crime, the Court stressed that individuals have criminal liability. The Court further stated that all State Parties to ‘the relevant treaties’ have a right and duty to enforce this liability through criminal proceedings. ‘Relevant treaties’ seems here to refer to human rights treaties such as ICCPR, ACHR and ECHR.¹²⁹ This implies that State Parties to either of these conventions, which constitute the great majority of States, have accepted that torture creates individual criminal liability.

US courts have further in the Filartiga case expressed that torture is an act which clearly is prohibited by international law:

“Having examined the sources from which customary international law is derived the usage of nations, judicial opinions and the works of jurists we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and ambiguous”.¹³⁰

On the basis of the customary recognition of the *definition* of torture in CAT, the widespread *prohibition* in domestic law and the clear *prohibition* against torture under treaty and customary international law, the right of the individual to predict the lawfulness

¹²⁷ See Ingelse (2001), p. 324-5.

¹²⁸ See the Furundzija case, § 145.

¹²⁹ See ICCPR article 2 paragraph 3 litra a in conjunction with article 7, ACHR articles 2 and 25 in conjunction with article 5 paragraph 2 and ECHR articles 1 and 13 in conjunction with article 3. The extent to which State Parties to these conventions have a duty to prosecute torture is further elaborated on in subsection 4.3.2.

¹³⁰ See the Filartiga case, last paragraph under part II.

of his or her acts does not appear violated by the recognition of torture as a separate international crime.

2.7.3 Universal condemnation and concern over crimes of torture

Further requirements for recognizing torture as a separate international crime is that the crime is universally condemned, that the international community is concerned with the crime and that the crime of a valid reason cannot be left within the exclusive jurisdiction of the territorial State.

The establishment and wide formal adherence to CAT, combined with domestic criminalization of torture in most States, proves that torture is the subject of universal condemnation as a serious crime.

Furthermore, the *jus cogens* nature of the prohibition against torture provides evidence that States in general have an interest in the enforcement of liability for violations of the norm, independent of where the violations have occurred and the nationality of the violator. This must be a rational conclusion since no derogation from *jus cogens* norms is allowed. The *jus cogens* nature of the norm could therefore be argued to constitute a valid ground for other States to prosecute violations of the norm.

The fact that torture seldom is prosecuted in the territorial State is a pragmatic argument which support the *jus cogens* argument. The territorial State should not have exclusive jurisdiction over a serious crime such as torture when territorial States have proved unwilling to prosecute these acts. Since CAT imposes a duty to criminalize extraterritorial acts of torture, and extradite or prosecute alleged torturers present in the State's territory, the adoption and recognition of this Convention illustrates that States recognize the need for other States to react upon crimes of torture committed abroad among foreigners.

In the Furundzija case, the ICTY further stated:

“The existence of this corpus of general and treaty rules proscribing torture shows that the international community, aware of the importance of outlawing this heinous phenomenon, has decided to suppress any manifestation of torture by operating both at the interstate level and at the level of individuals. No legal loopholes have been left.”¹³¹

The statement that “no legal loopholes have been left” indicates that the ICTY has accepted torture as an international crime under customary law. Further support for this

¹³¹ See the Furundzija case, § 146.

interpretation is found in another paragraph of the judgment, where the ICTY refers to “the inherently universal character of the crime”.¹³²

In the Pinochet case, Lord Browne-Wilkinson maintained that torture is an international crime also when committed in peace time:

“In the early years state torture was one of the elements of a war crime. In consequence torture, and various other crimes against humanity, were linked to war or at least to hostilities of some kind. But in the course of time this linkage with war fell away and torture, divorced from war or hostilities, became *an international crime on its own* (emphasis added)”.¹³³

The interpretation that torture has become an international crime of its own is supported by Antonio Cassese,¹³⁴ Steven R. Ratner and Jason S. Abrahams,¹³⁵ Ian Seidermann¹³⁶ and Farhad Malekian.¹³⁷

2.7.4 Conclusion

Although certain commentators argue that torture not yet has developed into an international crime, the arguments drawn from the available sources provide substantial support for the conclusion that torture fulfils the main requirements for being defined as an international crime. It is especially important in this regard that the principle of *nullum crimen sine lege* does not appear challenged by this conclusion. In the present thesis, torture is thus referred to as an international crime.

¹³² See the Furundzija case, § 156. The passage cited will be further analysed in section 4.3.4.

¹³³ See note 88, p. 10.

¹³⁴ See Cassese (2003), p. 117.

¹³⁵ See Ratner and Abrams (2001), p. 118.

¹³⁶ See Seiderman (2001), pp. 127-8.

¹³⁷ See Malekian, *International Criminal Law. The Legal and Critical Analysis of International Crime* (1991), pp. 405-8.

3 Universal jurisdiction in doctrine

3.1 Introduction

As elaborated on section 1.2, the controversial nature of universal jurisdiction is due to the political implications which may arise when this form of jurisdiction is exercised. The controversy is also caused by the fact that there is of yet no authoritative definition or interpretation of the universality principle, which is the principle this jurisdiction is referred to be based on.¹³⁸

The wide diversity of opinions on universal jurisdiction increases the challenge of a legal examination. An understanding of its historical background and political rationale is helpful when evaluating the legal material of relevance. The presentation of the development of universal jurisdiction in doctrine below will accordingly serve as an introduction to the legal analysis in chapter 4 and 5.

The objective of the examination of doctrine is to single out different conceptions of universal jurisdiction and the grounds upon which these can be based. The aim is not to present a chronological historical account. The difference in conceptions regards the scope of crimes covered and the criteria for its exercise. There is further a distinction between a discretionary *right* and an international *duty* to exercise universal jurisdiction. The difference in rationale is related to the classical conflict between natural law theory and legal positivism.¹³⁹

3.2 The territorial State has an exclusive right to prosecute

The medieval Italian city-States, characterized as such from the middle of the 13th century until the beginning of the 16th century,¹⁴⁰ were the first to work out a code comparable to

¹³⁸ Authoritative statements which address selected aspect of the principle are examined below in chapter 4.

¹³⁹ According to natural law theory, the law is perceptible by reason as belonging to human nature or implicit in the nature of rational thought and action. Under this theory, moral values are universal and the basis for legal rules binding upon all States. Legal positivism postulates, on the other hand, that legal rules are valid only when they are enacted by the 'sovereign' or derive logically from existing decisions delivered by authoritative bodies. Under this latter approach, ideal or moral considerations without a positive legal basis are denied and not should in any way limit the operation or scope of the law. See the article "Philosophy of law", *Encyclopædia Britannica Online*, <http://search.eb.com/eb/article?eu=115100> (visited 05.04.04).

¹⁴⁰ See the article "Signoria", *Encyclopædia Britannica Online*, <http://search.eb.com/eb/article?eu=69476> (visited 02.02.04).

modern international law.¹⁴¹ These city-States recognized jurisdiction primarily for the courts covering the place of the crime, the *locus delicti*. Alternatively, the courts covering the place of domicile of the offender were recognized.¹⁴² In the case of vagabonds, jurisdiction for the courts where a vagabond was taken into custody, *judex deprehensionis*, could be recognized, but only if it proved difficult or impossible to prosecute the vagabond in the courts covering the place of the crime.¹⁴³ The jurisdiction of the custodial State was not recognized under any other circumstances by the medieval Italian city-States.

In the 18th century, important political philosophers such as Charles-Louis de Secondat Montesquieu, Jean-Jacques Rousseau and Voltaire, the pseudonym of François-Marie Arouet, supported the main rule in the referred practice.¹⁴⁴ They argued that crimes only are to be prosecuted in the territory where they have been committed. This body of thought developed into a theory of territoriality, whose foundation was inspired by pragmatic as well as moral concerns. Firstly, the territory of the national State was where the evidence was available and where criminal prosecution would have the best deterrent effect. Secondly, man should only be punished in the place where he had infringed the law, as the content of the legal rules varied from State to State. Thirdly, since a crime was considered a violation of the social contract, it was considered reasonable that the offender was punished where the contract had been breached.¹⁴⁵ Cesare Beccaria, an Italian criminologist and economist, argued eloquently for this theory of territoriality in his much celebrated book *Dei delitti e delle pene* (Crimes and Punishment) from 1764:

“There are those who think, that an act of cruelty committed, for example, at Constantinople, may be punished at Paris; for this abstracted reason, that he who offends humanity, should have enemies in all mankind, and be the object of universal execration; as if the judges were to be the knights errant of human nature in general, rather than guardians of particular conventions between men. The place of punishment can certainly be no other, than that where the crime was committed; for the necessity of punishing an individual for the general good subsists there, and there only.”¹⁴⁶

¹⁴¹ See the article "International law", *Encyclopædia Britannica Online*, <http://search.eb.com/ebi/article?eu=297015> (visited 02.02.04).

¹⁴² See Reydams (2003), p. 29.

¹⁴³ *Ibid.*

¹⁴⁴ For further references, see the Separate opinion of Guillaume to the Arrest warrant case, p. 2, § 4, note 3.

¹⁴⁵ See Cassese (2003), p. 278.

¹⁴⁶ Cited with original references in Cassese (2003), p. 278, note 1.

The main rationale behind this approach is to a large extent still valid. It is e.g. undisputed that a crime preferably is prosecuted in the State where a crime has been. On the other hand have most publicists on international law accepted the need for a more flexible approach to criminal jurisdiction.¹⁴⁷

3.3 The custodial State has a duty to extradite or prosecute

3.3.1 All serious crimes

While the territorial theory essentially was in line with the practice of the medieval Italian city-States, the sixteenth-century Spanish author Diego Covarruvias found it unreasonable that only vagabonds should be subjected to the jurisdiction of the place of arrest. He argued that the State having custody of the defendant had a *duty* to contribute to the prosecution of all serious crimes, either by extraditing the offender for the purpose of prosecution, or alternatively prosecute the crime itself. The duty was based on natural law theories, where the principle idea was that it was intolerable to let foreign criminals take refuge in other States in order to enjoy the fruits of their crimes.¹⁴⁸ Covarruvias stressed the negative obligation not to shield a fugitive criminal from prosecution rather than a positive right to exercise universal jurisdiction.¹⁴⁹

3.3.2 Only crimes against the law of nature or of nations

Hugo Grotius, the Dutch jurist who became one of the fathers of modern international law, published the book *De jure belli ac pacis* (On the Law of War and Peace) in 1625. This became one of the foundational works of international law. In his arguments, Grotius agreed with Covarruvias on several points. Nevertheless, where Covarruvias argued that all serious crimes were covered by the duty to extradite or prosecute, Grotius made a distinction between regular crimes and crimes that “excessively violate the law of nature or of nations”.¹⁵⁰ Only in regard to the last category would the duty to extradite or prosecute apply. Ordinary crimes “should be left to the States themselves and their rulers, to be punished or condoned at their discretion”.¹⁵¹ Furthermore, according to Grotius, the

¹⁴⁷ Henry A. Kissinger is a commentator who appears more conservative in his approach to criminal jurisdiction than most others, see Kissinger, “The Pitfalls of Universal Jurisdiction” in *Foreign Affairs*, July/August 2001.

¹⁴⁸ For original references, see the Separate opinion of Guillaume to the Arrest warrant case, § 4, note 2.

¹⁴⁹ See Reydams (2003), p. 37.

¹⁵⁰ *Ibid.*, p. 35 with references.

¹⁵¹ *Ibid.*, p. 35, with original references in note 36.

custodial State had a duty to extradite or prosecute only if another State made an appeal and the alleged offender was found guilty by the courts of the custodial State.¹⁵²

3.3.3 The modern treaty obligation *aut dedere aut judicare*

The doctrine established by Covarruvias and further developed by Grotius is the basis for the modern treaty obligation to extradite or prosecute; in latin “*aut dedere aut judicare*”.¹⁵³ This formula has been adopted in a wide range of international treaties on the enforcement and punishment of crimes of international concern.¹⁵⁴

The recognition of this duty is, however, no longer based on natural law theories. The predominant view under current international law is that States are bound by positive international law only, as expressed in treaty or customary law.

3.4 The custodial State has a right to extradite or prosecute

3.4.1 Recognition in scholarly works

One of the first academic attempts to unite the States’ conception of universal jurisdiction was made by the highly regarded L’Institut de Droit International (hereafter *the Institute*) in 1883.¹⁵⁵ According to the resolution adopted by the Institute, the custodial State had a *right* to prosecute an alleged offender present in its territory.¹⁵⁶ The right was subsidiary to the right of the territorial State or the national State. The jurisdiction of the custodial State was only accepted if extradition to one of these other States was denied due to ‘barbaric justice’ or danger due to revolution or war.¹⁵⁷ There was no requirement of an appeal from another State, but there had to be *prima facie* evidence of a serious crime. The scope of crimes covered was not limited to international crimes.

By the beginning of the twentieth century, many States had incorporated subsidiary conditioned universal jurisdiction as a discretionary right for all serious crimes.¹⁵⁸ Recognition of this jurisdiction can also be identified in several international resolutions

¹⁵² Ibid., p. 36.

¹⁵³ The original formulation of Covarruvias was ‘*judex requisitus vel remittere tenetur, vel delinquentem ipsum punire*’, *ibid.*, p. 29, note 8 with accompanying text.

¹⁵⁴ For a thorough presentation of the duty to extradite or prosecute in international law, see Bassiouni and Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or prosecute in International Law* (1995).

¹⁵⁵ The Institute was founded in 1873 as a private and purely scientific association with the aim to promote the progression of international law. For more information, see <http://www.idi-iil.org/> (visited 04.02.04).

¹⁵⁶ See article 10, translated into English in Reydams (2003), p. 30.

¹⁵⁷ The term ‘barbaric justice’ derives from the official comment on article 10 by von Bar and Brusa, translated into English in Reydams (2003), p. 30.

¹⁵⁸ See Reydams (2003), p. 31, with references in note 17.

and drafts adopted in the first part of the twentieth century: the 1927 Warsaw Conference for the Unification of Penal Law,¹⁵⁹ the resolution of the 1932 Hague International Congress of Comparative Law¹⁶⁰ and the 1935 Draft Convention on Jurisdiction with Respect to Crime by Harvard Research in International Law.¹⁶¹

L’Institut de Droit International adopted a new resolution on criminal jurisdiction in 1931. This Resolution provided a right to exercise conditioned universal jurisdiction only over *delicta juris gentium*, i.e. crimes against the law of nations. The only condition set forth in this version was that the accused was not requested extradited, or alternatively, that the territorial State or the national State did not accept an extradition offer.¹⁶²

Conditioned universal jurisdiction for serious ‘ordinary’ crimes was again recognized in the 1965 Draft European Convention on Conflicts of Jurisdiction in Criminal Matters.¹⁶³ The explanatory comment issued by the Council of Europe reflects the philosophy underlying the draft:

“The universality principle is, of course, the principle whereby the court of the place in which the offender is located (*judex deprehensionis*) is competent to hear the case, irrespective of the place of commission and of the nationality of the offender or his victim. The principle arose from the need to ensure the safety of certain basic values in which every State has an equal concern. These are either fundamental values such as life, sexual morality, family morality or property, which are protected by all penal codes or interests protected by international conventions and *jus cogens gentium*.”¹⁶⁴

Unknown for what reason, the draft was never proposed for adoption.¹⁶⁵ The wide scope of universal jurisdiction might have been the actual reason, but there is no official statement on the issue.

3.4.2 Natural law theory versus unilateral positivism

While Covarruvias and partly Grotius based their theory on natural law, not all the members of the Institute found support in natural law ideas on universal justice and solidarity among nations.¹⁶⁶ Among them was Emile Brusa, one of the Institute’s official Rapporteurs under the 1883 session, who preferred a more positivistic approach. Brusa

¹⁵⁹ See articles 6 and 7, cited in Reydams (2003), p. 32, note 21.

¹⁶⁰ See article 4, cited in Reydams (2003), p. 32, note 22.

¹⁶¹ See article 9 and 10, cited in Reydams (2003), p. 32, note 23.

¹⁶² See article 5, translated into English in Reydams (2003), p. 37.

¹⁶³ See article 5, cited in Reydams (2003), p. 73-4.

¹⁶⁴ Article-by article comment by Rapporteur de Grailly, § 34, cited in Reydams (2003), p. 74.

¹⁶⁵ See Reydams (2003), p. 73.

¹⁶⁶ See Reydams (2003), p. 30 with references.

based the jurisdiction of the custodial State upon the State's territorial sovereignty.¹⁶⁷ Under this approach, the idea was that "[t]he culpable act travels with the offender".¹⁶⁸ The State is therefore justified in enforcing a rule of law in regard to alien criminals that willingly have entered the State's territory.

Maurice Travers, a French doctor of international law and a successor of Brusa, agreed on this point. The only reason why he could accept subsidiary jurisdiction of the custodial State was this State's right to protect its own interests:

"...an offender peacefully enjoying the benefits of his misdeed encourages criminality and the possibility of an offender taking refuge in a State with the certainty that its penal law will not be applied would attract ruffraff to hospitable countries, necessarily impacting their social order. ... Extradition and expulsion are inadequate remedies for this double danger because the first is not always feasible and the latter does not produce a sufficiently moralizing effect."¹⁶⁹

Travers strongly opposed a theory of universality based on natural law ideas on moral and juridical solidarity among States:

"Formulated too broadly, this theory has to be rejected. It goes against the nature of the penal law and against the very conception of State. Every State has, in principle, no other mission than to defend its own interests. Because its sovereignty is limited, it cannot act on behalf of all humanity; it only represents the Society of nations *parte in qua*. The nature of the State determines the scope of its criminal law."¹⁷⁰

It is interesting to note that although Travers strongly rejected the rationale of Covarruvias and Grotius, he adopted their main argument that the presence of an unpunished criminal is intolerable. This argument fit just as well with his positivistic approach based on the interest of single States. In practice, both approaches were reactions to the same actual situation and proposed the same solution, with a common ambition to end the impunity of alleged offenders present in the State's territory.

