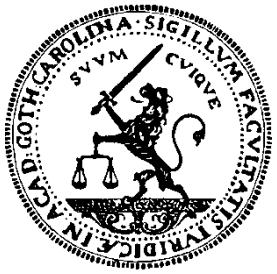

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Universal Jurisdiction and the Fight Against Torture: Ensuring Accountability Through a Human Rights Centred Approach

LAGM01 Graduate Thesis

Graduate Thesis, Master of Laws program
30 higher education credits

Supervisor: Letizia LoGiacco

Semester of graduation: Spring 2020

Contents

Summary

Within international human rights law, the prohibition of torture is absolute and uncontroversial. However, despite considerable efforts to end it, torture remains a pervasive problem all over the world, in part due to the widespread impunity for such acts. Many have hence identified universal jurisdiction as one of the ways whereby accountability for torture may be enhanced. The present thesis examines universal jurisdiction in the light of existing state obligations related to torture under international human rights law. It hereby adopts an approach which transcends strict regime demarcations, by considering universal jurisdiction, which is typically invoked in an international criminal law ambit, from a human rights perspective and by assessing its value in the realm of state obligations in the fight against torture.

The thesis argues that there exists a paradox in the relationship between the struggle against torture in international human rights law, which is built on state obligations, and the traditional understanding of universal jurisdiction, which is typically considered an entitlement, rather than an obligation, of states. The thesis therefore aims, firstly, to problematize the current paradoxical understanding of universal jurisdiction in association with crimes under international law, with a specific focus on acts of torture; and secondly, it seeks to construct a human rights centred understanding of universal jurisdiction in an attempt to begin to resolve the paradox. This is done through an examination of positive state obligations to end impunity for torture in general international human rights law; the principle of universal jurisdiction as traditionally understood and as enshrined in customary international law; relevant provisions of the United Nations Convention Against Torture; and the right to an effective remedy for victims of torture offences.

The thesis concludes that universal jurisdiction is traditionally considered to be a state entitlement, rather than an obligation. In relation to torture, the UN Convention Against Torture however prescribes the assertion and exercise of primary, compulsory universal jurisdiction over torture offences when the suspect is physically present within the territory of a States Party to the convention. Under international human rights law, victims of torture enjoy the right to an effective remedy, which includes individual rights to e.g. investigation, access to justice and reparation for the harm suffered. A human rights centred approach to universal jurisdiction must therefore be based on state obligations to exercise universal jurisdiction in certain situations and be in accordance with states' existing human rights obligations to respect, protect and fulfil the rights of everyone within their jurisdiction.

In the future, the principle of universal jurisdiction, which today suffers from serious ambiguity and controversy, needs to be governed by a clear legal framework which defines the concept itself, its legal limits and the situations in which its application is compulsory, so as to strengthen the international rule of law and limit both over and under-extension of jurisdiction. Considering the importance of human rights protection in the system of international law, the only way to ensure the legitimacy of such a framework is to place human rights at its center.

Sammanfattning

Inom det folkrättsliga regelverket för mänskliga rättigheter är förbudet mot tortyr absolut och okontroversiellt. Trots de betydande insatser som gjorts för att bekämpa tortyr, kvarstår det dock som ett allvarligt och utbrett problem, delvis på grund av att faktisk straffrihet förblir vanligt. Universell jurisdiktion har därför identifierats som ett verktyg för att försöka säkerställa straffrättsligt ansvarsutkrävande för tortyr. Uppsatsen undersöker universell jurisdiktion i ljuset av staters existerande folkrättsliga skyldigheter att säkerställa skyddet mot tortyr. I uppsatsen antas härvid ett perspektiv som överskrider strikta gränsdragningar mellan folkrättens olika regimer genom att undersöka universell jurisdiktion, som traditionellt åberopas inom den internationella straffrätten, och granska den utifrån staters internationella åtaganden för mänskliga rättigheter, i kampen mot tortyr.

I uppsatsen anförs att det existerar en paradox i förhållandet mellan kampen mot tortyr som en del av skyddet för mänskliga rättigheter, som bygger på staters bindande skyldigheter, och den traditionella synen på universell jurisdiktion, som typiskt sett betraktas som en rättighet, inte en förpliktelse, för stater. Syftet med undersökningen är därför, för det första, att problematisera den nuvarande paradoxala synen på universell jurisdiktion i förhållande till internationella brott, med specifikt fokus på tortyr. För det andra är syftet att konstruera en alternativ tolkning av universell jurisdiktion baserad på mänskliga rättigheter. Detta görs genom att undersöka i) staters existerande folkrättsliga åtaganden att säkerställa straffrättsligt ansvarsutkrävande för tortyr, ii) den traditionella synen på universell jurisdiktion som utgör en del av den internationella sedvanerätten, iii) relevanta delar av FN:s Konvention mot tortyr, och iv) rätten till ett effektivt rättsmedel för tortyroffer.

Baserat på undersökningen dras slutsatsen att universell jurisdiktion traditionellt sett ses som en rätt, inte en skyldighet för stater. Vad gäller tortyr föreskriver dock tortyrkonventionen primär, obligatorisk, universell jurisdiktion över tortyrmål i fall där den misstänkte befinner sig inom en konventionsstats territorium. Enligt de mänskliga rättigheterna åtnjuter tortyroffer en rätt till effektivt rättsmedel, vilket omfattar bland annat rätten att få sitt fall utrett, rätten till rättslig prövning och rätten till ersättning för skada. En modell för universell jurisdiktion baseras på mänskliga rättigheter måste därför, för det första, baseras på en skyldighet för stater att i vissa situationer tillämpa sin jurisdiktion och, för det andra, vara i enlighet med existerande skyldigheter att respektera, skydda och uppfylla de mänskliga rättigheterna för alla som befinner sig inom statens jurisdiktion.

Universell jurisdiktion lider idag av betydande otydligheter och dess användning är kontroversiellt. För att stärka den internationella rättssäkerheten och förebygga både dess för breda och för smala tillämpning, behöver universell jurisdiktion i framtiden regleras av ett tydligt internationellt regelverk. Ett sådant regelverk bör definiera principen, förtydliga dess juridiska gränser och klarlägga i vilka situationer dess tillämpning är obligatoriskt. Betydelsen av skyddet för de mänskliga rättigheterna i det folkrättsliga systemet innebär att det enda sättet att säkerställa regelverkets legitimitet är att placera de mänskliga rättigheterna i dess centrum.

Acknowledgements

I would like to express my sincerest gratitude, firstly, to my supervisor Letizia LoGiacco for her inspiring and insightful guidance throughout this project. This thesis would not have been what it is without her always on-point comments and input on everything from exact wording to overall direction of the thesis.

Secondly, I would like to express my gratitude to DIGNITY – Danish Institute Against Torture for allowing me to take part in the Talent Program and learn from the work of the institute and the insightful people taking part in the program. I am also grateful to my co-supervisor Elna Søndergaard, for the inspiration and input she has provided me during the writing of this thesis.

To all my friends: Vältarna, Legacis Lundencis, Foodies, safetysquad and everyone, who had the good sense not to associate with any foolish sounding squads, thank you. Thank you for being both my everyday and my escape, for making ordinary moments extraordinary and filling these years with memories.

Thank you to my family for always supporting me. It is thanks to you that I have always been able to chase both my dreams and sudden whims. Pappa, thank you for being my biggest supporter in both life and law, for convincing me to come to Lund in the first place and for the many read-throughs of this thesis, among others. Äiti, thank you for your unconditional love.

Thank you, Gregor, for being my rock through all these years and for reminding me of the important things.

Lund, May 2020
Elina Hammarström

Abbreviations

ACHR	American Convention on Human Rights (1969)
ACHPR	African Charter on Human and Peoples' Rights (1981)
AU	African Union
CAT Committee	Committee Against Torture
DRC	Democratic Republic of the Congo
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
ECtHR	European Court of Human Rights (Strasbourg Court)
ECOWAS	Economic Community of West African States
EU	European Union
HRC	Human Rights Committee
IACPPT	Inter-American Convention to Prevent and Punish Torture (1985)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights (1966)
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
Istanbul Protocol	Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
NGO	Non-governmental organisation
OAS	Organization of American States
OPCAT	Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (2003)
PCIJ	Permanent Court of International Justice
RIG	Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines, 2008)
Rome Statute	Rome Statute of the International Criminal Court (1998)
Third Restatement	Restatement of the Law (Third) of Foreign Relations Law of the United States (1987)
UDHR	Universal Declaration of Human Rights (1948)
UN	United Nations
UNCAT	Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Torture Convention, 1984)
US	United States of America

1 Introduction

1.1 Background

1.1.1 Torture

Torture constitutes a deliberate attack on human dignity and aims at depriving the individual victim of their inherent humanity through the perpetrator's exercise of unrestricted *de facto* power over the victim. It aims at breaking the will of the victim through the use of a variety of horrific measures to achieve a certain purpose, such as extracting information from the victim against their will.[1] Historically torture has been used widely and in various cultures and societies. Following the horrors of the Second World War, which included systematic and cruel torture practices employed under e.g. the regimes of Nazism and Stalinism, the prohibition of torture soon emerged as a non-derogable human right which under international law applies no matter the context.[2] Today, the prohibition of torture is a fundamental part of the international human rights regime and is enshrined in a number of general international human rights treaties, and specifically in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention" or "UNCAT").[3] The prohibition not only requires states to refrain from using torture, but also entails positive obligations for states to prevent, sanction and remedy such violations, even when committed by private actors. The importance and existence of such obligations to make effective the struggle against torture is uncontroversial in international law.[4]

Regardless, torture remains a pervasive problem all over the world.[5] Many have therefore identified universal jurisdiction, namely a state's exercise of criminal jurisdiction outside the scope of other more traditional jurisdictional bases such as territoriality and nationality,[6] as one of the ways whereby accountability for severe human rights violations may be ensured.[7] The present thesis therefore examines universal jurisdiction as a supplementary mechanism in the

[1] Note that the definition of torture varies somewhat between different instruments of international law. The requirement for a specific purpose can however be found in several of them. See Manfred Nowak, *The United Nations Convention against Torture: A Commentary* (2nd edition., Oxford University Press 2019) 1.
[2] ibid 2. See further Chapter 2 and e.g. Universal Declaration of Human Rights, 1948 1948 (217 A (III)) Art 5.
[3] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (United Nations, Treaty Series, vol 1465, p 85). See Chapters 2 and 4 below.
[4] At least as far as treaty law is concerned. See Chapters 2 and 4 below.
[5] Manfred Nowak, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak: Addendum - Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, Including an Assessment of Conditions of Detention' (UN Human Rights Council 2010) A/HRC/13/39/Add.5 paras 250, 2555; Amnesty International, 'Torture' <https://www.amnesty.org/en/what-we-do/torture/> accessed 20 May 2020.
[6] The definition of universal jurisdiction is discussed in more detail in Chapter 3.
[7] See e.g. Wolfgang Kaleck and Patrick Kroker, 'Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?' (2018) 16 Journal of International Criminal Justice 165; Debra Long, et al., 'Combating Torture and Other Ill-Treatment - A Manual for Action' (Amnesty International) 263, 265, 271, 280; 'Two Syrian Officers of the Regime Face Trial: "A Historic Step Towards Justice"' *TRIAL International News Release* (23 April 2020) <https://trialinternational.org/latest-post/two-syrian-officers-of-the-regime-face-trial-in-germany-a-historic-step-towards-justice/>; Amnesty International, 'Universal Jurisdiction: UN General Assembly Should Support This Essential International Justice Tool' (2010) <https://www.amnesty.ca/sites/amnesty/files/2010-10-05ior530152010enuniversaljurisdiction.pdf>.

fight against torture, which may further strengthen the human rights framework proscribing such acts. As such, it adopts an approach which transcends strict regime demarcations, by appealing to the concept of universal jurisdiction, which is typically invoked in an international criminal law ambit, and assessing its value in an international human rights context, i.e. that proscribing torture.

1.1.2 Universal Jurisdiction and the Timely Relevance of the Examination

The historical development of universal jurisdiction has been a process of gradual acceptance of the concept in both international customary and treaty law as well as doctrine. Even today, the role and status of universal jurisdiction are impacted by its historical background.[8] Within classic international law and the classic jurisdictional regime, territorial jurisdiction was the dominant basis of criminal jurisdiction and universal jurisdiction was at best limited and supplemental to other jurisdictional bases. The primacy of universal jurisdiction was however admitted in relation to piracy, which was exempted due to the seriousness of the crime, the lack of effective jurisdiction over it and states' great interest in protecting sea trade and national security.[9] Based on such primacy, all states enjoyed an equal right to investigate and prosecute piracy. Following the Second World War, trials concerning international crimes emerged in Nuremberg and Tokyo as well as in the national courts of the Allied States. This cannot however be said to entail the exercise of universal jurisdiction in practice or to have led to the emergence of universal jurisdiction as a customary norm.[10] The adoption of the four Geneva Conventions[11] in 1949 opened the door for the exercise of 'universal jurisdiction' over war crimes constituting grave breaches of international humanitarian law, but affirming the customary international law status of the norm faced some problems due to the insufficient evidence of state practice. State reluctance to embrace universal jurisdiction was manifested in the text of the later Genocide Convention,[12] which despite recognizing the authority of international tribunals failed to prescribe forms of national jurisdiction other than territoriality.[13]

In the early 1960s, the most prominent precedent on the application of universal jurisdiction over genocide emerged before Israeli courts, namely the trial of Adolf Eichmann, one of the main organisers of the Holocaust.[14] While Eichmann strongly challenged the jurisdiction of the

[8] Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia 2005) 47.
[9] ibid 55.
[10] ibid 55ff.
[11] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) 1949 (75 UNTS 31); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) 1949 (75 UNTS 85); Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) 1949 (75 UNTS 135); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) 1949 (75 UNTS 287).
[12] Convention on the Prevention and Punishment of the Crime of Genocide 1948 (United Nations, Treaty Series, vol 78, p 277).
[13] The Four Geneva Conventions, Arts 49, 50, 129 and 146, respectively, ibid Art 6; Inazumi (n 8) 66f.
[14] *Attorney General v Adolf Eichmann* [1961] District Court of Jerusalem, Israel Criminal Case No. 40/61; *Attorney General v Adolf Eichmann* [1962] Supreme Court of Israel Criminal Appeal 336/61.

Israeli courts to hear the case, the courts rejected his various challenges and found Israel to have jurisdiction based on the principle of universal jurisdiction.[15] While the Eichmann-judgements are by some hailed as support for the customary norm allowing the exercise of universal jurisdiction over genocide, others have criticised the findings of the Israeli courts and concluded that the extraordinary case entailed an exception rather than a rule.[16] Overall, in the period following WWII and during the beginning of the Cold War, the recognition of the heinousness of war crimes, crimes against humanity and genocide did not directly translate to acceptance of the existence of universal jurisdiction even over such crimes. All sides of the political divide were hesitant to recognize a principle which might be used against them and distrusted foreign courts, contributing to the continued dominance of territorial jurisdiction.[17] Even within the field of international criminal law, universal jurisdiction was therefore a historical development.

The adoption of international treaties continued in the 1970s and 80s, with the adoption of further human rights instruments such as the Torture Convention, but also instruments directed at fighting specific serious or transnational crimes such as terrorism, in part due to the failure of traditional jurisdictional regimes to effectively respond to such acts.[18] This led to the adoption a new jurisdictional system based on provisions requiring States Parties to take necessary measures to establish their jurisdiction over certain crimes and to exercise it to prosecute perpetrators found in state territory, unless they were extradited to another state for prosecution – obligations *aut dedere aut judicare*.[19] The emergence of new conventions expressly allowing or sometimes obliging the exercise of jurisdiction outside traditional jurisdictional bases, arguably changed the nature of universal jurisdiction, by strengthening its position and supporting the arguments of those who recognized universal jurisdiction as part of customary law. The increased acceptance of universal jurisdiction however did not immediately lead to an increase in prosecutions or state practice, and court proceedings in other states remained subject to scepticism.[20]

A great transition in the jurisdictional system, as well as a development of international criminal and humanitarian law, took place in the 1990s starting with the establishment of the *ad hoc* international criminal tribunals for the Former Yugoslavia and Rwanda - the ICTY and the ICTR respectively. The new international interest in ending impunity for international crimes, encouraged states to begin to pave the way for more accountability also at the national level, including in a number of cases through the exercise of universal jurisdiction. These included e.g. the famous case of the UK House of Lords concerning the former Chilean dictator Augusto Pinochet, who had been subject to an investigation and subsequent extradition request by Spain based on universal jurisdiction over international crimes including torture.[21] The 1990s also

[15] *Attorney General v. Adolf Eichmann* (n 14) para 12; Inazumi (n 8) 63.
[16] Inazumi (n 8) 65f.
[17] ibid 68f.
[18] ibid 69ff; Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 2–7.
[19] Inazumi (n 8) 69f.
[20] ibid 81f.
[21] Although the court found extradition to be possible under the Torture Convention, Pinochet was in the end not extradited due to health concerns. Instead, he returned to Chile, where he faced prosecution under territorial jurisdiction. See *Regina v Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Regina v Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte*

saw the process for the establishment of the International Criminal Court ("ICC"). Although the court was not itself granted universal jurisdiction[22] and its preamble cannot be held to prescribe such jurisdiction, the recognition of the importance of ending impunity for international crimes led many states to consider expanding their national jurisdiction to better cover such crimes.[23] Subsequent developments have further strengthened the international recognition of universal jurisdiction, although the practical outcomes of its exercise remain modest in relation to the often high expectations of victims and advocates. Today universal jurisdiction is therefore a much talked about but not widely adhered to standard, which however continues to develop.[24]

In considering state practice on the use of universal jurisdiction at the national level, the leading narrative has in recent years been that of the 'rise and fall' of universal jurisdiction, according to which the concept was first embraced with enthusiasm, but then began to subside after a number of high profile setbacks, such as the *Arrest Warrant* judgement of the International Court of Justice ("ICJ") and subsequent changes to national laws on universal jurisdiction in e.g. Belgium.[25] This narrative has however recently been challenged by other scholars, such as Langer and Eason, who based on an analysis of data gathered through a review of all universal jurisdiction cases have concluded that there has in fact been a quiet expansion in the use of universal jurisdiction, at least in relation to the core international crimes genocide, crimes against humanity and war crimes.[26] The last few years have also seen a fast rise in the number of universal jurisdiction cases brought in various countries. In 2019 prosecutions were ongoing in 16 countries, with 11 defendants on trial and over 200 suspects under investigation. The charges brought under universal jurisdiction included 92 charges of torture.[27] Universal jurisdiction however remains controversial, e.g. as to the legitimacy and pure universal character of the principle, i.e. whether jurisdiction can purely be based on the grave nature of the crime.[28] The controversial and unclear nature of the principle arguably risks leading to arbitrariness in its use, as some states may attempt to illegitimately extend universal jurisdiction, while others may hesitate to act against alleged perpetrators, thereby creating impunity.[29]

Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division) (UK House of Lords); Inazumi (n 8) 83–86.

[22] Rome Statute of the International Criminal Court (last amended 2010) 1998 Art 12.

[23] Inazumi (n 8) 86f.

[24] ibid 88, 98f.

[25] The *Arrest Warrant* judgment is discussed in Chapter 3. See e.g. Luc Reydams, 'The Rise and Fall of Universal Jurisdiction', *W. Schabas and N. Bernaz (eds), Routledge Handbook of International Criminal Law* (2011); Rephael Ben-Ari, 'Universal Jurisdiction: Chronicle of a Death Foretold' (2015) 43 Denver Journal of International Law and Policy 165.

[26] Máximo Langer and Mackenzie Eason, 'The Quiet Expansion of Universal Jurisdiction' (2019) 30 European Journal of International Law 779.

[27] Trial International et al., 'Universal Jurisdiction Annual Review 2020 "Terrorism and International Crimes: Prosecuting Atrocities for What They Are"' (2020) 13 <https://trialinternational.org/wp-content/uploads/2020/03/TRIAL-International_UJAR-2020_DIGITAL.pdf>.

[28] See e.g. Sienho Yee, 'Universal Jurisdiction: Concept, Logic, and Reality' (2011) 10 Chinese Journal of International Law 503.

[29] See e.g. Charles Chernor Jalloh, 'Report of the International Law Commission: Seventieth Session, Annex A: Universal Criminal Jurisdiction' (2018) General Assembly Official Records Seventy-third Session, Supplement No. 10 (A/73/10) para 3 <https://legal.un.org/docs/?symbol=A/73/10>.

Recently, the principle of universal jurisdiction has become especially prevalent in discussions surrounding international crimes committed in Syria since the outbreak of the Syrian conflict in 2011. The systematic detention and brutal torture of tens of thousands of people by the government forces and affiliated militias is only one of the many appalling atrocities which have taken place in Syria in recent years.[30] While the Syrian population has suffered atrocities on a massive scale, the international community has found itself in a deadlock when trying to ensure accountability for such crimes. Plainly, an international judicial response would be all the more necessary owing to the lack of willingness by the Syrian authorities to investigate the crimes allegedly committed by the regime. Similarly, the UN Security Council failed to find the necessary agreement for referring the situation of Syria to the ICC, particularly because of the veto posed by its permanent members Russia and China. For the same reason, also the creation of an *ad hoc* tribunal appears unlikely should the political climate remain unchanged.[31]

In the meantime, huge numbers of Syrians including survivors of the ongoing torture practices have fled from the country. Some of these survivors have then sought justice in their countries of destination, leading to complaints and investigations against former and current Syrian officials in a number of national jurisdictions, including e.g. Sweden,[32] France[33] and Germany.[34] Today, the use of the universality principle by the national authorities of other states therefore seems like the only available mechanism to enforce individual accountability for crimes committed by the Syrian regime in the foreseeable future. On 23 April 2020, the first ever criminal trial on allegations of torture committed by agents of the Syrian regime began in the German Higher Regional Court of Koblenz against two former Syrian state officials. The two accused are Syrian nationals, alleged to have been members of the Syrian General Intelligence service arrested on German territory,[35] and accused of co-perpetrating crimes against humanity through 58 cases of murder, rape and grave sexual assault between April 2011 and September 2012.[36] The accused are being tried under universal jurisdiction in accordance

[30] Independent International Commission of Inquiry on the Syrian Arab Republic, 'Detention in the Syrian Arab Republic: A Way Forward' (2018) 2 <https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/AWayForward_DetentionInSyria.pdf>.
[31] Trial International et al., 'Make Way for Justice #3: Universal Jurisdiction Annual Review 2017' (2017) 3 <https://trialinternational.org/wp-content/uploads/2017/03/UJAR-MEP_A4_012.pdf>.
[32] See e.g. 'Executive Summary: Criminal Complaint to the War Crimes Commission of Swedish Police and the Swedish War Crimes Prosecutor Team Torture in Syria' (Civil Rights Defenders et al) <Available at: https://crd.org/2019/02/20/syrians-in-sweden-are-demanding-redress-for-torture/>.
[33] See e.g. Emmanuel Jarry, 'France Issues Arrest Warrants for Senior Syrian Officials' *Reuters* (5 November 2018) <https://www.reuters.com/article/us-syria-crisis-france/france-issues-arrest-warrants-for-senior-syrian-officials-idUSKCN1NA11L>.
[34] Oberlandesgericht Koblenz, 'Anklage Gegen Zwei Mutmaßliche Mitarbeiter Des Syrischen Geheimdienstes Wegen Der Begehung von Verbrechen Gegen Die Menschlichkeit u.a. Zugelassen' (10 March 2020) <https://olgko.justiz.rlp.de/de/startseite/detail/news/News/detail/anklage-gegen-zwei-mutmassliche-mitarbeiter-des-syrischen-geheimdienstes-wegen-der-begehung-von-verbr/> accessed 16 March 2020; European Centre for Constitutional and Human Rights, 'Dossier: Human Rights Violations in Syria, Survivors Demand Justice - Germany Could Set Precedent in First Trial World Wide on State Torture' <https://www.ecchr.eu/fileadmin/Sondernewsletter_Dossiers/Dossier_Syria_2019December.pdf>.
[35] The trial is therefore taking place under universal jurisdiction, but not universal jurisdiction *in absentia*. On the distinctions between different kinds of universal jurisdiction, see Chapter 3. Oberlandesgericht Koblenz (n 34).
[36] ibid.

with the German law for international crimes (*Völkerstrafgesetzbuch*).[37] The trial has by NGOs such as Amnesty International and TRIAL International been hailed as "a historic step in the struggle for justice for the tens of thousands of people unlawfully detained, tortured and killed in Syrian government's prisons and detention centers", which will hopefully inspire other countries to initiate similar proceedings.[38]

1.2 Central Argument of the Thesis

Under human rights law, states bear an obligation to investigate and prosecute violations of individuals' right to be free from torture and cruel, inhuman and degrading treatment. The existence of such an obligation is uncontroversial at least as a part of the treaty law.[39] However, when international crimes, which are arguably the gravest offenses of concern for the entire international community, are committed, there is no general obligation to ensure accountability for such crimes. This is the paradox laying at the foundation of the present thesis and is hereby considered specifically as relating to acts of torture.

On the one hand, the regime surrounding torture is built upon the importance of the fight against torture and the need to end impunity for such offences through the imposition of positive state obligations to investigate and prosecute such crimes. On the other hand, universal jurisdiction, which is required to investigate and prosecute crimes which lack a traditional jurisdictional link to the forum state, is typically considered an entitlement, not an obligation, of states. States may therefore in practice be given a wide latitude to decide whether and when to investigate acts of torture committed outside the state's traditional jurisdictional reach. This aspect further reinforces arguments about the politicization of the use of universal jurisdiction. The traditional understanding of universal jurisdiction as an entitlement rather than a positive obligation on states therefore creates a legal gap in the fight against torture, potentially undermining the effectiveness of the legal system. An obligation to apply jurisdiction outside of the traditional jurisdictional principles can however, at least to a certain extent, stem from treaty law, e.g. under the Torture Convention and the grave breaches regime under the four Geneva Conventions. Such obligations may however be triggered by the physical presence of the perpetrator on the territory of the forum state, thus stipulating a 'conditioned' version of jurisdiction, rather than a 'pure' form of universal jurisdiction. The Torture Convention constitutes a clear example of the former.[40]

In light of the foregoing, the thesis suggests the construction of a human rights centered approach to universal jurisdiction based on the human rights of victims of torture and the obligations to repress torture offences found in international human rights law instruments, whereby states are not only provided with an entitlement to investigate and prosecute acts of torture, but have an obligation to do so. This is done by renouncing a strict regime demarcation

[37] Völkerstrafgesetzbuch vom 26. Juni 2002 (BGBl. I S. 2254), das durch Artikel 1 des Gesetzes vom 22. Dezember 2016 (BGBl. I S. 3150) geändert worden ist para § 7.
[38] 'Two Syrian Officers of the Regime Face Trial: "A Historic Step Towards Justice"' (n 7).
[39] See Chapter 2 below.
[40] This is examined and discussed in Chapter 4 of the thesis.

between international criminal law and international human rights law. Indeed, as the emergence of international criminal law was strongly informed by international human rights law, this original link between the two shall be reinvigorated rather than weakened.[41]

1.3 Aim and Research Questions

This thesis aims, on the one hand, to problematize the current paradoxical understanding of universal jurisdiction associated with crimes under international law with a specific focus on the acts of torture; and on the other, it seeks to construct a human rights centred understanding of universal jurisdiction to resolve such a paradox.

The specific research questions the thesis seeks to answer are:

- Can universal jurisdiction be strengthened as a tool for enhanced protection against torture through the construction of a human rights centred approach?
    - What is the relationship between the positive obligations of states to criminalize, investigate and prosecute acts of torture under international human rights law and the traditional understanding of the principle of universal jurisdiction?
    - Do the obligations of states to provide and exercise jurisdiction over acts of torture committed by foreign nationals abroad under Art 5(2), 6 and 7 of the Torture Convention entail an obligation to ascertain and exercise universal jurisdiction?
    - How can the jurisdictional regime of the UNCAT and the individual right to an effective remedy for victims of torture inform the construction of a human rights centred approach to universal jurisdiction in torture cases?

1.4 Delimitations

While the principle of universal jurisdiction has been discussed and written about for a long time and at considerable length, the concept remains controversial and ambiguous.[42] The present thesis does therefore not set out to establish a pure, generally applicable definition of the concept at large, but uses a working definition of the term described in more detail in Chapter 3. The examination of the concept focuses on how the traditional understanding of universal jurisdiction contributes to the creation of a paradox, which undermines the role of the principle in the international efforts to prevent impunity for torture, and how this paradox can be remedied. In considering the relationships between universal jurisdiction and human rights, focus is placed on human rights as a trigger for the application of universal jurisdiction, rather than on how human rights regulate the criminal justice process and the application of universal jurisdiction.[43]

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[41] See below, section 3.7.2.
[42] Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives.* (Oxford University Press 2006).
[43] On the dual relationship between international human rights law and international criminal law, see section 3.7.2.

Due to space constraints, the choice has been made to limit the examination to cover only torture as a stand-alone act and to not discuss other acts or crimes in relation to which the exercise of universal jurisdiction is typically considered, such as war crimes, genocide and crimes against humanity, although these are touched upon where especially relevant. The choice to focus on the crime of torture specifically is based on a twofold reason. Firstly, the prohibition of torture and state obligations to investigate and repress its commission are specifically enshrined in a number of human rights instruments dealing with civil and political rights, and that there therefore is plenty of material available on the international struggle against torture as a human rights violation. Secondly, torture is governed by a specific international convention, the Torture Convention, which includes explicit positive obligations on states to investigate and prosecute torture crimes, including an obligation to establish jurisdiction over crimes lacking a traditional jurisdictional basis, which is often termed 'universal jurisdiction'.[44]

While the use of universal jurisdiction by national courts and authorities is often closely linked to questions of immunity of the alleged perpetrators, such issues fall outside the scope of this thesis. Since the focus is to consider the use of universal jurisdiction in particular, criminal proceedings falling within other forms of jurisdiction, such as those brought against a state's own nationals under the principle of active personality, are not be considered. Although under international human rights law, the provisions proscribing torture generally also proscribe cruel, inhuman and degrading treatment or punishment ("other forms of ill-treatment"), forms of ill-treatment not qualifying as torture are not examined at depth, as the focus of the thesis is on torture as defined by the Torture Convention.[45] In discussing the status of relevant norms as a part of customary international law, limitations of space entail that the issue cannot be provided with the comprehensive examination of state practice it merits, especially considering the arguably fast-developing nature of the relevant norms and their customary status. The examination of customary international law has therefore been limited to discussing the main arguments.

In examining the rights of victims of torture, the norms on the standing of victims during the criminal process itself, e.g. rights to participate and take on specific roles in the criminal trial of the perpetrators, are not be examined. Instead, the focus lays on the victims' right to an effective remedy, including procedural rights to remedy and the substantive right to reparation, which the author judges are more closely related to the question of the forum state's exercise of universal jurisdiction, as they are more relevant for the initiation of an investigation and proceedings. Issues of standing and procedural issues related to the criminal proceedings themselves fall outside the scope of the present thesis, the focus of which is on the establishment and exercise of jurisdiction in general, as opposed to ensuring the quality of investigation or proceedings conducted under such jurisdiction.

Importantly, the thesis also does not delve into the questions regarding the pros and cons of criminal investigations and proceedings as a form of human rights protection, transitional

[44] The 'universal' nature of these obligations are examined in Chapter 4.
[45] See further Chapter 4.

justice or form of state violence. It also does not deal with questions regarding whether criminal law action from the perspective of criminology truly has a deterrent effect, but chooses to follow the line adopted by international human rights actors such as courts and treaty bodies, which have continually emphasized the importance of accountability in strengthening human rights protections.[46] The thesis also does not set out to discuss the many political, philosophical or moral issues linked to the exercise of universal jurisdiction.

1.5 Theory

The thesis builds on the analysis of positive state obligations relevant for ensuring individual accountability for torture, as well as the rights of victims of torture to an effective remedy for the harm suffered. Importantly, it does not fully subscribe to a legal positivist theory of law, grounded on the consent of states.[47] It rather seeks to reconstruct the system of obligations surrounding the exercise of extra-territorial jurisdiction based not only on the *lege lata* considerations but also on *de lege ferenda* ones. Hereby the thesis steps outside the consensualist approach to international law and instead assumes a teleological view looking at international law as a system pursuing values and goals of the international community as expressed in the Charter of the United Nations,[48] including in accepting the central position of the protection of human rights within the legal system. As a 'system of law' international law should also be shaped and applied in a way which contributes to the coherence of the system, thereby contributing to the central goals and values of the international community. Hereby the author seeks to overcome the limits between different branches of law, namely international human rights and international criminal law, to understand the legal system comprehensively. This arguably enables one to question the incoherencies created by the separation between the different fields and, in particular, to illuminate the paradox described above.

Although jurisdiction is generally considered to be conceptually separate from questions of material justice, by forming a precondition for the exercise of powers by the state or other relevant actor in question, the present thesis deals with the issue as more closely connected to the factual state obligations to act in certain ways in certain situations. This approach is adopted based on the intention to construct a human rights-based approach to universal jurisdiction which may challenge and supplement the mainstream position on it. In view of this, two concepts of jurisdiction are flanked. The first concept of jurisdiction is the one found under public international law, which entails a state entitlement to make applicable and enforce law to those 'falling within' the state's jurisdiction. Hereby states are free to extend their jurisdiction as they please, as long as the exercise of such jurisdiction does not violate norms of international law, such as the territorial sovereignty of another state. This includes the traditional understanding of universal jurisdiction as a state entitlement. The second concept of jurisdiction is the one found in international human rights law, whereby jurisdiction is determined by

[46] See Chapter 2 below.
[47] For a questioning of the traditional accounts of legal positivism and some more realistic modern approaches to the theory see Jörg Kammerhofer, 'International Legal Positivism' in Anne Orford and Florian Hoffmann (eds), *Oxford Handbook of the Theory of International Law* (Oxford University Press 2016).
[48] Charter of the United Nations 1945 (1 UNTS XVI).

principles hinging on the state's *de facto* control and cannot be determined freely by the state. Where the state exercises sufficient control, it is also bound by its obligations to respect, protect, fulfil and promote human rights for everyone within its jurisdiction, entailing that states have an interest in limiting their jurisdiction in order to limit their obligations.[49] The separation between the two jurisdictional concepts is further clarified throughout the thesis, since it is also illustrated by the resulting paradox between human rights obligations and universal jurisdiction.

1.6 Method and Material

The research is mainly based on a doctrinal research method, complemented by the inclusion of elements of analytical reconstruction in the application of the human rights centred approach to the topic. Hereby the thesis adopts an approach which transcends strict regime demarcations within international law, by appealing to a concept of international criminal law, i.e. universal jurisdiction, and assessing its value in an international human rights context, i.e. that proscribing torture.

The material laying the foundation of the thesis consists primarily of sources of international law,[50] namely treaties, customary international law, as evidenced by state practice and *opinio juris*, and general principles of law. Furthermore, subsidiary means of determining the rules of international law have been used including the case law from international, regional and some national courts, as well as practice from the UN Treaty Bodies such as the Committee Against Torture ("CAT Committee"), and works of legal doctrine. Soft law instruments such as guidelines and declarations have also been considered. Additional sources, such as media coverage and electronic materials, have been used to draw complementary information to the legal analysis. The role of legal doctrine is especially important in the context of analytical reconstruction and critical examination of the logic underlying the legal framework. Some of the main works used in the examination include Manfred Nowak et al. (eds.), *The United Nations Convention against Torture and its Optional Protocol: A Commentary*;[51] Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction in Prosecuting Serious Crimes under International Law;*[52] and Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives.*[53]

1.7 Terminology

Jurisdiction can in general be defined as "the authority to affect legal interests – to prescribe rules of law, to adjudicate legal questions and to compel or take enforcement action." It is the tool used by states to make the law functional and to translate it into reality. Any legal definition or legal institution necessitates a spatial and temporal scope of jurisdiction. However, the term

[49] Gregor Noll, 'Theorizing Jurisdiction' in Anne Orford and Florian Hoffmann (eds), *Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 602–607.
[50] Art 38, United Nations, Statute of the International Court of Justice, 18 April 1946 1946.
[51] For more on the concept of jurisdiction and the different denotations of the term, see Nowak, *The United Nations Convention against Torture: A Commentary* (n 1).
[52] Inazumi (n 8).
[53] Reydams (n 42).

itself includes both rule-making and rule-enforcing jurisdiction, and it is of importance to separate between prescriptive or legislative jurisdiction, adjudicative jurisdiction and enforcement jurisdiction. The latter two forms depend on the existence of the first, since no adjudication or enforcement can take place where there is no law.[54] This definition of jurisdiction entails jurisdiction as understood in public international law and consequently in international criminal law and the thesis hereby deals mainly with the adjudicative and enforcement aspects of such jurisdiction. As mentioned above, within international human rights law jurisdiction however is a question of delimitation of state obligations, which determines the applicability of the states' human rights duties.[55] Through its approach, the thesis seeks to combine these two jurisdictional concepts, to consider the rights and perhaps obligations of states to not only legislate providing for universal jurisdiction, but to take investigative and prosecutorial action against suspected perpetrators of torture.

While the scope and exact meaning of the principle of *universal jurisdiction* is not clear in international law, the term 'universal jurisdiction' in the context of this thesis refers to the criminal jurisdiction a state extends based on the nature of the crime in question as a particularly serious violation of human rights and international law, in the absence of territorial or nationality aspects. Hereby the only connection between the crime and the state exercising jurisdiction may be the requirement of the perpetrator's presence in the state, after the commission of the crime.[56] Universal jurisdiction therefore implies jurisdiction extended without any of the classic jurisdictional links, e.g. territoriality, active or passive personality. The definition of universal jurisdiction is discussed further in Chapter 3. In the present context, universal jurisdiction does not include jurisdiction exercised by international tribunals, but refers to the jurisdiction of states. Also universal *civil* jurisdiction, although often overlapping with its criminal counterpart, falls outside the scope of this examination.[57]

The term *international crimes* is often used in a variety of ways and may include different crimes. Although torture as a stand-alone crime is not always termed as an international crime per se, it is for the sake of simplicity in the context of the present thesis included in the term. *International crimes* therefore include the core international crimes covered by the Rome Statute, namely genocide, crimes against humanity, war crimes and aggression, as well as the crime of torture. The obligation *aut dedere aut judicare*, also known as the obligation to extradite or prosecute, is a type of provision found in a number of international treaties which deal with specific grave crimes. Its aim is to avoid the creation of safe-havens and thereby prevent impunity for such crimes. The specific scope and form of the *aut dedere aut judicare* obligation under the Torture Convention is be examined in Chapter 4.

[54] Christopher L Blakesley and Dan E Stigall, 'The Myopia of U.S. v. Martinelli: Extraterritorial Jurisdiction in the 21st Century' (2007) 39 George Washington International Law Review 1, 12.
[55] See section 1.5 above.
[56] International Law Association Committee on International Human Rights Law and Practice, 'Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences' (2000) International Law Association Reports of Conferences, 69, 403-442 404.
[57] See Reydams (n 42) 1ff.

For the sake of clarity, the term *territorial state* is used to mark the state in which a crime has been committed. *Forum state* refers to the non-territorial state in which an investigation or prosecution of an extraterritorial offence is underway, *custodial state* to the state which has a suspect under custody and *jurisdictional state* to any state which enjoys jurisdiction over a certain crime. The terms *accused*, *suspect, defendant* and *perpetrator* are all used in an everyday, as opposed to a legal technical sense.[58] While there is an ongoing discussion about the appropriateness of the terminology surrounding victims/survivors of serious crime, especially in relation to sexual violence, the thesis applies the term *victim.* The term is chosen since the victim classification is associated with specific legal rights which are examined in Chapter 5 of the thesis.

1.8 Contribution to Existing Scholarship

While universal jurisdiction has been discussed and written about for a long time and at considerable length, the concept remains controversial and ambiguous. The scholarship on the issue has tended to regard universal jurisdiction primarily as a state entitlement rather than an obligation, following the public international law conception of jurisdiction. The literature is abundant also in relation to state obligations to prosecute international crimes and serious violations of human rights, including torture. Such scholarship has however tended to focus on the prosecution of crimes committed on the territory of the state or perpetrated by state agents, alternatively with the support or acquiescence of the prosecuting state such as in the context of extraordinary rendition. Also the UNCAT has been analysed and commented on e.g. in notable works such as Nowak et al. (eds.) work *The United Nations Convention against Torture and its Optional Protocol: A Commentary*.

The present thesis seeks to contribute to the existing scholarship primarily by illustrating the paradox of the fight against torture in international human rights law and the view of universal jurisdiction as an entitlement for states and by suggesting the construction of a human rights centered approach to universal jurisdiction based on positive state obligations to investigate and prosecute torture and the right to an effective remedy of victims of torture.

1.9 Outline

Chapter 2 provides a brief consideration of the prohibition of torture in international human rights law, specifically in a number of instruments dealing with civil and political rights, and the positive state obligations to investigate and prosecute torture enshrined in these provisions. The chapter also briefly discusses the existence of customary international law norms providing for such positive obligations.

Chapter 3 provides an introduction and overview of the principle of universal jurisdiction in general: its development, role in ending impunity for international crimes, and basis in

[58] ibid 5f.

international law. Also the controversial nature of universal jurisdiction and some of the critiques raised against the principle are discussed. Chapter 3 also discusses the traditional view of universal jurisdiction as an entitlement for states and argues that this leads to a paradox in the international legal regime created to stop impunity for torture and international crimes in general. The chapter also argues that the paradox can be partly remedied through the formulation of a human rights centred approach to universal jurisdiction, which entails recognizing the role of state obligations to exercise such jurisdiction.

Chapter 4 discusses the existence and extent of states' obligations to provide and exercise universal jurisdiction under the Torture Convention. Hereby the Chapter consists of a review of relevant articles including the definition of torture, the obligations to prevent and criminalize torture, and the obligations to establish and exercise criminal jurisdiction over perpetrators of torture offences. The chapter also includes an analysis of the existence and scope of state obligations to apply universal jurisdiction, i.e. an analysis of the relationship between the principle of universal jurisdiction and UNCAT obligations to extend jurisdiction to (investigate and prosecute) any perpetrator present in territory under the jurisdiction of a States Party.

Chapter 5 examines the right to an effective remedy for victims of torture; the different rights and obligations this entails e.g. in relation to investigation, reparation and prosecution; and considers the impact of such rights on the construction of a human rights based approach to universal jurisdiction in torture cases.

Finally, Chapter 6 includes the final discussion on the topic. The chapter begins with an examination of whether customary international law can be held to entail an obligation for states to exercise universal jurisdiction over torture offences. Thereafter ideas on how a human rights centred approach to universal jurisdiction impacts the form of the principle and related international obligations are presented.

2 State Obligations to Ensure Accountability for Torture under General International Human Rights Law

2.1 Introduction

The prohibition of torture and the positive obligations incumbent upon states, are today enshrined in a number of human rights instruments, and the legal framework dealing with the issue is one of the most developed in international human rights law.[59] The prohibition has also been recognized as a customary rule of international law with the status of a peremptory norm – *jus cogens* – which therefore is binding on all states irrespective of ratification of human rights treaties and cannot be limited or derogated from through treaty.[60]

This chapter provides an overview of the relevant provisions and the positive state obligations[61] to criminalize, investigate and prosecute torture under general human rights law instruments. Obligations to ensure accountability for torture through criminalisation, investigation and prosecution or extradition are also explicitly included in the UN Torture Convention, which is the international instrument specialized on the fight against torture. In order to better allow for the step by step analytical reconstruction of a human rights centred understanding of universal jurisdiction, and to not fragmentalise UNCAT as a coherent treaty regime, by covering all relevan discuss these provisions, as well as the internationally recognized definition of torture enshrined in the Torture Convention, are however discussed below in Chapter 4 of the present thesis and is therefore not covered in the present Chapter.

The examination is undertaken to illustrate the extensive human rights framework dealing with torture, which is in Chapter 3 contrasted with the traditional view of universal jurisdiction to argue for the existence of a paradox underlying the system. The examination hereby focuses on the International Covenant on Civil and Political Rights ("ICCPR")[62] and the regional human rights systems in Europe, America and Africa.[63] It begins by briefly presenting the relevant human rights treaty regimes, before discussing the positive state obligations to ensure

[59] Metin Başoğlu (ed), *Torture and Its Definition in International Law: An Interdisciplinary Approach* (Oxford University Press 2017) 216f.
[60] See e.g. Vienna Convention on the Law of Treaties 1969 (Treaty Series, vol 1155, p 331) Art 53; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Judgment* [2012] International Court of Justice I.C.J. Reports 2012, p. 422 [99]; *Prosecutor v Furundžija (Trial Chamber Judgement))* [1998] International Criminal Tribunal for the former Yugoslavia (ICTY) IT-95-17/1 [153–154]; *Caesar v Trinidad and Tobago* [2005] Inter-American Court of Human Rights Series C 123 [70].
[61] Positive state obligations refers to the state's obligations to take positive measures to safeguard the rights enshrined in international human rights law. They therefore differ from negative obligations, which entail an obligation to not interfere with the rights in question. Whereas a violation of the former results primarily from inaction, a violation of the latter results from a factual act of the state or its agents, resulting in an interference with the right. See e.g. Jean-François Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights* (Council of Europe 2007) 11.
[62] International Covenant on Civil and Political Rights 1966 (United Nations, Treaty Series, vol 999, p 171).
[63] Provisions prohibiting torture can however also be found in other instruments, such as Arab Charter on Human Rights 1994 Art 13.

accountability enshrined in the instruments. It thereafter conducts a brief examination of customary international law. While many of the obligations discussed in this chapter apply not only to torture but also to cruel, inhuman and degrading treatment or punishment, this chapter does not discuss other types of ill-treatment and whether the state obligations discussed below are applicable to such treatment, but focuses on torture as defined under the Torture Convention,[64] to which all positive obligations are applicable.

2.2 Treaty Law

2.2.1 Relevant Treaty Regimes

International Covenant on Civil and Political Rights

The ICCPR is one of the main human rights instruments at the global level, with 173 States Parties and a broad territorial scope.[65] Its Article 7 provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment…" The goal of the provision is to protect the human dignity and personal integrity of every individual and it is complemented by the positive obligations on the humane and respectful treatment of persons deprived of their liberty under Art 10(1).[66] The scope of the brief provision of Article 7 has been significantly clarified through e.g. practice of the UN Human Rights Committee ("HRC"), the treaty monitoring body of the ICCPR, which has among other things discussed its scope and the positive obligations it entails.

European Regional Human Rights System

At the European regional level, Art 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR" or "European Convention")[67] is identical to the first sentence of Art 7 ICCPR. The brief provision has received significant attention in the case law of the European Court of Human Rights ("ECtHR" or "Strasbourg Court") and enshrines today a complex and wide-ranging set of positive and negative state obligations to prevent and sanction torture. The great focus placed on the prohibition and ending of torture has within the European regional system also resulted in the adoption of the specialized instrument, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which establishes the Committee for the Prevention of Torture, which has the authority to make visits to places of detention within the member states of the Council of Europe.[68]

Inter-American Regional Human Rights System

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[64] See further Chapter 4.
[65] 'UN Human Rights Treaties, Status of Ratification: Interactive Dashboard' (UN Human Rights, Office of the High Commissioner) <https://indicators.ohchr.org/>.
[66] Human Rights Committee, 'General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (1992) para 2.
[67] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 1950 (ETS 5).
[68] William Schabas, *The European Convention on Human Rights: A Commentary* (First edition, Oxford University Press 2015) 165.

Within the Inter-American human rights system, the leading human rights instrument is the American Convention on Human Rights ("ACHR"),[69] under which the prohibition of torture is enshrined in Art 5 on the right to humane treatment. Art 5(2) specifically provides that: "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person." Hereby the first sentence is virtually identical to the first sentence of Art 7 ICCPR. The right to humane treatment under Art 5 ACHR, including the prohibition of ill-treatment, entails positive obligations on States Parties to the ACHR to exercise due diligence to both prevent and respond to breaches of the convention rights caused by private actors.[70]

Besides in the ACHR, positive obligations to respond to torture can within the American system also be found in the Inter-American Convention to Prevent and Punish Torture ("IACPPT").[71] The IACPPT, which has as of April 2020 been ratified by 18 member states of the Organization of American States ("OAS")[72], includes provisions similar to, if less detailed than, those covered by the Torture Convention, including state obligations to prevent and punish torture within their jurisdiction.[73]

African Regional Human Rights System

Also within the African regional human rights system, the main human rights instrument, namely the African Charter on Human and Peoples' Rights ("ACHPR" or "African Charter")[74] prescribes a prohibition of torture. Its Art 5 states:

> "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

Notable about the provision is not only the inclusion of the right to respect for the dignity inherent in every human being, but also the classification of torture as a form of 'exploitation and degradation of man' together with slavery and slave trade. In the African human rights system torture is additionally prohibited by Art 16 of the African Charter on the Rights and Welfare of the Child.[75]

The human rights court of the African system has had less time to develop its case law than its European and American counterparts and Africa lacks a regional instrument specifically covering torture, such as what exists in Europe and America. However, to strengthen the struggle against torture and other forms of ill-treatment in Africa and to assist African states in meeting their international obligations in this regard, in 2008 the African Commission on Human and People's Rights ("African Commission") adopted the Robben Island Guidelines

[69] American Convention on Human Rights 1969.
[70] *Velásquez-Rodríguez v Honduras* [1988] Inter-American Court of Human Rights Series C 4 [172–173].
[71] Inter-American Convention to Prevent and Punish Torture 1985 (OAS Treaty Series No 67).
[72] 'Status of Ratification: Inter-American Convention to Prevent and Punish Torture' <https://www.oas.org/juridico/english/sigs/a-51.html>.
[73] Inter-American Convention to Prevent and Punish Torture Art 6.
[74] African Charter on Human and Peoples' Rights ('Banjul Charter') 1981 (CAB/LEG/67/3 rev 5, 21 ILM 58 (1982)).
[75] African Charter on the Rights and Welfare of the Child 1990 (CAB/LEG/249/49 (1990)).

("RIG")[76] for the prohibition and prevention of torture and ill-treatment. The RIG adopt best practices on the prevention and response to torture and ill-treatment and provide that African states should e.g. ratify or accede to international instruments relevant for the fight against torture, such as the Torture Convention, ICCPR and the Rome Statute of the International Criminal Court ("Rome Statute")[77], and promote and support cooperation with international mechanisms.[78] The RIG also include a number of guidelines on torture prevention and responding to the needs of victims.

2.2.2 The Nature of the Prohibition

The prohibition of torture covers both physical and mental suffering and prohibits corporal punishment.[79] While the relevant provisions prohibit both torture and other forms of ill-treatment, the different articles do not generally provide definitions for the different kinds of ill-treatment covered. Treaty monitoring bodies have chosen somewhat differing approaches, but often avoided drawing up sharp distinctions between the different kinds of prohibited treatment or creating lists of specifically prohibited acts. Instead, distinctions are based on the nature, purpose and severity of the treatment in the specific case.[80] E.g. to fall within the scope of Art 3 ECHR the ill-treatment must reach a minimum level of severity which "depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc."[81] There is however no particular consequence to the distinction between torture and other forms of ill-treatment, since the same state obligations are applicable regardless of the type of ill-treatment.[82] The Inter-American Court and Commission of Human Rights in turn have relied on the torture definition in Art 2 IACPPT, which the court has found to constitute a part of the *corpus iuris* the court must rely on in establishing the scope of Art 5(2) ACHR. The most widely accepted definition of torture can however be found in the Torture Convention, which is discussed in Chapter 4.