3.5 The custodial State has a primary duty to prosecute

The doctrines presented so far regarded conditioned universal jurisdiction as a subsidiary means of criminal enforcement. Not every scholar has accepted this approach. Mikliszanski was a scholar who strongly contended the subsidiary character of universal

¹⁶⁷ Ibid., p. 31.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid., p. 33.

jurisdiction. Mikliszanski was a passionate advocate of the universality theory, at least for the then emerging category of *delicta juris gentium*, international crimes. In an article in 1936 he argued:

“For the repression of those crimes, it is not about to assign to the State a simple auxiliary role, an international courtesy. It really is about giving to the penal norm a universally valid expression of human justice, doing away with every consideration of a statist and national order to rally exclusively behind the idea of combating the offence.”¹⁷¹

Under the doctrine of Mikliszanski, universal jurisdiction was just as primary as territorial jurisdiction or jurisdiction based on nationality in the case of international crimes:

“This competence must be primary and obligatory, so that it is exercised in the name of the whole international community. Indeed, in the system of universal repression ... the criminal judges of the entire world all represent the same and only justice.”¹⁷²

While Beccaria strongly contended that judges are the avengers of mankind, Mikliszanski was of the opposite view:

“This is one of the most interesting practical aspects of the universality theory: the perpetration of the offence triggers the equal competence of all criminal courts, but only the judge of the place of arrest may actually exercise jurisdiction.”¹⁷³

When Covarruvias and Grotius emphasized that the custodial State could either extradite or prosecute, this signified that the main ambition of their argumentation was to ensure that no criminal enjoyed impunity by taking refuge in other States. They seem to have been of the opinion that the territorial State in most cases would be the best place to prosecute. Mikliszanski's approach is different, as he argued that a crime against the law of nations truly was an offence for which each and every State had equal competence and interest in trying. Nonetheless, despite this seemingly unlimited universal approach, his doctrine required the presence of the offender. He thereby excluded absolute universal jurisdiction in the same manner as was proposed by Covarruvias, Grotius, Brusa and Travers.

¹⁷⁰ Ibid.

¹⁷¹ Ibid., p. 34 with references.

¹⁷² Ibid.

¹⁷³ Ibid.

3.6 Every State has a subsidiary right to prosecute

While the earlier mentioned publicists rejected universal jurisdiction without the presence of an alleged offender, some current publicists accept this wide form of universal jurisdiction. Under this alternative doctrine on universal jurisdiction, every State has subject matter jurisdiction over international crimes committed abroad amongst foreigners. This jurisdiction is referred to as absolute universal jurisdiction since the presence of the alleged offender is not required. The most explicit support for absolute universal jurisdiction is found in the scholarly work of the Princeton Project on Universal Jurisdiction.¹⁷⁴ Under Principle 1 of the Princeton Principles on Universal Jurisdiction:

“...universal jurisdiction is criminal jurisdiction based on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any connection to the State exercising such jurisdiction.”¹⁷⁵

Principle 1(3) reads:

“A state may rely on universal jurisdiction as a basis for seeking the extradition of a person accused or convicted of committing a serious crime under international law as specified in Principle 2(1) provided that it has established a *prima facie* case of the person’s guilt and that the person sought to be extradited will be tried or the punishment carried out in accordance with international norms and standards on the protection of human rights in the context of criminal proceedings.”¹⁷⁶

It is difficult to trace the origin of this doctrine.¹⁷⁷ Today it is nonetheless advocated or accepted by publicists such as Cassese,¹⁷⁸ Bassiouni,¹⁷⁹ and Rosalyn Higgins.¹⁸⁰ As suggested in particular by Cassese, Professor of International Law at the University of Florence and former President of the ICTY, this form of jurisdiction is nonetheless

¹⁷⁴ The Princeton Project is sponsored by the Program in Law and Public Affairs and the Woodrow Wilson School of Public and International Affairs, Princeton University; the International Commission of Jurists; the American Association for the International Commission of Jurists; the Netherlands Institute of Human Rights and the Urban Morgan Institute for Human Rights.

¹⁷⁵ The principles are enclosed in the Annex.

¹⁷⁶ Ibid.

¹⁷⁷ The origin of absolute universal jurisdiction in doctrine has not been clearly addressed in the literature examined, i.e. Cassese (2003), pp. 286-91; Reydams (2003), pp. 38-42; Shaw (2003), pp. 592-7; Broomhall (2003), pp. 105-127; Brownlie (2003), pp. 303-5; Higgins (1994), pp. 56-65; Randall (1987-8), pp. 785-841; Bassiouni (2001-2002), pp. 96-104; and Hall, “Contemporary universal jurisdiction” (2003), pp. 111-37.

¹⁷⁸ See Cassese (2003), pp. 286-91; and Cassese, “When may Senior State Officials Be Tried for International Crimes? Some Comments on The Congo v. Belgium Case” (2002), pp. 853-76.

¹⁷⁹ See Bassiouni (2001-2002), pp. 155-6.

¹⁸⁰ See Higgins (1994), p. 64.

subsidiary. This entails that the jurisdiction is premised on the failure of the territorial State or national State to take proceedings.¹⁸¹

The term ‘universal jurisdiction’ is also applied, without requiring the presence of the offender, in the Restatement of the Foreign Relations Law of the US,¹⁸² the latest draft Resolution on Extraterritorial Jurisdiction of States by L’Institut de Droit International,¹⁸³ and the draft on Basic Principles and Guidelines on the Right to a remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.¹⁸⁴ These scholarly works *do not explicitly accept* the validity of extradition claims based on universal jurisdiction, but *neither do they exclude* absolute universal jurisdiction, as the earlier scholarly works referred to in section 3.4.1 did.¹⁸⁵

¹⁸¹ See Cassese (2003), p. 287.

¹⁸² See the Restatement (1987), Sections 404 and 423.

¹⁸³ See Reydams (2003), p. 41, citing article 8 and 4.

¹⁸⁴ See the draft articles 4 and 5.

¹⁸⁵ Reydams expresses no doubt when he interprets the Restatement and the latest Resolution of the Institute to recognize absolute universal jurisdiction, see Reydams (2003), p. 40-2.

4 Universal jurisdiction over torture under customary law

4.1 Introduction

After having analysed the international recognition of the prohibition against torture in chapter two, and thereafter presented different conceptions of universal jurisdiction in doctrine in chapter three, the study will in the following examine whether, or to what extent, there is a relationship *between* torture and universal jurisdiction under customary law.

As universal jurisdiction provides extraterritorial criminal jurisdiction, the content and scope of universal jurisdiction is regulated by the legal premises for extraterritorial criminal jurisdiction. These premises are unfortunately not clear under international law, making the identification of the relevant rules a task of its own. The question of debate is primarily whether extraterritorial criminal jurisdiction can be claimed unilaterally on the basis of State sovereignty, or whether it requires authority from a rule recognized in treaty or customary law.

The position that every State has extraterritorial criminal jurisdiction on the basis of State sovereignty is supported by the fact that this jurisdiction is exercised *within* the territory of the legislative State. As long as jurisdiction is not exercised on the territory of another State, the adherents of this position argues that limitations to extraterritorial jurisdiction must follow from a clear rule of international law.

The position that extraterritorial criminal jurisdiction has to be recognized by a rule of international law is buttressed by respect for the sovereignty of the territorial State and the fundamental territorial character of criminal law. The advocates of this approach do not accept the territorial sovereignty of a legislating State as a sufficient basis for exercising criminal jurisdiction over crimes committed abroad amongst foreigners.

The content of each position and their support in international sources will be examined in section 4.2. Section 4.3 discusses thereafter on what grounds, and to what extent, universal jurisdiction over torture is lawful under customary law under both approaches. If it is found to be lawful, it will further be examined whether States may have a *duty* under customary law to apply universal jurisdiction over torture.

4.2 The legal premises for universal jurisdiction

4.2.1 Introduction to the Lotus judgment

The question of whether every State has extraterritorial criminal jurisdiction on the basis of its own sovereignty has a long history of debate in international discourse. So far, the only authoritative discussion of the issue has been provided by the Permanent Court of International Justice (hereafter PCIJ) in 1927 in the Lotus case.¹⁸⁶ The topic of dispute was whether Turkey had extraterritorial criminal jurisdiction to prosecute a French public official. The Frenchman was accused of involuntary manslaughter on the high seas causing Turkish casualties.

The Court did not discuss the issue of universal jurisdiction, but it did elaborate on the legal premises for extraterritorial criminal jurisdiction. The Court presented first a ‘general rule’ on extraterritorial jurisdiction, after which it presented a potential *lex specialis* with application only to criminal jurisdiction.

The content of the ‘general rule’ was in line with the position presented above that States unilaterally have competence to prosecute crimes committed abroad. This jurisdiction was based on the territorial sovereignty of legislating State and was lawful as long as it did not violate other rules of international law. The position covered by this ‘general rule’ will in the following be referred to as the ‘main rule’.

The rule proposed as ‘*lex specialis*’ for criminal jurisdiction corresponds in large parts to the more restrictive approach introduced above. Under this rule, extraterritorial jurisdiction would only be lawful if it had a legal basis in international law. It is interesting to note that the rationale presented by the PCIJ in favour of a possible alternative rule for criminal jurisdiction was the *special nature of criminal law*, not the territorial sovereignty of the territorial State. The position covered by this ‘*lex specialis*’ will in the following be referred to as the ‘alternative rule’.

The Court did not conclude on which rule applied to criminal jurisdiction as this was found to be irrelevant for the case at hand. If the alternative rule had applied to criminal law, the main rule would necessarily only cover extraterritorial *civil* jurisdiction. If the alternative rule did not apply, both civil and criminal jurisdiction would be regulated by the main rule.

¹⁸⁶ See note 38.

The Lotus judgment has been central in the international discussion on extraterritorial jurisdiction, but the judgment is not easily applied as a guideline to the rules on extraterritorial criminal jurisdiction. Firstly, since the Court found it unnecessary to decide whether the alternative rule really applied criminal jurisdiction, it is difficult to determine whether the PCIJ thereby regarded the main rule to apply until international law clarified the question.

Secondly, on the basis that there was a strong dissent on the *obiter dictum* concerning the main rule on extraterritorial jurisdiction, the authority of Lotus has been questioned in legal theory.¹⁸⁷ The majority won due to the double vote of the President, meaning that a substantial minority of the judges did not agree that States in principle can base extraterritorial jurisdiction on their own sovereignty.

Despite the fact that the interpretation of Lotus varies in legal theory, the relevant statements by the PCIJ form the basis for following analysis of customary law. In spite of its age and disputed character, the Lotus judgment is important as a point of departure.

4.2.2 Introduction to the individual opinions to the Arrest Warrant case

The contentious and undetermined scope and nature of criminal extraterritorial jurisdiction was confirmed in the separate and dissenting opinions in the Arrest warrant case in 2002. The Arrest warrant case concerned the lawfulness of an arrest warrant issued on the basis of absolute universal jurisdiction. The warrant was issued by Belgium against the incumbent Minister for Foreign Affairs of the Democratic Republic of Congo. While the judgement itself only addressed the issue of immunity, several of the judges chose to elaborate on the legality of absolute universal jurisdiction in separate and dissenting opinions.¹⁸⁸ These opinions are thus of interest for the analysis of the two conflicting approaches to extraterritorial criminal jurisdiction and the current relevance and weight of the Lotus judgment.

The individual opinions of the ICJ judges differed greatly and serve to illustrate the divide between those who argue that the main rule applies to criminal jurisdiction and

¹⁸⁷ The theoretical controversy over the Lotus case in this regard is addressed e.g. in Schachter, *International law in theory and practice* (1991), pp. 250-2; and Spierman, *Moderne folkerett - etter det 20. århundre* (1999), pp. 118-25.

¹⁸⁸ The ICJ has established a well-founded principle that hinders it from adjudicating other questions than the subject matter question put forward to them by the parties. As stated in 1959 in the Asylum case, the Court has a “duty not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions”, see the Asylum Case (Colombia v. Peru), Judgment, ICJ Reports 1959, p. 402.

those who argue that the alternative rule applies. An examination of their views is accordingly of relevance when discussing the content and implications of the main rule and the alternative rule in regard to criminal jurisdiction, as well as the arguments invoked in favour of each approach.

Judge Gilbert Guillaume, at the time President of the ICJ (France), the three judges Rosalyn Higgins (UK), Pieter H. Kooijmans (Netherlands) and Thomas Buergenthal (USA),¹⁸⁹ and ad hoc judge Christine Van den Wyngaert (Belgium) provide the most interesting opinions in regard to universal jurisdiction. For the purpose of this thesis it is sufficient to give attention to their opinions.

4.2.3 Extraterritorial criminal jurisdiction based on territorial sovereignty

4.2.3.1 The content of the main rule presented by the PCIJ

The independence or sovereignty of the State is of importance for the determination and interpretation of the State's rights and obligations under international law.¹⁹⁰ According to the PCIJ in the Lotus case, an effect of State sovereignty was that any restrictions on the State's exercise of legislative, judicial and executive power within its own territory had to be accepted by the State itself. Restrictions upon these sovereign rights could not be presumed.¹⁹¹

As long as States did not act contrary to any of the established restrictions, States were regarded free to exercise State power at their own discretion. A different way of framing this is that the PCIJ regarded State power to be regulated by *prohibitions* and not permissive rules.¹⁹² A State act which was not prohibited was lawful in the eyes of the PCIJ.

The PCIJ stressed that most basic limitation to State sovereignty is that States cannot exercise State power outside their own territory:

¹⁸⁹ Higgins, Kooijmans and Burgenthal presented their view in a Joint separate opinion.

¹⁹⁰ A theoretical question which will not be pursued here is whether State sovereignty is created by international law as a legal order, or whether it is inherent in the States prior to the creation of international law. For an interesting elaboration on different approaches to the relationship between state sovereignty and international law, see Spierman (1999), pp. 17-23.

¹⁹¹ See the Lotus judgment, p. 5. See also the ICJ in the Nicaragua case, where the court stated that "in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise", note 81, p. 135, § 269.

¹⁹² The majority of the ICJ seems to have supported this view also in the advisory opinion on the Legality of the Threat or use of Nuclear Weapons: "State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorisation but, on the contrary, is formulated in terms of prohibition", see ICJ Reports 1996, p. 247.

“Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from convention.”¹⁹³

Extraterritorial *legislative* jurisdiction *per se* was not regarded an exercise of State power outside the State’s territory.¹⁹⁴ As long as it was enforced within the State’s territory and not contrary to other international rules, the PCIJ argued that States had a wide margin of discretion in the case of extraterritorial jurisdiction:

“Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their court to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the *principles* which it regards as best and most suitable (emphasis added).”¹⁹⁵

When the reference to ‘principles’ is read in its context, the PCIJ seems to imply that States as a main rule are free to apply jurisdictional principles in accordance with *their own* interpretation of their content and scope.¹⁹⁶ This interpretation further is supported by the PCIJ’s statement later in the judgment where the main rule is referred to as the ‘principle of freedom’:

“According to ... the principle of freedom, in virtue of which each State may regulate its legislation at its discretion, provided that in doing so it does not come in conflict with a restriction imposed by international law...”¹⁹⁷

The PCIJ did not specify in this statement which prohibitive rules the Court had in mind when it stressed that extraterritorial jurisdiction had its limitations. The most important limitation had already had been stressed by the PCIJ, i.e. that no State may *exercise* jurisdiction outside their own territory. The relevance of this prohibition in regard to universal jurisdiction, and especially absolute universal jurisdiction, will be examined in section 4.2.3.2.

The relevance of other prohibitive rules was perhaps difficult to address as they in practice depend on the developing status of international law and the facts of a case. A

¹⁹³ See the Lotus judgment, p. 5.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ For a more restrictive interpretation of the PCIJ’s reference to ‘principles’, see Reydams (2003), p. 21.

¹⁹⁷ See the Lotus judgment, p. 6.

prohibitive rule of general relevance in the case of torture is the principle of non-interference in the internal affairs of other States. This principle will be examined in regard to torture below in section 4.3.2. Other prohibitive rules of potential relevance in the case of torture are the international rules on immunity. Nonetheless, due to the limitations of the thesis, these rules will not be discussed.¹⁹⁸

4.2.3.2 Absolute universal jurisdiction and the requirement that no extraterritorial jurisdiction may be exercised outside the territory of the legislating State

A basic criterion under the main rule presented above is that extraterritorial jurisdiction cannot be *exercised* outside the territory of the legislating State. Since the basis for the extraterritorial jurisdiction is the territorial sovereignty of the legislating State, the exercise of jurisdiction must be limited to *this State's* territory. In the wording of the PCIJ, a State “may not exercise its power in any form in the territory of another State”.¹⁹⁹ If State power is enforced outside the territory, the State needs competence according to a rule of international law, or alternatively consent from the State whose interests are affected.

The requirement that jurisdiction has to be exercised within the territory of the State is not particularly problematic with respect to conditioned universal jurisdiction. This form of universal jurisdiction covers only alleged offenders present in the territory of the State by their own will. Jurisdiction may as a result be fully exercised within the territory of the State.²⁰⁰

Absolute universal jurisdiction, on the other hand, covers all alleged offenders irrespective of where they are located geographically. If the State claiming absolute universal jurisdiction is to be able to give the defendant the right to be present during his or her own prosecution,²⁰¹ custody over the defendant has to be obtained by means of extradition from a third State on the basis of an international arrest warrant.

Since prosecution on the basis of absolute universal jurisdiction requires an extradition act from a third State, and since extradition here implies the exercise of enforcement jurisdiction outside the State claiming absolute universal jurisdiction, the question arises whether absolute universal jurisdiction is fully enforced within the territory of the State. As suggested by *ad hoc* Judge Van den Wyngaert in her Dissenting opinion to the Arrest Warrant case:

¹⁹⁸ See the delimitation in subsection 1.3.1.