The prohibition of torture "enshrines one of the most fundamental values of democratic societies".[83] Under all human rights treaties, the prohibition is therefore absolute and no derogation is allowed, even during public emergency or other serious crisis, and there is no valid justification for breaches, including excuses based on superior orders.[84] Also the obligation to fight impunity for grave human rights violations including torture has been recognized by all relevant human rights systems. E.g. the Human Rights Committee has

[76] Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) 2008 Preamble.
[77] Rome Statute of the International Criminal Court (last amended 2010).
[78] Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) paras 1–3.
[79] Human Rights Committee (n 66) para 5.
[80] ibid 4. Note however that an explicit definition of torture can be found under the UNCAT, which is discussed in Chapter 4.
[81] *Ireland v the United Kingdom* [1978] European Court of Human Rights (Application no. 5310/71) [162].
[82] Schabas (n 68) 169.
[83] *A and Others v the United Kingdom* [2009] European Court of Human Rights (Application no. 3455/05) [126].
[84] International Covenant on Civil and Political Rights Art 4(2); Human Rights Committee (n 66) para 3; American Convention on Human Rights Art 5, Art 27. See also Art 5 Inter-American Torture Convention.

expressed that impunity is an issue of sustained concern and noted that such impunity "may well be an important contributing element in the recurrence of the violations". States should therefore remove any impediments for the establishment of accountability and cooperate in establishing accountability for human rights violations criminalized under national or international law.[85] As stated by the Inter-American Court, which has hereby arguably taken a more progressive stance than other bodies, states have "the obligation to use all the legal means at [their] disposal to combat [impunity], since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives."[86] The provisions prohibiting torture have therefore, often in combination with other relevant treaty provisions, been interpreted to entail not only an obligation for States Parties to abstain from interfering with the right to be free from torture, but also a large number of positive obligations to repress torture and ill-treatment and to provide victims with effective remedies. The rights of victims in this regard is discussed further in Chapter 5 and focus in this section is therefore on the obligations to ensure accountability.

2.2.3 Positive State Obligations to Ensure Accountability

The provisions prohibiting torture under general international human rights law instruments have a positive dimension, and important part of these positive obligations consists of the so called 'procedural obligations' to criminalize, investigate and where appropriate prosecute violations. These procedural obligations were first developed by the Inter-American Court in respect to the state's obligation to investigate and act upon deaths and disappearances, but have come to apply also in relation to other serious human rights violations such as torture and which have been adopted by other human rights regimes.[87]

2.2.3.1 Criminalization and the Legal System

The fundamental first requirement for the taking of effective measures to investigate and prosecute cases of torture is that the state put in place the necessary legislation at the national level. This includes criminalization of violations of the prohibition of torture, but also other necessary legislation. E.g. according to the Human Rights Committee, States Parties should in their reporting indicate the relevant provisions in their national laws criminalizing torture and which penalties perpetrators may be subject to.[88] The domestic legal system should effectively guarantee "the immediate termination of all the acts prohibited by article 7 [ICCPR] as well as appropriate redress" for victims.[89] States Parties are therefore obliged to criminalize torture and to provide appropriate redress to victims of such violations. The HRC has however also held that the prohibition or criminalization of torture is not sufficient to fulfil the obligations under Art 7 ICCPR, but that states "should inform the Committee of the legislative, administrative,

[85] Human Rights Committee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) CCPR/C/21/Rev.1/Add. 13 para 18.
[86] *"White Van" (Paniagua-Morales et al) v Guatemala* [1998] Inter-American Court of Human Rights Series C 37 [173].
[87] Schabas (n 68) 191.
[88] Human Rights Committee (n 66) para 13.
[89] ibid 14.

judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction."[90]

The criminal-law provisions put in place to deter the commission of offences against personal integrity must be effective and be backed up by law-enforcement machinery to prevent, suppress and punish breaches of the provisions, including when administered by private actors. In practice, e.g. for the ECtHR to find a state to be in violation of this obligation it must "be shown that the domestic legal system, and in particular the criminal law applicable in the circumstances of the case, fails to provide practical and effective protection of the rights guaranteed by Article 3".[91] The obligation is therefore one of conduct, not result, as it cannot be required that e.g. criminal proceedings end in a specific way. However, where the criminal law does not provide adequate protection against treatment contrary to the prohibition, the state is in violation of its obligations.[92] Hereby the ECtHR has found that when the criminal law provisions are ineffective e.g. because they reflect outdated stereotypes about sexual violence such as requiring proof of physical resistance for a finding of sexual assault and thereby contribute to impunity for torture, the state can be found in violation of Art 3.[93]

Within the African regional system, the RIG include significant references to the Torture Convention and hold that states should in their national law criminalize torture in accordance with its definition in Article 1 UNCAT and ensure jurisdictional competence over torture crimes committed abroad when the perpetrator is present in the state in accordance with Art 5(2) of the UNCAT.[94] The RIG also provide for a number of principles on the criminalization of torture, such as the lack of justifications, that trials and extraditions of torture suspects shall take place expeditiously and that perpetrators shall be subject to appropriate sanctions reflecting the gravity of the offence in accordance with international standards.[95]

2.2.3.2 Investigation

The first procedural step in ensuring non-impunity for torture is to conduct a prompt and impartial investigation into any alleged violations of the prohibition in order to prevent impunity both among private and public actors.[96] The investigation conducted must be effective, meaning it should be capable of leading to identification of the responsible parties, and the relevant human rights bodies have developed detailed norms for how this should be done. E.g. the Strasbourg Court has held that an effective investigation entails the taking of all reasonable steps to secure witnesses and forensic evidence, and must be sufficiently independent and

[90] ibid 8.
[91] *Beganović v Croatia* [2009] European Court of Human Rights Application no. 46423/06 [71].
[92] *A v the United Kingdom* [1998] European Court of Human Rights Application no. 25599/94 [19–24].
[93] *MC v Bulgaria* [2003] European Court of Human Rights Application no. 39272/98; Schabas (n 68) 192.
[94] The UN Torture Convention including the torture definition and the proscribed jurisdictional bases is discussed below in Chapter 4.
[95] Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) paras 6–14.
[96] Human Rights Committee (n 66) para 14; *Velásquez-Rodríguez v. Honduras* (n 70) para 176.

expeditious. Without such specific requirements, the investigation would in practice not serve to end impunity for torture.[97]

Although the obligation to investigate is an obligation of conduct, not result, the investigation must, in order for the state to fulfil its procedural obligations, be serious, have an objective, be conducted by the state as its legal responsibility and consist of an effective search for the truth, irrespective of the identity of the perpetrator.[98] The Inter-American Court has also highlighted the importance of conducting a proper investigation by holding that states should take into consideration "the international standards for documenting and interpreting the forensic evidence regarding the perpetration of acts of torture, particularly those defined in the Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol")".[99] In addition, the public authorities must act to begin an investigation on their own volition as soon as a complaint has come to their attention, and they cannot leave it up to the victims "to lodge a formal complaint or to request particular lines of inquiry or investigative procedures".[100] Once they have become aware of the existence of a situation possibly meriting investigation, the state authorities therefore have full responsibility to take initiative, carry out an investigation and be "determined to identify and prosecute those responsible". Once it has been determined that torture has taken place the state must continue the investigation with the view of identifying the perpetrators and prosecuting them for torture.[101]

The Strasbourg and the Inter-American courts have also made clear that states are in situations of specific types of ill-treatment obliged to take specific and targeted procedural measures to deal with them. E.g. when suspicions arise that racist motives may lie behind violent attacks, the authorities must under Art 3 ECHR investigate such motives specifically irrespective of whether the perpetrator is a private individual or public official. As stated by the ECtHR: "[t]reating racially motivated violence and brutality on an equal footing with cases lacking any racist overtones would be tantamount to turning a blind eye to the specific nature of acts which are particularly destructive of fundamental human rights."[102] Also the Inter-American court has held that states have a duty to take all necessary steps to investigate possible discriminatory motives and that investigations should avoid the use of stereotypes, such as inquiring about the victim's sex life in connection with an investigation of allegations of sexual violence.[103]

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[97] *Assenov and Others v Bulgaria* [1998] European Court of Human Rights Application no. 24760/64 101–106; M Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59 LAW AND CONTEMPORARY PROBLEMS 41, 193.
[98] *Velásquez-Rodríguez v. Honduras* (n 70) para 177.
[99] *Lysias Fleury et al v Haiti* [2011] Inter-American Court of Human Rights Series C 236 [121]. See also Inter-American Convention to Prevent and Punish Torture Art 8.
[100] *Nachova and Others v Bulgaria* [2005] European Court of Human Rights Application no. 43577/98 [111]; *Ilhan v Turkey* [2000] European Court of Human Rights Application no. 22277/93 [63].
[101] *Krastanov v Bulgaria* [2004] European Court of Human Rights Application no. 50222/99 [59–60].
[102] *Abdu v Bulgaria* [2014] European Court of Human Rights Application no. 26827/08 [44].
[103] *Azul Rojas Marín y otra vs Perú* [2020] Inter-American Court of Human Rights Series C 402; Chris Esdaile, Alejandra Vicente and Clara Sandoval, 'Discriminatory Torture of an LGBTI Person: Landmark Precedent Set by the Inter-American Court (Azul Rojas Marín and Another v. Peru)' (*EJIL:Talk!*, 4 May 2020) <https://www.ejiltalk.org/discriminatory-torture-of-an-lgbti-person-landmark-precedent-set-by-the-inter-

2.2.3.3 Prosecution and Punishment

To ensure non-impunity, the prohibition of torture also entails an obligation to prosecute and punish such acts, when appropriate. Such an obligation does not generally exist in relation to all human rights violations, where one may envision other ways of bringing perpetrators to justice. The obligation to prosecute and punish perpetrators is however clear and present in the case of the most serious human rights violations, including torture. This obligation applies irrespective of whether the perpetrator is a public official or a private individual and whether they have participated in the commission "by encouraging, ordering, tolerating or perpetrating prohibited acts".[104] The duty to punish perpetrators stems from the view that punishment is not only an effective option for dealing with serious human rights violations, but is essential and mandatory for the fulfilment of state obligations to respect and ensure the protected rights. In relation to serious human rights violations, the usual latitude afforded to states to choose an appropriate enforcement mechanism is removed and criminal justice provided as the only acceptable alternative.[105]

In a similar vein, within the African human rights system the RIG hold that states should ensure e.g. that perpetrators are subject to legal process, that there is no immunity from such process beyond the level required for foreign nationals by international law and that extradition requests by other states are handled expeditiously and in accordance with international standards.[106] As to choice of forum for criminal proceedings for torture as well as human rights violations more widely, the Inter-American Court has consistently rejected the competence of military criminal jurisdictions to try such violations, finding that where civil courts are not allowed to examine such cases this constitutes a violation of the rights to judicial guarantees.[107] The positive procedural obligations have in recent years seen a rapid development and illustrate a move towards the increasing use of criminal law as a protection tool in international human rights law. In e.g. the European system, the importance of the procedural obligations under Art 3 ECHR is also illustrated by the lack of a margin of appreciation, which would allow states to choose an appropriate national application of the rights and which is a common occurrence within the ECHR regime.[108]

The obligation to prosecute acts of torture is also closely connected to the principle that granting amnesties for such acts constitutes a violation of the torture prohibition by creating impunity.[109] Indeed, much of the early case law of both the Inter-American Court and Commission on state obligations to prevent and repress serious human rights violations revolved around the various

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american-court-azul-rojas-marin-and-another-v-peru/?fbclid=IwAR3stKMp_712J33aSBmqte3Rs7zvtnRJ7aIWUi1nEYDEgo2DRKIFtr1PkR4>.

[104] Human Rights Committee (n 66) para 13; Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford University Press 2009) 46.

[105] Seibert-Fohr (n 104) 46f.

[106] Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) para 16.

[107] Art 8 ACHR. Diego Rodriguez-Pinzón and others, *The Prohibition of Torture and Ill-Treatment in the Inter-American Human Rights System: A Handbook for Victims and Their Advocates* (World Organisation Against Torture 2014) 150 <https://atlas-of-torture.org/api/files/1556022875756br2vjwdv8os.pdf>.

[108] Seibert-Fohr (n 104) 146ff.

[109] See e.g. *Marguš v Croatia* [2014] European Court of Human Rights Application no. 4455/10 [127].

amnesties provided for such crimes in Latin America in the 1970s and 80s. Although the case law has developed gradually, the two human rights institutions have never approved any amnesty and the role of criminal law in human rights protections has further increased with time. As criminal justice has become a central theme of interest for the Inter-American Court, focus has moved from *de jure* to *de facto* impunity, which arises when states fail to take measures to investigate and prosecute human rights violations such as torture, rather than impunity through a legal construct such as amnesty.[110]

2.2.4 Extraterritorial Applicability of Human Rights Treaties

While the existence of positive state obligations in relation to the ending of impunity for torture is clearly established in international human rights law instruments and uncontroversial in themselves, their existence does not necessarily mean that the obligations are clear in situations with an extra-territorial element, such as in cases which rely on the exercise of universal jurisdiction. Since all general human rights law instruments have a certain jurisdictional scope, which is determined by what can be expected of states in terms of fulfilment of human rights, cases of torture which have been committed outside of the traditional jurisdictional scope of these instruments may not be covered by the wide-ranging obligations states are bound by within the treaty system.[111] This fact risks undermining the comprehensiveness of the legal regime and in extension may lead to impunity, especially in cases where the states with more obvious jurisdictional links to the crime, such as the territorial state and the state of nationality of the perpetrator of torture, fail to fulfil their obligations to prevent impunity.

In practice, international instruments take different approaches to extraterritorial applicability and where such clauses exist no two jurisdictional clauses are exactly alike.[112] Although the jurisdictional limits of human rights instruments can therefore vary, they are fundamentally constructed on the principle of the universality of human rights, which sets the baseline against which other considerations are to be measured. Considerations of the state's formal title over an area and that a finding of jurisdiction may arguably infringe on the sovereignty of another state or the individual's citizenship are therefore of no or only secondary relevance in determining the extraterritorial applicability of human rights instruments. In practice universality cannot however be the only consideration and questions of effectiveness of the regime play a part in determining the findings of courts and other actors.[113]

Among the human rights instruments including a dedicated jurisdictional clause, two main models of extraterritorial applicability can be found: i) the spatial model entailing jurisdiction

[110] Seibert-Fohr (n 104) 51f.
[111] See International Covenant on Civil and Political Rights Art 2(1); European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 Art 1; American Convention on Human Rights Art 1(1).
[112] Compare e.g. International Covenant on Civil and Political Rights Art 2(1); European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 Art 1. Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011) 11.
[113] Milanovic (n 112) 106–117.

as effective overall control over an area, and ii) the personal model entailing jurisdiction as authority and control over individuals.[114] Hereby the former model is most strongly anchored in jurisprudence,[115] although the latter has received some recognition within at least the HRC and American and European regional systems.[116] In addition, a third model, which hinges on territorial jurisdiction alongside a distinction between negative and positive obligations, has been suggested.[117]

Let us consider the example of the European system's handling of the jurisdictional limits of the ECHR. In 2011, the ECtHR gave an extensive account of its arguably less than consistent case law on the matter of jurisdictional scope of the ECHR in its case *Al-Skeini v. the UK*.[118] In the case, the court held territorial jurisdiction as the primary form of state jurisdiction, stating that extraterritoriality could only apply in "exceptional cases" and provided two such alternative categories of jurisdiction: "effective control over an area" and "State agent authority and control", which is further subdivided into "acts of diplomatic or consular agents on foreign territory", "exercise of public functions in another state that consented to it, invited it or acquiesced to it" and "the full and effective control over an individual".[119] The neat division of jurisdiction into primarily territorial and only exceptionally extraterritorial has however not been upheld in the Court's case law and has been questioned in doctrine. E.g. Gregor Noll has questioned the reliance on territoriality and held it to be rooted in an attempt to place the international human rights law concept of jurisdiction within the confines of the public international law concept, which relies on the primacy of territoriality. This arguably fails to consider the special character of jurisdiction under human rights law, as a delimitation to the state's obligations, which would more appropriately be determined considering the *de facto* power of the state.[120]

The relevance of the issue of extraterritorial applicability in relation to the procedural obligations relevant to torture can be illustrated by the example of the case of *Al-Adsani v. the UK*[121] decided by the European Court of Human Rights. In the case, the applicant, who had allegedly been subjected to torture by state agents in Kuwait, submitted that the UK had violated its obligations under Articles 1, 3 and 13 ECHR by granting the state of Kuwait immunity from a civil suit brought by the applicant before British courts.[122] The applicant submitted that the relevant articles should be interpreted as obliging the UK to assist its citizens in obtaining an effective remedy for torture against another state.[123] Article 1 ECHR provides that states shall

[114] ibid IV(2), (3).
[115] See e.g. *Loizidou v Turkey (preliminary objections)* [1995] European Court of Human Rights Application no. 15318/89 [62]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [2004] International Court of Justice ICJ Reports 2004, at 136 [109–113].
[116] See e.g. Human Rights Committee (n 85) para 10; Milanovic (n 112) 175–186.
[117] Milanovic (n 112) ch IV(4).
[118] *Al-Skeini and Others v The United Kingdom* [2011] European Court of Human Rights Application no. 55721/07.
[119] ibid 131–142; Gregor Noll, *'Theorizing Jurisdiction' in Orford & Hoffman (Eds.) Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 605f.
[120] Noll (n 119) 606f. See also above section 1.5.
[121] *Al-Adsani v the United Kingdom* [2001] European Court of Human Rights Application no. 35763/97.
[122] ibid 3.
[123] ibid 35.

secure the rights under the ECHR to "everyone within their jurisdiction", and the Court found that Articles 1 and 3 taken together provide the state with a number of positive obligations to prevent and provide redress for torture, but that such obligations only apply in relation to acts committed within the jurisdiction of the state. While Art 3 has certain extraterritorial applicability, e.g. in cases of *non-refoulment*, the court found such applicability to require a causal relationship between the commission of torture and the action of the States Party. Since no such causality existed in the present case, the UK was not obliged to provide the applicant with a civil remedy in respect to the alleged torture by Kuwaiti authorities.[124]

The judgement in the *Al-Adsani* case suggests that the Strasbourg Court, despite interpreting Article 3 to include a number of positive procedural obligations, does not consider them to apply to cases of torture which have taken place abroad without a causality connection to acts of the prospective forum state. Hereby it is interesting to consider whether the situation would be different in a case dealing with criminal investigation or proceedings against an individual, possibly present in the forum state and arguably posing a threat of future torture, instead of immunity from civil proceedings against a state, which in itself is a matter of public international law.

To discuss the issue of extraterritorial applicability of human rights it is however important to acknowledge that extraterritoriality, as pointed out by Milanovic, simply means that the individual is not at the time of the violation of their human rights physically present within the territorial jurisdiction of the state in question. This means that a violation of the prohibition of torture through *refoulment* to a country where the individual is at risk of torture or ill-treatment is not really a question of extraterritorial applicability of human rights, since the individual is in this case within the territory of the state. It is not the ill-treatment which may take place in the destination state but the *refoulment* itself – the state knowingly exposing an individual to the risk of ill-treatment – which constitutes the violation of Art 3.[125]

A similar argument could therefore be made in relation to procedural obligations relevant to torture. Although the act of torture itself has taken place extraterritorially, the state's omission to investigate and prosecute it may well take place within its territorial jurisdiction if the victim of the crime is now present in such territory. Especially in cases where also the perpetrator is now present on the territory of the state in question and therefore arguably poses a risk of further violations, such as in the German trial against former Syrian officials discussed in Chapter 1, the preventative interest of investigation and prosecution is present and it could therefore be argued that so is the state obligation to take positive measures.[126] Hereby it is of importance to clarify that there are in this situation two different kinds of jurisdiction at play. While investigations and prosecutions of crimes which have taken place abroad and outside the scope of traditional territorial principles take place under universal criminal jurisdiction, the state's human rights obligations to take positive procedural measures against such crimes may be

[124] ibid 39–40.
[125] See Milanovic (n 112) 8f.
[126] The remedial character of the obligations is discussed in Chapter 5.

territorial in nature. Universal criminal jurisdiction can therefore serve as a tool for fulfilling the arguably territorial positive human rights obligations of the state.

In addition, should the ECtHR and other human rights bodies begin to accept a more pragmatic model of determining state jurisdiction under international human rights law, namely a model based on the state's *de facto* power to act and ability to fulfil its obligations under human rights law, such a model would clearly facilitate the extension of procedural obligations to international crimes and severe human rights violations committed outside the territorial jurisdiction of the state. Since such a model would hinge on the *de facto* powers of the state, a state would be obliged to conduct an investigation and initiate proceedings in cases of alleged torture to the extent possible, no matter where such crimes had taken place. Since the procedural obligations are obligations of conduct, not result, practical difficulties states may face in such a process, such as the unavailability of evidence would not place the state in violation of its obligations, as long as the state had fulfilled its *due diligence* obligations.

Overall, it is as a matter of *lex lata* difficult to determine consistently to what extent the positive state obligations enshrined in international human rights treaties are applicable in relation to situations which may require the exercise of universal jurisdiction to ensure accountability. This is based on the issues and ambiguities at the very heart of the concept of jurisdiction in international law, including the attempts by e.g. the ECtHR to harmonize human rights related jurisdiction, which delimits the applicability of state obligations, with the traditional understanding of jurisdiction under public international law, which is centered around the primacy of territoriality and assumed to entail a state right, rather than a duty. The issue of applicability of human rights obligations to crimes committed abroad is however considered further under Chapter 5, where the rights of victims are at play.

2.2.5 Concluding Remarks

While the different instruments and regimes discussed above show some differences in the wording and form of the prohibitions of torture and the related positive state obligations, the examination also shows many similarities in the approach adopted to torture prevention and response. Firstly, all instruments discussed include an explicit prohibition of torture and uphold the right not to be subjected to such treatment as a non-derogable right, from which no exceptions can be made under any circumstances. The prohibition of torture is in each regime framed as one of the fundamental rights, violations of which entail serious breaches of human dignity. Torture is without fail classified among the most serious human rights violations together with e.g. murder, extrajudicial killings, and enforced disappearances, and the development of the positive obligations concerning torture is often linked to the development of similar obligations in relation to other serious human rights violations. Significant cross-referencing between the systems can also be seen, e.g. in the adoption of the procedural obligations doctrine from the Inter-American to the European system. The various human rights bodies also recognize the customary and *jus cogens* character of the prohibition of torture. The fundamental importance of the prohibition and the right not to be subjected to such violations is therefore absolute and uncontroversial.

Secondly, all regimes discussed above entail not only an obligation of non-interference with the right but also positive obligations for states to prevent and ensure accountability for torture. Hereby, the role of criminal law and the ending of impunity for such acts has been significantly strengthened over time to the point where criminalization, investigation, prosecution and punishment are today considered a necessary part of the fight against torture and the protection of fundamental rights. The recognition of the necessity of a criminal law response has had a far-reaching impact in terms of state obligations to e.g. investigate effectively, initiate investigations at the volition of the authorities, provide for effective and independent judicial processes and appropriate penalties which take into account the seriousness of the crime in question etc. It has also led to amnesties and immunities for torture being considered as an impediment to accountability and therefore as generally unacceptable from a human rights point of view. Overall, the obligations to criminalize, investigate and where appropriate prosecute torture are clear and present in all the major general human rights systems examined. As expressed by the Inter-American Court, a state is under the obligation "to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation" for serious human rights violations such as torture.[127] While the African system may not recognize state obligations to investigate and punish torture as strongly as the European and American regional mechanisms, it is clear that it too accepts the absolute nature of the prohibition of torture and envisions investigation and prosecution, in cooperation with international mechanisms and in accordance with international standards, as one of the most important mechanisms in the fight against such serious human rights violations.

2.3 Customary International Law

Besides treaty law, there are of course other sources of international law to take into account, the most important of which is customary international law.[128] Whereas treaties are in themselves binding only on their States Parties, customary international law is from the time of its emergence binding on all states and therefore of great importance in the attempt to secure universal human rights standards and protections. While the customary nature and *jus cogens* status of the prohibition of torture is generally accepted, it does not automatically mean that also the positive obligations as developed in the practice of international and regional human rights mechanisms are a part of customary international law.

It is generally accepted that custom consists of two aspects: state practice in accordance with the custom and *opinio juris*, the state's sense of legal obligation to comply with the custom.[129] In examining customary international law, there are however two main approaches to determine the existence of customary norms, *induction* and *deduction*. Both approaches seek to infer new knowledge from old knowledge, but through differing approaches to legal reasoning. To determine the existence of a customary norm induction relies on "a pattern of empirically

[127] *Velásquez-Rodríguez v. Honduras* (n 70) para 174.
[128] Art 38(1), United Nations, Statute of the International Court of Justice, 18 April 1946.
[129] See e.g. *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 1969 (International Court of Justice) [77].

observable individual instances of State practice and opinio juris", while deduction relies on "inference, by way of legal reasoning, of a specific rule from an existing and generally accepted (but not necessarily hierarchically superior) rule or principle".[130] Although the inductive method enjoys the widest general acceptance, in the practice of the ICJ four situations have been identified in which the use of deduction is necessary in order for the court to come to a conclusion rather than declaring a *non liquet*. These situations are i) where state practice is non-existent due to the novelty of the situation, ii) where state practice is inconclusive due to conflicting or various approaches, iii) where *opinio juris* cannot be established, and iv) when there is a discrepancy between state practice and *opinio juris*.[131] Both approaches however arguably fail to appropriately illuminate the element of discretion involved in the process of ascertaining customary international law, which in practice involves an element of argumentation rather than an objective search for the truth.[132]

According to the traditional understanding of customary international law which relies on induction, the development of a custom began with the emergence of "a general (or extensive) uniform, consistent and settled practice" which was gradually joined by the corresponding *opinio juris.* In practice state actions were what counted, as the *opinio juris* was difficult to verify, and practice was induced from single instances of state action or omission, an *inductive* process.[133] Such an inductive process implies *finding* rules of international law, whereby the lawyer does not create but discovers norms enshrined in practice and *opinio juris*.[134] Today custom can however be derived from *deductive* processes, in which the existence of a customary international norm can be logically deduced from fundamental principles and norms of international law, based on the fundamental assumption that the coherence of the system of international law can justify the existence of customary norms.[135] The approach also relies more heavily on *opinio juris*, as opposed to individual instances of state practice to prove the existence of a custom and may therefore develop significantly faster than traditional custom.[136]

If one follows the traditional approach to the development of custom, which places a larger weight on uniform, consistent and settled state practice, it seems difficult to comprehensively hold that there is a definite customary law obligation to investigate and punish serious human rights violations in general or torture in particular. This is especially the case if one does not accept statements or voting in international fora as evidence of state practice, but relies only on material actions, in this case of investigation and prosecution of perpetrators of torture, as state

[130] Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 European Journal of International Law 417, 420. See further in sections 2.3 and 6.2.
[131] ibid 422f.
[132] Letizia LoGiacco, 'Eureka! On Court's Discretion in "Ascertaining" Rules of Customary International Law' in P Merkouris, J Kammerhoffer and N Arajärvi (eds), *Philosophy of Customary International Law and its Interpretation (forthcoming 2020)* 4, 16f <https://tricilawofficial.files.wordpress.com/2020/02/trici-law-research-paper-seriues-010-2019.pdf>.
[133] Reydams (n 42) 7f.
[134] LoGiacco (n 132) 3f.
[135] ibid 16f.
[136] Reydams (n 42) 7f.

practice.[137] Even so, such an obligation is at the very least in the process of developing and has arguably been in the process of emerging for a while.[138] The lack of consistent state practice could arguably be invoked also in relation to the prohibition of torture itself, to argue that the customary status of the prohibition can be questioned since torture remains such a pervasive and wide-spread problem. This of course would be at odds with the strong acceptance of the customary and *jus cogens* status of the prohibition of torture.[139]

With time an increasing amount of support has been garnered for the view that an obligation to prosecute and punish serious human rights violations such as torture exists also in customary international law, including through interpretations by UN bodies such as various Special Rapporteurs, Working Groups etc. in reports which have later been endorsed by the UN General Assembly.[140] While these developments support the existence of an *opinio juris*, the evidence of material state practice is less easy to establish and in fact there has long been a problematic practice, especially prevalent during the Cold War, of not bringing perpetrators of serious and mass human rights violations to justice.[141] On the basis of existing practice from states and international actors such as UN organs as well as the Final Declaration of the Vienna World Conference on Human Rights, e.g. Carla Edelenbos concluded in 1994 that while the obligation to investigate and prosecute international crimes amounting to crimes against humanity and war crimes was established, such an obligation was only emerging in relation to other human rights violations such as torture.[142] More recently, there has however been an increasing tendency towards factually holding perpetrators of serious human rights violations accountable for their crimes, although the developments have been mainly focused on the exercise of international criminal jurisdiction by international and hybrid tribunals.[143] Naomi Roth-Arriaza in turn has suggested three alternative bases for the existence of a customary norm on the obligation to investigate and prosecute serious human rights violations, namely: "(1) the treaty provisions and judicial decisions [including such an obligation] taken together; (2) state practice, including adherence to U.N. resolutions and state representations before international bodies; and (3) the law of state responsibility of injury to aliens, as updated in light of human rights law".[144] Through an examination of these bases she concluded that there exists such a customary obligation.[145]

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[137] See e.g. Jan Klabbers, *International Law.* (Second edition, Cambridge University Press 2017) 31 <http://ludwig.lub.lu.se/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=cat07147a&AN=lub.5007119&site=eds-live&scope=site>.
[138] Seibert-Fohr (n 104) 277–280.
[139] See e.g. *ICJ Habré case* (n 60) para 99; *Prosecutor v. Furundžija (Trial Chamber Judgement))* (n 60) paras 153–154; *Caesar v. Trinidad and Tobago* (n 60) para 70.
[140] Diane F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 The Yale Law Journal 2537, 2582ff.
[141] Carla Edelenbos, 'Human Rights Violations: A Duty to Prosecute?' (1994) 7 Leiden Journal of International Law 5, 13f.
[142] ibid 15f.
[143] Seibert-Fohr (n 104) 229f.
[144] Naomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 California Law Review 449, 489.
[145] ibid 489–505.

Although the present chapter has not dealt with the Torture Convention, which is discussed in detail in Chapter 4 of the present thesis, it too includes obligations to criminalize, investigate and either prosecute or extradite perpetrators of torture offences.[146] These treaty provisions themselves cannot be invoked as direct support for the existence of a customary norm, however the today wide geographical scope of the various human rights instruments enshrining procedural obligations related to torture speaks for the development of a custom based on these obligations. In addition, the practice of the international community supports the customary nature of the obligations. E.g. the adoption of the Torture Convention was preceded by the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Declaration Against Torture"), which was adopted without a vote by the UN General Assembly.[147] The declaration, although unbinding in itself, includes state duties to criminalize, investigate and prosecute alleged torture offences.[148] It could therefore be argued that the UNCAT at the time of adoption either codified existing or crystallized emerging customary norms in relation to positive obligations to investigate and prosecute torture offences.[149] The declaration, together with subsequent General Assembly resolutions and other statements by states and the international community[150] speak for the recognition of a customary duty to criminalize, investigate and where appropriate prosecute perpetrators of torture.

To come to terms with situations in which the international community exhibits public support for a rule of international law which states in practice keep breaking, the distinction between material and verbal acts has been relied on to come to terms with the problem of morally unacceptable state acts.[151] Such an approach was relied on e.g. in the Nicaragua case of the International Court of Justice ("ICJ"), in which the court stated that to deduce a customary rule it was not required that the state always act in accordance with the rule, but that instances of state conduct inconsistent with the rule should be considered as breaches rather than as evidence of the inexistence of a norm. Where a state acts in breach of a rule but seeks to justify its actions by appealing to exceptions or justifications included in the rule itself, such an attitude endorses the rule's customary nature.[152] This can be considered as supporting the modern deductive process for determining customary international law, which better justifies the existence of an obligation to investigate and prosecute torture than the traditional approach.[153]

[146] See further Chapter 4.
[147] UNGA, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1975 (General Assembly resolution 3452 (XXX)).
[148] ibid Art 7-10.
[149] See e.g. *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* (n 129) para 61.
[150] See e.g. UNGA, Torture and other cruel, inhuman or degrading treatment or punishment 2008 (A/RES/62/148); UNGA, Torture and other cruel, inhuman or degrading treatment or punishment 2008 (A/RES/63/166).
[151] Klabbers (n 137) 34f.
[152] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America); Merits* (International Court of Justice) [186].
[153] Klabbers (n 137) 35.

In the present case, there is also arguably a discrepancy between *opinio juris* and factual state practice, as the importance of ensuring accountability is generally recognized and highlighted, all the while states fail to do so in practice. This speaks for the adoption of a deductive approach to ascertaining the customary norm. Applying the deductive approach, the existence of customary obligations to criminalize, investigate and prosecute can also be logically deduced from the fundamental and non-derogatory nature of the prohibition of torture as a *jus cogens* norm. E.g. in the *Furundžija* case of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), the tribunal stated that a result of the *jus cogens* nature of the prohibition of torture was that it would "de-legitimise any legislative, administrative or judicial act authorising torture", since "[i]t would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law."[154] Although the ICTY did not state that *jus cogens* would also entail a positive obligation to investigate or prosecute, there is arguably no great difference between on the one hand *de jure* impunity created through explicit state acts such as condoning torture and absolving its perpetrators through amnesties, and *de facto* impunity created by the state's omission to take action against even clear and systematic use of torture, which is a serious problem in many states. Therefore, if the *jus cogens* nature of the prohibition entails the invalidity of amnesties, it should also entail an obligation for states to act to prevent *de facto* impunity. Based on the above arguments taken together, the author therefore argues that positive obligations to criminalize, investigate and prosecute torture offences today must be considered to exist not only in relation to the States Parties of relevant international treaties, but also as a part of international customary law which is binding on all states.

2.4 Concluding Remarks

From the various legal provisions proscribing of torture, including the peremptory norm of customary international law which cannot be limited, it appears uncontroversial that the international community has a strong interest in eradicating torture. With a view to this, the fundamental importance of preventing impunity for reaching this goal, has entailed a rapid development of positive state obligations to criminalize, investigate and prosecute perpetrators of such crimes, including as a part of customary international law. Despite this, torture remains a pervasive and wide-spread problem all over the world and impunity is often the norm rather than the exception. Impunity for torture also continues to be one of the main reasons for its continued and widespread use.[155]

One way of strengthening accountability and allowing states to fulfil their positive obligations to investigate and prosecute torture is the application of universal jurisdiction to investigate and

[154] *Prosecutor v. Furundžija (Trial Chamber Judgement))* (n 60) para 155.
[155] Nowak, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak: Addendum - Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, Including an Assessment of Conditions of Detention' (n 5) paras 250, 253, 255.

prosecute acts of torture. Hereby questions emerge as to whether universal jurisdiction can provide an effective and human rights friendly tool in the global fight against torture. The following chapter therefore discusses the concept of universal jurisdiction to determine whether the traditional understanding of the principle and its application can together with the positive state obligations examined in the present chapter form a cohesive system to prevent impunity and make more effective to the struggle against torture.

3 Principle of Universal Jurisdiction

3.1 Introduction

The application of criminal law in a national jurisdiction depends, inter alia, on the principles regulating the exercise of jurisdiction.[156] Despite long-term efforts to the contrary, there is today no global treaty framework to regulate states' use of jurisdictional principles, which means that state practice varies widely.[157] At a doctrinal level, there are a total of seven jurisdictional principles: *territoriality*, *active personality*, *passive personality*, *the principle of the flag*, *the principle of protection*, *the 'representation' principle* and *universal jurisdiction*.[158] Hereby the most traditional and most commonly applied jurisdictional links are *territoriality*, whereby criminal law applies in relation to crimes committed on the territory of the state, and *active personality*, whereby national laws are applicable to crimes committed by the state's nationals, even when the crime is committed extraterritorially.[159] Although states take varying approaches to the application of the different jurisdictional principles, all major systems of criminal law base their systems on the primacy of territorial jurisdiction, meaning that other jurisdictional principles are treated as exceptions or complements to territoriality and are therefore in need of special regulation.[160] The five other jurisdictional principles, including universal jurisdiction, are therefore less often applied and more controversial in existence and scope.[161]

This chapter focuses on the concept of universal jurisdiction, which has by some been hailed as an extremely important tool in bridging the gap in accountability for torture. Especially where territorial states are, despite their international obligations, unwilling or unable to investigate and prosecute acts of torture and international tribunals are for different reasons unable to enforce accountability, universal jurisdiction offers an alternative route at the national level. However, this route is not without its own legal and practical challenges, since universal jurisdiction has long been hotly debated and challenged, and suffers from serious ambiguities and controversy, both as to the legal basis and scope of the principle, as well as to the appropriateness of its use.

Some treaty regimes focusing on specific international crimes such as the grave breaches regime under the four Geneva Conventions include obligations on states to assert their jurisdiction over such crimes outside the reach of the traditional jurisdictional bases in certain circumstances. While such obligations are often referred to as 'universal jurisdiction', the view of them as such as been challenged by others, who claim that such treaty based obligations

[156] Antonio Cassese, *Cassese's International Criminal Law.* (3. ed. / revised by Antonio Cassese ..., Oxford University Press 2013) 271.
[157] Reydams (n 42) 16.
[158] Council of Europe, European Committee on Crime Problems, 'Extraterritorial Criminal Jurisdiction' (1992) 3 Criminal Law Forum 441, 445–453.
[159] Cassese (n 156) 271.
[160] Council of Europe, European Committee on Crime Problems (n 158) 495.
[161] ibid 449–452.

entail something different from 'pure' universal jurisdiction.[162] This chapter therefore mainly focuses on the concept of universal jurisdiction in general, as stemming from customary international law, and not on considering any specific treaty regime in detail, although some of the relevant treaty provisions are touched upon. The possible 'universal' nature of the jurisdictional requirements under the Torture Convention specifically is considered in Chapter 4. This chapter maps some main points relating to the concept of universal jurisdiction and seeks to show the paradox underlying the use of universal jurisdiction as a tool for accountability for violations of human rights such as torture, namely the traditional view of universal jurisdiction as an entitlement, not an obligation for states.

3.2 Universal Jurisdiction in the Case Law of International Courts

International guiding jurisprudence on universal jurisdiction and even extraterritorial criminal jurisdiction in general is scarce. However, certain guiding cases are still relevant to discuss, as they may provide certain light on the matter. In this section two important cases are highlighted: the *S.S. Lotus* and the *Arrest Warrant* cases.[163]

3.2.1 *S.S. Lotus* Case

The discussion on the principle of universal jurisdiction or the relationship between a state's criminal jurisdiction and international law in general, begins with the *Lotus* case, decided in 1927.[164] The case concerned criminal charges brought by Turkey against the French officer of the watch on board the French steamer S.S. Lotus, following a crash between it and a Turkish ship on the high seas, which led to the deaths of eight Turkish nationals.[165] The French government challenged the charges before the Permanent Court of International Justice ("PCIJ") and argued that the jurisdiction to bring charges against the French national belonged exclusively to France, and that Turkey had therefore violated the rules of international law by prosecuting, imprisoning and convicting the French commander. France argued that in absence of an express or implicit special agreement allowing it, Turkey could not claim jurisdiction over the French national solely based on the nationality of the victims of the crash, in other words based on the passive personality principle.[166] Turkey on the other hand contended that the state had the right to exercise its jurisdiction over the crime since no international norm prohibited it from doing so.[167]

[162] See e.g. Yee (n 28); Matthew Garrod, 'Unraveling the Confused Relationship between Treaty Obligations to Extradite or Prosecute and Universal Jurisdiction in the Light of the Habre Case' (2018) 59 Harvard International Law Journal 125.
[163] Some additional cases on the use of universal jurisdiction are discussed in later chapters of the thesis.
[164] *Case of SS Lotus (France v Turkey)* [1927] Permanent Court of International Justice Docket XI, Judgement no. 9; Cassese (n 156) 272.
[165] *Case of S.S. Lotus (France v. Turkey)* (n 164) 5.
[166] ibid 7f.
[167] ibid 9.

The PCIJ held that international law emanates from the free will of independent states and restrictions upon sovereignty therefore cannot be presumed. While a state cannot in the absence of a permissive rule exercise its jurisdiction on the territory of another state, this does not imply that a state is prohibited from exercising jurisdiction in its own territory over acts which have taken place abroad. Every state therefore has discretion to extend its jurisdiction to such acts as long as no international norm prohibits it.[168] The PCIJ also stated that while the territorial character of criminal law is fundamental, all or most criminal law systems extend their jurisdiction beyond such cases in different ways, illustrating that the territoriality of criminal law is not an absolute principle of international law.[169] The court stated that the criminal action of the French commander had taken place on board the Lotus, while the effects of the crime took place on the Turkish vessel. Since considering one or the other of these occurrences separately would be meaningless, they had to be seen as an inseparable entity. To adequately protect the interests of both states, concurrent jurisdiction over the incident as a whole was the only natural solution. Turkey had therefore not violated any international rules or principles.[170]

Extensive debate followed the judgement, primarily focusing on the PCIJ's reliance on the principle that "[r]estrictions upon the independence of states cannot… be presumed", which came to be known as the 'Lotus Principle'. The principle has since then come to be widely used to argue that states have the right to act as they please as long as no prohibition exists in international law, relying on the view that international law is regulative, not constitutive of the rights of states. According to the theory of *immanence*, which the view is based upon, sovereignty precedes international law, meaning that the character of international law is that of self-imposed regulation and limitation and that such exceptions to the sovereign liberty can be lifted at will. The opposing theory is that of *attribution*, according to which sovereignty is a quality created by and allocated to states through the international legal order, and that states therefore must show a specific rule, or at least the absence of a prohibition, entitling them to act in a certain manner.[171] The division between these two fundamental legal philosophical theories, immanence and attribution, lives on to this day among even the most prominent jurists. While some scholars have confidently held that the Lotus Principle has since its formulation been widely condemned and cannot be considered valid law,[172] others who rely on state practice and the lack of referral of jurisdictional cases to the ICJ argue that the Lotus Principle did and continues to apply.[173]

Despite the great controversy and unclarity surrounding the fundamental principles and the *Lotus* case, it does provide for certain conclusions to be drawn. Firstly, that international law governs the application of extraterritorial jurisdiction over foreign citizens, and states therefore

[168] ibid 18–20.
[169] ibid 20.
[170] ibid 30f.
[171] Reydams (n 42) 13f.
[172] Frederick Alexander Mann, *The Doctrine of Jurisdiction In International Law* (The Hague Academy of International Law 1964) 35.
[173] Maarten Bos, 'The Extraterritorial Jurisdiction of States, Preliminary Report' (Institute of International Law 1993) 39 <http://www.idi-iil.org/app/uploads/2018/06/1993_vol_65-I_Session_de_Milan.pdf>. See also Hazel Fox, 'Jurisdiction and Immunities' in Lowe and Fitzmauritz (eds.) *Fifty Years of the International Court of Justice* (1996), 210, 212-215.

do not have absolute discretion in this matter. Secondly, that international law recognizes concurrent jurisdiction, meaning that more than one state may have the right to exercise jurisdiction at the same time. This is of great importance in relation to the principle of universal jurisdiction, since universal jurisdiction will always exist together with another state's jurisdiction based on territoriality or active personality.[174]

3.2.2 *Arrest Warrant* Case

Another international but much later case touching upon issues of criminal jurisdiction and universal jurisdiction is the ICJ *Arrest Warrant* case between the Democratic Republic of the Congo ("DRC") and Belgium.[175] The background of the case was the issuance of an international arrest warrant by a Belgian judge against the then Minister of Foreign Affairs of the DRC, Mr Yerodia, charging him with war crimes and crimes against humanity.[176] The arrest warrant accused Yerodia of i.a. using his speeches to incite ethnic hatred and was based on a Belgian law which provided Belgium with universal jurisdiction over crimes against humanity and humanitarian law.[177]

The DRC began proceedings at the ICJ and requested the court to require Belgium to annul the arrest warrant. The DRC claimed that Belgium's self-attribution of universal jurisdiction violated international law by constituting an attempt to assert authority over another state and by undermining the sovereign equality of states. It also claimed that the Belgian law's lack of recognition of the immunity of the Minister of Foreign Affairs violated diplomatic immunity.[178] As the case went on, the argument concerning Belgium's assertion of universal jurisdiction was however abandoned and the court therefore gave its judgement with the assumption that Belgium did indeed have universal jurisdiction, which was a precondition for an examination of the immunity of Mr Yerodia.[179] A notable fact about the Belgian law in question is that it was one of few laws providing for a form of universal jurisdiction *in absentia* over international crimes, as it did not require the presence of the accused in Belgium to initiate proceedings.[180] Since the DRC however recalled its claim based on the illegitimacy of the universal jurisdiction invoked by Belgium, the opportunity to evaluate the legality of such an approach was lost.[181] While the court could arguably have chosen to discuss the issue anyhow, considering that the existence of jurisdiction is a precondition for immunity, the majority of the Court chose not to

[174] Reydams (n 42) 15f.
[175] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) Judgement* [2002] International Court of Justice I.C.J. Reports 2002.
[176] ibid 13.
[177] ibid 15.
[178] ibid 17.
[179] ibid 45f.
[180] Mark A Summers, 'The International Court of Justice's Decision in Congo v. Belgium: How Has It Affected the Development of a Principle of Universal Jurisdiction That Would Obligate All States to Prosecute War Criminals' (2003) 21(1) Boston University International Law Journal 67. On universal jurisdiction *in absentia*, see below section 3.3.2.1.
[181] ibid 68.

do so.[182] Several judges however submitted separate opinions on the issue, taking different approaches to the matter. While the arrest warrant against Mr Yerodia included charges of war crimes, Belgium did not argue that its universal jurisdiction was based on the Geneva Conventions. Instead Belgium argued in the words of the ICJ that "there was a general obligation on States under customary international law to prosecute perpetrators of crimes. It conceded, however, that where such persons were non-nationals, outside of its territory, there was no obligation but rather an available option. No territorial presence was required for the exercise of jurisdiction where the offence violated the fundamental interests of the international community."[183] The judges' opinions therefore did not cover whether universal jurisdiction was afforded under the treaty regime of the Geneva Conventions, but approached the matter as one of customary international law.

In his separate opinion, President Guillaume found no support for the exercise of 'pure' universal jurisdiction, namely universal jurisdiction *in absentia*, in cases other than piracy in either international treaties or customary law. He held that Belgium could not rely on the Lotus Principle to argue its freedom to extend its jurisdiction. Instead he argued that the development of international law in general and international criminal law in particular since the *Lotus* judgement had served to strengthen the territoriality principle and that providing for 'pure' universal jurisdiction would lead to judicial chaos allowing powerful states to dominate others in the name of the poorly defined international community.[184] States are therefore only at liberty to prosecute crimes committed abroad when the principle of passive personality or protection are fulfilled, in the case of piracy or through subsidiary universal jurisdiction provided for by international conventions when the offender is present in the territory of the state,[185] such as obligations *aut dedere aut judicare*.

In their joint separate opinion judges Higgins, Kooijmans and Burgenthal also found that the Court should have dealt with the issue of jurisdiction.[186] While the judges through an overview of state practice as well as national and international written law found no true support for the existence of 'pure' universal jurisdiction *in absentia*, they also did not find that state practice excluded the existence of such a principle outright. Instead they considered state practice to be neutral on the matter and that there was a trend towards accepting more wide-reaching forms of jurisdiction.[187] They therefore found that while no positive rule allowing for the exercise of universal jurisdiction *in absentia* existed, there were indications of the gradual development of such a principle.[188] They argued that the only prohibitive rule in this regard is the prohibition of the exercise of jurisdiction on the territory of another state, as held in the *Lotus* judgement, which was not the case here, since the arrest warrant was envisioned to lead to the arrest of Mr

[182] See e.g. *Joint Separate Opinion of Judges Higgins, Kooijmans and Burgenthal, Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] International Court of Justice I.C.J. Reports 2002 [5, 18].
[183] *ibid 8; Summers (n 180) 80f.*
[184] *Separate Opinion of President Guillaume, Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] International Court of Justice I.C.J. Reports 2002 [12, 15].
[185] ibid 16.
[186] *Joint Separate Opinion of Judges Higgins, Kooijmans and Burgenthal, Arrest Warrant Case* (n 182) para 18.
[187] ibid 45ff.
[188] ibid 51f.

Yerodia when he entered the territory of Belgium or a cooperative third state.[189] While the *aut dedere aut judicare* obligation conceptually relies on the presence of the suspect in the state in question, this cannot be interpreted as completely excluding jurisdiction in other cases.[190] The three judges therefore held that a state is free to choose to exercise universal jurisdiction *in absentia*. They however also pointed out that to protect inter-state relations such extension of jurisdiction requires certain safeguards, such as providing the territorial state with the opportunity to act upon the charges itself and that jurisdiction only be exercised when there is a special circumstance bringing the situation to the attention of the authorities of the forum state, e.g. a request to commence proceedings submitted by victims or their relatives to the authorities of the forum state.[191] It can however be questioned whether this is truly a legal argument, since it rather seems to proscribe states with a kind of 'best practice' in relation to the exercise of universal jurisdiction *in absentia*.

Although the *Arrest Warrant* case does not in itself provide clear guidance as to the extension of universal jurisdiction to grave crimes *in absentia*, the opinions voiced by the judges in their separate judgements are illustrative of both the debate surrounding universal jurisdiction at large and the purity or lack thereof of the principle. They also illustrate the more fundamental difference between the assertion of universal jurisdiction requiring only the absence of a prohibition, as determined by Higgins et al, versus requiring a specific permissive rule on the matter – the question which also underpinned the *Lotus* case. Some of the criticism of universal jurisdiction are discussed further below. It is also notable that both the *Lotus* and *Arrest Warrant* cases are strongly linked to the traditional view of universal jurisdiction as a state entitlement, whereby the exercise of such jurisdiction is up to the individual state to decide upon, as long as there is no international norm prohibiting it from extending its jurisdiction in such a way. This is of course due to the subject matter of the cases, both of which dealt with a challenge to an alleged over-extension of state jurisdiction, but it is also a reflection of how issues of universal jurisdiction have often been framed and debated. It is also in line with universal jurisdiction being categorised as a form of jurisdiction under international criminal law, entailing as discussed earlier that it is traditionally considered a right rather than a state duty.

3.3 Definition of Universal Jurisdiction

Discussions surrounding universal jurisdiction and its application are often complicated by the different interpretations of the term and its uses. Although the concept has been briefly defined in Chapter 1 it is in order to facilitate the further discussion on the concept for the purposes of the present thesis necessary to discuss the definition in some more detail. In order to clarify the definition it is also necessary to first consider the rationales underpinning the concept, before settling on the appropriate definition. Hereby some important distinctions are be clarified in order to minimise the ambiguity of the concept.

[189] ibid 54.
[190] ibid 57.
[191] ibid 59.

3.3.1 Rationales

Proponents of the principle of universal jurisdiction have offered several rationales for its existence and necessity. Firstly, universal jurisdiction is argued to mirror the international community's desire to repress crimes committed outside all state territories, such as piracy committed on the high seas, which would without such a principle fall outside the scope of all criminal jurisdiction and enjoy *de facto* impunity to the detriment of the international community. Secondly, it is argued that universal jurisdiction is justified since its purpose is to fight crimes which violate universal values and humanitarian principles, crimes which are condemned by the community of states and where jurisdiction must necessarily extend beyond one state. Lastly, proponents argue that some crimes due to their magnitude and seriousness shock the consciousness of mankind and risk undermining international peace and security, and that all states therefore have the right to investigate and prosecute them.[192]

Today, much of the discussion surrounding universal jurisdiction concentrates on its application to crimes other than piracy. Focus has therefore shifted away from the first rationale, which would seem to support a view of universal jurisdiction as supplementary to other forms of jurisdiction, meaning it would only apply where accountability cannot otherwise be secured. Instead, many scholars today establish the existence of universal jurisdiction over a certain crime solely based on the gravity of said crime.[193] This shift has led to e.g. the expansion of the category of crimes covered by universal jurisdiction through analogy by comparing the seriousness of crimes. There has in addition been a trend towards prescribing arguably 'universal' jurisdiction over less serious crimes, such as drug trafficking, which may indicate a general direction of the development of international law. However, such expansion in treaty law does not necessarily imply a corresponding development of customary international law.[194]

3.3.2 Definition

There is today no universal definition of the term universal jurisdiction, which leads to severe ambiguities in much of the discussion surrounding the concept. There are however two main ways to define universal jurisdiction which focus on different aspects of the concept: its separation from other jurisdictional bases or the nature of the crime. By some, universal jurisdiction is primarily defined as a form of jurisdiction which permits a state to exercise its jurisdiction over crimes of a serious nature in the interest of the international community.[195] By others, it is defined as a form of jurisdiction exercised outside the traditional jurisdictional principles, namely jurisdiction over crimes committed abroad, among foreigners and without impacting the interests of the forum state.[196] For the purposes of the present thesis a definition in accordance with the description formulated in the Final Report on the Exercise of Universal

[192] Jalloh (n 29) paras 4–6.
[193] Inazumi (n 8) 106f.
[194] ibid 108.
[195] See e.g. Stephen Macedo and others, *The Princeton Principles on Universal Jurisdiction* (Program in Law and Public Affairs, Princeton University 2001) Principle 1(1); Jalloh (n 29) para 1.
[196] See e.g. 'The AU-EU Expert Report on the Principle of Universal Jurisdiction' (European Union, African Union 2009) 8672/1/09 REV 1 para 8.