¹⁹⁹ See note 194.

²⁰⁰ The collection of evidence in other States would naturally require the consent of the relevant States.

“...it might be argued that circulating a warrant internationally brings it within the realm of *enforcement* jurisdiction, which, under the “*Lotus*” test, is in principle prohibited.”²⁰²

The PCIJ did not raise the question of whether issuances of international arrest warrants and extradition claims, followed by third States’ compliance with such requests, constituted extraterritorial exercise of jurisdiction. Neither did the Court bring up the question of the rights of individuals to be present in their own trial. Based on the lack of affirmative pronouncements, the PCIJ appears to have regarded requests for extradition as unproblematic or even irrelevant for the question of subject matter jurisdiction. However, given that the Court did not address the issue, and in view of the fact that the main prohibition against extraterritorial enforcement still applies, the nature of extradition claims and their effect must be subject to further examination.

The lawfulness of arrest warrants and extradition claims was discussed in the Arrest warrant case. The interpretation set forward by the ICJ did not explicitly define the concept of extraterritorial enforcement, but the Court did discuss the nature and effects of the international arrest warrant in the case before them.

The ICJ noted that the purpose of the distribution had been to establish a legal basis for the arrest and subsequent extradition of the accused Foreign Minister. The Court argued that even though third States would have to take further administrative and legal steps in order to act upon the arrest warrant, the warrant still represented an infringement of the sovereignty of the Congo.²⁰³ The rationale of the ICJ was that the circulation of the arrest warrant possibly could lead to other States taking action, thereby in itself violating the immunity of the Foreign Minister:

“As in the case of the warrant’s issue, its international circulation from June 2000 by the Belgian authorities, given its nature and purpose, effectively infringed Mr. Yerodia’s immunity as the Congo’s incumbent Minister for Foreign Affairs and was furthermore liable to affect the Congo’s conduct of its international relations...”²⁰⁴

When the distribution of an arrest warrant is regarded to violate immunity rules, the very distribution of an international arrest warrant seems to imply the exercise of State power. The question which is not answered by the ICJ is nonetheless whether the exercise of this

²⁰¹ See the rule contained in ICCPR article 14 paragraph 3 litra e, presented in subsection 1.4.3.

²⁰² See the Dissenting opinion of *ad hoc* Judge Van den Wyngaert, § 76.

²⁰³ See the Arrest Warrant case, Judgment, § 71.

²⁰⁴ *Ibid.*

power is regarded as extraterritorial in the terminology of the PCIJ. This question was addressed by ad hoc judge Van den Wyngaert, and to some extent also the three judges Higgins, Kooijmans and Burgenthal in their individual opinions.

According to Van den Wyngaert, the Belgian distribution of an arrest warrant through Interpol did not entail extraterritorial enforcement.²⁰⁵ Her argument was that the custodial State would have to take an authoritative decision in order to act upon the arrest warrant. The custodial State would therefore be the State exercising State power in its own territory when arresting and extraditing in accordance with the request.

The three judges Higgins, Kooijmans and Burgenthal concluded in the same manner as Van den Wyngaert in their joint separate opinion. After having emphasized that “[t]he only prohibitive rule ... is that criminal jurisdiction should not be exercised, without permission, within the territory of another State”,²⁰⁶ the judges maintain:

“The Belgian arrest warrant envisaged the arrest of Mr. Yerodia in Belgium, or the possibilities of his arrest in third States at the discretion of the States concerned. This would in principle seem to violate no existing prohibiting rule of international law.”²⁰⁷

With respect to the possible relationship between the issuing of arrest warrants and the lawfulness of absolute universal jurisdiction, the three judges used the opportunity to suggest that there was no link:

“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.”²⁰⁸

This last statement supports the interpretation that extradition requests was left unaddressed in the Lotus judgment simply because the topic was regarded irrelevant for the lawfulness of jurisdiction.

A final point of examination entails a brief look at the rules concerning undisputed extraterritorial enforcement, as exemplified by the Eichman case. In this case, Israeli Moussad agents abducted Adolf Eichman, a German war criminal, from Argentina,

²⁰⁵ See Separate opinion of *ad hoc* Judge Van den Wyngaert, §§ 78 and 79.

²⁰⁶ See the Joint separate opinion of Judges Higgins, Kooijmans and Burgenthal, § 54.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*, § 56.

without the consent of the Argentinean Government. The purpose was to bring Eichman to Israel, where he in 1962 stood trial for atrocities committed during the World War Two.²⁰⁹

Absolute universal jurisdiction *does not* provide a right to abduct an alleged offender, Absolute universal jurisdiction only provides competence to initiate investigations and issue international arrest warrants and extradition claims. When the term *extraterritorial enforcement* is applied to State sanctioned kidnapping as in the Eichman case, the natural meaning of the term appears more clearly than in the case of the circulation of international arrest warrants. Because international arrest warrants are acted upon by custodial States with territorial jurisdiction, it would appear far fetched to classify the circulation of arrest warrants as extraterritorial enforcement.

On the basis of the above referred statements and arguments, the conclusion is drawn that absolute universal jurisdiction not *in itself* involve or imply extraterritorial *enforcement* in the terminology of the PCIJ. According to the main rule, where States have extraterritorial subject matter jurisdiction on the basis of their own sovereignty, absolute universal jurisdiction is thus just as lawful as conditioned universal jurisdiction. Both conditioned and absolute universal jurisdiction may however be limited by other rules of relevance in a give case, e.g. the principle of non-interference in the internal affairs of other States and rules on immunity.

4.2.4 Extraterritorial criminal jurisdiction recognized by international law

4.2.4.1 The content of the alternative rule proposed by the PCIJ

As mentioned in subsection 4.2.1, the PCIJ did not restrict itself to only present the main rule. Although the PCIJ noted that nearly all systems of law had extended their application to crimes taking place outside their own borders,²¹⁰ the Court wondered whether there was an exceptional rule governing extraterritorial *criminal* jurisdiction. The PCIJ reasoned that an alternative rule:

“...might be the outcome of the close connection which for a long time existed between the conception of supreme criminal jurisdiction and that of a State, and also by the especial importance of criminal jurisdiction from the point of view of the individual.”²¹¹

²⁰⁹ Attorney-General of the Government of Israel v. Adolf Eichmann, 29 May 1962, *English translation in 36 International Law Reports* p. 298. For more information on this case, see <http://www.nizkor.org/hweb/people/e/eichmann-adolf/> (visited 27.03.04).

²¹⁰ See the Lotus judgment, p. 6.

²¹¹ Ibid.

The rationale behind a potential *lex specialis* in the case of criminal jurisdiction was accordingly the fundamental territorial character of criminal law and the rights of the individual. The sovereignty of the territorial State was not explicitly invoked as an argument in favour of the alternative rule, but the territorial State would be the only State with subject matter jurisdiction on the basis of its own sovereignty. Other States would need authority from other rules of international law:

“According to the other standpoint, the exclusively territorial character of law relating to this domain constitutes a principle which, except as otherwise expressly provided, would *ipso facto*, prevent States from extending the criminal jurisdiction of their own courts beyond their frontiers; the exceptions in question, which include for instance extraterritorial jurisdiction over nationals and over crimes directed against public safety, would therefore rest on special permissive rules forming part of international law.”²¹²

If extraterritorial criminal jurisdiction could not be based on a treaty provision, the jurisdiction would have to be recognized by customary law in order to be lawful. The examples mentioned by the PCIJ resembles extraterritorial jurisdiction which is well recognized as customary law.

In the given case, the effect was felt on a Turkish ship, constituting ‘Turkish territory’. On this basis, the Court found that Turkey had a form of territorial jurisdiction.²¹³ Since it was generally accepted that States had jurisdiction over crimes having effects within their own territory, Turkey was regarded to have subject matter jurisdiction independent of whether the general rule or the alternative rule applied to criminal jurisdiction.

Even though the PCIJ *did not* provide a final conclusion with respect to whether the alternative rule actually applied to criminal jurisdiction, the Court stressed that in the event that *it would have reached* the conclusion that the alternative rule applied, rules prohibiting the exercise of jurisdiction would be equally important as under the main rule:

“Consequently, whichever of the two systems described above be adopted, the same result will be arrived at in this particular case: the necessity of ascertaining whether or not under international law there is a principle which would have prohibited Turkey, in the circumstances before the Court, from prosecuting Lieutenant Demons...”²¹⁴

²¹² Ibid.

²¹³ This form of territorial jurisdiction is referred to as objective territorial jurisdiction in current doctrine.

²¹⁴ See the Lotus judgment, p. 7.

Independent of whether States have subject matter jurisdiction on the basis of State sovereignty or a rule of international law, prosecution would accordingly be unlawful if it conflicted with other rules of international law applicable in the given case. Prohibitive rules are thus of relevance also when extraterritorial criminal jurisdiction is recognized for a certain crime under a rule of international law.²¹⁵

4.2.5 The difficult assessment of the current status of customary law

4.2.5.1 Arguments in favour of the main rule

The fact that the PCIJ suggested an alternative rule, without offering any conclusion on the matter, has not barred experienced interpreters of international law from invoking Lotus in support of the rule that every State have extraterritorial criminal jurisdiction on the basis of their own sovereignty.

Ad hoc Judge in the Arrest warrant case Van den Wyngaert, also *ad litem* judge of the ICTY, concluded in her dissenting opinion to the Arrest Warrant case that the Lotus judgment affords States full freedom to apply extraterritorial criminal jurisdiction as long as it is not prohibited by other international rules:

“It follows from the “*Lotus*” case that a State has the right to provide extraterritorial jurisdiction on its territory unless there is a problem under international law...”²¹⁶

The same view seems to be shared by Professor Cassese, former President of the ICTY:

“Under the general principle enunciated in 1927 by the PCIJ in Lotus, States are free to exercise their criminal jurisdiction over acts performed outside their territory, whenever no specific international limitations (provided for either in treaties or in customary rules) restrict such freedom...”²¹⁷

Their rationale for this interpretation is not elaborated on in their individual opinions to the Arrest warrant case, but it is probably linked to the fact that the alternative rule never was confirmed by the PCIJ. As long as the validity of an exceptional rule is unclear, it can be argued that the safest approach is to apply the main rule.

The rationale behind the rule that every State has extraterritorial jurisdiction on the basis of the State’s own sovereignty is furthermore related to the unilateral, positivistic

²¹⁵ See subsection 4.2.3.2.

²¹⁶ The Dissenting opinion of *ad hoc* Judge Van den Wyngaert, p. 26, § 51.

²¹⁷ See Cassese (2003), p. 303:

approach advocated by Brusa and Travers.²¹⁸ The link to Brusa and Travers is nonetheless only present when an accused perpetrator is within the territory of the state by his or her own free will. Only in these situations will the accused represent a threat to the custodial state and its rule of law. When the alleged offender is outside the territory of the State, as in the case of absolute universal jurisdiction, the main argument for jurisdiction is not the interests of an individual state, but rather the interests of the international community of States as a whole.

4.2.5.2 Arguments in favour of the alternative rule

The fact that the PCIJ presented an alternative rule could on the other hand imply that the Lotus judgment does not provide support for *any* fixed rule in regard to extraterritorial *criminal* jurisdiction. The rationale behind this approach is, briefly stated, that by suggesting an alternative rule without concluding, the Lotus case explicitly acknowledged the ambiguous stance of international law with respect to this legal problem. If this conclusion prevails, customary law has to be determined on the basis of the developments in international law *after* Lotus.

ICJ judge Guillaume, President of the ICJ at the time when the Arrest Warrant case was adjudicated, is a prominent advocate of the approach that States need a basis in international law in order to exercise extraterritorial criminal jurisdiction.²¹⁹ Guillaume's view is expressed in his Separate opinion in the Arrest warrant case. He concluded in his opinion that criminal jurisdiction today is governed by the alternative rule, requiring that States claiming extraterritorial jurisdiction have authority under an explicit rule of international law. Since Guillaume himself not is an authoritative interpreter of international law when he expresses his views in a separate opinion, each of his arguments should be presented and evaluated before the validity of his rationale can be assessed.

The first argument forwarded by Guillaume in support of the alternative rule is the UN Charter's recognition of the sovereign equality of States.²²⁰ He suggested further that the emergence of new States born of decolonization provides similar support for the rule that States need authority in international law in order to apply extraterritorial criminal

²¹⁸ See subsection 3.4.2.

²¹⁹ See the Separate opinion of President Guillaume, § 15.

²²⁰ Ibid.

jurisdiction.²²¹ Moreover, Guillaume derived arguments from the extensive adoption and recognition of treaty law in the field of international criminal law:

“International criminal law has itself undergone considerable development and constitutes today an impressive legal *corpus*. It recognizes in many situations the possibility, or indeed the obligation, for a State other than that on whose territory the offence was committed to confer jurisdiction on its courts to prosecute the authors of certain crimes where they are present on its territory. International criminal courts have been created. But at no time has it been envisaged that jurisdiction should be conferred upon the courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found.”²²²

Hence, in situations without a solid basis for extraterritorial jurisdiction, Guillaume emphasised the need to respect the sovereignty of the *territorial* State. In his view, the application of universal jurisdiction without a permissive rule would threaten, not ensure international justice.²²³ The viewpoint of Guillaume will now be discussed.

Guillaume invokes State sovereignty and equality as an argument in favour of the alternative rule. He argues that the recognition of State equality in the UN charter and the appearance of ‘new States born of decolonization’ have strengthened the territorial principle. It can be agreed that State sovereignty supports the alternative rule in the sense that every State has a primary and exclusive right to enforce a rule of law in its own territory. On the other hand, in the view of the PCIJ, State sovereignty also supports the main rule, under which State sovereignty is the basis for extraterritorial jurisdiction as long as extraterritorial jurisdiction is enforced within the State’s own territory.²²⁴ According to the PCIJ, it was the *special* character of criminal law which provided the main argument for an alternative rule in regard to criminal jurisdiction, not State sovereignty *per se*. State sovereignty is accordingly not an argument which only provides support for Guillaume’s conclusion. It is important to stress in this context that the sovereignty of the territorial State is protected by the principle of non-interference, but this principle should be examined in regard to each and not as a general prohibition against extraterritorial criminal jurisdiction.²²⁵

Guillaume continues by referring to the developments in international *criminal* law. Criminal jurisdiction in regard to the most serious international crimes has to a large extent

²²¹ Ibid.

²²² Ibid.

²²³ Ibid.

²²⁴ See subsection 4.2.3.2.

been regulated in international legal instruments. Treaty law imposes today a *duty* to apply conditioned universal jurisdiction in certain situations. Nonetheless, this observation does not provide authoritative support for the conclusion that the *right* to apply extraterritorial criminal jurisdiction has to have a similar legal basis. It is therefore difficult to assess the relevance of this development without any further authoritative support.

Guillaume's final argument is that universal jurisdiction which is not recognized by an explicit rule of international law, would threaten, and not ensure, international justice. This is perhaps the most important argument in favour of the alternative rule. The politically controversial aspect of international criminal law suggests that enforcement of individual accountability preferably should be regulated by explicit rules accepted by the community of States. This would provide better predictability and stability in the distribution of criminal jurisdiction. Furthermore, it would strengthen the political support for enforcement across the territorial borders in the most important situations. The only drawback is that it probably is a policy argument with limited legal weight. It may influence the further development of international criminal law, but at present it does not solve the question of whether the alternative, rather than the main rule, now applies to criminal jurisdiction.

It could be mentioned that the position invoked by Guillaume to a certain extent is related to the doctrine of e.g. Beccaria.²²⁶ In the view of Beccaria, a crime should be prosecuted and punished in the place where the crime was committed. This was where the damage had been inflicted and accordingly where justice should be fulfilled. Judges were not the avengers of all mankind and should not adjudicate acts committed outside the borders for their own territorial jurisdiction. Nonetheless, while Beccaria in theory rejected all form of extraterritorial criminal jurisdiction, the alternative rule as advocated by Guillaume recognizes extraterritorial jurisdiction as long as it is provided for by a rule of international law. Guillaume recognizes accordingly a need for a flexible administration of criminal jurisdiction as long as the authority for such jurisdiction originates from rules consented upon by the international community of States, not from the sovereignty of the individual State.

²²⁵ As informed above, this principle will be examined in regard to the prosecution of *torture* in section 4.3.2.

²²⁶ See section 3.2.

4.2.5.3 Preliminary conclusion

Until the premises for extraterritorial criminal jurisdiction are addressed in an authoritative source, it remains an unresolved topic of debate which rule applies to criminal jurisdiction. The position that States have extraterritorial criminal jurisdiction on the basis of their status as sovereign nations appears to have more authoritative support than the alternative position, but it is difficult to argue that the support derived from the Lotus judgment is clear and persuasive. The judgement is in addition old and legal scholars disagree on the relevance of Lotus for the current status of extraterritorial criminal jurisdiction and the judgment.

The position that Lotus is losing its relevance seems to be supported by the ICJ judges Higgins, Kooijmans and Buergenthal in their Joint separate opinion to the Arrest Warrant case. Although admitting that the Lotus dictum “represents a continuing potential in the context of jurisdiction over international crimes”,²²⁷ the judges added that the dictum represented “the high water mark of *laissez-faire* in international relations” and that this “era has been significantly overtaken by other tendencies”.²²⁸

Another publicist who has chosen to emphasize that things have changed since Lotus is Malcolm N. Shaw, Professor of International Law at the University of Leicester and the author of a bestselling textbook on international law. According to Shaw, the main rule that extraterritorial jurisdiction can be based on State sovereignty no longer applies under international law, not even in the case of civil jurisdiction:

“The general pronouncements by the Court leading to the dismissal of the French contentions have been criticised by writers for a number of years, particularly with respect to its philosophical approach in treating States as possessing very wide powers of jurisdiction which could only be restricted by proof of a rule of international law prohibiting the action concerned. It is widely accepted today that the emphasis lays the other way around.”²²⁹

Furthermore, even though the legal value of Guillaume’s argumentation is limited, his position as ICJ judge and former President of the ICJ suggests that his view might be influential in the future.

On the background of the available sources of international law it is difficult to conclude on whether States at present need a basis in international or whether they have extraterritorial criminal jurisdiction on the basis of their own sovereignty. No fixed,

²²⁷ See the Joint separate opinion, § 50.

²²⁸ Ibid, § 51.

generally accepted interpretation appears available under currently international law. The lawfulness of conditioned and absolute universal jurisdiction over torture will therefore in the present thesis be evaluated under the main rule as well as the alternative rule.

4.3 Universal jurisdiction over torture

4.3.1 Introduction

Independent of which rule applies to criminal jurisdiction, the exercise of extraterritorial criminal jurisdiction must not violate other rules of international law. The principle of non-interference in the internal affairs of other States is relevant in this regard. Subsection 4.3.2 examines its relevance for the application of universal jurisdiction over torture.

Subsections 4.3.3-4.3.6 examines thereafter legal grounds which may provide explicit recognition for universal jurisdiction over torture under international law. Even though such recognition is necessary only under the alternative rule, it may also prove important for the popular acceptance of universal jurisdiction under the main rule. In a diplomatic dispute, which is likely to erupt when State A initiates criminal proceedings against e.g. a former Head of State B, jurisdiction recognized in an international rule would provide valuable political support. The current dispute between France and the Congo regarding the right to France to exercise universal jurisdiction on the basis of CAT illustrates this point. The customary status of conditioned and absolute universal jurisdiction over torture will be summarized in subsections 4.3.7-4.3.8.

4.3.2 The principle of non-interference in the domestic jurisdiction of States

The principle of non-interference in the domestic jurisdiction of States is a corollary of State sovereignty and a basic norm in international customary law. Article 2 paragraph 7 of the UN Charter is based on this principle and expresses a general duty for the UN to respect the domestic jurisdiction of the State:

“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State.”²³⁰

The principle is also adopted in the UN Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States.²³¹

²²⁹ See Shaw (2003), pp. 460-1.

When the principle of non-intervention is to be applied as a legal rule, the text of the UN Charter is the basis for the analysis. The formulation of article 2 paragraph 7 suggests that the principle of non-interference is a rule without exceptions, but it only applies to “domestic jurisdiction”. The question is then if criminal jurisdiction over torture, committed by a State official within the State’s territory against the State’s nationals, is an affair that is “essential within the domestic jurisdiction” of the State. If this is the case, the principle of non-interference will prohibit States from establishing and enforcing universal jurisdiction without the consent of the territorial State, even if the alleged offender is present within the territory of the State claiming universal jurisdiction.

The procedure of identifying domestic matters is not prescribed in the UN Charter. An ordinary interpretation of the words “essentially within the domestic jurisdiction” suggests that the exclusive domestic domain is reserved for internal affairs which are regulated by internal law only. As stated by the ICJ in the Nicaragua case:

“A State’s domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law...”²³²

Ian Brownlie supports this perception of the domestic domain and defines its scope in the following manner:

“The general position is that the ‘reserved domain’ is the domain of state activities where the jurisdiction of the state is not bound by international law: the extent of this domain depends on international law and varies according to its development...”²³³

What has to be decided is then whether, or to what extent, the jurisdiction over torture is a matter regulated by international law.

As discussed in chapter two, the prohibition against torture has been recognized as a non-derogable human rights norm both under treaty and customary law. Accordingly, all States are prohibited from actively practicing or passively accepting torture within their own territory. The investigation and prosecution of torture is, nevertheless, not explicitly regulated by the human rights norm. The principle of non-interference could therefore be

²³⁰ The Charter of the United Nations, adopted in San Francisco 26 June 1945, entered into force 24 October 1945.

²³¹ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations, adopted by the General Assembly by consensus on 24 October 1970.

²³² See p. 131, § 258.

²³³ See Brownlie (2003), p. 291.

invoked as a bar against universal jurisdiction unless also the right and duty to prosecute is explicitly regulated by an international rule binding upon the territorial State.

State Parties to CAT and the Inter-American Convention for the Prevention and Punishment of Torture have a clear and undisputed obligation to investigate and prosecute torture. Prosecution of torture committed in these States could therefore hardly be categorized as a matter within the exclusive domestic jurisdiction of these State Parties.²³⁴

The obligation to give effect to the human right to be free from torture, including the duty to provide an effective remedy for violations, is further an international obligation of State Parties to the ICCPR. Under the ICCPR article 2, paragraph 3 litra a, State Parties shall undertake:

“To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy...”

Article 2 does not emphasize that every violation should be addressed through legal proceedings, but in the case of torture, criminal investigation and legal proceedings appear as the most appropriate remedies in the context of the ICCPR. Of interest in this regard is the Human Rights Committee’s General Comment No.20 to article 7 of the ICCPR:

“The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.”²³⁵

This Comment elaborates on the lawfulness of domestic amnesties, but it has relevance for the discussion on whether the investigation and prosecution of torture is a matter within the exclusive jurisdiction of the territorial State. Had it had been within the exclusive domestic domain of State Parties to the ICCPR, the Human Rights Committee would not consider it appropriate or even under its mandate to criticize the practice of granting domestic amnesties.

The general comments of the Human Rights Committee are neither authoritative interpretations of customary law nor legally binding on State Parties to the ICCPR.

²³⁴ The content of this duty under CAT is examined in chapter 5. For a discussion on the relevance of the principle of non-interference in the context of CAT, see subsection 5.2.3.2.

²³⁵ See § 15.

Nonetheless they are important tools for the actual application and interpretation of State obligations under the ICCPR. On the basis of the text of article 2, paragraph 3 *litra a* and the General Comment to article 7, the prosecution of torture appears regulated by international law in the case of the 151 State Parties to the ICCPR and is accordingly not within their exclusive domestic jurisdiction.²³⁶

Articles 2 and 25 of the ACHR have content similar to that of article 2 under ICCPR. In the view of the Inter-American Court of Human Rights:

“States Parties are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse”²³⁷

The Court did not state explicitly that all human rights violations have to be prosecuted, but maintained that amnesties in the case torture are contrary to the responsibility of State Parties to the ACHR as amnesties:

“... are intended to prevent the *investigation and punishment* of those responsible for serious human rights violations such as *torture*, extrajudicial, summary or arbitrary execution and forced disappearance ... (emphasis added).”²³⁸

On this basis could it be argued that criminal prosecution of torture is no issue exclusively regulated by the domestic law of State Parties to the ACHR.

According to article 1 and 13 of the ECHR, State Parties to this Convention also have an obligation to provide an effective remedy to individuals whose rights and freedoms have been violated.²³⁹ State Parties to the ECHR would therefore be under a similar obligation to prosecute torture committed within their own territory, implying that the prosecution of torture is outside the scope of their exclusive domestic jurisdiction.

When torture has been committed within the territory of States which are Non-Party States to all the referred treaties, the status of customary law becomes decisive.

An argument that may prove relevant in this context is the *erga omnes* nature of the obligation to respect the prohibition against torture. It has been suggested in the literature that this obligation, which in the case of fundamental human rights is owed toward the entire international community, contains a duty to investigate and prosecute all alleged

²³⁶ Ratification status is available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp> (visited 20.02.04).

²³⁷ See the Barrios Altos case, Chumbipuma Aguirre et al. vs Peru, Judgment of March 14, 2001, § 43.

²³⁸ See the Barrios Altos case, note 257, §§ 41.

²³⁹ As mentioned in section 2.2, the freedom from torture is here protected in article 3.

violations of torture committed within the State's own territory.²⁴⁰ There is no explicit authoritative support for this claim, but it may be inferred as a reasonable consequence of the *erga omnes* nature of a norm that the State has a duty to prosecute violations.²⁴¹

The relationship between exclusive domestic jurisdiction and international crimes has further been addressed by the ICTY in the Tadic case:

“...the Trial Chamber can see no invasion into a State's jurisdiction because, as it has been rightly argued on behalf of the prosecutor, *they were never crimes within the exclusive jurisdiction of any individual State* (emphasis added)...”²⁴²

According to Ingelse, this statement supports the conclusion that torture is a crime outside the exclusive jurisdiction of the territorial State.²⁴³ The validity of this argument can be questioned since Tadic was accused of war crimes and crimes against humanity, not individual acts of torture. On the other hand, the main rationale behind the statement appears to be the status of the offences as international crimes. If torture has gained recognition as a separate international crime, as proposed by this thesis,²⁴⁴ the statement from the Tadic case supports the conclusion that the prosecution of torture is a matter outside the exclusive jurisdiction of individual States.

Furthermore, if customary international law authorizes universal jurisdiction over torture, this implies that prosecution of torture is a matter of international concern and outside the scope of the exclusive domestic jurisdiction of any State. Customary law may not authorize or oblige States to exercise jurisdiction over acts within the exclusive domestic jurisdiction of the territorial State. While the discussions in the following subsections primarily address the issue of whether, or to what extent States have a right or a duty to prosecute torture committed in *other* States, the existence of such a right or duty have implications for the applicability of the principle of non-interference. The final closure on the relevance of the principle of non-interference is therefore part of the concluding comment on the lawfulness of conditioned and absolute universal jurisdiction over torture.²⁴⁵

²⁴⁰ See Boed (2000), p. 328.

²⁴¹ The argument of *erga omnes* has also been invoked to provide every State a duty to prosecute torture irrespectively of where it has been committed, thereby providing universal jurisdiction. This argument is discussed in section 4.3.4.

²⁴² See Prosecutor v. Dusko Tadic A/K/A “Dule”, Case No.IT-94-1-T, Trial Chamber, Decision on the Defence Motion on Jurisdiction, 10 August 1995, § 44.

²⁴³ See Ingelse (2001), pp. 324-5.

²⁴⁴ See section 2.7.

²⁴⁵ See subsections 4.3.7-4.3.8.

4.3.3 The *jus cogens* nature of the prohibition against torture

The question to be examined in the following is whether the *jus cogens* nature of the prohibition against torture provides every State with universal jurisdiction.²⁴⁶

4.3.3.1 Does *jus cogens* provide a discretionary right to apply universal jurisdiction?

Since every State has an interest in the fulfilment of *jus cogens* norms, every States would in principle have an interest in the prosecution of a violation. This appears as a rationale consequence of the *jus cogens* quality of a norm. Bassiouni is among those who have argued that the *jus cogens* nature of an international crime is sufficient as a basis for universal jurisdiction:

“Scholars, including this writer, support the proposition that an independent theory of universal jurisdiction exists with respect to *jus cogens* international crimes.”²⁴⁷

Lord Browne-Wilkinson expressed the same opinion in the Pinochet case:

“The *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction. International law provides that offences *jus cogens* may be punished by any State because the offenders are “common enemies of all mankind and all nations have an equal interest in their apprehension”.²⁴⁸

Another Law Lord in the Pinochet case, Lord Millet, suggested a related but more restrictive procedure on how to determine whether a crime is covered by universal jurisdiction or not. He maintained that there is a connection between universal jurisdiction and *jus cogens*, but argued that it is only partly and dependent upon additional circumstances:

“In my opinion, crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a *jus cogens*. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order. Isolated offences, even if committed by public officials, would not satisfy these criteria.”²⁴⁹

²⁴⁶ The *jus cogens* nature of the prohibition against torture is examined in section 2.5.

²⁴⁷ See Bassiouni (2001-2002), p. 104.

²⁴⁸ See the opinion of Lord-Browne-Wilkinson in the Pinochet case, note 95, p. 13. Lord Browne-Wilkinson cites *Demjanjuk v. Petrovsky* (1985) 603 F. Supp. 1468; 776 F. 2d. 571.

²⁴⁹ See the opinion of Lord Millet, note 95, p. 106.

A single act of torture would not qualify as a crime covered by universal jurisdiction under the view of Lord Millet while it would qualify under the approach of Lord Browne-Wilkinson. Because there are several interpretations of the nature of the relationship between *jus cogens* and universal jurisdiction there is a need for authoritative support in order to conclude on the matter.

While this topic not has been addressed by the ICJ, the ICTY discussed it in the above cited Furundzija case. In this case the ICTY elaborated on the practical implications of the *jus cogens* character in regard to individual criminal liability:

“The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-State and individual levels. ... at the individual, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon 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.”²⁵⁰

Since the formulation is clear, the Court forcefully supports the interpretation that all States are justified, or ‘entitled’, to investigate, prosecute and punish or extradite alleged torturers *present* in their territory. The content of the described right resembles the content of the formula ‘*aut dedere aut judicare*’, which is based on conditioned universal jurisdiction.

As the rationale for its conclusion, the Court emphasizes:

“Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad.”²⁵¹

It could be argued that the treaty-making power is one aspect of the State sovereignty that is quite different from the competence to prosecute individuals accused of extraterritorial crimes. On the other hand, it is important to remember that a *jus cogens* norm is absolute and universal, and any violation, derogation or exception accordingly is regarded a serious violation against all mankind. On the basis of this norm, it seems reasonable that every State is justified in prosecuting torture unless other rules bar prosecution in a given case.

If the question is to be raised in front of the ICJ, which it possible may in the case between France and the Congo, the ICJ can challenge the view of the ICTY, but it can not ignore it. As an international tribunal established by the UN Security Council, the ICTY

²⁵⁰ See the Furundzija case, §§ 155 and 156.

²⁵¹ Ibid.

holds an important position in the international legal community. The ICTY must therefore be regarded as an authoritative interpreter of customary law,²⁵² in particular in the field of international criminal law. The Court's interpretation of international law at this point was not necessary for the outcome of the case, but even as an obiter dictum, the statement carries significant interest. Until then, the statement of the ICTY appears to be the most weighty and authoritative interpretation of customary law in regard to the right of every State to apply conditioned universal jurisdiction.

Since there is no authoritative interpretation in regard to the application of absolute universal jurisdiction over torture, and no State practice that support such a rule, it is difficult to provide evidence that the *jus cogens* nature also permits this form of universal jurisdiction.

4.3.3.2 Does *jus cogens* provide an obligation to apply universal jurisdiction?

Bassiouni has further argued that one implication of recognizing an international crime as a *jus cogens* norm is that every State has a *duty* to prosecute or extradite alleged torturers present in the territory:

“To this writer, the implications of *jus cogens* are those of a duty and not of optional rights; otherwise, *jus cogens* would not constitute a peremptory norm of international law. ... Above all, the characterization of certain crimes as *jus cogens* places upon states the *obligation erga omnes* not to grant impunity to the violators of such crimes.”²⁵³

His rationale is that the duty not to grant impunity for such crimes is an obligation *erga omnes* due to the un-derogable nature of these crimes.²⁵⁴ Hazel Fox seems to support this view when she writes that an obligation *aut dedere aut judicare*, which is adopted in treaty provisions:

“... is to be distinguished from that of universal jurisdiction which arises as a consequence of an *erga omnes* obligation to exercise jurisdiction over acts wherever committed in violation of certain *jus cogens* norms...”²⁵⁵

Nonetheless, when the ICTY elaborated on the effects of *jus cogens*, the ICTY acknowledged a *right* to establish and exercise conditioned universal jurisdiction, not a duty. If the duty had developed into a rule of customary law, either as a consequence of the

²⁵² This is illustrated in the *Al Adsani* case, where the European Court of Human Rights referred to the ICTY and their evaluation of torture as a *jus cogens* norm, see §§ 30 and 61.

²⁵³ See Bassiouni, “International Crimes: *Jus cogens* and *Erga Omnes*” (1998), pp. 136-7.

²⁵⁴ For elaboration of this question, see Bassiouni and Wise (1995).

jus cogens character or through demonstrated compatible behaviour and *opinio juris*, it could have been clarified by the ICTY.

The approach that every State has an *obligation* under customary law to exercise universal jurisdiction over torture is interesting; if it was to be recognized as customary law, and implemented and acted upon by all States, the enforcement of individual liability for international crimes would without doubt be more effective. The fight against impunity would be afforded considerable political importance, and all States would idealistically cooperate in the best interests of justice. Currently, however, the position is without authoritative support in international law. In the literature, even advocates of universal jurisdiction commonly refer to universal jurisdiction as a possible right under customary law, not a duty. As phrased by the former Special Rapporteur on torture, Nigel Rodley:

“... *permissive* universality of jurisdiction is probably already achieved under general international law [emphasis added]...”²⁵⁶

Without further evidence it is difficult to maintain that all States have an *erga omnes* obligation to prosecute *jus cogens* crimes.

4.3.4 The universal nature of the crime of torture

The narrow link between universal jurisdiction and international crimes in modern doctrine and practice necessitates a discussion on whether the status of torture as an international crime is sufficient to establish universal jurisdiction.

In his Separate opinion to the Arrest warrant case, President Guillaume does not accept such a link. Having examined certain examples of State practice and *opinio juris*, he cites the following passage by Lord Slynn of Hadley, one of the Law Lords in the Pinochet case:

“It does not seem ... that it has been shown that there is any State practice or general consensus let alone a widely supported convention that all crimes against international law should be justiciable in National Courts on the basis of the universality of jurisdiction ... The fact that an act is recognized as a crime under international law does not mean that the courts of all States have jurisdiction to try it ... There is no universality of jurisdiction for crimes against international law...”²⁵⁷

²⁵⁵ See Fox, *The law of state immunity* (2002), p 526.

²⁵⁶ See Rodley (1999), p. 130; and Randall (1987-88), p. 821.