Jurisdiction in Respect of Gross Human Rights Offences presented to the International Law Association is applied:

> "Under the principle of universal jurisdiction a state is entitled or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim. The only connection between the crime and the prosecuting state that may be required is the physical presence of the alleged offender within the jurisdiction of that state."[197]

Under this definition, the focus of universal jurisdiction is on the today more dominant rationale underpinning the concept, namely the serious nature of the crimes covered by such jurisdiction, but it also allows for the requirement that the perpetrator be present within the forum state. The definition therefore does not require the purest form of universal jurisdiction, universal jurisdiction *in absentia* or universal jurisdiction based *solely* on the nature of the crime and therefore belonging all states equally.[198] However, in the author's opinion the selected definition sufficiently illustrates the separation of universal jurisdiction from other forms of criminal jurisdiction, as the optional link to the forum state, the suspect's presence on state territory, can come about long after the commission of the crime in question. This entails a much weaker link between the crime and the forum state than that required under traditional territorial jurisdiction. The definition also opens-up for both permissive and compulsory universal jurisdiction, an important aspect which is discussed frequently throughout the thesis.

3.3.2.1 Conditioned Universal Jurisdiction vs. Univeral Jurisdiction *in Absentia*

In order to clearly and logically discuss universal jurisdiction it is also necessary to establish some basic classifications which fall within the wider principle of universal jurisdiction and are important for the continued discussion. The first fundamental distinction is the difference between universal jurisdiction *in absentia* and universal jurisdiction based on a presence requirement, so called conditioned universal jurisdiction. Often, the assertion of jurisdiction over extraterritorial crimes is connected to the presence of a suspect within the forum state,[199] but it has been suggested that it is possible, or even necessary for terming something universal jurisdiction, to assert universal jurisdiction even without such presence. This was the case under the Belgian law on universal jurisdiction discussed in the *Arrest Warrant* case, but also e.g. the Princeton Principles on Universal Jurisdiction envision that states may rely on universal jurisdiction to request extradition from another state, thereby not requiring presence at the early stages of the proceedings.[200]

While some scholars argue that only 'pure' forms of universal jurisdiction which require no connection whatsoever between the crime and the prosecuting state can be called universal

[197] International Law Association Committee on International Human Rights Law and Practice (n 56) 404.
[198] Compare with e.g. Yee's different forms of universal jurisdiction, whereby he holds that only the 'purest' forms can be considered truly universal. Yee (n 28).
[199] This is e.g. the case in the German trial discussed above in section 1.1.2.
[200] Macedo and others (n 195) Principle 1(3).

jurisdiction proper,[201] most are willing to accept jurisdiction which may only be exercised on condition of the suspect's presence as universal. Which of the options is referred to when discussing universal jurisdiction is of great importance in facilitating a functional debate, since universal jurisdiction *in absentia* has a clearly much wider scope. If no connection at all is required between the crime and the forum state, any state in the world may e.g. investigate and request extradition of a suspected perpetrator of international crimes, which will arguably infringe the interests of the territorial state more than universal jurisdiction exercised only upon the presence of the suspect in the prospective forum state.

Despite the importance of the distinction between conditioned and *in absentia* universal jurisdiction, it may not be as clear cut in practice, since the line between the two is impacted by the temporal scope of existing presence requirements, namely at which point in the proceedings the perpetrator's presence is necessary for the exercise of jurisdiction. This is discussed further in relation to the presence requirement under the Torture Convention in Chapter 4.

3.3.2.2 Primary vs. Supplemental Jurisdiction

Another important distinction is that between universal jurisdiction as a primary versus a supplemental form of jurisdiction in the legal sense, whereby the former entails that universal jurisdiction has a position equal to that of other forms of primary jurisdiction such as territoriality, and the latter that universal jurisdiction can be applied only once no other jurisdictional bases are available. This may be the case e.g. when an *aut dedere aut judicare* obligation, which envisions the exercise of universal jurisdiction, gives preference to extradition over prosecution in the state acting under universal jurisdiction, meaning the state may only exercise universal jurisdiction when extradition is impossible.[202]

There has over time been a move towards the increasing recognition of universal jurisdiction as a primary form of jurisdiction. Hereby, the shift of focus away from the rationale that universal jurisdiction is based on the need to ensure accountability for crimes falling outside all effective jurisdictions has also led to a shift away from considering universal jurisdiction a supplemental form of jurisdiction, the application of which should respect and be secondary to jurisdiction based on more traditional grounds. Ignoring the purely practical rationale of ensuring accountability for crimes which would otherwise go unpunished and focusing instead on the nature of certain crimes as universally condemned or shocking to the conscience of mankind has thereby contributed to changing universal jurisdiction into a primary form of jurisdiction applicable irrespective of other jurisdictional grounds.[203]

3.3.2.3 Permissive vs. Compulsory Jurisdiction

The perhaps most crucial distinction in the context of the present thesis is however that between permissive and compulsory exercise of universal jurisdiction – between the establishment and

[201] See e.g. Yee (n 28).
[202] Inazumi (n 8) 28.
[203] ibid 107f.

exercise of universal jurisdiction as an entitlement or as a duty for the state in question. Much of the traditional view of universal jurisdiction is one of a primarily *permissive* jurisdictional basis, which gives states the right but not the obligation to exercise jurisdiction over crimes falling within its scope.[204] This is especially true if one does not immediately accept all treaty based systems of *aut dedere aut judicare* as expressions of universal jurisdiction.[205] Outside the specific provisions prescribing the exercise of jurisdiction beyond the traditional jurisdictional bases over certain crimes as enshrined in their specific treaty regimes, the entire universal jurisdiction regime and discussion surrounding it is focused on the *permissive* scope of such jurisdiction. The implications of this from a human rights approach are considered at the end of this chapter.

3.4 Legal Basis

Although universal jurisdiction has been and remains debated and has been widely examined in doctrine, conclusively stating the legal basis or legal status of the concept is not a straightforward exercise. Both customary and treaty law are often claimed to form the basis for universal jurisdiction over certain crimes, but what constitutes custom is controversial[206] and holding all treaty provisions which envision or prescribe the exercise of jurisdiction over crimes committed extraterritorially as an automatic expression of universal jurisdiction seems like an oversimplification. In addition, state practice on universal jurisdiction varies widely. This section therefore briefly maps out some of the often-cited legal bases of universal jurisdiction.

3.4.1.1 Treaty Law

The expansion of conventional law, both within human rights and serious or transnational crime, also entailed an extension of the national jurisdictional regime, by including articles which allow or in some cases require a States Parties to extend their jurisdiction to cover crimes lacking a traditional jurisdictional basis, e.g. when the perpetrator is found within the territorial jurisdiction of the state in question. Such provisions can today be found in e.g. the Torture Convention, the grave breaches regime of the four Geneva Conventions, as well as conventions relating to terrorism or other crime which may be difficult to fight through traditional jurisdictional mechanisms.[207] Although some of these conventions proscribe a duty to exercise such 'universal jurisdiction', this applies only when a state does not extradite the suspect to another jurisdictional state and can for the sake of clarity therefore be termed '*aut dedere aut judicare* jurisdiction'. To date, no convention has included an absolute duty to exercise such jurisdiction or explicitly allowed for or required its exercise *in absentia*.[208] Since the option to

[204] Seibert-Fohr (n 104) 255f.
[205] See e.g. *Joint Separate Opinion of Judges Higgins, Kooijmans and Burgenthal, Arrest Warrant Case* (n 182) para 41.
[206] Reydams (n 42) 7.
[207] See e.g. Convention for the Suppression of Unlawful Seizure of Aircraft 1970 (UN Treaty Series 1973); International Convention Against the Taking of Hostages 1979 (United Nations, Treaty Series , vol 1316, p 205); United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (United Nations, Treaty Series, vol 1582, p 95;).
[208] *Separate Opinion of President Guillaume, Arrest Warrant Case* (n 184) para 9; Inazumi (n 8) 129ff.

extradite or prosecute logically relies on the presence of the suspect in the forum state, it is difficult to see it applying *in absentia*.

Although the Rome Statute of the ICC deals with international criminal jurisdiction rather than national jurisdiction, its Preamble which recalls "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" has by some been argued to enshrine an obligation to exercise jurisdiction, including universal jurisdiction even *in absentia*, over international crimes.[209] However, the Preamble is not in itself a binding legal provision and it seems unlikely that states would have – all the while refusing universal jurisdiction for the ICC itself – undertaken an obligation to exercise such jurisdiction at the national level, especially not in the absence of the suspect's presence.

3.4.1.2 Customary Law

Much of the legal basis for universal jurisdiction therefore relies on customary international law. Following the rationale expressed in the *Lotus* judgement, jurisdiction may be overlapping, which entails that the existence of other bases for jurisdiction such as territoriality, does not make universal jurisdiction illegal. It is also presumed that an act of a state is legal unless shown otherwise through the invocation of a rule to the contrary. Hereby it is important to note that the exercise of universal jurisdiction takes place within the territory of the forum state, thereby perhaps affecting the interests of another state, but never exercising sovereignty on the territory of another state, meaning it does not *ipso facto* fall within the prohibition articulated in the *Lotus* case.[210] Since responding to international crimes and gross human rights violations is today recognized as a matter of international concern and the exercise of jurisdiction is only in respect to individuals, not other states, the exercise of universal jurisdiction over such crimes also does not violate the principle of non-intervention or the sovereign equality of states, which are fundamental to international law.[211] The exercise of universal jurisdiction is therefore not illegal under international law, and there is no evidence of sufficient practice and *opino juris* to constitute a customary norm to that matter.[212]

Today it can be said that there is rather wide recognition of the existence of *permissive* universal jurisdiction in respect to at least genocide, crimes against humanity, war crimes and torture.[213] For example the International Committee of the Red Cross ("ICRC") has in its study of customary international humanitarian law, found that the exercise of universal jurisdiction over

[209] Inazumi (n 8) 130, note 66.
[210] ibid 134f.
[211] The principle of non-intervention, which is a part of customary international law, is enshrined in e.g. the UN Charter, which prohibits forceful intervention, as well as the UN Friendly Relations Declaration. The Declaration holds that "[n]o State… has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state". This includes the use of force, threats, economic, political or other types of coercion to undermine the sovereignty of a state. The principle of non-intervention should however not be construed as affecting the provisions of the UN Charter in relation to the maintenance of international peace and security. An illegitimate intervention in another state's affairs consists of an intervention bearing on "matters in which each state is permitted, by the principle of state sovereignty, to decide freely". See also ibid 136f.
[212] *Joint Separate Opinion of Judges Higgins, Kooijmans and Burgenthal, Arrest Warrant Case* (n 182) para 45; Inazumi (n 8) 138f.
[213] See e.g. 'The AU-EU Expert Report on the Principle of Universal Jurisdiction' (n 196); Inazumi (n 8) 140.

war crimes committed in the context of both international and non-international armed conflict is a part of customary law. In examining state practice, national law, military manuals etc. the ICRC did not find any consensus as to whether such universal jurisdiction required a link between the perpetrator and the prosecuting state. While some states rely on a presence requirement thereby excluding universal jurisdiction *in absentia*, other states and the Geneva Conventions themselves do not require the presence of the accused.[214]

In relation to universal jurisdiction over torture specifically, e.g. the ICTY has held that permissive universal jurisdiction over the crime must be derived from the *jus cogens* nature of the prohibition of torture, since "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."[215] In so far as it entails a state *entitlement*, universal jurisdiction, including its exercise *in absentia*, is therefore legal under customary international law and it is precisely this form of universal jurisdiction which has long been the focus of traditional understandings of universal jurisdiction.[216] Since the rationales underpinning the traditional understanding of universal jurisdiction are based on the voluntary intervention of a state in securing accountability for crimes which would otherwise go unpunished or for particularly serious crimes, the traditional view of universal jurisdiction is based on that states have the *right*, but not necessarily a duty, to exercise such jurisdiction.

Recently, voices have however also increasingly been raised speaking for the recognition of *obligatory* universal jurisdiction as a customary norm. However, in light of the fierce debate, lacking state practice and many remaining uncertainties surrounding universal jurisdiction in general as well as its compulsory use it seems too early to contend that such a customary norm would have emerged conclusively, at least in relation to all international crimes. In relation to war crimes for example, the ICRC customary study held that the customary *entitlement* to extend universal jurisdiction does not impact on the treaty obligation to exercise such jurisdiction over war crimes amounting to grave breaches, but did not state that compulsory universal jurisdiction existed as a part of customary international law.[217] The law surrounding universal jurisdiction is however evolving rapidly,[218] and enhanced focus on possible obligations to apply jurisdiction in the interest of ending impunity for international crimes such as torture may support the emergence of such a norm. The existence of a customary norm prescribing compulsory universal jurisdiction over torture is discussed further in Chapter 6.

[214] ICRC, 'Customary IHL Database' Rule 157: Jurisdiction over War Crimes <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>.
[215] *Prosecutor v. Furundžija (Trial Chamber Judgement))* (n 60) para 155.
[216] Inazumi (n 8) 148.
[217] ICRC (n 214) Rule 157: Jurisdiction over War Crimes.
[218] Inazumi (n 8) 141–144, 148.

3.5 Appraising Universal Jurisdiction

The principle of universal jurisdiction has, both recently and for a long time, been the object of great controversy and debate. This section briefly presents some of the main critiques raised against the application of universal jurisdiction, for the sake of simplicity, focusing on an often quoted and strong critique against universal jurisdiction brought by the former US Secretary of State, Henry Kissinger, in 2001.[219] Naturally Kissinger's views represent a strongly US-standpoint on the issue, mirroring the country's general hesitance towards international regulation of its foreign policy choices and arguable willingness to have others judged while remaining immune to outside judgement itself.[220] While many would disagree with Kissinger's characterization of the application of universal jurisdiction in the Pinochet-case as "the prosecution of one fashionably reviled man on the right, while scores of East European communist leaders – not to speak of Caribbean, Middle-Eastern and African leaders… have not had to face similar prosecutions", many would also agree on some of his main points.[221]

One of the frequent criticisms against the exercise of universal jurisdiction is the concern that it may undermine sovereign equality among states by providing powerful states with a tool for intervention in other states' affairs and great inherently political discretion to wield it. The exercise of universal jurisdiction as a political tool risks exasperating existing international power structures, by allowing powerful states to intervene in the domestic affairs of less powerful states through the guise of acting for the ill-defined 'international community'.[222] Such criticism is particularly prominent among the African, Latin American and Caribbean groups, as well as the Non-Aligned Movement, who hold that only nationals of less powerful states become the object of proceedings under universal jurisdiction, while nationals of powerful states escape accountability.[223] Also former US Secretary of State, Henry Kissinger expressed his concerns on the political nature of universal jurisdiction, stating that the system

[219] Henry A. Kissinger, 'The Pitfalls of Universal Jurisdiction' (2001) 80 Foreign Affairs 86.
[220] See e.g. Kissinger's statement concerning that "[m]ost Americans would be amazed to learn" that the ICTY, which had been created with U.S. support would assert the right to examine U.S. conduct in Kosovo, ibid 94.
[221] See e.g. Jalloh (n 29) 9. See also e.g. a number of resolutions adopted by the African Union, expressing serious concern about potential misuse and abuse of universal jurisdiction, 'Assembly/ AU/Dec. 296 (XV), Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. EX.CL/606 (XVII); Fifteenth Ordinary Session of the Assembly in in Kampala, Uganda in July 2010'; 'Assembly/AU/Dec. 355(XVI), Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. EX.CL/640(XVIII), Sixteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia, 30–31 January 2011'; 'Assembly/AU/Dec. 420(XIX), Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. EX.CL/731(XXI); Nineteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia, 15– 16 July 2012';; 'Assembly/AU/Dec.199 (XI), Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/14 (XI); Eleventh Ordinary Session of the Assembly in Addis Ababa, Ethiopia, 30 June–1 July, 2008'; 'Assembly/AU/Dec.213(XII), Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/3 (XII); Twelfth Ordinary Session of the Assembly in Addis Ababa, Ethiopia, 1–3 February 2009'; 'Assembly/AU/Dec.243(XIII) Rev.1, Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly /AU/11 (XIII); Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya, 1–3 July 2009'; 'Assembly/AU/Dec.271(XIV), Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. EX.CL/540(XVI); Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia, 31 January–2 February 2010'. [AU Resolutions]
[222] See e.g. AU Resolutions (n221); *Separate Opinion of President Guillaume, Arrest Warrant Case* (n 184) paras 12, 15.
[223] AU Resolutions (n221); Jalloh (n 29) para 9.

risks allowing itself to be used as a tool of political maneuvering and harassment of political opponents.[224] According to his argument, universal jurisdiction would allow states engaged in a conflict to transfer their conflict to the legal field by pursuing their opponents through extradition requests with the support of the wide discretion left to national authorities to decide to apply universal jurisdiction at will.[225] In general, the critique that the use of universal jurisdiction may be a strongly political exercise is legitimate, at least when referring to permissive rather than obligatory universal jurisdiction. Hereby states would be free to choose in which situations to extend their jurisdiction, which arguably leaves the state with discretion to allow political considerations to influence the decisions to investigate and prosecute crimes committed abroad. Questioning the traditional view of universal jurisdiction as a right rather than an obligation and clarifying the concept further to minimize ambiguities is therefore necessary in order to deal with the critique.

Another often raised criticism against the exercise of universal jurisdiction is that it may risk hampering the post-conflict or post-atrocity reconciliation efforts of the territorial state. Kissinger raised this argument in his criticism, stating that trials conducted on the basis of universal jurisdiction impede national reconciliation efforts in the time following the commission of human rights atrocities by substituting the views of the judiciary for the national reconciliation efforts even in democratic societies. He elaborated as follows:

> "It is an important principle that those who commit war crimes or systematically violate human rights should be held accountable. But the consolidation of law, domestic peace, and representative government in a nation struggling to come to terms with a brutal past has a claim as well. The instinct to punish must be related, as in every constitutional democratic political structure, to a system of checks and balances that includes other elements critical to the survival and expansion of democracy."[226]

This is again a relevant and legitimate argument against not only the use of universal jurisdiction, but criminal law in general as a mechanism of transitional justice in post-conflict or post-atrocity situations. Since it is arguably equally relevant, if perhaps less obvious, in relation to criminal trials taking place under other jurisdictional principles outside of the immediate context in which the crimes were committed, such as passive personality when the victims were foreign nationals, the argument is not unique to universal jurisdiction per se. As discussed above, within international human rights law it is however generally accepted, that amnesties and immunities entailing impunity for the commission of grave and international crimes are incompatible with the fight against such crimes, including torture. A human rights-based approach to jurisdiction must therefore embrace criminal accountability, at least for those individuals considered the most accountable for the commission of grave crimes including torture, as a part of rather than an impediment to post-conflict or post-atrocity reconciliation.

Despite the stinging critiques which have been articulated against the concept of universal jurisdiction, there has also been a rising wave of advocacy supporting the concept and its use.

[224] Henry A. Kissinger (n 219) 90–93.
[225] ibid 91f.
[226] ibid 90f.

The hopes for increased accountability and preventing grave human rights violations and international crime through the application of universal jurisdiction have been and in some cases remain high among many e.g. victims and NGOs. Indeed, there are several ongoing efforts to increase the application of universal jurisdiction over crimes which would otherwise go unpunished, such as the widespread torture and other human rights violations taking place in Syria.[227]

3.6 Some Trends in State Approaches to Universal Jurisdiction

Before the concluding remarks on universal jurisdiction are presented, it is also relevant to briefly present some of the approaches states have adopted in relation to the use of universal jurisdiction in modern times. The differences in state approaches further illustrate some of the vagueness surrounding the concept of universal jurisdiction by showing the different practices different interpretations of state entitlements and obligations lead to. Since the increase in the use of universal jurisdiction in practice, two main state approaches have been identified among those states who use universal jurisdiction at all: the 'no safe-haven' approach and the 'global enforcer' approach.[228] Recently, it has also been argued that an additional third approach to the issue, namely the 'complementary preparedness' approach, has emerged. While the approaches may correlate with different variations of universal jurisdiction, they illustrate the state's role and level of activity in relation to universal jurisdiction, rather than expressing different legal models and requirements for the exercise of such jurisdiction. The approaches also represent different points on a wide scale, and states or the views of other actors may in reality fall anywhere along that scale, rather than simply representing one or the other.[229]

3.6.1.1 'No Safe-Haven' vs. 'Global Enforcer' Approach

The 'no safe-haven' and 'global enforcer' approaches are two alternative conceptions adopted by states and other interested parties as to what the role of states should be in relation to the investigation and prosecution of crimes under universal jurisdiction. According to the 'global enforcer' approach, a state should exercise jurisdiction over crimes irrespective of where they have been committed and whether there exists a jurisdictional link with the forum state, based on the idea that all states have the responsibility to prevent and punish international crimes. The

[227] See e.g. Amnesty International (n 7); Trial International et al., 'Universal Jurisdiction Annual Review 2020 "Terrorism and International Crimes: Prosecuting Atrocities for What They Are"' (n 27); Trial International et al., 'Evidentiary Challenges in Universal Jurisdiction Cases: Universal Jurisdiction Annual Review 2019' <https://trialinternational.org/wp-content/uploads/2019/03/Universal_Jurisdiction_Annual_Review2019.pdf>; European Centre for Constitutional and Human Rights (n 34); Civil Rights Defenders et al, 'Executive Summary: Criminal Complaint to the War Crimes Commission of Swedish Police and the Swedish War Crimes Prosecutor Team - Torture in Syria' (2019) <https://crd.org/wp-content/uploads/2019/02/Executive-summary_FINAL1.pdf>; Jarry (n 33); European Centre for Constitutional and Human Rights, 'German Authorities Issue Arrest Warrant against Jamil Hassan, Head of Syrin Air Force Intelligence' <https://www.ecchr.eu/en/case/german-authorities-issue-arrest-warrant-against-jamil-hassan-head-of-the-syrian-air-force-intellige/>; Oberlandesgericht Koblenz (n 34).

[228] Máximo Langer, 'Universal Jurisdiction Is Not Disappearing: The Shift from "Global Enforcer" to "No Safe Haven" Universal Jurisdiction' (2015) 13 Journal of International Criminal Justice 245, 246.

[229] ibid 250.

'global enforcer' approach is often favoured by human rights litigants and advocates, who prefer its stronger anti-impunity rationale and the possibility it creates for using universal jurisdiction as an active rather than reactive tool for international accountability.[230] Since the 'global enforcer' approach is based on the state's right to exercise jurisdiction over any crime, no matter the presence of the perpetrator on the territory of the state, it is often linked to the exercise of 'pure' universal jurisdiction *in absentia*. The 'no safe-haven' approach on the other hand takes a less active starting point to the exercise of jurisdiction and is based on the conception that a state may use universal jurisdiction in order to not act as a safe haven for perpetrators who seek to escape justice by leaving the territorial state and avoiding the reach of traditional jurisdictional principles. Although advocates have typically preferred the 'global enforcer' approach, they have through their accountability advocacy also significantly contributed to the adoption of a 'no safe haven' conception by a number of states, which had not previously acted under universal jurisdiction.[231] This approach is in line with the rationale of *aut dedere aut judicare* obligations in international treaty law.

While the number of universal jurisdiction cases in reality has not diminished, a shift has arguably taken place away from the 'global enforcer' approach to the benefit of the 'no safe haven' approach. This does not however imply that application of universal jurisdiction in accordance with the 'global enforcer' approach is dead, which is illustrated by a number of national level actions such as the issuance of arrest warrants against suspects not in the territory of the issuing state.[232] The shift suggests that the states which previously took a strong stance choosing to apply universal jurisdiction even in *in absentia* cases, have become more careful in their approach, which is likely connected to setbacks such as the *Arrest Warrant* case, in which the ICJ despite not considering the issue of universal jurisdiction itself found Belgium to be in violation of the immunities afforded to Ministers of Foreign Affairs.[233]

3.6.1.2 'Complementary Preparedness' Approach

In addition to the two above mentioned approaches, Florian Jeßberger has argued that the current shift in the application of universal jurisdiction in some EU member states is from a 'no safe-haven' approach towards a so called 'complementary preparedness' approach. The approach, which has received support from the law enforcement agencies of some EU member states, entails prosecutorial activities with the view of supporting or facilitating future prosecutions under universal jurisdiction, in the investigating state or another state. Hereby evidence is collected, consolidated, preserved and analysed in anticipation of either the suspect arriving on the territory of the investigating state or becoming the object of investigation in another state or an international tribunal, which may require legal assistance and have use for the evidence collected.[234] The 'complementary preparedness' approach reflects the fact that a

[230] ibid 246f.
[231] ibid 247.
[232] Consider e.g. the German international arrest warrant for Syrian Jamil Hassan issued under universal jurisdiction *in absentia*. European Centre for Constitutional and Human Rights (n 227).
[233] *Arrest Warrant case* (n 175) paras 70, 71.
[234] Florian Jeßberger, 'Towards a "Complementary Preparedness" Approach to Universal Jurisdiction – Recent Trends and Best Practices in the European Union' (European Parliament, Policy Department, Directorate-

trial under universal jurisdiction, in comparison to trials conducted under other jurisdictional principles, often is the least practical and desirable option for the creation of accountability and that it should therefore be applied as a complementary form of jurisdiction. In the same way, it can be argued that the success, or lack thereof, of the exercise of universal jurisdiction should not be measured in the number of completed trials or convictions. Instead the concept should be considered as a part of a more complex international and multi-level system of international justice, where investigations under universal jurisdiction in one state can trigger prosecutions and trials in another jurisdictional state.[235]

Possible tools for the 'complementary preparedness' approach include structural investigations, i.e. broad preliminary investigations designed to gather information about potential crimes for possible future proceedings, against yet undetermined suspects.[236] The future proceedings might take place in the investigating state, another state or in front of an international tribunal. This shifts the focus from reactive to active state action under universal jurisdiction and the strategy resembles the mechanism of a preliminary investigation into a situation by the Office of the Prosecutor of the ICC, where no specific suspects have yet been identified.[237] In the future the complementary preparedness approach may prove a useful tool in the fight against impunity, by providing a way for states to investigate alleged international crimes and cooperate with other states or alternative mechanisms such as international tribunals for future accountability action.