²⁵⁷ See Separate opinion of Guillaume, §12, where reference is made to House of Lords, 25 November 1998, *R. v. Bartle*; ex parte Pinochet.

The ICTY in the Furundzija case bases their argumentation mainly on the *jus cogens* nature of the prohibition against torture. Simultaneously, it is evident that the Court also regards the *universal* nature of the crime as a relevant factor:

“This legal basis for States’ universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime.”²⁵⁸

After this passage, the ICTY cites domestic Courts that have invoked the universality of the crime as the main argument for universal jurisdiction.²⁵⁹ This signifies that the Court evaluate the universal nature of the crime as a supportive and complimentary argument for the lawfulness of conditioned universal jurisdiction.

The view of the ICTY has greater weight than the personal view of the ICJ’s President and a British Law Lord. It is still worth noticing that the opinions seem to be divided, and that the ICTY places a greater emphasis on the *jus cogens* character of the crime than its universal nature. Presumably, it is the combination of an international crime and a violation of a *jus cogens* norm which provides conditioned universal jurisdiction under current international law.

4.3.5 The *erga omnes* character of the prohibition against torture

Jus cogens norms are primarily substantive in nature while *erga omnes* obligations are procedural.²⁶⁰ On the basis of this observation can it be questioned whether the *erga omnes* character of a *jus cogens* norm is important for the establishment of universal procedural rights, or whether the three qualities of *jus cogens*, *erga omnes* and international crimes *together* justify universal jurisdiction. A brief examination of the relevance of *erga omnes* is thus useful.

The arguments of those who emphasise the importance of *erga omnes* are based on the following dictum in the Barcelona Traction case:

“...an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former concerned all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”²⁶¹

²⁵⁸ See the Furundzija case, § 156.

²⁵⁹ See § 156, where the Court cites Israeli courts in the Eichman case and US courts in the Demjanuk case.

²⁶⁰ See e.g. Ford, “Adjudicating *jus cogens*” (1994), p. 147.

²⁶¹ See the Barcelona Traction case, § 33.

The relevant statement in the dictum is that “all States can be held to have a legal interest” in the protection of *erga omnes* obligation. A textual interpretation of the term ‘legal interest’ could suggest that it refers to, or includes, a justified right to establish jurisdiction. The rationale presented by Randall is more or less representative of the publicists who invoke the argument of *erga omnes* in the discussion on universal jurisdiction:

“Violations of obligations *erga omnes* and *jus cogens* norms affect all states, whether committed by state actors or individuals. Indeed, domestic jurisdiction over those violations may draw support from the *Barcelona Traction* case dictum, which, though not without ambiguity, may support a type of *actio popularis*, enabling any state to vindicate rights common to all. If that dictum supports judicial remedies against state offenders, it logically also supports judicial remedies against individual offenders, thus complementing the universality principle. In this way, the *erga omnes* and *jus cogens* doctrines may buttress the universal jurisdiction of all states.”²⁶²

Further support has been founded on the argument that the *Barcelona Traction* dictum was delivered as a modification of an earlier dictum by the ICJ in the South-West Africa cases.²⁶³ In the South West Africa cases, Liberia and Ethiopia were denied *locus standing* in proceedings regarding South Africa’s administration of South West Africa, in particular in regard to South Africa’s practice of apartheid.²⁶⁴ According to the ICJ, international law did not recognize the legal standing of a State not directly involved in a case. The Court stated that humanitarian considerations could inspire, but not in itself entail a legal interest. Publicists that connect *Barcelona Traction* and South West Africa have inferred that the *erga omnes* statement must be read as an acceptance of every State’s legal interest in the fulfilment and enforcement of humanitarian standards.²⁶⁵

Arguments against the relevance of *erga omnes* and its link to the South West Africa cases are related to the observation that universal jurisdiction regards the enforcement of individual liability and not State responsibility.²⁶⁶ The context of both the *Barcelona Traction* case and the South West Africa cases were both inter-State conflicts, where no individuals were parties to the proceedings. The fact that the ICJ did not mention individual liability indicates that legal standing to enforce *individual* liability was regarded as irrelevant with respect to *erga omnes* obligations.

²⁶² See Randall (1987-1988), p. 831.

²⁶³ See the South West Africa cases, Judgment, ICJ Reports 1966, p. 34, § 50.

²⁶⁴ The case is presented in more detail in Brownlie (2003), pp. 449-52.

²⁶⁵ Schachter discussed the relationship between the *Barcelona Traction* judgment and the South West Africa cases in regard to inter-State conflicts, see Schachter (1991), pp. 208-13.

²⁶⁶ See Reydams (2003), p. 40.

The role of the State was also evident in the terminology of the ICJ, as the Court stressed that *erga omnes* obligations are owed by *States* towards the entire community of other *States*. An interpretation that the *erga omnes* nature of the prohibition against torture provides universal jurisdiction to enforce individual liability could therefore not be based on a textual interpretation of the Barcelona Traction dictum.²⁶⁷

Furthermore, in the Furundzija case, the ICTY addressed the relevance of torture being an *erga omnes* obligation without mentioning the enforcement of individual liability. In the two paragraphs that address torture as an *erga omnes* obligation, §§ 151-52, the ICTY did not add any new aspects to the concept that could involve a right for States to investigate and prosecute individuals. In regard to the rights of the States, the Court merely maintained that all States “has a right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued”. To insist on the State’s compliance is not the same as enforcing individual criminal liability. The fact that the Court elaborated on the *jus cogens* effect in regard to the right to prosecute individuals, while it remained silent on the relevance of *erga omnes*, may indicate that the Court only regard *jus cogens* to be irrelevant for the question of universal jurisdiction.

As long as no authoritative interpreter has connected *erga omnes* obligations to the enforcement of individual liability through universal jurisdiction, it appears difficult to argue that such a link exists. The absence of such a statement indicates rather that the *erga omnes* character of the prohibition against torture neither is necessary nor relevant for the right of other States to prosecute individuals. In regard to other States, the application of the term ‘legal interest’ at best appears to be limited to a standing before an international tribunal in an inter-State dispute.²⁶⁸

4.3.6 CAT

As mentioned above, CAT defines the crime of torture and places a common responsibility upon State Parties to investigate, prosecute and punish all acts of torture.²⁶⁹ State Parties are *also* under an obligation to prosecute *extraterritorial* crimes of torture whenever the offender is present in the territory and not extradited for prosecution in another State.²⁷⁰

²⁶⁷ See Higgins (1994), p. 57.

²⁶⁸ See the Barcelona Traction case, § 91; and Schachter (1991), pp. 208-13.

²⁶⁹ See articles 1, 4-8 and 12.

²⁷⁰ See CAT article 5 paragraph 2 and article 7. The application of these provisions will be examined in chapter 5.

CAT thus provides a basis in treaty law for obligatory conditioned universal jurisdiction over torture in regard to alleged offenders from other State Parties.

The interpretation of the content of this duty in regard to State Parties is analyzed in chapter 6. To be examined in subsection 4.3.6 is whether the adoption and recognition of CAT has established conditioned universal jurisdiction over torture as part of customary law, either in an obligatory or permissive form.

4.3.6.1 Has the duty enshrined in CAT developed into customary law?

Non-Party States are not bound by treaty obligations unless they explicitly give their consent.²⁷¹ A treaty provision of a fundamental norm-creating character may still develop into a binding rule for Non-Party States if both State Parties and Non-Party States demonstrate compatible behaviour and *opinio juris*.²⁷² Since CAT imposes an *obligation* to establish and exercise conditioned universal jurisdiction over alleged offenders who are not extradited, the natural question is whether this *duty* has become a rule of customary law through the traditional procedure of identifying State practice and *opinio juris*.

134 of the 191 UN member States are presently State Parties to CAT.²⁷³ There is State practice post Pinochet which signifies that certain State Parties fulfil their obligations under CAT, but the practice is limited. As mentioned in the introductory chapter, a Dutch court has convicted a Congolese national for torture committed in the Congo on the basis of CAT.²⁷⁴ France has initiated investigations in regard to alleged crimes of torture committed in Congo, but no one has yet been prosecuted.²⁷⁵ Belgium has claimed jurisdiction over torture committed in Chad under the rule of Habré and filed a case against the ex-Chadian dictator. After having examined State reports submitted to the Torture Committee up till 2001, Ingelse found only one reported case where a foreigner actually had been prosecuted for torture committed abroad against foreigners on the basis of CAT.²⁷⁶ Ingelse did not provide information on how many alleged torturers had been reported extradited for the purpose of prosecution.

²⁷¹ See article 34 in the Vienna Convention.

²⁷² See North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark) (Federal Republic of Germany v. Netherlands), ICJ Reports 1969, p. 45.

²⁷³ For information on ratifications of CAT as of 21 November 2003, see <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp> (visited 12.04.04).

²⁷⁴ See note 19.

²⁷⁵ See note 21 with accompanying text.

²⁷⁶ See Ingelse (2001), p. 351, referring to CAT/C/SR. 345, § 24.

In the case of Non-Party States, no practice of relevance is referred to in the examined literature.²⁷⁷ No expression of relevant *opinio juris* is either documented in this regard. The lack of reference to relevant State practice and *opinio juris*, especially among Non-Party States, is a strong indication that the obligation to establish and exercise conditioned universal jurisdiction under CAT has not developed into customary law.

The ICJ has so far not addressed this issue in any operative part of their judgments. As emphasised above, in the Furundzija case, the ICTY concluded that every State is *entitled* to apply conditioned universal jurisdiction, but the Court did not maintain that every State has a duty to apply this jurisdiction under customary law.²⁷⁸

In his Separate opinion to the Arrest Warrant case, Guillaume seems to conclude that the duty has developed into a rule of customary law:

“Whenever the perpetrator of any of the offences covered by these conventions is found in the territory of a State, that State is under an obligation to arrest him, and then extradite or prosecute. ... Thus, universal punishment of the offences in question is assured, as the perpetrators are denied refuge in all States.”²⁷⁹

When the statement is read in its context though, Guillaume does not appear to intend this interpretation of the wording. He argues that customary law traditionally only has recognized one case of universal jurisdiction, namely that of piracy,²⁸⁰ and that *treaty law* provides “compulsory, albeit subsidiary universal jurisdiction” for several crimes.²⁸¹ Guillaume himself does not elaborate further on the issue and its weight is in any case limited without any support in more authoritative sources.

No other evidence has been found in support of a customary *duty* to apply conditioned universal jurisdiction over an alleged torturer who is not extradited.

4.3.6.2 Has CAT lead to a permissive rule under customary law?

The next question then becomes whether the adoption of CAT by the UN General Assembly, and the recognition of CAT by 134 States Parties, has made conditioned universal jurisdiction a *right* under customary law.

The status of customary law in regard to universal jurisdiction over torture was uncertain at the time of the adoption of CAT. Certain States, such as the USA, argued that

²⁷⁷ See Ingelse (2001); Reydams (2003); and Cassese (2003).

²⁷⁸ The Furundzija case § 156.

²⁷⁹ See the Separate opinion of President Guillaume, § 9.

²⁸⁰ *Ibid.*, § 5.

torture was an enemy of all mankind and could be prosecuted anywhere in the same way as piracy. Other States, such as France, Australia and the UK, long opposed the provision on universal jurisdiction.²⁸² Nonetheless, the establishment and recognition of CAT by the State Members of the UN illustrated that the international community of States had a common interest in ensuring investigation and prosecution of torture. CAT further signified that the enforcement of individual liability *should* be a matter of international concern, independent of where torture had been committed or the nationality of the offender or the victim.

Randall finds the adoption of CAT and similar suppression conventions relevant for the existence of a customary right to apply universal jurisdiction over the crimes addressed in the conventions:

“While Parties are obliged to prosecute or extradite such offenders, nonParties have the right to prosecute those offenders. This view gains force from the adoption or approval of these conventions by consensus or with few dissenting votes by the representative international organizations...”²⁸³

Further support for this viewpoint may be inferred from the following statement by Lord Browne-Wilkinson, the senior judge in the Pinochet case:

“Not until there was some form of universal jurisdiction for punishment of the crime of torture could it really be talked about as a fully constituted international crime. What CAT did provide was missing: a worldwide universal jurisdiction.”²⁸⁴

Boulesbaa, on the other hand, interprets CAT to be irrelevant for the rights of Non-Party States under international law:

“The multi-State jurisdiction in the Torture Convention merely connotes ‘a multiplicity of jurisdictions’ limited to State Parties of the Torture Convention”.²⁸⁵

Indirect support for this conclusion can perhaps be drawn from the ICTY’s argumentation in the Furundzija case. Instead of arguing that the relevant obligations in CAT had developed into customary law, the Court maintained that every State had permission to prosecute on the basis that the prohibition against torture had acquired the status of a *jus*

²⁸¹ Ibid., § 7.

²⁸² See UN.Doc E/CN. 4/1314 (1978) for a summary of the comments received from Governments on the first Draft Articles of the Convention. See also Boulesbaa (1999), pp. 204-5.

²⁸³ See Randall (1987-88), p. 826.

²⁸⁴ See the opinion of Lord-Browne-Wilkinson, note 88, p. 21.

cogens norm. This indicates that the Court found it more valid to base conditioned universal jurisdiction upon the recognition of torture a *jus cogens* rule than the establishment and adoption of CAT.

On the basis of this material it appears difficult to conclude on the relevance of CAT for the establishment of a customary permissive rule on conditioned universal jurisdiction over torture. There is little doubt, however, that the existence of CAT is important as a political justification for such jurisdiction. In an evaluation of whether customary law recognizes conditioned universal jurisdiction or not, CAT would surely be included as a relevant argument in support of such a rule.

4.3.7 Concluding observations on conditioned universal jurisdiction

4.3.7.1 Conclusion under the main rule

According to the main rule proposed by the PCIJ, States have conditioned universal jurisdiction on the basis of their own sovereignty. The only limitation is that the exercise of conditioned universal jurisdiction must not violate other rules of international law. Of importance in this regard are especially 1) the prohibition against exercise of jurisdiction outside the territory of the legislating State, 2) the principle of non-interference in the exclusive domestic jurisdiction of other States and 3) other rules which may bar prosecution in a given case, e.g. a valid claim of immunity.

While immunity rules are left outside the scope of the thesis, none of the other rules have been found to prohibit conditioned universal jurisdiction over torture. Conditioned universal jurisdiction is enforced within the State's own territory, and the prosecution does not interfere in the exclusive domestic jurisdiction of the territorial State. If the territorial State is *not* a State Party to neither CAT, the Inter-American Convention, the ICCPR, the ACHR nor the ECHR, the *jus cogens* character of the prohibition against torture, together with its *erga omnes* nature and the recognition of torture as an international crime, provides sufficient evidence that the right to prosecute torturers is not an exclusive internal affair under customary law.

4.3.7.2 Conclusion under the alternative rule

Under the alternative rule, States must prove that they have conditioned universal jurisdiction according to an explicit rule of international law. Furthermore, States must

²⁸⁵ See Boulesbaa (1999), p. 205.

ensure that the exercise of jurisdiction does not violate any other international rules of relevance. The prohibitive rules mentioned in regard to the main rule are equally important under this approach.

In the case of torture, the recognition of the *jus cogens* nature of the prohibition against torture, the recognition of torture as an international crime and the adoption and wide recognition of CAT, are all relevant arguments in favour of an international customary rule providing conditioned universal jurisdiction. This conclusion is supported by the ICTY, as well as by individual judges of the British House of Lords and a number of acknowledged publicists on international criminal law. It is nonetheless difficult to determine when such a customary rule emerged. This study will therefore only conclude that customary law *at present* provides conditioned universal jurisdiction over torture. If conditioned universal jurisdiction is exercised in regard to torture committed at an earlier point in time, the temporal scope of the customary rule may be of relevance.²⁸⁶

4.3.8 Concluding observations on absolute universal jurisdiction

4.3.8.1 Conclusion under the main rule

Under main rule, absolute universal jurisdiction is just as lawful as conditioned universal jurisdiction. The principle of non-interference does not apply differently than in the case of conditioned universal jurisdiction since the jurisdiction only can be enforced within the territory of the legislating State. In order to exercise this jurisdiction, the State must also in this case ensure that no prohibitive rules are violated. The question of whether or when absolute universal jurisdiction *should* be applied is a separate question, which will be elaborated on in subsection 6.3.

4.3.8.2 Conclusion under the alternative rule

Under the alternative rule, absolute universal jurisdiction also needs an explicit basis in customary law in order to be lawful. Significantly, though, a customary rule on absolute universal jurisdiction over torture is not supported by authoritative evidence. No international tribunals have explicitly addressed the issue. Some domestic legal systems have adopted the principle, but domestic legal courts have not relied upon this jurisdiction without some additional jurisdictional principles, in most cases the passive personality

²⁸⁶ The relevance of the temporal scope of conditioned universal jurisdiction under CAT is examined in subsection 5.2.2.

principle. This is well illustrated by the Pinochet case and the Eichman case. Furthermore, in the Furundzija case, the ICTY linked the right to prosecute torture to the presence of the alleged offender. This leads to the conclusion that absolute jurisdiction over torture under the alternative rule is unlawful under current international law, unless the territorial State itself requires or gives consent to its application.

5 Universal jurisdiction over torture under CAT

5.1 The duty under CAT to establish conditioned universal jurisdiction

Having examined universal jurisdiction over torture under customary law, the focus of study turns now to treaty law. The present chapter will analyse the application of conditioned universal jurisdiction over torture under CAT.

5.1.1 Introduction to the text of article 5 paragraph 2

CAT addresses the establishment of jurisdiction in its article 5:

“1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

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

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.”²⁸⁷

With the words “Each State Party shall take such measures as may be necessary to establish its jurisdiction” in paragraph 1 and 2, the article stipulates a positive obligation for State Parties to establish jurisdiction. The offences referred to in article 4, for which jurisdiction shall be established, are “all acts of torture”, including “attempt[s] to commit torture” and acts “which constitutes complicity or participation in torture”.²⁸⁸

²⁸⁷ The formulation in article 5, especially paragraph 2 and 3, resembles that which appears in other international suppression conventions, see Bassiouni and Wise (1995).

²⁸⁸ See the Annex for the full text of CAT article 4.

Jurisdiction is to be established in four different situations. These situations reflect different principles of criminal jurisdiction.²⁸⁹ The jurisdiction in paragraph 1 litra a is based on the territorial principle; jurisdiction shall be established over all acts committed within the territory of the State. The jurisdiction in paragraph 1 litra b is based on the active nationality principle; jurisdiction shall be established over all acts committed by nationals of the State, independent of where they have been committed. The jurisdiction in paragraph 1 litra c is based on the passive nationality principle; jurisdiction *may* be established over all acts committed against nationals of the State, independent of where they have been committed. The jurisdiction in paragraph 2 is based on the conditioned universality principle and linked to the duty to extradite or prosecute;²⁹⁰ jurisdiction shall be established over alleged torturers who are present in their territory and not extradited. No other nexus is required than the voluntary presence of an alleged offender.

Article 5 paragraph 3 stresses that CAT does not limit the right of the State Parties to exercise wider criminal jurisdiction in accordance with internal law. The right to establish and exercise e.g. absolute universal jurisdiction is accordingly regulated by customary law, not CAT.²⁹¹

Of relevance for the discussion of article 5 is only paragraph 2, which provides conditioned universal jurisdiction over torture. While some commentators reject the use of the term universal jurisdiction in regard to treaty provisions linked to the formula *aut dedere aut judicare*,²⁹² others apply it as a matter of course.²⁹³ Since the main characteristics are equal, the present thesis uses the term ‘conditioned universal jurisdiction’ in regard to both customary and treaty law.

²⁸⁹ For a thorough elaboration and comparison of the different forms of criminal extraterritorial jurisdiction, see e.g. Reydams (2003), pp. 21-4, Cassese (2003), pp. 277-91, Shaw (2003), pp. 579-610, and Bassiouni, “Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice” (2001-2002), p. 90, note 34.

²⁹⁰ In latin *aut dedere aut judicare*. See chapter 3, section 3.3 above for an introduction to the development of this duty. See section 5.2 below for an analysis of this duty under CAT.

²⁹¹ The status of customary law in regard to absolute universal jurisdiction is discussed in chapter 4, with conclusion in subsection 4.3.7.

²⁹² See e.g. Boulesbaa (1999), pp. 204-5, preferring the term ‘multi-State jurisdiction’.

²⁹³ See e.g. Cassese, note 40.

5.1.2 The scope in regard to the nationality of the alleged offender

Treaties are only binding on State Parties, or third States which have consented thereto.²⁹⁴ A ‘law-making’ treaty may nonetheless create general norms with universal application, as long as treaty provisions do not violate rights of third States under customary law.²⁹⁵

Since the object of CAT is to strengthen the *universal* recognition and enforcement of the prohibition against torture,²⁹⁶ a reasonable question is whether CAT addresses torture committed by nationals of all States, or only torture committed by nationals of State Parties. This question is practical both in regard to the interpretation of CAT article 5 paragraph 2 and article 7, but its exploration appears most natural under the heading of article 5.²⁹⁷

5.1.2.1 The text, context and purpose of article 5 paragraph 2

According to the main rule on treaty interpretation, article 31 of the Vienna Convention, treaties shall be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty. These terms shall be read in their context and in the light of the object and purpose of the treaty.²⁹⁸ To be examined in this section is the text of article 5 paragraph 2, its context in CAT and the purpose of CAT.

The obligation in article 5 paragraph 2 is formulated as a duty for the custodial State to “establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in article 1”.²⁹⁹ According to the text, there are two cumulative criteria which determine the scope of the duty to establish jurisdiction. The first criterion is that an alleged offender has to be present within the territory of a State Party. The second criterion is that the alleged offender is not extradited pursuant to article 8 to any State having jurisdiction under paragraph 1. If these two criteria are fulfilled, there is no alternative for the State Party but to establish jurisdiction over the alleged torturer.

²⁹⁴ See article 34 of the Vienna Convention.

²⁹⁵ As opposed to ‘treaty-contracts’, which only applies to a limited number of State Parties. The distinction is practical rather than formal, see Shaw (2003), pp.88-9.

²⁹⁶ See Burgers and Danelius, *A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988), pp. 1 and 131; and Ingelse (2001), p. 318.

²⁹⁷ The duty to exercise jurisdiction in article 7 refers to the situations prescribed in article 5. The text of article 7 is presented in subsection 5.2.1.

²⁹⁸ Included in the context are also any subsequent agreements on interpretation, any subsequent practice that establishes an agreement of the State Parties, and any customary rules applicable in the relations between the Parties, see article 31 paragraph 2. None of these sources are referred to in the scholarly treatment of article 5 paragraph 2. The following literature has been examined: Burgers and Danelius (1988); Boulesbaa (1999); and Ingelse (2001).

Difficulties arise in conjunction with the second cumulative criterion, which is fulfilled if the alleged perpetrator is not extradited under article 8 to any State having jurisdiction under paragraph 1. As article 8 only regulates extradition between State Parties, the custodial State could not extradite an alleged torturer to a Non-Party State pursuant to article 8.³⁰⁰ Because the scope of the extradition alternative in article 5 paragraph 2 in practice is limited to nationals of State Parties, the question is whether this aspect of the criterion also limits the scope of the first criterion.

While paragraph 2 is formulated as a duty either to *establish* jurisdiction or *extradite*, with no other alternative, a textual interpretation suggests that *all* alleged torturers present in the territory either should be extradited or covered by the jurisdiction. This interpretation is also supported by the ordinary meaning of the term “the alleged offender”, which is not linked to any nationality requirement in article 5 paragraph 2. The absence of such a requirement is different from article 5 paragraph 1 *litra* b and c, where the issue of nationality is specifically addressed. Even though the reference to article 8 limits the scope of the second criterion, the formulation of the first criterion and its context in article 5 does not suggest that it also restricts the scope of alleged offenders covered by the first criterion.

It is important to note that CAT may not effect the application of existing extradition agreements between State Parties and Non-Party States.³⁰¹ Although nationals of Non-Party States cannot be extradited on the basis of article 8, the custodial State may have a primary obligation to extradite these individuals on the basis of multilateral or bilateral extradition agreements independent of CAT. The text of article 5 paragraph 2 does therefore not limit the extradition alternative to nationals of State Parties.

The sole consequence of limiting the scope of the second criterion to article 8 would be that the custodial State Party has a duty to establish subject matter jurisdiction over all alleged torturers who can not be extradited to a State Party pursuant to article 8 with jurisdiction according to paragraph 1.

²⁹⁹ The term “such offences” refers to all cases of torture, as defined in article 4.

³⁰⁰ It follows from article 8 paragraph 1 that State Parties to CAT have to include torture as an extraditable offence in any extradition agreement between them. According to paragraph 2, CAT shall serve as an extradition treaty if there is no such treaty between two State Parties and the custodial State requires a treaty basis for extradition. States that do not require an extradition agreement shall also recognize torture as extraditable offences in relation to other State Parties according to paragraph 3. Under paragraph 4, for the purpose of extradition between State Parties, all acts of torture shall be considered as if they had been committed also within the territory of the States required to establish their jurisdiction in accordance with article 5 paragraph 1.

³⁰¹ See article 34 of the Vienna Convention.

The interpretation that alleged torturers of all nationalities are covered by article 5 paragraph 2 is further supported by the objective of the Convention to create an effective system for the enforcement of the prohibition against torture.³⁰² As stated in its preamble, CAT was created based on a desire “to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world”. The formulation embeds a clear ambition to fight torture and torturers on a universal basis. If article 5 paragraph 2 was to be interpreted to only impose a duty to establish jurisdiction over nationals of State Parties, the effectiveness of the Convention would be drastically reduced. Only if the article is applicable to *all* alleged torturers can the Convention prevent the territories of State Parties from becoming safe havens for torturers. Hence, the objective and purpose of the Convention support an interpretation which includes all nationalities.³⁰³

5.1.2.2 Interpretations of publicists

Ingelse proposes that the aim of CAT apparently includes nationals of Non-Party States , while the reference to article 8 suggests that they are not.³⁰⁴ On this basis he is hesitant to conclude that a State Party which fails to establish an extensive universal jurisdiction is in breach of a Convention obligation.³⁰⁵ Instead he recommends that the Torture Committee should encourage State Parties to voluntarily include nationals of Non-Party States .³⁰⁶ This conclusion may seem reasonable, but only if one agrees that the textual interpretation clearly supports his conclusion.

Burgers and Danelius, on the other hand, do not explicitly discuss whether there may be any limitations to the duty to establish jurisdiction:

“Paragraph 2 provides that, whether or not any of the grounds of jurisdiction dealt with in paragraph 1 exist, a State Party shall have jurisdiction over offences of torture in *all* cases where the alleged offender is present in a territory under its jurisdiction and it does not extradite him to a State which has jurisdiction under paragraph 1 (emphasis added). In view of paragraph 2, the Convention can be said to be *based on the principle of universal jurisdiction* (emphasis added).”³⁰⁷

³⁰² See Ingelse (2001), p. 318; and Burgers and Danelius (1988), p. 131.

³⁰³ The preparatory work of CAT does not address the issue, see Ingelse (2001), p. 322.

³⁰⁴ See Ingelse (2001), pp. 322-3.

³⁰⁵ Ibid, p. 323.

³⁰⁶ See Ingelse (2001), p. 327.

³⁰⁷ See Burger and Danelius (1988), pp. 132-3.

Since Burgers and Danelius are silent on the issue, interpretations of their comment may turn into speculations. It might be argued that the term “all cases” in combination with the term “universal jurisdiction” support the conclusion that alleged torturers from all States are included in the scope. However, even though they stress that the jurisdiction in article 5 paragraph 2 is based on the principle of universal jurisdiction, this do not have to mean that the jurisdiction necessarily also covers nationals of Non-Party States . The legal relevance of their comment is therefore limited in this respect.

5.1.2.3 State practice

As Ingelse interprets the formulation of article 5 paragraph 2 to exclude nationals of Non-Party States , practice concerning its implementation is of some interest. Albeit State practice does not necessarily signify *opinio juris*, it illustrates how State Parties have chosen to fulfil their treaty obligation.

Reydams has examined the ambit of the criminal law of 14 States in regard to universal jurisdiction, which were all State Parties to CAT.³⁰⁸ The countries examined were Australia, Austria, Belgium, Canada, Denmark, France, Germany, Israel, the Netherlands, Senegal, Spain, Switzerland, The United Kingdom and the United States of America. The examination shows that none of the States had limited their provisions on conditioned or absolute universal jurisdiction to nationals of State Parties.³⁰⁹ Four of the States had established conditioned universal jurisdiction over all alleged torturers present in their territories through a special act implementing CAT.³¹⁰ Nine of the States had established general clauses that endow their municipal courts with universal jurisdiction in accordance with their treaty obligations.³¹¹

As laid out in the argumentation above, it is not clear whether this State practice is the result of a perceived duty or practical considerations. Therefore, the implementation of article 5 paragraph 2 by individual State Parties has no critical significance for the determination of its scope. Still, it is worth noting that 13 of the 14 States which had

³⁰⁸ See Reydams (2003).

³⁰⁹ For his conclusion on this matter, see Reydams (2003), p. 220.

³¹⁰ Examples referred to in Reydams (2003) are Australia, p. 89; The Netherlands, pp. 167-9; The UK, pp. 203-4 and note 40, pp. 208-9; and the USA, p. 215.

³¹¹ Examples referred to in Reydams (2003) are Austria, pp. 94 and 97; Denmark, pp. 127-6; France, pp. 132-3; Belgium, p. 105; Canada, p. 119; Germany, pp. 142-3; Israel, p. 159; Spain, p. 183; and Switzerland, p. 194.

established universal jurisdiction had established a general jurisdiction rather than a jurisdiction limited to nationals of State Parties to treaties.³¹²

5.1.2.4 No treaty obligation may modify sovereign rights of third States

The final issue to be examined with respect to the scope of article 5 paragraph 2 is whether a duty to include nationals of Non-Party States infringes sovereign rights of third States. If this is the case, the scope of the duty must be limited to nationals of State Parties independent of the text and object of CAT.

Illustrative of this problem is the dispute between the US and State Parties to the ICC treaty, concerning the right of the State Parties to use the authority of the Rome Statute to prosecute nationals of Non-Party States, such as the US. The US has argued that the wording of the ICC treaty constitute a violation of the sovereign right of the US to oppose new treaty obligations and reject any binding effect of an emerging customary rule through persistent objections.³¹³ This argument may be questioned, in particular since all States are understood to have conditioned universal jurisdiction under *customary law* over the crimes covered by the ICC Statute.³¹⁴ Still, the case is interesting as it suggests that non-State Parties to CAT may reject the conditioned universal jurisdiction of State Parties on the same basis.

A question of more abstract nature, which arises in conjunction with CAT, is whether rights of Non-Party States should be examined in regard to the duty to *exercise* jurisdiction under article 7. As demonstrated by State practice, extraterritorial *legislative* jurisdiction is seldom a matter of international concern before it is enforced.³¹⁵

In the case of CAT, the scope of the duty to establish jurisdiction is closely related to the scope of the duty to exercise jurisdiction. According to article 7 paragraph 1, State Parties have a duty to extradite or prosecute alleged torturers “in the cases contemplated in article 5”. Since CAT presumes that the situations covered by article 5 and article 7 in general are the same, it appears useful to examine the relevance of third States rights with respect to article 5. This discussion has then implications also for the scope of the duty to

³¹² At the time of Reydams examination, Senegal had not yet established any form of universal jurisdiction in its domestic law, see Reydams (2003) p. 180.

³¹³ The US invoked arguments from the ICJ in the Fisheries case (UK v. Norway) as support for their dissent, see ICJ Reports 1951, p. 131.

³¹⁴ See Scharft, “The ICC’s Jurisdiction over the Nationals of Non-Party States” (2000), pp. 213-37.

³¹⁵ The observation is also made by Schachter (1991), p. 257; and Reydams (2003), p. 25.

exercise jurisdiction under article 7, even though the exercise of jurisdiction may be further limited, e.g. by a temporal limitation or a valid claim of immunity.³¹⁶

The fundamental rule concerning the relationship between treaty obligations and third States rights is codified in article 34 of the Vienna Convention. According to this rule, no treaty obligation may create a right or obligation for third States without their consent. In its commentary to the Vienna Convention, the International Law Commission acknowledged, referring to the practice of international tribunals, that also *modifications* of rights in principle require the consent of third States:

“International tribunals have been firm in laying down that in principle treaties, whether bilateral or multilateral, neither impose obligations on States which are not Parties nor *modify* in any way their legal rights without their consent (emphasis added).”³¹⁷

In view of the fact that neither the establishment nor the exercise of jurisdiction may create rights or obligations for third States, the relevant question is whether the establishment and later exercise of conditioned universal jurisdiction *modifies* an exclusive right of third States to prosecute their own nationals.

The problem of whether States originally has an exclusive right to prosecute torture is related to the discussion on whether the matter is within the exclusive domestic jurisdiction of the territorial State. It is further related to the question of whether other States have conditioned universal jurisdiction under customary law. If both questions are answered affirmatively, a duty to establish, and later exercise, conditioned universal jurisdiction would not violate third State rights. If all States have conditioned universal jurisdiction over torture under customary law, a treaty rule transforming this right into a duty would not modify any rights of third States.

As concluded in chapter 4, the prosecution of torture does not appear as a matter exclusively regulated by internal law or treaty provisions.³¹⁸ This study has also concluded that conditioned universal jurisdiction is lawful under customary law, both in regard to the main rule and the alternative rule presented by the PCIJ in the Lotus judgement.³¹⁹ The different aspects of the international recognition of the prohibition against torture, and relevant interpretations of the legal effect of this recognition by both authoritative and less

³¹⁶ See section 5.2 in regard to the temporal question.

³¹⁷ See the Report of the International Law Commission, published in Watts, *International Law Commission 1949-1998*, Vol. II, p. 698.

³¹⁸ See subsections 4.3.2 and 4.3.7.

³¹⁹ See subsection 4.3.7.

authoritative sources, provide substantial support for these two conclusions.³²⁰ Thus, under current international law, article 34 of the Vienna Convention does not constitute an obstacle for the inclusion of nationals of Non-Party States in the scope of article 5 and 7.

5.1.2.5 Conclusion

The wording of article 5 paragraph 2, as interpreted in subsection 5.1.2.1, suggests that no alleged offender is excluded from the scope of jurisdiction under article 5 paragraph 2. The object of CAT and the State practice referred to above supports this solution. State Parties to CAT are thus under an obligation to establish conditioned universal jurisdiction over all alleged torturers present in their territory who are not extradited to State Parties. The decision whether to extradite or prosecute nationals of Non-Party States is then to be decided by the competent authorities under article 7.

5.2 The duty under CAT to exercise conditioned universal jurisdiction

5.2.1 Introduction to the text of article 7

As mentioned above, CAT addresses the enforcement of jurisdiction in its article 7. Under this provision, State Parties are under a duty to exercise conditioned universal jurisdiction through the principle of *aut dedere aut judicare*. Article 7 reads in full text:

“The 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.

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.

Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.”³²¹

In paragraph 1 a, the article formulates a positive obligation upon State Parties to enforce conditioned universal jurisdiction over alleged torturers present in their territory who are not extradited. The situations in which jurisdiction shall be enforced is “the cases

³²⁰ See subsections 4.3.3-4.3.6.