3.7 Identifying the Paradox: Universal Jurisdiction in the Fight Against Torture under International Human Rights Law

3.7.1 Conceptualising Universal Jurisdiction

Overall, it is clear that both the legal and political debate surrounding the principle of universal jurisdiction is characterised by controversy, disagreement and ambiguity. Despite the long history of the principle, states and scholars have been unable to agree on many of the basic aspects of it, including its scope, correct terminology and legitimacy. It is however clear that while more traditional principles of criminal jurisdiction inhabit a primary role in the creation of accountability, the importance and impact of universal jurisdiction in relation to grave crimes has increased, if somewhat unsteadily, in recent decades. With time, majority agreement has arisen on issues such as the existence of customary law norms which permit the exercise of

General for External Policies 2018) 7 <https://www.jura.uni-hamburg.de/die-fakultaet/professuren/professur-jessberger/media-fj/media-forschung-stellungnahmen/briefing-eu-parl-2018.pdf>.

[235] ibid 7f.

[236] Examples of such investigations can be found in e.g. Germany and Sweden in relation to alleged crimes committed in e.g. Syria. See e.g. Civil Rights Defenders et al (n 227); European Centre for Constitutional and Human Rights (n 34); Der Generalbundesanwalt beim Bundesgerichtshof, 'Unsere Aufgaben: Völkerstrafrecht' <https://www.generalbundesanwalt.de/DE/Unsere_Aufgaben/Voelkerstrafrecht/Voelkerstrafrecht-node.html> accessed 16 March 2020.

[237] Jeßberger (n 234) 8.

universal jurisdiction over at least international crimes, including torture, and efforts are ongoing to systematise and clarify the principle and its scope further.

The application of universal jurisdiction and especially the strong advocacy around the principle in the 1980s and 90s have however also led to the rise of critiques against the concept. These critiques are often legitimate and based on real concerns such as the opportunities for misuse of the principle provided by the vagueness surrounding the concept. That less powerful and especially Global South states should be concerned about the use of universal jurisdiction as a political tool against them seems like a natural reaction, considering that trends in state practice, while limited in scope, have for a long time been towards Global North states prosecuting nationals of Global South countries. While such trends may depend on a variety of reasons, including practical questions concerning the availability of perpetrators and the presence of victims in the prospective forum state, it seems natural to assume that states also use their wide discretion in relation to universal jurisdiction to avoid going after nationals of allies or powerful states, in order not to risk a harmful backlash from the perpetrator's home state. However, some of these critiques may be somewhat lessened by more recent emerging trends in the use of universal jurisdiction, such as its regionalization, i.e. its increasing use on and by states within the same region, and its reversion, i.e. universal jurisdiction being applied by non-European states against European perpetrators. Such trends may contribute to addressing critiques concerning the use of universal jurisdiction as a post-colonial tool to prosecute nationals of states in the Global South.[238] Examples of these trends include the universal jurisdiction prosecution of Habré in Senegal and attempts in Argentina to create accountability for the crimes of the Spanish Franco-regime.[239]

As evidenced by the discussion above, much of the critique surrounding universal jurisdiction also centers around the traditionally permissive form of the principle of universal jurisdiction – universal jurisdiction as providing states with a right, but not an obligation, to act against suspected perpetrators of crimes – and the space this allows for political maneuvering in the choice whether or not to act. One way of easing some of the political tension associated with the exercise of universal jurisdiction could therefore be to clarify the existence and scope of possible state obligations to exercise universal jurisdiction, leaving less room for purely political considerations to play in to the mechanisms for investigation and prosecution of international crimes. Contributing to providing such clarity is therefore one of the aims of this thesis.

3.7.2 Universal Jurisdiction and Human Rights

There is in general a close and obvious relationship between criminal law and human rights. This relationship has however by many scholars been described as paradoxical and dual, due to human rights acting as both the 'shield' and the 'sword' of criminal law. This refers to the fact that human rights both protect individuals from rights violations committed through the

[238] ibid 6f.
[239] See below, sections 4.6.4 and 6.2.1 respectively.

criminal justice system and trigger the application of criminal justice against individuals who fail to respect the human rights of others.[240] A similar dual relationship could be said to exist between international criminal law and international human rights law, whereby human rights both regulate and trigger the application of international criminal law, including universal jurisdiction.[241]

International criminal law and international human rights law have much in common. Indeed, one of the main rationales underpinning the principle of universal jurisdiction and the field of international criminal law at large is that certain violations of human rights are so severe and unacceptable that they are not only a matter of one domestic jurisdiction, but of common concern to the international community. International criminal law is therefore involved in the enforcement of fundamental human rights such as the prohibition of torture. Both fields of law also deal more or less directly with individuals, despite approaching them from opposite directions by focusing on the duties and rights of individuals respectively.[242] The differences between the systems, including the different approach to individuals and thereby the role of states in guaranteeing rights versus justice, leads to a separation between the two fields, which can be difficult to cross and which may create gaps between the systems such as the paradox examined in the present thesis.

In relation to universal jurisdiction and human rights law, the most important thing to note is however that universal jurisdiction as traditionally understood is a tool of international criminal law, not of human rights. It is therefore built on the public international law understanding of jurisdiction, leading all the way back to the *Lotus* case, according to which jurisdiction is a state entitlement which states are free to apply as they please unless otherwise provided in international law. For this reason, one can also not derive state obligations to investigate and prosecute torture, such as those established to exist under international human right law, from the existence of permissive universal jurisdiction over such crimes. [243]

3.7.2.1 The Paradox of the Traditional Concept of Universal Jurisdiction as a Tool in the Fight Against Torture

Lifting the perspective for a minute and comparing the conclusions of Chapters 2 and 3 illustrates a more central point, namely the paradox inherent in the reliance on universal jurisdiction as traditionally understood as a tool in the fight against torture. As discussed above, the fundamental nature and extreme importance of the prohibition against torture and in extension the various positive state obligations this entails under international human rights law are uncontroversial. Various human rights actors at the international and regional levels have

[240] C. Van den Wyngaert is credited as the first to describe the paradox in this way. See e.g. Francoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights.' (2011) 9 Journal of International Criminal Justice 577ff.
[241] Damien Scalia, *'Human Rights in the Context of International Criminal Law: Respecting Them and Ensuring Respect for Them' in Kolb and Gaggiolo (Eds.) Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing 2013).
[242] The rationales underpinning universal jurisdiction is discussed further in Chapter 3. Daniel Moeckli and others (eds), *International Human Rights Law* (Third edition, Oxford University Press 2018) 521f.
[243] See e.g. Seibert-Fohr (n 104) 255f.

interpreted the fundamental prohibition to require states to take active and well-defined measures to criminalize, investigate, prosecute and punish perpetrators of torture as defined under international human rights law. Any state actions amounting to *de jure* or *de facto* impunity for such actions are inherently unacceptable, as they would rob the prohibition of its effects and render the fight against torture a mere question of rhetoric. Ending impunity is of vital importance to preventing future human rights violations and fighting torture on a large scale.

However, the traditional understanding of universal jurisdiction is strongly focused on the existence, scope and purity of the *right* to apply universal jurisdiction in certain circumstances – considering universal jurisdiction as an entitlement afforded to states based on the nature of the crime at hand as a common concern of humanity. From the viewpoint of ending impunity, the assumption is that states will, if allowed to do so, attempt to bring perpetrators of international crimes to justice based on either a political or moral incentive to do so. Should they opt not to do so, perhaps another state will step in its place. Due to this view much of the traditional literature on universal jurisdiction discusses treaties involving compulsory *aut dedere aut judicare* jurisdiction either as an example of the permissibility of universal jurisdiction, or as a special treaty-based form of compulsory jurisdiction, which is inherently separate from universal jurisdiction, depending on e.g. whether the author identifies as a proponent of universal jurisdiction or adopts a more critical stance in analysing the issue.[244]

Permissible universal jurisdiction leaves all discretion with the individual state which is completely free to choose whether to take action against or disregard allegations of international crimes, even when a suspect is present in the state at hand, which allows states to serve as safe havens for those who would commit crimes under international law. Taking into account also the economic, political and diplomatic costs which may be associated with the initiation of proceedings under universal jurisdiction, it is no wonder that state practice on the issue varies and that the number of cases brought under universal jurisdiction despite fast growth remains low. The human rights system however, is constructed upon the principles of the responsibility of the state, the duty bearer, in relation the individual, the rights holder, as well as the accountability and access to justice where the state fails to uphold its obligations. From the standpoint of human rights law, which is founded on state obligations to respect, protect, ensure and promote the enjoyment of human rights, offering states an *option* to take action against serious human rights violations is therefore neither effective nor in line with the logic of the system at large.

This entails that universal jurisdiction, as traditionally understood, is not an effective human rights mechanism for building accountability for torture in accordance with the requirements of human rights law. Although this may be unsurprising considering the traditional public international law roots of the concept which are strongly centred around principles such as sovereignty, it also entails that universal jurisdiction, when understood as a state entitlement, fails to fulfil one of the main rationales underpinning its existence namely that certain crimes

[244] See for the latter e.g. Yee (n 28); Garrod (n 162).

should never go un-investigated or unpunished. The importance of ending impunity for torture, versus the voluntary nature of traditional universal jurisdiction: this is the paradox surrounding the use of universal jurisdiction as a tool for human rights protection in general and fighting impunity for torture in particular.

3.7.2.2 Remedying the Paradox: A Human Rights Centred Approach

Does this mean that universal jurisdiction as a tool of accountability for serious human rights violations in general and torture in particular is completely arbitrary and ineffective? It is in this thesis argued that this is not the case and that universal jurisdiction may, despite the paradox identified here and the many other ambiguities surrounding the concept, be a useful tool in the continued struggle against torture. In seeking to remedy the paradox, the present thesis suggests the construction of a human rights based understanding of universal jurisdiction through the adoption of a human rights centred approach.

The approach suggested in this thesis is fundamentally predicated on accountability and the empowerment of individuals to claim their rights. It therefore builds on the qualitative difference in assigning something a right versus terming it as a policy, goal or similar, which the human rights logic is constructed upon.[245] For accountability for rights breaches to exist, there is also a fundamental requirement of transparency and a normative framework, which regulates the actions of the duty-bearer. Therefore, it is necessary to construct a framework of duties, which in the context of universal jurisdiction can manifest itself as a normative system regulating the use of such jurisdiction. The traditional view of universal jurisdiction as a state entitlement, which can be applied as the state pleases as long as is not prohibited by international law, is therefore not only ineffective as a tool in the fight against torture, but also lacks transparency and accountability required within a human rights centred approach. The first step in creating a human rights centred understanding of universal jurisdiction is therefore examining the existence of state duties to exercise universal jurisdiction.

The following chapters therefore examine human rights standards relevant for a normative framework regulating the use of universal jurisdiction over acts of torture. Hereby the thesis examines first, the existence and scope of obligations to exercise universal jurisdiction over torture under the relevant articles of the UN Torture Convention, and second, the standards on the right to an effective remedy for victims of torture in international human rights law.

[245] Siobhán McInerneey-Lankford, "Legal methodologies and human rights research: challenges and opportunities" in Bård-Anders Andreassen, HO Sano and Siobhán Mclnerney-Lankford (eds), *Research Methods in Human Rights: A Handbook* (Edward Elgar Publishing 2017) 57f.

4 State Obligations to Provide and Exercise Universal Jurisdiction under UNCAT

4.1 Introduction

When considering the exercise of universal jurisdiction over a specific crime it is logical to consider relevant treaty law on the crime in question. Having in Chapter 2 already discussed the provisions relevant to torture in the major general human rights instruments, this chapter considers the convention most relevant to questions of torture and universal jurisdiction, namely the specialised UN Convention Against Torture. The chapter begins by examining relevant treaty provisions of the UNCAT, beginning briefly with the general provisions such as the definition of torture under the Torture Convention, the obligation to prevent and criminalize torture. It then considers the articles most relevant to the existence and extent of universal jurisdiction and the obligation to extend such jurisdiction under the convention, namely Articles 5, 6 and 7. With the help of the famous Habré case, an analysis is conducted on the relationship between universal jurisdiction and the obligations found under the UNCAT. The aim of the chapter is to examine the existence and extent of obligations to extend and exercise *compulsory* universal jurisdiction under the UNCAT.

4.2 Torture Convention and the Role of the Committee against Torture

The Torture Convention was adopted unanimously by the UN General Assembly on 10 December 1984 and entered into force 26 June 1987, after other international human rights law instruments failed to put a stop to cruel torture practices employed in several countries in the 1960s and 70s.[246] The Convention has as of May 2020 been ratified by 169 and signed by 5 states from across the globe.[247] According to its preamble, the Torture Convention is based on the desire "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world" having regard to the provisions prohibiting such treatment in international human rights law instruments such as Art 5 Universal Declaration of Human Rights ("UDHR")[248] and Art 7 ICCPR.[249] While the UNCAT lacks a provision providing an individual right not to be subjected to torture or a general prohibition of torture, the convention is built upon the presupposition of such a prohibition in other international human rights law instruments and builds further upon these general prohibitions through a number of specialised provisions.[250] These include three types of obligations: comprehensive state obligations to prevent torture from taking place, repression of perpetrators of torture through domestic criminal law and the use of extraterritorial jurisdiction,

[246] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 2f.
[247] 'UN Human Rights Treaties, Status of Ratification: Interactive Dashboard' (n 65).
[248] Universal Declaration of Human Rights, 1948.
[249] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Preamble.
[250] ibid Preamble, paras. 5-7.

and the recognition of the rights of victims of torture to reparation and remedy.[251] The present chapter considers the first two types of obligations, while the rights of victims are discussed in Chapter 5.

The Committee against Torture is the treaty monitoring body tasked with the monitoring of the UNCAT's implementation.[252] The Committee is a quasi-judicial treaty based organ, modelled after the Human Rights Committee, and is relatively independent from the UN system at large.[253] The work of the CAT Committee is carried out through different monitoring mechanisms, namely the compulsory reporting procedure and submission of concluding observations and general comments, the power to conduct ex-officio inquiries based on well-founded indications of torture being practiced systematically in a member state, and the optional inter-State and individual communications mechanisms.[254] Like other Treaty Bodies, the CAT Committee plays an important role in monitoring, interpreting and developing the Torture Convention, which like other international human rights instruments is to be considered as a living instrument. The CAT Committee's practice is especially interesting in relation to criminal jurisdiction issues, which unlike many other torture related issues has not generally been discussed by other treaty monitoring bodies such as the HRC, as the UNCAT's inclusion of jurisdictional matters differs from general human rights instruments.[255]

4.3 Definition of Torture

Article 1 of UNCAT includes the definition of torture which is not universal but often referred to. Torture is under the UNCAT defined by the four main elements: i) an intentional act, ii) inflicting severe physical or mental pain or suffering, iii) for a specific purpose or for a discriminatory reason, and iv) with the involvement of a public official or other person of official capacity. The definition does not include "pain or suffering arising only from, inherent in or incidental to lawful sanctions".[256] Despite its wording, the definition does not exclude torture committed by omission.[257] Since suggestions of the inclusion of a requirement of 'systematic' infliction of pain and suffering were rejected during the drafting process, even a single act can constitute torture. The requirement of intention means that purely negligent conduct cannot amount to torture, only to cruel and/or inhuman treatment, even where it causes

[251] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 7.
[252] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art 17.
[253] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 476.
[254] UNCAT Art 19 to 22. For data on which states have accepted the optional procedures see, 'Underlying Data Excel: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [Last Updated: 20/03/2020 10:41:38]' <available at: https://indicators.ohchr.org/>. For data on overdue state reports see, 'Treaty Body Database "Late and Non-Reporting States: View by Treaties"' <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/LateReporting.aspx> accessed 28 March 2020; Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 509.
[255] See e.g. Chris Ingelse, *The UN Committee against Torture : An Assessment.* (Kluwer Law International 2001) 403.
[256] Convention on the Prevention and Punishment of the Crime of Genocide Art 1; Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 24.
[257] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 42. Committee Against Torture, 'General Comment No. 2 on the Implementation of Article 2 by States Parties' (2008) UN Doc CAT/C/GC/2 para 15.

severe pain and suffering.[258] The examination of intent and purpose does not involve a subjective consideration of the state of mind of the perpetrator, but is based on the objective circumstances in the particular case.[259]

During the drafting of the UNCAT it was generally agreed that a requirement of severity of the pain was necessary so as to avoid the inflation of the term torture, which is a particularly severe human rights violation.[260] The CAT Committee does however not often engage in a detailed analysis before finding a certain treatment to reach the threshold of severe pain and suffering, but the understanding of the concept has clearly evolved over time.[261] The Committee has in its practice recognized many different kinds of ill-treatment as amounting to torture,[262] including gender-based violence such as rape.[263] In general, the CAT Committee however makes the determination of whether the severity threshold has been reached on a case by case basis.[264] During the drafting of the UNCAT, there was also significant consensus for the inclusion of a requirement that only ill-treatment committed for certain purposes be classified as torture. The list of purposes included in Art 1 should however be considered indicative and not exhaustive.[265] Other motives similar to those listed, which while not illegitimate motivations per se, all relate to "the interests and policies of the State and its organs", may therefore be sufficient to classify ill-treatment as torture.[266] While ill-treatment can in principle be committed by a state official for purely private motives such as simple sadism or personal gain, it would only in exceptional circumstances be possible to conclude such treatment as not falling within the definition of torture, as such acts would often involve an element of punishment or intimidation in accordance with the torture definition. It can also be assumed that such acts would mainly take place against the background of a wider public policy to tolerate or acquiescence to such acts.[267]

The term 'public official' has been interpreted widely by the CAT Committee, which has criticized several states for defining the requirement so narrowly as to exclude certain categories

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[258] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 53.
[259] Committee Against Torture, 'General Comment No. 2 on the Implementation of Article 2 by States Parties' (n 257) para 9.
[260] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 42.
[261] ibid 48–53.
[262] See e.g. Committee Against Torture, 'Report on Mexico Produced by the Committee under Article 20 of the Convention, and Reply from the Government of Mexico' (2003) CAT/C/7526 paras 143–144.
[263] *CT and KM v Sweden* [2006] Committee Against Torture Communication No. 279/2005, CAT/C/37/D/279/2005 [7.5]; Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 48. See also, Manfred Nowak, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak' (UN Human Rights Council 2010) A/HRC/13/39 para 44; Nowak, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak: Addendum - Study on the Phenomena of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, Including an Assessment of Conditions of Detention' (n 5) paras 54–55.
[264] Committee Against Torture, 'Report of the Committee against Torture' (2001) UN Doc A/56/44 paras 176, 183; Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 49f.
[265] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 54f.
[266] J Herman Burgers and Hans Danelius, *The United Nations Convention against Torture : A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.* (M Nijhoff 1988) 118f.
[267] Ingelse (n 255) 118f.

of officials or state agents.[268] As to the meaning of 'other person acting in an official capacity', the extension was included to capture any non-State actors exercising authority comparable to that of states. Such *de facto* authorities may consist of e.g. rebel, guerilla or insurgent groups exercising authority over certain areas.[269] 'Instigation' by a public official requires the direct or indirect involvement and participation of the official in question through incitement, inducement or solicitation of the crime.[270] The terms 'consent' and 'acquiescence' are however much broader and can cover a wide range of situations whereby the torture is directly perpetrated by a private actor when a representative of the state could in principle have stopped the ill-treatment from taking place but failed to do so.[271] A state can also be held responsible for torture committed by a non-state actor through the state's failure to exercise due diligence to prevent, investigate, prosecute and punish such ill-treatment. The principle has been applied e.g. to states' failure to act against gender-based violence.[272]

The lawful sanctions clause contained in the last sentence of Art 1(1) was deeply controversial already during the negotiations of the UNCAT and has remained so since the convention's adoption. Although initially careful not to provoke confrontations with States Parties over the limitation, the CAT Committee has more recently made clear that corporal punishment is not allowed under the lawful sanctions clause.[273] In relation to capital punishment, the Committee has both recommended states to review their execution methods to make sure they do not amount cause severe pain and suffering, and regularly recommended states to accede to the Second Optional Protocol to the ICCPR,[274] which aims at the abolition of the death penalty.[275]

4.3.1 Other Forms of Ill-Treatment

While the definition of torture in Art 1 may seem narrow, e.g. due to the requirements of involvement of a public official and specific purpose, the torture definition is to be read in conjunction with Art 16, which requires states to also prevent "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture". The distinction between torture and other forms of absolutely prohibited ill-treatment was created in order to limit some state obligations, especially the obligation to punish perpetrators, to only apply to torture.[276]

In distinguishing between torture and other forms of ill-treatment, the severity of the inflicted pain and suffering is, while an essential element of the torture definition, not a distinguishing criterion. All forms of cruel and inhuman treatment, including torture, require the infliction of

[268] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 59f.
[269] ibid 60.
[270] Ahcene Boulesbaa, *The U.N. Convention on Torture and the Prospects for Enforcement.* (M Nijhoff Publishers 1999) 26.
[271] Ingelse (n 255) 210.
[272] Committee Against Torture, 'General Comment No. 2 on the Implementation of Article 2 by States Parties' (n 257) para 18.
[273] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 64ff.
[274] Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty 1989.
[275] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 66.
[276] ibid 23f.

pain or suffering which is severe. Less severe pain or suffering only reaches the level of degrading treatment or punishment prohibited under Art 16 when combined with particularly humiliating treatment.[277] Today there is increasing consensus that the purpose of the ill-treatment as well as the powerlessness endured by the victim constitute the relevant criteria for distinction.[278] The importance of purpose has been partly confirmed by the CAT Committee, which has stated that ill-treatment does not require impermissible motivations.[279] Also the powerlessness of the victim is a factor typical to torture, illustrated by the purposes listed under Art 1, which typically relate to situations of detention or other factual power or control over the victim. Accordingly, the CAT Committee has held that States Parties "should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service…".[280]

Although the right not to be subjected to torture and other forms of cruel, inhuman and degrading treatment and punishment is an absolute right and therefore not subject to limitations, determining the scope of the right may require a determination of the proportionality. This may be the case e.g. when considering force used by police in order to effect a lawful arrest or to quell a riot, which may amount to an intentional infliction of severe pain or suffering. Whether such conduct amounts to cruel, inhuman or degrading treatment depends on the proportionality of the force used in relation to the legitimate and lawful goal to be achieved. If the force is not proportional or necessary it might qualify as cruel, inhuman or degrading treatment. If the same force causes severe pain or suffering and is applied for the purposes listed in Art 1 in a situation of powerlessness, the act amounts to torture and can never be justified, no matter the surrounding circumstances.[281]

While the UNCAT consequently includes provisions which either explicitly or implicitly apply to forms of ill-treatment not qualifying as torture, the matter of other forms of ill-treatment are not discussed further in the present chapter, which focuses on acts qualifying as torture.