³²¹ The formulation in article 7 is similar to that which appears in other suppression conventions, see Bassiouni and Wise (1995).

contemplated in article 5". Even though the scope of the duty to establish jurisdiction under article 5 determines the outer limits for the scope of the duty to exercise jurisdiction,³²² the duty to exercise jurisdiction may be further limited by other factors. To be examined here are three issues of special importance for the duty to exercise jurisdiction in individual cases: 1) the temporal scope of the duty, 2) the interrelationship between the duty to extradite and the duty to prosecute and 3) the exercise of prosecutorial discretion.³²³

5.2.2 The temporal scope of article 7

The time of the crime may be of relevance for the scope of the duty to exercise jurisdiction. As it is customary to decide the temporal scope in regard to exercise of jurisdiction, rather than the establishment of jurisdiction, this aspect of CAT is discussed in regard to article 7. This is e.g. the common procedure in regard to criminal provisions in domestic law. In spite of the fundamental prohibition against non-retroactivity of substantial criminal provisions, such provisions do not themselves spell out their temporal scope, neither in domestic law nor in the statutes of international criminal tribunals. They are nonetheless applied from the time each provision entered into force.

5.2.2.1 The relevance of article 34 of the Vienna Convention

As concluded with respect to article 5 paragraph 2, article 34 of the Vienna Convention does not limit the scope of the duty to *establish* conditioned universal jurisdiction. The rationale leading to this conclusion is that conditioned universal jurisdiction over torture today must be recognized as customary international law.³²⁴ The scope of the duty to *exercise* conditioned universal jurisdiction is in addition dependent on the status of customary law at the time of commission of a given crime. Unless the territorial State at that time had ratified CAT or later consents to the jurisdiction of the custodial State, the status of customary law decides whether the exercise is a violation of article 34 or not. The result of the examination of customary law may depend on whether the main rule or the alternative rule proposed by the PCIJ in Lotus applied at the time of the crime.³²⁵

³²² See the discussion in subsection 5.1.2.

³²³ Claims related to immunity and domestic amnesties may also be of relevance.

³²⁴ See chapter 4, with conclusion in subsection 4.3.7.

³²⁵ See content of the different rules are explored in section 4.2.

5.2.2.2 Non-retroactivity of treaties under article 28 of the Vienna Convention

According to customary law, as codified in article 28 of the Vienna Convention, no treaty is to be given retroactive effect unless otherwise decided by the Parties. The rule is linked to the sovereignty of the State, in the sense that State Parties themselves decide the temporal scope of a treaty obligation. According to the formulation in article 28:

“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that Party.”

CAT article 27 regulates the entry into force of CAT. The article does not address the issue of whether CAT binds State Parties in regard to torture committed prior to the entry into force of CAT in regard to the individual State Party. No other part of CAT addresses this issue either. In this situation, the main rule contained in article 28 applies.

According to the wording of article 28, State Parties to CAT are under no obligation to exercise jurisdiction over torture committed before they themselves become State Parties to CAT. An act of torture constitutes an “act or fact” in the terminology of article 28, and State Parties would only have a duty to extradite or submit for prosecution individuals accused of torture committed *after* CAT entered into force with respect to the custodial State Parties.

This conclusion is coherent with CAT article 4, under which a State Party must criminalize all acts of torture, and CAT article 5, under which a State Party must establish the necessary jurisdiction over extraterritorial acts of torture. Only from the date a State is bound by CAT can the State be expected to have criminalized and established jurisdiction over torture in accordance with CAT. Hence, only from this point in time is it reasonable to require State Parties to react upon crimes of torture committed abroad amongst foreigners. The rationale behind prosecution or extradition would fail if the extraterritorial crime was not covered by domestic law of the custodial State at the time it was committed.

The status of domestic law may further influence the *application* of the temporal scope of article 7. Even though lacking domestic legislation is unacceptable as an excuse for non-fulfilment of international treaty obligations,³²⁶ domestic courts could reject to exercise jurisdiction which did not exist at the time of the crime.³²⁷

³²⁶ See article 27 of the Vienna Convention.

³²⁷ The relevance of domestic criminalization of extraterritorial acts of torture was emphasized in the Pinochet case, see e.g. the opinion of Lord Hope of Craighead, note 88, p. 60.

None of the scholars in the examined literature have addressed the application of non-retroactivity in regard to article 7. The House of Lords addressed the temporal question in the Pinochet case, but the discussion was mainly related to the requirement of double criminality under British law. The wording of article 28 and the context of CAT provides nonetheless solid support for the conclusion that the temporal scope of article 7 is limited to acts of torture committed after the custodial State became bound by CAT.

5.2.2.3 The principle of *nullum crimen sine lege*

The exercise of criminal jurisdiction must not violate the principle of *nullum crimen sine lege*.³²⁸ If torture neither was criminalized in the territorial State, nor recognized as an international crime when the act was committed, the principle of *nullum crimen sine lege* constitutes a bar against prosecution. On the other hand, if the crime of torture was recognized as a crime under international law at the time of the crime, the domestic law of the territorial State is irrelevant. The principle of *nullum crimen sine lege* would not constitute a bar against prosecution, even if the territorial State had not criminalized torture at the time of the crime.

5.2.2.4 Conclusion

The temporal scope of article 7 is thus restricted by three cumulative conditions. The first condition is that torture has been committed after CAT became binding upon the *custodial* State. The second condition is that the *territorial* State had ratified CAT at the time of the crime, or alternatively that the exercise of jurisdiction was lawful under customary law *at the time of the crime*. The third condition is that the *territorial* State had criminalized torture at the time of the crime, or that the crime of torture was recognised as an international crime at the time it was committed. The temporal scope of article 7 does of course not limit the *right* to exercise conditioned universal jurisdiction over torture under customary law.

5.2.3 Is the duty to prosecute subsidiary to the duty to extradite?

The territoriality of criminal law is fundamental. There can be no doubt that the domestic penal codes of each State is adopted primarily with the objective to prescribe and punish criminal conduct occurring within the State's own territory. State practice also signifies that territorial prosecution by far is the most common form of criminal enforcement.

³²⁸ The principle is presented and debated in regard to torture in section 2.7.

Accordingly, in most cases it will be in the interest of both the territorial State and the custodial State that prosecution takes place in the territorial State.

Nevertheless, situations where the custodial State regards the territorial State as unable or unwilling to conduct a fair trial may still arise. The impression of such inability or unwillingness could be based on reports of e.g. an inadequate judicial system or an unstable and dangerous political situation. In these circumstances, the question arises whether the custodial State has discretion to reject a claim for extradition from the territorial State and submit the case to its own prosecutorial authorities for the purpose of prosecution. If the custodial State has the right to reject an extradition claim on this basis, the duty to extradite or prosecute is ‘alternative’ in nature. If the custodial State in every case has to comply with an extradition request from the territorial State, or another State with jurisdiction under article 5 paragraph 1, the duty to submit the case for prosecution is ‘subsidiary’ to the duty to extradite.

Before examining the interrelationship between the duty to extradite and submit for prosecution, it is important to remember the supremacy of extradition agreements. In the event of the existence of a valid extradition agreement between the custodial State and the territorial State, the custodial State has a duty to extradite in accordance with the agreement. Such treaty obligations are not altered or modified by CAT.³²⁹ The in the following investigation is accordingly only relevant for situations *not* covered by a binding extradition agreement between the States involved.

5.2.3.1 The text, context and purpose of article 7

According to the wording of article 7 paragraph 1, every State Party has a duty to either extradite *or* submit for prosecution alleged offenders present in their territory. There is no supremacy for extradition over prosecution according to the text. The text itself provides therefore clear support for the conclusion that the duty to submit for prosecution is alternative rather than subsidiary to the duty to extradite.

The same conclusion may be drawn from article 5, upon which jurisdiction is established. This article creates a system where several States have concurrent and competing jurisdiction over the same act of torture, but does not deal with the issue of priority. Thus, in principle each State with jurisdiction under article 5 has an equal right to prosecute if the State obtains custody of an alleged torturer.

³²⁹ See article 34 of the Vienna Convention.

One of the basic aims of CAT is further to contribute to the enforcement of individual liability for torture through fair criminal proceedings. Could this be achieved in the territorial State, compliance with an extradition claim would appear as the preferred solution for all Parties involved. The availability of evidence and witnesses would improve, and the general deterrent effect would be stronger in the community where the crime was committed. The victims would have greater possibility to take part in the process of legal enforcement, if they had a wish or an ambition to do so. Conversely, if a military dictatorship has replaced a rule of law, or if substantial evidence suggests that non-legal considerations will determine the decision to prosecute and the judgement itself, prosecution in the custodial State would be preferred. Under such circumstances, the object of CAT will only be realized through prosecution in the custodial State.

The text and aim of CAT suggests therefore that State Parties have freedom to evaluate and choose the most appropriate alternative in each given case. Extradition would only be preferable if the territorial State, or alternatively another State with a close nexus to the crime, was both willing and capable of conducting a fair trial.

5.2.3.2 Interpretations of publicists

The only publicist examined who comments in some detail on the issue is Boulesbaa. He is of the opinion that the duty to prosecute is subsidiary to the duty to extradite on the basis of two grounds; a principle of reasonableness and the principle of non-interference in the exclusive domestic jurisdiction of the State.³³⁰ The relevance of the two grounds he invokes in support of his argument will be discussed separately below.

The principle of reasonableness is adopted in the Restatement and formulated in the following manner:

“When it would be not unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescription by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state’s interest in exercising jurisdiction, in light of all the relevant factors”.³³¹

Among the relevant factors enumerated are: the link to territory, other connections between the State and the act, the importance of jurisdiction, the existence of justified expectations and the traditions of the international system. The list is not exhaustive.³³² When all

³³⁰ See Bulesbaa (1999), p 179 and p. 235. The relevance of the principle of non-interference in regard to customary law was examined in chapter 4, see subsections 4.3.2 and 4.3.7.

³³¹ See the Restatement, section 403 (3).

³³² Ibid, section 403 (2).

relevant factors are evaluated, a State should “defer to the other state if that state’s interest is clearly greater”.³³³

The matter to be examined here is whether the principle applies to extraterritorial criminal jurisdiction under customary international law. The principle has been developed by US courts in the field of *private* international law and anti-trust litigation, which is not a part of public international law. While this principle has proved convenient in relation to the so-called “effect” doctrine, where a State may assume jurisdiction over a commercial act which has produced effects within its own territory, it is not evident that the principle applies to the exercise of jurisdiction under CAT.

The Restatement suggests that the principle of reasonableness has been recognized as a general principle of customary law.³³⁴ However, this interpretation is not supported by international authoritative sources. The customary status of the principle is also a topic of debate within American legal academia. An illustration is Schachter’s citation of a US Federal Judge in disagreement with the Restatement on this issue:

“International law does not require a court (or government) to override a less reasonable assertion as long as both are in fact consistent with the limitations on jurisdiction imposed by international law.”³³⁵

Moreover, the main argument *de lege ferenda* against the principle is interesting, as it is argued that the balancing of interests creates substantial difficulties and that it should be treated as a rule of *comity* rather than a requirement of law.³³⁶

Had a principle of reasonableness applied to article 7, the State with the greatest interest would prevail in a conflict of jurisdictions. The custodial State would be under an unconditional obligation to comply with a claim of extradition based on CAT article 5 paragraph 1.³³⁷ Such an interpretation does not fit well with the wording of article 7 and would require a solid basis in customary law to prevail over an interpretation based on the text. The lack of evidence of consistent State practice and *opinio juris* supports the

³³³ Ibid, section 403 (3).

³³⁴ See the Restatement, Section 403, Comment a.

³³⁵ See Schachter (1999), pp 260-1, referring to *Laker Airways Ltd. v. Sabena et al.*, 731 F. 2d, pp. 951-2.

³³⁶ See Schachter (1999), pp. 259-60.

³³⁷ If several States claim jurisdiction, Boulesbaa seems to support the following hierarchy of jurisdictions: 1) the territorial State, 2) the State of the offender, 3) the State of the victim, and 4) the custodial State, see Boulesbaa (1999), p. 203. The suggested hierarchy was suggested by the International Association of Penal Law in the Draft Convention for the Prevention and Suppression of Torture, UN Doc. E/CN.4/NGO.213 (1987). The draft was never adopted, but under the principle of reasonableness, the hierarchical structure would probably be resembled in State practice.

conclusion that customary law does not provide such a rule, at least not in regard to extraterritorial jurisdiction over international crimes.

Boulesbaa further argues that the exercise of jurisdiction is conditioned by the principle of non-intervention in the domestic affairs of other States.³³⁸ He suggests that the requirements of the principle of non-intervention implies that the territorial State under any circumstances has a primary right to prosecute. If this State requests jurisdiction, the custodial State would be under an absolute obligation to extradite. Only if the territorial State did not require extradition could the custodial State submit the case to its competent authorities without violating the principle of non-intervention.³³⁹

Boulesbaa finds support for his argumentation in the preparatory work of the Convention, where the drafters expressed an intention not to offend the principle of non-intervention. The weight of this argument may be disputed, since the preparatory work of the Convention is only relevant as a supplementary means of interpretation. Only if the interpretation based on the adopted text and the purpose of the provision is ambiguous or unreasonable, should arguments from the process of drafting be referred to in support of a different meaning.³⁴⁰

Given the lack of ambiguity in the textual interpretation of article 7, the final alternative is that the result based on the text is unreasonable. This alternative does not seem appropriate. If the territorial State itself is considered to be unable or unwilling to conduct a fair trial, it does not appear unreasonable to let a custodial State Party investigate and prosecute the alleged offender of torture; especially when the territorial State itself has accepted the formulation in the adopted text. If the territorial State is a Non-Party State, the customary status of the principle of non-interference in regard to the prosecution of torture must be examined.³⁴¹

Guillaume, like Bassiouni, is of the opinion that extradition must have primacy to prosecution. In his Arrest Warrant-opinion, Guillaume writes that “subsidiary universal jurisdiction [is] provided for by various conventions”.³⁴² He does not, however, explain what he means by using this terminology.

Bassiouni and Wiese argue that there is no supremacy for one alternative over the other when the obligation to extradite or prosecute is applied. In the introduction to their

³³⁸ Boulesbaa (1999), p. 179 and p. 235.

³³⁹ Boulesbaa (1999), p. 233.

³⁴⁰ See article 32 of the Vienna Convention.

³⁴¹ See the discussion in chapter 4, subsections 4.3.2 and 4.3.7.

³⁴² See the Separate opinion of President Guillaume, §§ 7, 12 and 16.

book “*Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International law*”, Bassiouni and Wiese put forward the view that:

“...the order in which these words appear should not be taken to signify that any particular priority is supposed to attach to extradition (as opposed to prosecution)...”³⁴³

Instead of arguing that one of the alternatives in general is primary to the other, they infer that there may be circumstances under which one of them should be preferred.³⁴⁴ A similar approach is taken by Ingelse.³⁴⁵

5.2.3.3 State practice

As elaborated on in section 4.3.6.1, State practice is limited with respect to exercise of conditioned universal jurisdiction on the basis of CAT. This *may* be perceived as evidence that extradition is perceived as primary to prosecution in the custodial State. On the other hand, the practice may also be a result of convenience, ‘political politeness’ and other considerations. Accordingly it does not provide solid support for any one interpretation.

The question of whether the right to exercise jurisdiction on the basis of CAT article 7 is subsidiary to the jurisdiction of the territorial State, is one of the issues debated in the Case Concerning Certain Criminal proceedings in France.³⁴⁶ France is here of the opinion that their jurisdiction is not subsidiary, while the Congo is of the opposite opinion.

Although it is necessary to exercise caution in drawing analogies between practices related to different conventions, the Lockerbie-case illustrates how a similar jurisdictional conflict, arising under the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, was solved. The case regarded the right of Libya to deny extradition of two Libyans. The men were accused of hijacking and bombing an American airplane over Lockerbie, Scotland, in 1988. The States involved, Libya, the UK and the United States, were all Parties to the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, a convention with articles similar to CAT article 5 and 7. The UK and the US claimed extradition on the basis of the Montreal Convention, but the claim was initially rejected by Libya on the grounds that Libya both had jurisdiction over the act and wanted to exercise jurisdiction.

³⁴³ See Bassiouni and Wise (1995), p. xii.

³⁴⁴ Ibid.

³⁴⁵ See Ingelse (2001), p. 326.

³⁴⁶ See note 21 with accompanying text.

When Libya denied extradition, the US and the UK, joined by France, presented the case to the UN Security Council and General Assembly in 1991.³⁴⁷ The result was three UN resolutions; the first urging Libya to comply with the extradition request,³⁴⁸ the second imposing economic sanctions on Libya³⁴⁹ and the third extending the sanctions.³⁵⁰

Libya responded by bringing the case before the ICJ. It requested provisional measures to prevent the US and the UK from taking any action to coerce Libya into handing over the two suspects. Libya did not succeed. The court denied such measures by vote of 11 to 5, thereby affirming the validity of the UN Resolutions.³⁵¹

In 1998, the Security Council passed a new resolution in which it fully endorsed a plan proposed by the UK and the US. According to this plan, prosecution of the two Libyans was to be conducted in the Netherlands by a Scottish Court. The accused were transferred to the Netherlands on 5 April 1999 in order to stand trial.³⁵² 10 September 2003 the ICJ removed the case from the Court's List at the joint request of the Parties.³⁵³

The Lockerbie case is interesting as it shows that the UN had to be involved in order to compel a State to extradite, or rather transfer to a third State, an alleged offender. It was not claimed that Libya had a primary duty to extradite the alleged offenders to the territorial State or otherwise was unable to fulfil its obligations under the Montreal Convention. The political aspect of the case made the territorial States apply extraordinary means in order to attain custody of the accused in order to bring them to trial.