4.4 State Obligation to Prevent and Criminalize Torture

4.4.1 Prevention

Art 2 UNCAT provides a comprehensive state obligation to prevent torture from taking place by obliging States Parties to the Convention to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction".[282] The article also specifies the non-derogable nature of the prohibition of torture, providing that neither an order from a superior or public authority nor any exceptional circumstances,

[277] ibid 44f.
[278] ibid 24.
[279] Committee Against Torture, 'General Comment No. 2 on the Implementation of Article 2 by States Parties' (n 257) para 10.
[280] ibid 15.
[281] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 58f.
[282] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art 2(1).

including but not limited to war, political instability or public emergency, may be invoked as justification for torture.[283] While the obligations under Art 2 only relate to torture, the obligation is "indivisible, interdependent and interrelated" with the prohibition of and obligation to prevent other forms of ill-treatment under Art 16.[284] This statement is supported by the practice of the CAT Committee, which in its recommendations and Concluding Observations often refers to Articles 2 and 16 together.[285]

Article 2(1) is often seen as an umbrella-provision covering all different obligations to prevent torture, including those stipulated in other articles under the convention, e.g. the typical preventative obligations found under Articles 10 to 13 and Article 15, but also other articles such as *non-refoulment* under Art 3 and obligations related to criminalization and prosecution of torture have a clear preventative character.[286] Focusing on the criminal and jurisdictional aspects of Art 2, the obligation for States Parties to take effective preventative measures includes the obligation to ensure the implementation of the UNCAT provisions by providing them with direct effect before national courts by transposing the provisions into national law or by recognizing their direct effect.[287] States are obliged to criminalize torture in national law at a minimum in accordance with the elements provided under Art 1 and the criteria under Art 4 UNCAT.[288] Legislative measures are however not enough and the Committee often recommends states to take a number of other measures such as appropriate training to officials being in a position to apply the convention.[289] The CAT Committee has also emphasized that the obligations under Art 2 include the obligation to fully investigate alleged instances of torture "through competent, independent and impartial prosecutorial and judicial authorities" in relation to both direct perpetrators and persons higher up in the chain of command.[290]

While the wording of Art 2 seems to limit the scope of the obligation to acts committed within the strict territorial jurisdiction of the States Party, it has early been clarified that the phrase also includes torture committed aboard ships and aircrafts as well as territories occupied by a States Party.[291] The CAT Committee has further held that in the light of the non-derogable nature of

[283] ibid Art 2(2) and (3).
[284] Committee Against Torture, 'General Comment No. 2 on the Implementation of Article 2 by States Parties' (n 257) para 3.
[285] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 78.
[286] ibid 79.
[287] See e.g. *Concluding observations on the initial report of Mauritania* [2013] CAT/C/MRT/CO/1 (Committee Against Torture) [9]; *Concluding observations on the combined fifth and sixth periodic reports of the Netherlands* [2013] CATCNLDCO5-6 (Committee Against Torture) [9]; *Concluding observations on the sixth periodic report of New Zealand* [2015] CAT/C/NZL/CO/6 (Committee Against Torture) [8]; Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 82.
[288] Committee Against Torture, 'General Comment No. 2 on the Implementation of Article 2 by States Parties' (n 257) paras 8–9.
[289] See e.g. *Concluding observations on the initial report of Mauritania* (n 287) para 9; *Concluding observations on the combined fifth and sixth periodic reports of the Netherlands* (n 287) para 9; *Concluding observations on the sixth periodic report of New Zealand* (n 287) para 8.
[290] Committee Against Torture, 'General Comment No. 2 on the Implementation of Article 2 by States Parties' (n 257) paras 26, 7, 9; Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 86.
[291] Commission on Human Rights, 'Report on the 35th Session, 12 February-16 March 1979' E/1979/36, E/CN.4/1347 40, para 32 <available at: https://digitallibrary.un.org/record/2607?ln=en>; Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 90.

the obligation it also covers any territory, facility or person under the *de jure* or *de facto* control of a States Party, as well as anyone acting on behalf of the state.[292] The state is therefore obligated to act against torture in territories and facilities under the control of a state, which include areas such as territory under military occupation, military bases, embassies and detention centres, where the state exercises directly or indirectly *de jure* or *de facto* control over detainees.[293] This interpretation is applicable also to the other articles of the UNCAT, as well as its Optional Protocol ("OPCAT"),[294] which establishes a system of regular visits by independent national and international bodies to places where persons are deprived of their liberty with the goal of preventing torture and other forms of ill-treatment.[295]

Does Art 2 Include an Obligation to Exercise Universal Jurisdiction?
Although the jurisdictional requirement of Art 2 is not as strict as it seems at first glance, there is a limitation of the extent of states' obligations to prevent torture and states cannot be held responsible for torture which has been committed completely outside the territory and control of the States Party. It could however be argued as discussed in connection with general human rights instruments in Chapter 2 that the obligations which become active after torture has been committed, such as the obligation to investigate and prosecute alleged torture, would apply also to crimes committed beyond the territorial or 'control requirements' relied on by the CAT Committee. Such situations are however likely to be covered by the specific obligations enshrined in other articles which are discussed below.

The CAT Committee has highlighted that the obligation to prevent under Art 2 includes, but is not limited to the specific requirements put forth by Articles 3 to 15 of the Torture Convention, and that preventative measures may need to go beyond both the scope of these specific Articles and what has been remunerated in the committee's General Comment No 2. An example raised is e.g. the importance of providing both the general public with education on the prohibition of torture and law enforcement and other relevant personnel with training on torture prevention.[296] This could be interpreted to imply that also obligations to exercise criminal jurisdiction, extending beyond those provided by other Articles under UNCAT, could be implicitly enshrined in Art 2. However, since the obligations to prosecute and punish perpetrators are obligations which are typically considered far reaching and entailing a significant limitation of state sovereignty, as evidenced by the decision to separate between torture and other forms of ill-treatment on the matter, such an argument seems unsustainable. Instead, any implicit obligations going beyond what has been enshrined in the articles or in the practice of the Committee is most likely limited to more general preventative measures similar to the example of education raised by the Committee.

[292] Committee Against Torture, 'General Comment No. 2 on the Implementation of Article 2 by States Parties' (n 257) para 7.
[293] ibid 16; *Conclusions and Recommendations, United States of America* [2006] CAT/C/USA/CO/2 (Committee Against Torture) [15]; *Concluding observations on the combined third to fifth periodic reports of the United States of America* [2014] CATCUSACO3-5 (Committee Against Torture) [10].
[294] Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment 2003.
[295] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 90.
[296] Committee Against Torture, 'General Comment No. 2 on the Implementation of Article 2 by States Parties' (n 257) para 25.

4.4.2 Criminalization

The main state obligation to criminalize torture is enshrined in Art 4 UNCAT, which provides that States Parties "shall ensure that all acts of torture are offences under its criminal law". This applies to the commission of the crime itself, attempted torture as well as any act constituting complicity or participation in torture. In accordance with the definition of torture under Art 1 it also includes e.g. instigation, incitement, instruction, and consent and acquiescence to torture, as well as the commission of torture through omission.[297] Persons exercising superior authority are guilty as accomplices to torture "where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures".[298] Torture offences shall be "punishable by appropriate penalties which take into account their grave nature."[299]

4.5 Jurisdiction under the Torture Convention

4.5.1 Types of Jurisdiction over the Crime of Torture

Art 5 UNCAT can be considered a cornerstone of the convention since the provision seeks to fulfil one of its fundamental aims namely the eradication of safe-havens. Hereby the provision plays closely together with the legal measures prescribed by Art 6 as well as the obligation *aut dedere aut judicare* under Art 7, since the establishment of jurisdiction over an alleged crime in accordance with Art 5 is a precondition to the initiation of criminal proceedings against the suspect.[300] Hereby Art 5 obliges States Parties to take necessary measures to establish their jurisdiction over offences referred to in Art 4. States are firstly obliged to establish their jurisdiction 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."[301]

Art 5(1) therefore obliges states to establish jurisdiction over crimes based on the principle of territoriality, the principle of the flag and the principle of active personality. It also provides the option, 'when the state considers appropriate' to apply the passive personality principle.

Art 5(2) provides additionally that:

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

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[297] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 176, 181; Committee Against Torture, 'General Comment No. 3 on the Implementation of Article 14 by States Parties' (2012) CAT/C/GC/3 paras 3, 23 and 37.
[298] Committee Against Torture, 'General Comment No. 2 on the Implementation of Article 2 by States Parties' (n 257) para 26.
[299] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art 4(1) and (2).
[300] Burgers and Danelius (n 266) 131.
[301] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art 5(1).

Art 5 UNCAT entails the first international human rights law codification of an obligation to establish jurisdiction whenever a perpetrator is found to be present in any territory under the jurisdiction of a States Party, even when traditional jurisdictional principles do not apply.[302] The article and the convention at large do also not exclude any criminal jurisdiction exercised under national law.[303] The obligation under Art 5 includes the obligation for the legislature to establish jurisdiction in national law and for administrative and judicial authorities to take factual steps towards bringing perpetrators to justice.[304] As is the case under Art 2, 'any territory under [the States Party's] jurisdiction' must be interpreted broadly and applies, beyond sovereign land and sea territory as well as airspace, also to various areas and facilities under the direct or indirect, *de jure* or *de facto* effective control of the state.[305] The issue has been raised e.g. in relation to US military detention facility Guantanamo Bay located in Cuba. Having first disputed the applicability of the UNCAT to areas and facilities beyond the territory of the state, the US later adjusted its position and accepted that the Torture Convention applies to "all places that the States Party controls as a governmental authority" including Guantanamo Bay.[306]

The active nationality principle applies wherever the crimes were committed and therefore automatically provides for extraterritorial application. Taking into account the object and purpose of the UNCAT, namely making more effective the fight against torture and the ending of impunity for torture, the principle applies even when the nationality of the forum state has been acquired after the commission of the act of torture. The opposite conclusion would also be illogical in view of the obligation to extend jurisdiction no matter the nationality provided in paragraph 2.[307] The same principle must of course apply to cases of dual citizenship. This means that naturalized citizens are under the Torture Convention covered by the principle of active personality and do not require universal or other forms of alternative jurisdiction. Instead, the extension of jurisdiction over crimes committed by them is always mandatory, even when the individual is not present on the territory of the state. Since the active personality principle does not limit itself to public officials of the state, but applies to all nationals, and torture can under the Art 1 definition be committed by a private individual with the consent or acquiescence of a public official, the active nationality principle applies to the private actor irrespective of the nationality of the public official involved. The US would for example be obliged to exercise active personality jurisdiction over a US national employed by a private security company in Iraq, who commits torture with the consent or acquiescence of an Iraqi official.[308]

Under Art 5(2) States Parties shall in national legislation provide for jurisdiction over any torture crime under Art 4, the perpetrator of which is found present in within any territory under

[302] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 196.
[303] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art 5(3).
[304] Manfred Nowak, *United Nations Convention against Torture: A Commentary* (2008) 196 <http://ludwig.lub.lu.se/login?url=https://search.ebscohost.com/login.aspx?direct=true&db=cat07147a&AN=lub.5713700&site=eds-live&scope=site>.
[305] Committee Against Torture, 'General Comment No. 2 on the Implementation of Article 2 by States Parties' (n 257) para 16.
[306] *Concluding observations on the combined third to fifth periodic reports of the United States of America* (n 293) para 10.
[307] Burgers and Danelius (n 266) 132.
[308] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 214.

the States Party's jurisdiction. Such jurisdiction must be exercised unless the state decides to extradite the suspect to another state in accordance with Art 8. Since nothing in the UNCAT speaks to the contrary, the obligation to establish jurisdiction under Art 5(2) is equally compulsory as the establishment of territorial and active personality jurisdiction.[309]

4.5.2 Legal Measures: Custody and Investigation

Art 6(1) UNCAT provides that a state on the territory of which a suspected perpetrator of torture offences is present shall, when satisfied that the situation warrants it, take the suspect into custody or otherwise take legal measures to ensure the presence of the suspect.[310] Hereby the state, while in principle obliged to take action, has a "wide degree of freedom to assess whether or not the circumstances warrant" it. The state must hereby follow the conditions laid down in national law, in particular in relation to the required degree of suspicion, the establishment of a flight risk and any applicable time-limits, as long as these do not render the obligation under the UNCAT illusionary in practice.[311] The custodial state "shall immediately make a preliminary inquiry into the facts" and upon taking the suspect into custody immediately notify other states with a jurisdictional claim under Art 5(1). A state conducting a preliminary inquiry under jurisdiction based only on the suspects presence in accordance with Art 5(2) shall report on its findings and inform other jurisdictional states whether it intends to exercise jurisdiction.[312] The purpose of this is to protect the rights of the accused, to facilitate possible extradition requests from other states but also to inform other states who may have an interest in the matter, even when the custodial state has firmly decided to prosecute the case itself.[313] The Article also provides for other procedural safeguards.[314]

The duty to investigate cases of suspected torture enshrined in Art 6 is also included in the provision in Art 12 of the UNCAT, under which states shall ensure that a prompt and impartial investigation takes place "wherever there is reasonable grounds to believe that an act of torture has been committed under its jurisdiction." The obligation reinforces the investigative duty by shifting the responsibility for initiation of an investigation on to the state, which must take *ex officio* action even when no official complaint has been made.[315] This is well in line with the positive state obligations to investigate found under general human rights regimes, in relation to which the relevant interpretative bodies have found the duty to apply *ex officio*. Although not explicitly stated, the jurisdictional clause of Article 12 should according to the logic of the UNCAT be interpreted in the same broad sense as under Art 2, namely to cover "any territory or facilities and must be applied to protect any person… subject to the de jure or de facto control

[309] ibid 219f.
[310] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art 6(1).
[311] Burgers and Danelius (n 266) 134.
[312] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art 6(2) and (4).
[313] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 250; Burgers and Danelius (n 266) 135.
[314] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art 6(1) and (3).
[315] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 337.

of a State party."[316] Since the provision only applies to cases of torture committed within the jurisdiction, aka control, of the States Party, it is not relevant to situations requiring universal jurisdiction, since its scope overlaps with the other more traditional jurisdictional principles.

4.5.3 Aut Dedere Aut Judicare

Art 7 UNCAT provides for one of the fundamental principles in the fight against impunity for perpetrators of torture, *aut dedere aut judicare*, the obligation to extradite or prosecute suspects. Whereas Art 5 obliges states to establish jurisdiction over alleged torture offences, Art 7 provides for the obligation to exercise such jurisdiction through criminal proceedings when the suspect is found within territory under the jurisdiction of the state.[317] According to Art 7 a "States Party in the territory under whose jurisdiction" an alleged perpetrator of torture offences is found, "shall… if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."[318] The formulation as an obligation to submit the matter to relevant authorities for decision instead of as a direct obligation to prosecute is intended to protect the independence of decision-making authorities, who must naturally consider many questions such as the availability of evidence in making their decision whether to prosecute the case. The authorities' decision on whether to prosecute shall be made "in the same manner as in the case of any ordinary offence of a serious nature under the law of that State" and the same standards of evidence required for prosecution and conviction apply irrespective of the case's jurisdictional basis.[319] In practice, the lack of evidence may be a serious obstacle for the investigation and prosecution of extraterritorial offences, especially when the territorial state is not willing to cooperate with an investigation. The article however makes clear that this does not legitimise prosecutions or convictions on the basis of insufficient or inadequate evidence.[320] The suspect shall at all stages be guaranteed fair treatment, which entails of course that the suspect cannot themselves be subjected to torture or ill-treatment and that the trial must be conducted in accordance with the right to fair trial under international human rights law reflected in e.g. the UDHR and ICCPR.[321]

In interpreting and analysing the jurisdictional issues under Art 5, 6 and 7 of the Torture Convention, the Habré case is of particular interest. Below therefore follows a review of the case in its different phases. The findings in the case will thereafter be used in examining the obligations under Arts 5(2), 6 and 7, analysing whether they entail an obligation to extend universal jurisdiction to crimes of torture and determining their scope in relation to i.a. the requirement of territorial presence and whether there is a requirement that an extradition request have been made for the *aut dedere aut judicare* obligation to become active.

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[316] Committee Against Torture, 'General Comment No. 2 on the Implementation of Article 2 by States Parties' (n 257) para 7; Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 358.
[317] Burgers and Danelius (n 266) 136.
[318] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art 7(1).
[319] ibid Art 7(2).
[320] Burgers and Danelius (n 266) 138.
[321] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art 7(3); Burgers and Danelius (n 266) 138.

4.5.4 *Habré* case

Hissène Habré served as the president of Chad for eight years between 1982 and 1990. During his authoritarian rule, large scale human rights violations were committed in the country, including political arrests and detention, torture and ill-treatment as well as widespread extrajudicial killings and enforced disappearances. After Habré was overthrown in 1990, he requested and was granted political asylum in Senegal, where he took up residence.[322]

Several years later, victims of Habré's rule attempted to bring him to justice for his alleged crimes by bringing complaints against Habré in Senegal. However, the complaints were found inadmissible by Senegalese courts, which considered the state to lack jurisdictional basis in the country's national law to try the case. Meanwhile, other victims who had since the commission of the alleged crimes acquired Belgian nationality, brought complaints against Habré for torture, genocide and serious violations of international humanitarian law before Belgian courts. The complaints were based on the Belgian national law on serious violations of IHL, as well as the Torture Convention.[323] Following investigation, including cooperation with Chadian authorities, who informed Belgium that the former President Habré's immunities had been lifted, Belgium issued an arrest warrant for Habré and requested Senegal to extradite him in accordance with UNCAT. When the Senegalese courts determined the extradition request impossible to fulfil, Senegal referred the matter of the institution of proceedings against Habré to the African Union ("AU").[324] Senegal submitted that this was done in order to avoid a legal impasse and that it was acting in accordance with the spirit of the *aut dedere aut judicare* principle.[325] Having considered the issue, the AU provided Senegal with the mandate "to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial".[326]

4.5.4.1 Committee Against Torture: *Guengueng et al. v Senegal*

After Senegalese courts found the state to lack jurisdiction over Habré's alleged crimes, a number of his victims brought an individual complaint to the CAT Committee in accordance with Art 22(3) UNCAT. The complainants alleged that Senegal had violated its obligations under Arts 5(2) and 7 by failing to implement the convention into national law allowing Senegal to establish jurisdiction over Habré and by neither prosecuting or extraditing him.[327] In 2006, the Committee found that Senegal had violated the UNCAT by failing to adopt measures necessary to establish jurisdiction over torture crimes in accordance with Art 5(2), both since the state had not contended that it had taken such measures and since it in any case had not done

[322] *ICJ Habré case* (n 60) para 16. See also e.g. Commission of Inquiry, *'Chad: Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories', Reprinted in Neil J Kritz (Ed) Transitional Justice: How Emerging Democracies Reckon with Former Regimes. Laws, Rulings, and Reports*, vol 3 (United States Institute of Peace Press 1995).
[323] *ICJ Habré case* (n 60) paras 18–19.
[324] ibid 20–23.
[325] ibid 26.
[326] African Union, 'Assembly/Au/3 (VII), Decision On The Hissene Habre Case And The African Union' para 5(ii).
[327] *Suleymane Guengueng et al v Senegal* [2006] Committee Against Torture Communication No. 181/2001, CAT/C/36/D/181/2001 [3.1, 3.7 and 3.10].

so within a reasonable timeframe.[328] The decision constituted the first individual complaint in which the CAT Committee found a States Party to be in violation of Art 5(2).[329]

The Committee also found Senegal to have violated Art 7 by not fulfilling the obligation *aut dedere aut judicare* based on the state's failure to prosecute Habré as well as its refusal to extradite him to Belgium.[330] The Committee also specifically highlighted that in light of the purpose of the provision, namely preventing impunity for torture, the obligation to prosecute a perpetrator under Art 7 does not rely on the existence of an extradition request from another state, but that a States Party is in the absence of such a request obliged to submit the case to its relevant authorities, since it lacks the option of extradition.[331] Since States Parties cannot invoke the complexity of the situation or its national laws to justify its breach of the UNCAT provisions, Senegal was under the obligation to prosecute Habré "unless it could show that there was not sufficient evidence to prosecute", which the state had not done.[332]

4.5.4.2 ECOWAS Court of Justice

Following a number of legislative changes undertaken to facilitate the Habré trial in Senegal, including the establishment of universal jurisdiction over torture crimes, the ECOWAS Court of Justice ruled on an application made by Mr Habré. The court found that that Senegal had violated its obligations under international human rights law and ordered Senegal to strictly abide by principles of *res judicata* and non-retroactivity of criminal law.[333] The ECOWAS Court of Justice also interpreted the mandate Senegal had received from the AU to see to that Habré be prosecuted, to in fact be limited to a mandate to devise and make arrangements for special *ad hoc* international proceedings and found that Habré could in accordance with 'international habit which has become custom'[334] only be tried through such an *ad hoc* mechanism.[335] Senegal had therefore violated its obligations under international law enshrined in i.a. the UDHR, ICCPR and the African Charter.[336]

In its judgement, the ECOWAS court did not deal with the UNCAT or the obligation to prosecute under international law and its conclusion that there exists a customary norm as to that states may prosecute perpetrators of grave and international crimes only through *ad hoc* mechanisms is at best questionable. To the contrary, as established above, states under the Torture Convention and other conventions dealing with grave and international crimes have obligations to prosecute such crimes under their national criminal law systems and that such cases should be treated the same way as other severe crimes within domestic law.

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[328] ibid 9.5.
[329] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 224.
[330] *Suleymane Guengueng et al. v Senegal* (n 327) paras 9.9-9.12.
[331] ibid 9.7.
[332] ibid 9.8.
[333] *Hissein Habré c République du Sénégal* [2010] ECOWAS Court of Justice ECW/CCJ/JUD/06/10.
[334] Free translation by the author. Original: "la coutume internationale qui a pris L'habitude". Ibid. 58.
[335] *Hissein Habré c. République du Sénégal* (n 333) para 58.
[336] ibid 1.

4.5.4.3 International Court of Justice

Before the ICJ the *Habré* case began in 2009 when Belgium instituted proceedings against Senegal for alleged violations of the state's obligations to prosecute or extradite under the UNCAT and customary international law.[337] Belgium requested the ICJ to declare that Senegal had breached its international obligations by i) failing to legislate to give itself the power to exercise universal jurisdiction over crimes of torture provided for in Art 5(2) UNCAT; and ii) failing to bring criminal proceedings against Habré for crimes of torture, genocide, war crimes and crimes against humanity, or to extradite him to Belgium to face such charges, in violation of the UNCAT and customary international law. The ICJ was also requested to declare that Senegal could not invoke financial or other difficulties to justify its breaches. Belgium requested that Senegal be required to submit Habré's case to prosecution or to extradite him to Belgium without delay.[338] Since at the time, Senegal had already conducted a number of legislative changes to implement Art 5(2), the Court found itself to only have jurisdiction in relation to Belgium's claims under Art 6 paragraph 2 and Art 7 paragraph 1, namely the obligation to conduct a preliminary inquiry and the obligation *aut dedere aut judicare* and therefore limited its examination to these questions.[339]

Senegal questioned the admissibility of the complaints made by Belgium based on that none of the victims of the alleged crimes had at the time of the commission been a Belgian national. Belgium on the other hand contended that since complaints against Mr Habré had been filed by a Belgian national of Chadian origin, Belgian courts would exercise jurisdiction based on the passive personality principle. Belgium additionally claimed that any States Party of the UNCAT has the right to claim performance of and invoke responsibility for breaches of state obligations under the Convention.[340] The ICJ determined that based on the Preamble of the UNCAT as well as the object and purpose of the convention, the States Parties to it have a common interest to prevent torture and impunity for its perpetrators.

> "The obligations of a States Party to conduct a preliminary investigation into the facts and submit the case to its competent authorities for prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred. All the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present. That common interest implies that the obligations in question are owed by any States Party to all the other States parties to the Convention. These obligations may be defined as "obligations erga omnes partes" in the sense that each States Party has an interest in compliance with them in any given case."[341]

Based on the *erga omnes partes* nature of the obligations, any States Party is inherently entitled to make a claim concerning the cessation of a breach of an obligation under UNCAT and to

[337] *ICJ Habré case* (n 60) para 1.
[338] ibid 13.
[339] ibid 55.
[340] ibid 64–65.
[341] ibid 68.

invoke state responsibility. Belgium therefore had standing and the ICJ did not need to pronounce on whether the state had a special interest in the matter.[342]

Although the ICJ found itself to lack jurisdiction for an examination under Art 5(2), it noted the common goal of ending impunity for torture and "that the performance by the State of its obligation to establish the universal jurisdiction of its courts over the crime of torture is a necessary condition for enabling a preliminary inquiry (Article 6, paragraph 2), and for submitting the case to its competent authorities for the purpose of prosecution (Article 7, paragraph 1)."[343] The delay in implementation of the UNCAT therefore necessarily impacted Senegal's ability to comply with the other relevant provisions.[344] Although the Court did not assess a possible violation of Art 5(2) on the merits, the wording of the judgement strongly implies that the Court concurred with the assessment made by the CAT Committee that Senegal had been in violation of the Article until the time of the adoption of legislative changes implementing the UNCAT.[345]

As to the merits of the case the ICJ held that the preliminary inquiry under Art 6 paragraph 2 UNCAT is intended to corroborate, or not, the allegations brought against the suspect. It is to be carried out by the authorities tasked with such inquiries and involves the gathering of different kinds of evidence. Senegal should therefore have sought the cooperation of Chadian and other relevant authorities to fulfil its obligations.[346] The ICJ found that Senegal had not conducted any substantive inquiry into the allegations against Mr Habré. Although the choice of means for carrying out an investigation remains with the state, the provision must be interpreted in light of the object and purpose of the UNCAT and investigative steps must be taken as soon as the suspect is identified within the territory of the state. Since Senegal had not immediately started inquiries into the charges brought against Habré, the ICJ found a violation of the state's obligations under Art 6 paragraph 2.[347]

As to the obligation *aut dedere aut judicare*, the ICJ stated that the wording of the provision had been selected purposefully, so as to give the relevant authorities the freedom to choose whether to initiate proceedings, thus respecting the independence of the authorities. The decision shall be made as in any case of serious crimes under national law, considering the available evidence and the rules on criminal procedure.[348] According to the Court, which hereby concurred with the CAT Committee, the obligation to submit the case to the state's relevant authorities exists irrespective of whether there is an extradition request from another state. If an extradition request has however been made, the custodial state has the option to extradite the suspect in question, rather than prosecuting them itself. The two options provided by the *aut dedere aut judicare* obligation are therefore not of the same weight, since prosecution is an international obligation on the state, whereas extradition is an option the state may choose

[342] ibid 69–70.
[343] ibid 74.
[344] ibid 77.
[345] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 226.
[346] *ICJ Habré case* (n 60) para 83.
[347] ibid 86–88.
[348] ibid 90.

instead of prosecution. A violation of the state obligation to prosecute engages the responsibility of the state for a wrongful act.[349]

The court also stated that the prohibition of torture today is a peremptory norm of international law, *jus cogens*, but that the obligation to prosecute perpetrators of torture only applies for the time since the entry into force of the UNCAT for the state in question.[350] Senegal's obligation to prosecute therefore only extended to crimes committed after the entry into force of the Torture Convention in 1987.[351] Senegal could not invoke either its referral of the situation to the AU, financial difficulties, or the decision of the ECOWAS Court nor its national courts, to avoid responsibility. The obligation should have been fulfilled within reasonable time, considering the object and purpose of the convention, namely as soon as possible, in particular following the filing of the first complaint against Habré, and failing so Senegal had violated its obligations under Art 7 paragraph 1.[352]

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The case of Habré was finally concluded in April 2017, when the Appeals Chamber of the Extraordinary African Chamber, an internationalized *ad hoc* tribunal created for the purpose of prosecuting Habré, rendered its final judgement upholding Habré's conviction laid down by its Trial Chamber. Habré was convicted to a life sentence for torture as a stand-alone crime; the crimes against humanity of rape, sexual slavery, murder, summary execution and inhuman acts; and the war crimes of murder, torture, inhumane treatment, unlawful detention and cruel treatment.[353]

4.5.5 Do Arts 5(2), 6 and 7 Equal an Obligation to Exercise Universal Jurisdiction?

In light of the Habré case and the various statements made by the CAT Committee and the ICJ, let us now consider Articles 5, 6 and 7 and their relevance for the existence and scope of state obligations to extend and exercise universal jurisdiction over torture offences. As held by the ICJ, the three articles "taken as a whole, may be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility",[354] and are therefore considered together.