5.2.3.4 Conclusion

The text and context of article 7 supports the conclusion that the duty to submit for prosecution is alternative and not subsidiary to the duty to extradite. The aim of CAT and the interests of justice further suggest that the custodial State in each case evaluates the possibilities of fair trial, e.g. in the territorial State, before the decision to extradite or prosecute is made. The custodial State has discretion to make this evaluation under CAT.

³⁴⁷ UN Doc. A/46/825, S/23306, 31 December 1991.

³⁴⁸ SC Res. 731 (1992), 21 January 1992.

³⁴⁹ SC Res. 748 (1992), 31 March 1992.

³⁵⁰ SC Res. 883 (1993), 11 November 1993.

³⁵¹ See the Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) (Libyan Arab Jamahiriya v. United States of America), Order, Provisional Measures, 14 April 1992, General List No. 88 and 89.

³⁵² The case is presented in more detail by Plachta, "The Lockerbie Case: The Role of the Security Council in Enforcing the Principle *Aut Dedere Aut Judicare*" (2001), pp. 125-40.

³⁵³ The order and press release are available at http://212.153.43.18/icjwww/ipresscom/ipress2003/presscom2003-29_luklus_20030910.htm (visited 20.04.04).

The Lockerbie case shows that the decision whether to extradite or prosecute crimes with extraterritorial elements may involve difficult political considerations. In such cases, the Parties have to turn to other international bodies in order to reconcile their disagreements. The case supports the conclusion that there is primacy for neither extradition nor prosecution when the formula *aut dedere aut judicare* is applied in treaty law.

5.2.4 The exercise of prosecutorial discretion

5.2.4.1 Introduction

A decision to prosecute primarily depends on the fulfilment of the requirements of substantive and procedural law. Furthermore, extra-judicial considerations may influence the prosecutorial decision. In the case of ‘ordinary crimes’ the insignificance of the act or the disproportional costs of the proceedings may lead to the decision not to prosecute. This may be the result although all legal requirements for prosecution are fulfilled.

With respect to extraterritorial acts of torture, neither the insignificance of the act nor expensive proceedings seem relevant for the decision whether to prosecute or not.³⁵⁴ The proceedings may turn out to be expensive, but the gravity of the crime would in most cases ensure that the costs would be proportionate if sufficient evidence first was made available.

On the other hand, diplomatic relations between the prosecuting State and the territorial State could constitute an important consideration in the eyes of the Government and the Ministry of Foreign Affairs. In the case of torture committed abroad, such political considerations could easily impel a State not to prosecute an alleged torturer from another State.

The political nature of the crime of torture raises the question of whether, or to what extent, State Parties are free to take political concerns into consideration when they decide the question of prosecution.

5.2.4.2 The text, context and purpose of article 7

According to the wording of article 7 paragraph 1, State Parties are under an obligation to “*submit the case to its competent authorities for the purpose of prosecution*”. The text is not formulated as an absolute duty to prosecute, only as a duty to submit the case to the competent authorities. According to article 7 paragraph 2, the decision whether to

³⁵⁴ See Ingelse (2001), p. 329.

prosecute or not shall be taken in “*the same manner as in the case of any ordinary offence of a serious nature under the law of that state*”. This is the only explicit requirement in article 7 of relevance for the exercise of prosecutorial discretion.

On the basis of article 7 paragraph 1, keeping in mind that the purpose of submission is prosecution, it may be argued that prosecution should be the result in every case where the legal requirements for prosecution are fulfilled.

This solution would also have support from the aim and purpose of CAT. As stressed in regard to article 5 paragraph 2, the aim of CAT is “to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world”.³⁵⁵ Since few crimes of torture are prosecuted in the State where they are committed, the prosecution of torture in other States is important in order to bring the perpetrators to justice. If the prosecution of extraterritorial acts of torture could be cancelled due to political considerations, CAT as a whole would lose much of its practical significance in the fight against impunity for torture.

Conversely, the only way a prosecutorial decision would be contrary to the formulation of article 7 is if it is taken in a different manner than in the case of any other crime of a serious nature. As long as the procedure is the same as in any other case of a similar serious nature, the exercise of prosecutorial discretion appears unrestricted. The text in article 5 paragraph 2 is clear in this respect. Hence, albeit the purpose of article 7 is to ensure the prosecution of torturers, the text of the same article is formulated in a manner that clearly protects the prosecutorial discretion of the State.

5.2.4.3 Interpretations of publicists

Boulesbaa is the only scholar in the examined literature that explicitly addresses the relevance of political considerations for the exercise of prosecutorial discretion. In lack of explicit support from the preparatory work of CAT, Boulesbaa bases his argumentation on the preparatory work of other conventions which have adopted a similar formulation to CAT article 7. Boulesbaa argues in the following manner:

"Paragraph 2 of Article 7 of the Torture Convention was borrowed from the Hague and Montreal Conventions referred ... The records of the drafting history of the Hague Convention indicate that the paragraph was intended to prevent the intrusion of political considerations in deciding whether to prosecute or not to prosecute those who commit acts of hijacking. By analogy,

³⁵⁵ See CAT's preamble.

the desired function to be performed ... is to prohibit the competent authorities ... from taking into account the political aspects of the crime of torture when they make a decision."³⁵⁶

Boulesbaa concludes:

“While the paragraph did not totally close the door on the influence and involvement of political considerations ... it does not permit the competent authorities to make the decision with no regard whatsoever to legal grounds.”³⁵⁷

The argument derived from this analysis, namely that the relevance of political considerations should be restricted, fits properly with the aim of CAT to contribute to the enforcement of individual liability for torture. It is significant, though, that this argument is drawn from the preparatory work of *other* conventions. This method of reasoning is not usually applied in international law. The result derived from such a method may lead to a result the State Parties have had no opportunity to comment on.

When the wording of CAT clearly protects the discretion of State Parties, the result based on the textual interpretation should prevail. This interpretation is in accordance with the practice of the ICJ, which has emphasised that “the first duty of a tribunal which was called upon to interpret a text was to endeavour to give effect to the words used in the context in which they occurred, by attributing to them their natural and ordinary meaning.”³⁵⁸

Subsidiary means of interpretation should not be used to interpret the treaty in another direction when the text is clear; only to support a conclusion that follows from the text.³⁵⁹

In this context it is interesting to note that even though the relevance of political considerations was not explicitly debated during the drafting of CAT,³⁶⁰ the *formulation* of the duty to prosecute was. In the initial stages of the drafting process, the original Swedish proposal included an explicit duty to prosecute:

“Each State Party shall, except in the cases referred to in article 14, ensure that criminal proceedings are instituted in accordance with its national law against an alleged offender who is present in its territory, if its competent authorities establish an act of torture as defined in article 1 appears to have

³⁵⁶ Boulesbaa (1999), p. 230.

³⁵⁷ Ibid, p. 232.

³⁵⁸ See Competence of the General Assembly for the Admission to the United Nations Case, Advisory opinion, ICJ Reports, 1950, p. 8.

³⁵⁹ See the Vienna Convention article 32.

³⁶⁰ See Boulesbaa (1999), p. 230.

been committed and if that State Party has jurisdiction over the offence in accordance with article 8.”³⁶¹

The choice to alter this formulation signified a reluctance to impose a compulsory obligation to prosecute. This part of the drafting process therefore supports an unlimited discretion which fits well with the conclusion based on the ordinary meaning of the text.

5.2.4.4 State practice

Building on Ingelse’s research, the exercise of prosecutorial discretion with respect to article 7 paragraph 2 has mainly been addressed in the dialogue between the Netherlands and the Torture Committee.³⁶² Of special interest in this regard is the Dutch decision not to prosecute Pinochet during his visit to the Netherlands in 1994. The official rationale in the Report to the Torture Committee was that a successful prosecution seemed unlikely due to difficulties of attaining evidence from Chile.³⁶³ While the Dutch delegation invited a comment from the Torture Committee “as those issues might be of interest to other countries”,³⁶⁴ no such comment came forth.³⁶⁵

The Torture Committee *has* expressed that a system of ‘appropriateness of prosecution’ is in conflict with CAT article 12, but after the wording of article 12, the article concerns the duty of each State Party to ensure prompt investigation of torture committed “in any territory under its jurisdiction”.³⁶⁶ The statement seems thus to have limited relevance in regard to article 7 paragraph 2, even though the decision to prosecute shall be taken in the same manner as any other offence of a serious nature.

5.2.4.5 Conclusion

The ordinary meaning of the text, the preparatory work and the limited practice in regard to article 7 paragraph 2 provides support for the conclusion that the exercise of prosecutorial discretion is left to be regulated by the States. Arguments drawn from these sources suggest that the States have full discretion as long as the decision to prosecute is taken in the same manner as any other decision to prosecute serious crimes. The purpose of CAT

³⁶¹ See Boulesbaa (1999), pp. 208-217; and U.N. Doc. E/CN. 4/1285 (1978).

³⁶² See Ingelse (2001), pp. 346-9.

³⁶³ See Summary record of the public part of the 211th meeting, Netherlands, 01 May 1995, CAT/C/SR.211 (Summary Record), § 27-28.

³⁶⁴ *Ibid.*, § 29.

³⁶⁵ See Ingelse (2001), p. 348.

³⁶⁶ See Ingelse (2001), p. 348, referring to Summary record of the public part of the 323rd meeting: France, Norway. 11 May 1998, CAT/C/SR.323 (Summary Record), under D, 2 and E, 4.

and the arguments drawn from the preparatory works of other conventions do not have the weight to challenge this conclusion.

Of importance for the practical application of article 7 is then the question of whether State Parties *de facto* apply the same procedure when deciding whether to prosecute torture committed abroad, and torture, or other serious crimes, committed within its own territory.

A brief examination of the prosecutorial arrangements in a few States shows that the procedures often vary dependent on where the crime of torture has been committed and the nationality of the offender. The question whether to prosecute torture committed abroad by foreigners is e.g. in Norway taken by the Government,³⁶⁷ in Denmark by the Minister of Justice,³⁶⁸ and in Sweden the Government has to approve or control the prosecutorial decision.³⁶⁹ This is not the normal procedure of deciding prosecutorial questions in these three countries. In a case regarding a serious offence committed within the State's own territory, neither the Government nor the Minister of Justice would be involved in the prosecutorial process.³⁷⁰

The Norwegian and Danish approaches do not fit well with the treaty obligation to take the prosecutorial decision in the ordinary manner of other serious crimes. On the basis of the text of article 7 it could accordingly be argued that systems similar to the Norwegian and Danish ones in practice are contrary to CAT.³⁷¹

It is further evident that as long as the political leadership decides the prosecutorial question in cases with an international aspect, no external control may restrict the relevance of political motives. This may lead to unfortunate decisions that do not serve the interest of justice. Practice from States with independent prosecutors also shows that States with truly independent prosecutors to a much larger extent are willing to prosecute extraterritorial crimes when the territorial State itself is unwilling.

³⁶⁷ See the Norwegian Penal Code, § 13.

³⁶⁸ See "Rigsadvokatens meddelelse om forelæggelsesregler og kompetanceregler m.v.", 20 March 2002, CIR nr. 9104.

³⁶⁹ See Brottbalken, Chapter 2, § 5.

³⁷⁰ In the UK, the General Attorney has to consent to the prosecution of torture independent of where it has been committed and the nationality of the alleged offender, see the Criminal Justice Act of 1988, Part XI, sections 134 and 135.

³⁷¹ States which seem to fulfil the obligation to take the prosecutorial decision in the same manner as other serious crimes are e.g. the UK, see The Criminal Justice Act, 1988, Section 135, and Finland, see Strafflagen, § 12.

6 Concluding remarks and evaluations *de lege feranda*

6.1 The right to apply universal jurisdiction over torture

CAT has adopted the conditioned form of universal jurisdiction. State Parties to CAT have accordingly subject matter jurisdiction *on the basis of the Convention* over alleged tortures present in their territory which are nationals of other State Parties and not extradited to other States.

As discussed in the thesis, the status of customary law seems disputed in the case of extraterritorial criminal jurisdiction. On the basis of the PCIJ's judgement in the Lotus case, it may be argued that there are two possible rules for this type of jurisdiction.

Under the main rule on extraterritorial jurisdiction, as defined by the PCIJ in the Lotus judgement, the presence of the alleged torturer does not appear necessary for the lawfulness of universal jurisdiction. As long as universal jurisdiction is enforced within the territory of the State, without violating other rules of international law, every State can claim universal jurisdiction on the basis of the State's own sovereignty. Both absolute and conditioned universal jurisdiction will be lawful under this approach.

Under the proposed alternative rule on extraterritorial criminal jurisdiction, also defined by the PCIJ in the Lotus judgement, a State needs authority from a rule of international law in order to exercise universal jurisdiction. As the examination above illustrates, it is difficult to find evidence that customary law provides such absolute universal jurisdiction over torture. There is substantial evidence, however, that universal jurisdiction over torture is provided by customary international law when the alleged offender is present in the territory. The most authoritative interpretation in support of such a rule is based on the *jus cogens* status of the prohibition against torture.

The relevance of the presence of the alleged offender under customary law depends accordingly on whether extraterritorial criminal jurisdiction must be based on a rule of international law or not. It may be argued that the position presented as the 'main rule' in the Lotus judgment is too liberal and that a more restricted approach should be applied today. This position covered by the 'main rule' has, however, not been overruled neither by the ICJ or any other international tribunals in any operate part of their judgments. This is a substantial argument in support of its application until the question is decided

differently by an authoritative source. The case registered by the ICJ as the Case Concerning Certain Criminal proceedings in France case *may* result in a clarification of this question.

6.2 The duty to apply conditioned universal jurisdiction

Customary law provides a discretionary *right* to apply universal jurisdiction over torture, whether it be absolute under the main rule or conditioned under the alternative rule. There is no authoritative support for a duty to apply universal jurisdiction under customary law.

CAT on the other hand, provides a duty for State Parties to submit a case for prosecution unless the alleged offender is not extradited. The duty covers in principle all alleged torturers present in the territory of a State Party, but in the case of nationals of Non-Party States, the State Party should make sure that conditioned universal jurisdiction was recognized under customary law also at the time when the crime was committed.

State Parties have prosecutorial discretion, but the decision whether to prosecute or not shall be taken in the same manner as any other serious offence under domestic law. This requirement implies that neither the government nor the Ministry of Foreign Affairs should have the authority to decide whether to prosecute or not, unless these political bodies *also* have this competence in the case of other serious crimes committed within the State's own territory. As illustrated with practice from Norway, Denmark and Sweden, certain States have arranged their prosecutorial competence in a manner unlike the normal one in cases regarding torture committed abroad amongst foreigners.

6.3 Chaos or justice: Evaluations *de lege ferenda*

The primary aim of criminal law has by former President Guillaume of the ICJ been formulated in the following manner:

“The primary aim of the criminal law is to enable punishment in each country of offences committed in the national territory. That territory is where evidence of the offence can most often be gathered. That is where the offence generally produces its effects. Finally, that is where the punishment imposed can most naturally serve as an example.”

The observation that the territoriality of criminal law is fundamental and of principal standing is important and correct. Still, this does not imply that there are no extra-territorial elements in criminal law. The notion of a universal fight against impunity and aspirations of universal realization of fundamental human rights are factors which indicate that serious crimes are not only the concern of the State where the crime has been committed. As

pointed out by Mary Robinson, when she welcomed the Princeton Principles on Universal Jurisdiction:

“The principle of universal jurisdiction is based on the notion that certain crimes are so harmful to international interests that States are entitled - and even obliged - to bring proceedings against the perpetrator, regardless of the location of the crime or the nationality of the perpetrator or victim. Human rights abuses widely considered to be subject to universal jurisdiction include genocide, crimes against humanity, war crimes and torture. ... The exercise of universal jurisdiction holds the promise for greater justice for the victims of serious human rights violations around the world.”³⁷²

As long as the basic principles of criminal law are respected, such as legality, predictability and fair trial, universal jurisdiction may prove important in the fight against impunity for torture. If impunity for torture could be eliminated on a universal basis, this would constitute a clear message to all torturers as well as their victims. The message would be that torture never is accepted and that violations have a consequence, where ever it is committed and whoever the offender is.

When promising aspects of universal jurisdiction are stressed, the problematic sides should also be emphasised. Even though absolute universal jurisdiction may be lawful under current customary law, and furthermore prove useful in certain situations, the critique raised against this approach should not be neglected.

If absolute universal jurisdiction is to be applied, conflicts of jurisdiction are even more likely to appear than under the application of conditioned universal jurisdiction. One could emphasize in theory the importance of giving priority to the territorial State, if this State is willing and able to prosecute. In practice though, the determination of whether the territorial State is willing and able appears difficult.

The application of absolute universal jurisdiction will also make the enforcement of international criminal law quite unpredictable. While conditioned universal jurisdiction is limited to the State where an alleged torturer is present or his or her own free, absolute universal jurisdiction over torture in theory opens the gate for all States in all cases regarding torture.

The application of absolute universal jurisdiction over torture may thus create more inter-State conflicts than actually solve the problem of impunity. In order to put an effective end to impunity, active international co-operation in order to codify the rules on

³⁷² The foreword was delivered 23 July 2001 and is available at <http://www.princeton.edu/~lapa/principles.html> (visited 12.04.04).

criminal jurisdiction appears crucial. Only if the States have agreed upon the scope and application of extraterritorial criminal jurisdiction can they be expected to co-operate in order to provide evidence. All States should accordingly be encouraged to sign and ratify instruments that address the enforcement of individual liability, and, equally important, State Parties should be encouraged to implement and enforce jurisdiction in accordance with their international obligations. If necessary, the international community should continue to develop international instruments that clearly address the enforcement of individual accountability.

There is a need to strike a balance between the interests of the accused, the victims and the international community as a whole. This is a challenging task, but it is crucial for a fair and trustworthy administration of justice in a universal context.

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