Neither Article 5, 6 nor 7 nor the Convention as a whole mention the term 'universal jurisdiction', however the jurisdiction provided for under Art 5(2) has been widely termed as such, including by the CAT Committee, which has repeatedly called for States Parties to take

[349] ibid 94–95.
[350] ibid 100.
[351] ibid 102.
[352] ibid 111–117.
[353] *Trial Judgement, Ministère Public c Hissein Habré* (Chambre Africaine Extraordinaire d'Assises (Extraordinary African Chamber)) 536; *Appeals Judgement, Le Procureur Général c Hissein Habré* (Chambre Africane Extraordinaire d'Assises d'Appel (Extraordinary African Chamber, Appeal's Chamber)) 225.
[354] *ICJ Habré case* (n 60) para 91.

necessary steps to effectively exercise universal jurisdiction for torture offences.[355] To analyze the relationship between universal jurisdiction and the obligations provided under the UNCAT it is however necessary to first examine certain specific aspects of these obligations. Such aspects are the presence requirement, whether an extradition request must have been made to activate the obligation *aut dedere aut judicare* and the applicability of the obligations to nationals of states outside the treaty regime, as these issues impact on the purported universality of the jurisdiction.

4.5.5.1 Presence Requirement

The wording of all three examined relevant Articles, 5(2), 6 and 7, includes an explicit requirement that the suspected perpetrator be found 'within the territory under the jurisdiction of the States Party' for the positive state obligations to become active. This presence requirement entails that states are under these articles obligated to e.g. investigate and arrest a suspected perpetrator who is present on state territory, on an airplane or ship registered to the States Party or in another area or facility under the effective control of the state. They are however not obligated to e.g. start a structural investigation or to issue an international arrest warrant for a foreign perpetrator, who is present abroad and suspected of committing torture crimes in another state. The jurisdiction envisioned under Art 5(2) is therefore *conditioned*.

The obligations under Art 5(2), and thereby also under Arts 6 and 7, become active as soon as the state authorities 'have reason to suspect that a person present in their territory may be responsible' for torture offences, which happens at the latest when the first complaint against them is brought.[356] In fulfilling the presence requirement, the duration and reason for the suspect's presence in territory under the jurisdiction of the state is irrelevant, whether they be present due to e.g. habitual residence like Habré, short-term to participate in a conference or seek medical treatment, like Pinochet, or seeking asylum.[357] The CAT Committee has therefore criticized states for removing suspected torturers from the country instead of prosecuting them based on their presence and for placing requirements, such as that the perpetrator be normally resident in the state, on the exercise of universal jurisdiction in national legislation.[358]

It is however less clear at what time or stage of the proceedings the presence of the suspect is required. Neither the *travaux préparatoires* nor the practice of the CAT Committee clarify the issue conclusively and the practice of States Parties is varied. The most common temporal requirement found at the national level is that the presence of the suspect is required at the time

[355] See e.g. *Concluding observations on the sixth periodic report of Germany* [2019] CAT/C/DEU/CO/6 (Committee Against Torture) [22]; *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland* [2013] CAT/C/GBR/CO/5 (Committee Against Torture) [22]; *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland* [2019] CAT/C/GBR/CO/6 (Committee Against Torture) [49].
[356] International Law Commission, 'Report of the International Law Commission: Sixty-Sixth Session (5 May–6 June and 7 July–8 August 2014)' UN Doc A/69/10 139, Chapter VI c para. 20; *ICJ Habré case* (n 60) para 88.
[357] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 227f.
[358] *Concluding observations on the fourth to sixth periodic reports of France* [2010] CATCFRACO4-6 (Committee Against Torture) [19]; *Concluding observations on the sixth periodic report of Canada* [2012] CAT/C/CAN/CO/6 (Committee Against Torture) [14].

of the filing of the complaint. Where the perpetrator is not present at the time of the complaint, states are therefore likely to argue that they lack jurisdiction and dismiss the complaint. In certain cases the question has also arisen as to what happens if the suspect manages to abscond after the initiation of proceedings against them.[359] Meanwhile, other states only require the presence of the perpetrator at a later stage in the proceedings, allowing the initiation of an investigation in the absence of the perpetrator, such as in the case of the Belgian investigation into Habré and Spain's request for extradition of former Chilean dictator Augusto Pinochet, where both investigation and issuance of an arrest warrant were possible without the presence of the suspect on the territory of the forum state.[360] While states are in principle free to regulate the required timing for the fulfilment of the presence requirement, from a prosecutorial point of view allowing for the initiation of an investigation, before e.g. the expected arrival of a visiting suspect or with the intention to issue an international arrest warrant, would arguably ease the fight against impunity.[361] On the other hand, imposing an obligation on States Parties to investigate any torture crime brought to their attention without the presence requirement needing to be fulfilled until at a much later stage in the proceedings, may arguably place a large burden on the state authorities.

4.5.5.2 Primary Form of Juridiction

The forms of jurisdiction proscribed under Art 5 may overlap, obliging more than one state to extend and exercise its jurisdiction over the same crime. The question thus arises as to whether there is a legal hierarchy between the forms of jurisdiction. Art 5 does however not proscribe any formal ranking between e.g. territorial and extraterritorial forms of jurisdiction and jurisdiction proscribed under Art 5(2) is not supplementary to the more traditional jurisdictional bases, but legally a primary form of jurisdiction.[362] Nonetheless, this does not preclude the existence of practical considerations speaking against the exercise of universal jurisdiction. Such may include e.g. the availability of evidence, access to witnesses, or financial considerations.[363] A custodial state may therefore have a legitimate reason to prefer extradition over criminal proceedings under universal jurisdiction.

Moreover, as clarified by both the CAT Committee and the ICJ in the Habré case, the obligation *aut dedere aut judicare* under Art 7 does not provide for two equal alternatives, but for an obligation to prosecute, with the option of extradition.[364] Since the primary obligation is that of prosecution, the existence of an extradition request submitted by another jurisdictional state is not a requirement for Art 7 to become active. Had this been a requirement, as is the case under certain other conventions including an obligation to extradite or prosecute the suspect,[365] it would have entailed a significant limitation of the obligation to prosecute, likely hampering the fight against impunity by allowing states to shield perpetrators of torture offences as long as no

[359] Nowak, *United Nations Convention against Torture: A Commentary* (n 304) 229.
[360] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 236.
[361] ibid 235.
[362] ibid 239f.
[363] See e.g. ibid 240ff.
[364] See above under sections 4.6.4.1 and 4.6.4.3.
[365] International Law Commission (n 356) c para. 11.

other jurisdictional state was willing to request extradition. Furthermore, should the custodial state be presented with an extradition request, the state must still conduct a due diligence examination before opting for extradition. The States Party must thus ensure that extradition does not contravene the purposes of the Torture Convention either by facilitating impunity or by violating the non-refoulment principle under Art 3. Where there are any indications that the extradition request has been made for the purposes of providing the suspect with a safe-haven from accountability, the custodial state must deny the request and exercise universal jurisdiction to avoid impunity. The same applies where the requesting state's judicial system will *de facto* not be able to conduct criminal proceedings in accordance with international criminal and human rights law standards.[366]

4.5.5.3 Applicability to Nationals of Non-States Parties

One of the basic principles of the international law of treaties is that treaties only bind States Parties to the treaty but do not apply to non-States Parties, unless they become part of customary international law.[367] In the Habré case, the ICJ stated that while the prohibition of torture is a peremptory norm of international law, the obligation to prosecute torture crimes under Art 7 only applies after the entry into force of UNCAT for the state concerned,[368] implying that the obligation to prosecute using universal jurisdiction is, or at least was at the time, only based on the treaty itself and not a part of customary law. Does this mean that the obligation to exercise jurisdiction over torture crimes only applies to nationals of other States Parties to the Convention? Should this be the case, it would significantly limit the 'universal' scope of the obligation.

An obligation to exercise jurisdiction could arguably not exist for a crime which was not per se a part of customary international law, since states could not be generally obliged to prosecute individuals who may, as nationals of non-States Parties to the convention criminalizing the specific conduct, be unbound by the criminalization. Such prosecutions would violate the fundamental criminal law principle *nullum crimen sine lege* and thereby violate international human rights law.[369] However, as established before, the prohibition and criminalization of torture is a well-accepted part of customary law, thereby binding all states and their nationals. State practice on treaty based forms of 'universal jurisdiction' indicates that states may under international law extend such jurisdiction to nationals of non-States Parties to the treaty in question.[370] If the extension of jurisdiction to non-States Party nationals is allowed, it must based on the object and purpose of the Torture Convention, making more effective the struggle against torture, also be compulsory for States Parties. The nationality of the perpetrator is therefore irrelevant for the exercise of jurisdiction under Art 5(2).

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[366] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 240.
[367] Vienna Convention on the Law of Treaties Art 34, 38.
[368] *ICJ Habré case* (n 60) para 100.
[369] Universal Declaration of Human Rights, 1948 Art 11(2); International Covenant on Civil and Political Rights Art 15; European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 Art 7.
[370] Michael P Scharf, 'Application of Treaty-Based Universal Jurisdiction on Nationals of Non-Party States' (2001) 35 New England Law Review.

4.5.5.4 Relationship to Universal Jurisdiction

From the examination so far it is clear that the state obligations under the Torture Convention do not correspond to an obligation to apply the purest forms of universal jurisdiction, namely those which rely solely and completely on the nature of the crime in question. The requirement that the perpetrator be present on territory under the state's jurisdiction is a clear limitation of what torture crimes will really be prosecuted under the jurisdiction foreseen by Art 5(2), although as discussed above, the extent of this limitation will depend on the national law, since states are free to determine the timing of the presence requirement freely. This does not however change the fact that states are under Art 5(2) as it is interpreted today only *obliged* to exercise jurisdiction when the perpetrator is present on state territory at the time of the submission of the complaint or when the state otherwise has reason to suspect that the person is responsible for torture crimes.

Although the present thesis has determined that the obligation to exercise jurisdiction is not limited by the nationality of the perpetrator, since it applies also to nationals of non-States Parties to the UNCAT, the universality of the obligation is of course also limited by its treaty-based nature. However, according to the definition of universal jurisdiction as jurisdiction which does not rely on any of the traditional jurisdictional links such as territoriality or nationality, it must be concluded that the jurisdiction proscribed by Art 5(2) entails a form of universal jurisdiction, at least in accordance with the definition applied in the present thesis. This view has been shared by several authoritative actors, which have recognized the obligations under the Torture Convention to entail an obligation to exercise universal jurisdiction. Such actors include beside the ICJ, which throughout the Habré judgement discusses the prescriptive jurisdiction under Art 5(2) as universal jurisdiction,[371] also e.g. the CAT Committee and the International Law Commission, which has also noted the crucial nature of universal jurisdiction as a component in the prosecution of perpetrators of international crimes.[372] Also many notable scholars such as Nowak et al. have either concluded or taken for granted that the jurisdiction prescribed by Art 5(2) entails universal jurisdiction.[373]

As to the relation between universal jurisdiction and the obligation *aut dedere aut judicare*, e.g. Inazumi has expressed that, "[t]he principle of aut dedere aut judicare overlaps with universal jurisdiction when a State has no other nexus to the alleged crime or to the suspect other than the mere presence of the person within its territory."[374] While the obligation to prosecute is not itself a kind of jurisdiction, the obligation clearly relies on the existence of jurisdiction, which in situations falling under Art 5(2) UNCAT entails a form of universal jurisdiction. As formulated by Reydams: "Aut dedere aut judicare jurisdiction is thus 'universal' in the sense that the custodial state is competent *wherever* the crime was committed, not in the sense that *whoever* may prosecute."[375] The Torture Convention therefore proscribes the extension and exercise of *compulsory primary conditioned universal jurisdiction*.

[371] *ICJ Habré case* (n 60) see e.g. paras. 74, 75, 84, 91.
[372] International Law Commission (n 356) c para. 18.
[373] See e.g. Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 219.
[374] Inazumi (n 8) 122.
[375] Reydams (n 42) 80.

Arguably, in states which have chosen to interpret the presence requirement under Art 5(2) as only necessitating the presence of the perpetrator at a later stage in proceedings, the jurisdiction is nearing universal jurisdiction *in absentia*, since many of the steps involved in the exercise of jurisdiction can be taken already before the suspect is present in the forum state. Indeed, this is where the line between conditioned and *in absentia* universal jurisdiction becomes blurry. Since states are free to determine their interpretation of the presence requirement freely, this purer form of universal jurisdiction however rests only on an entitlement, not an obligation, and its legitimacy is likely to be challenged by critics of universal jurisdiction.

4.6 Concluding Remarks

In conclusion it can be reiterated that the UN Torture Convention recognizes and prescribes the establishment and exercise of universal jurisdiction over torture offences. Due to its presence requirement the jurisdiction prescribed is however not an expression of the purest form of universal jurisdiction, and the obligation to exercise such universal jurisdiction relies on the treaty system. While the obligation *aut dedere aut judicare* does not in itself entail any specific form of jurisdiction, the obligation to prosecute or extradite as well as the obligations to take legal measures under Art 6 rely on the existence of jurisdiction, the scope of which is significantly widened by the obligation to establish universal jurisdiction. Once the universal jurisdiction has been established, its exercise in accordance with the UNCAT entails rather wide ranging obligations on states to investigate the alleged crimes, to keep the suspect under custody or otherwise stop their escape, and to submit the matter to the relevant authorities for prosecution. These obligations should be fulfilled in the same way as in relation to other serious crimes under domestic law and irrespective of the kind of jurisdiction the actions rely on.

At the system level, the accountability regime included in the Torture Convention is especially interesting from the perspective of the separation between the jurisdictional concepts within international criminal law and international human rights law. Hereby the UNCAT lands somewhere in the middle ground and manages to create a level of blurring of the lines between the two fields of law, by including the obligatory establishment of *criminal jurisdiction* also over crimes which fall outside the state's *control jurisdiction* as commonly understood in international human rights law. As a human rights law instrument, the Torture Convention thereby mixes strong human rights concepts such as the positive state obligations to investigate and prosecute with universal jurisdiction, thereby both expanding the scope of its own human rights protection and strengthening universal jurisdiction as a human rights tool, by creating state accountability to regulate its use. As stated by the International Law Commission in relation to the *aut dedere aut judicare* formula under the UNCAT, [376] the Convention regime for the repression of torture could, with support of the ICJ's acceptance of the *jus cogens* character of the prohibition of torture, serve as a model for the development of similar regimes covering other grave and international crimes, such as crimes against humanity and genocide, which are not currently covered by a regime as detailed as that of the Torture Convention.

[376] International Law Commission (n 356) C. para. 15.

5 Victims of Torture and the Right to an Effective Remedy

5.1 Introduction

In the present thesis, the construction of a human rights centred understanding of universal jurisdiction is done by reference to the rights of individuals. The human rights centred approach to the topic rests on the view that state obligations can be inferred from existing individual rights, which is a fundamental part of the human rights regime illustrated e.g. by the state's obligation to respect, protect and fulfil human rights.[377] An important part of individual rights affected in context of torture, consists of the rights of the victims of torture. Since human rights law inherently deals with the vertical relationship between individual and state, we are hereby not concerned with the victim's rights in relation to the individual perpetrator of torture, but with the victim's human rights, which can be invoked against the state. To contribute to the formulation of a human rights based approach to universal jurisdiction, the present chapter therefore maps the scope of the right to an effective remedy for victims torture, and evaluates their impact in formulating universal jurisdiction as a more human rights centred doctrine.

The right to an effective remedy refers to both the procedural right to an effective remedy for the violation suffered by the victim and the substantive right to reparation, which is used to describe the range of measures which aim, as far as possible, at restoring the victim to the position they were in before the violation took place, with the goal of rehumanizing victims and restoring their dignity.[378] Hereby, the categories of rights connected to the state's exercise of criminal jurisdiction included under the right to remedy are discussed, without going into detail on the specific instruments proscribing such rights. Some more focus is however placed on the Torture Convention, which includes rights afforded to victims of torture specifically. Since the thesis is more focused on the initiation of proceedings rather than with the quality of such proceedings, which falls outside the scope of the examination, norms on e.g. victim protection or participation within the criminal process are not examined.[379]

In discussing the rights of victims in this context, the term 'victim' does not only refer to a legal technical definition of victim in international criminal law, but refers to a broader perspective which may include a wider range of individuals who have suffered harm due to international crimes or severe human rights violations such as torture. Such a wider perspective has been adopted e.g. in the UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious*

[377] On the correlativity of rights and duties see e.g. David Lyons, 'The Correlativity of Rights and Duties' (1970) 4 Noûs 45; Letizia LoGiacco, 'In the Midst of Reparation: On the Correlation between Individual Rights and State Obligations' (2018) 78 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht : Heidelberg journal of international law.

[378] Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing Limited 2008) 159, 207.

[379] For a catalogue on and examination of the various rights afforded to victims in international law, see e.g. Carlos Fernández de Casadevante Romani, *International Law of Victims* (Springer Berlin Heidelberg 2012) 133–244.

Violations of International Humanitarian Law ("Basic Principles" or "Van Boven/Bassiouni Principles"),[380] adopted by the General Assembly. They define a victim as

> "persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law", including where appropriate family and dependents of direct victims, "regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted…".[381]

5.2 Victims in International Law

Traditionally, the victim of international crimes or human rights violations has received little attention in international law, which due to its state-centred nature has only paid attention to individuals in certain specific fields falling within the wider scope of public international law, such as human rights, international humanitarian law and international criminal law.[382] Recent developments through the establishment and practice of the ICC and *ad hoc* tribunals as well as the adoption of a number of instruments on the topic of victims' rights have however led to a humanization of international law. This has entailed a reinterpretation of the aims of the criminal process, making the protection of the victim one of the goals sought, and led to the progressive adoption of international standards on the rights of victims, entailing positive state obligations to secure those rights. The majority of the rights now explicitly restated with focus on victims however already existed under general international human rights law, meaning they are not new but consolidated rights.[383] While many of the modern instruments on the rights of victims specifically are of an institutional nature and lack independent legally binding effect, they to a great extent reflect existing norms under international human rights law and show the existence of state consensus on the need to take into account the rights of victims, especially when such norms have been adopted by consensus.[384]

The norms relating to the rights of victims at the international level differ from their domestic counterparts by placing focus on the relationship between the victim and the state criminal justice system, rather on the horizontal victim-perpetrator relationship. This is based on the acknowledgement stemming from the system of international human rights law that states and powerful institutions contribute to victimization much more effectively than private individuals,

[380] UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 2005 (A/RES/60/147).
[381] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 2005 paras 8, 9.
[382] Fernández de Casadevante Romani (n 379) 3.
[383] ibid 5f. On the correlation between state obligations and individual rights to remedy and reparation, see e.g. Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press 2016) 167–193.
[384] Fernández de Casadevante Romani (n 379) 6f.

which is illustrated by e.g. the precarious position of the victim in their search for truth and justice for crimes committed by or with the acquiescence of the state.[385]

There is no general conception of who qualifies as a victim, but there are different concepts for the various categories of victims: "victims of crime, victims of abuse of power, victims of gross violations of international human rights law, victims of serious violations of international humanitarian law, victims of enforced disappearance, victims of violations of international criminal law, victims of trafficking and victims of terrorism".[386] In relation to victims of torture, the most relevant victim category is that of victims of gross violations of international human rights and humanitarian law, whose rights are enshrined in the Van Boven/Bassiouni Principles. The principles do not define the gross human rights violations they are applicable to, but state that such violations "by their very grave nature, constitute an affront to human dignity". This must, based on the *jus cogens* nature of the prohibition of torture, the universal condemnation of the practice and the general acceptance of the exercise of universal jurisdiction over the crime, be considered to include torture.[387] Although not a legally binding document in itself, the Basic Principles and Guidelines emphasize that they

> "do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms".[388]

Today, victims' rights are enshrined in a large number of international binding and non-binding instruments such as the Third and Fourth Geneva Conventions and their Additional Protocol I,[389] the Rome Statute,[390] the Van Boven/Bassiouni Principles, and the Torture Convention as well as the general human rights instruments discussed above in Chapter 2. Under the human rights regimes discussed above, the state's procedural obligations to e.g. investigate cases of torture are often if not always connected to the human rights of victims of torture. Such obligations are not only a way to prevent repetition of serious human rights violations, but also as an important part of the victim's right to redress, giving them the character of an individual right. This is important from the perspective of constructing a human rights centred approach to universal jurisdiction. In the interest of space, the consideration of victims' rights in the present chapter focuses on Articles 13 and 14 of the Torture Convention and on general human rights standards enshrined the Van Boven/Bassiouni Principles and practice of human rights

[385] Raquel Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes' (2004) 26 Human Rights Quarterly 605, 610f.
[386] Fernández de Casadevante Romani (n 379) 8.
[387] The principles themselves also raise torture and other forms of ill-treatment as an example of international legal obligations relating to prosecution and punishment, which states should follow. UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law para 5.
[388] ibid Preamble para. 7.
[389] In relation to war crimes. Third Geneva Convention; Fourth Geneva Convention; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977 (1125 UNTS 3).
[390] In relation to core international crimes under the jurisdiction of the ICC. Rome Statute of the International Criminal Court (last amended 2010).

bodies discussed in Chapter 2. It is also worth noting that the rights discussed are in many ways interconnected and overlapping, and may be classified differently in different contexts.

5.3 Right to an Effective Remedy in the Torture Convention

5.3.1 Right to Complain and Right to an Investigation

Under Article 13 of the Torture Convention,

> "Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given."

The right to complain and have the case impartially examined by the authorities constitutes a basic remedy for victims of torture and is aimed at the establishment of facts, which may then lead to criminal action in accordance with Articles 4 to 9 and the provision of other remedies such as compensation.[391] The right to complain however also plays an important role in providing victims with an avenue to express dissatisfaction and disapproval of their treatment and in extension for the reconstruction of victims' sense of control and dignity. Overall, the existence of complaint mechanisms plays a fundamental role in the prevention, punishment, remedy and reparation of torture.[392]

Legal guarantees of the right to complain are not sufficient, but the right must also be accessible and effective in practice. Lodging a complaint should not entail any unnecessary hardship which would discourage victims from lodging such complaints and states should provide assistance and support to minimize such difficulties and to make sure that the possibility to complain does not rely on the economic circumstances of the individual.[393] The territorial scope of the article should be understood the same way as under e.g. Art 2 and 5.[394]

The investigation envisioned under Art 13 as well as Art 12[395] is closely connected to the right to redress under Art 14, which cannot be fulfilled unless the obligations to provide complaints mechanisms and effective investigations are fulfilled.[396] Investigations must be impartial and prompt, and the fulfilment of the right should not be dependent on the discretion of the state authorities, which have an obligation to ensure the right.[397] The lack of independence and

[391] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 358.
[392] Redress, 'Taking Complaints of Torture Seriously: Rights of Victims and Responsibilities of Authorities' (2004) 7 <https://redress.org/wp-content/uploads/2018/01/Sept-TAKING-COMPLAINTS-OF-TORTURE-SERIOUSLY.pdf>.
[393] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 362.
[394] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art 16(1); Burgers and Danelius (n 266) 146. See above in Chapter 4.
[395] See above under section 4.6.2.
[396] Committee Against Torture, 'General Comment No. 3 on the Implementation of Article 14 by States Parties' (n 297) para 23.
[397] Ingelse (n 255) 367.

effectiveness of investigating mechanisms is a common problem and the UNCAT Committee and Special Rapporteurs generally recommend the establishment of independent complaint mechanisms.[398] In addition, the victim has the right to be informed of the outcome of their complaint within an appropriate time as well as the right to review by an independent authority, if a complaint is rejected.[399] The right to complaint and investigation also entails a large number of protection mechanisms such as requirements of information on the existence of complaints mechanisms, confidentiality of complaints and specific measures for persons in situations of vulnerability such as those with limited communication abilities, including detainees.[400]

5.3.2 Right to Redress: Remedy and Reparation

The right to adequate remedy and reparation under the Torture Convention is provided for by Art 14, the first paragraph of which states that States Parties shall in their legal system ensure

> "system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation."

Nothing in the article shall however negatively affect wider rights to remedy and reparation in national law.[401] The ultimate objective of the redress process is the restoration of the victim's dignity, which includes the crucial component of recognition of the violation which has taken place and that reparations are provided specifically for such a violation.[402]

The right to compensation shall be guaranteed in national law and not only granted based on a sense of moral obligation. As to the difference between redress and compensation, the former traditionally refers primarily to official recognition of the violation which the victim has suffered, while compensation is of a material and primarily pecuniary nature.[403] The contemporary terminology is however to refer to the right to redress as comprising the procedural notion of effective remedy and the substantive notion of reparation, which must be adequate, effective and comprehensive and in turn consists of "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition". These elements of full redress are settled with reference to international law and practice as enshrined in the Basic Principles and Guidelines.[404] The compensation a torture victim is entitled to must be substantial and must cover both material loss such as costs of medical and psychological treatment, including means for as full a rehabilitation as possible, as well as significant compensation of non-material damage caused to the victim.[405] The CAT Committee has held that the right articulated in Art

[398] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 366.
[399] ibid 366f.
[400] ibid 362–365.
[401] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art 14(2); Burgers and Danelius (n 266) 147.
[402] Committee Against Torture, 'General Comment No. 3 on the Implementation of Article 14 by States Parties' (n 297) paras 4, 37.
[403] Burgers and Danelius (n 266) 146.
[404] Committee Against Torture, 'General Comment No. 3 on the Implementation of Article 14 by States Parties' (n 297) paras 2, 6.
[405] Burgers and Danelius (n 266) 147.

14 entails a corresponding state duty to guarantee such compensation and "that compensation should cover all the damages suffered by the victim, which includes, among other measures, restitution, compensation, and rehabilitation of the victim, as well as measures to guarantee the non-repetition of the violations". Art 14 is thus of both remedial and preventative character.[406]

In its General Comment No. 3, the CAT Committee has given guidelines on the interpretation and application of Article 14. These include e.g. the clarification that the state bears responsibility for providing redress for victims where "State authorities or others acting in their official capacity have committed, know or have reasonable grounds to believe that acts of torture or ill-treatment have been committed by non-State officials or private actors and failed to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors in accordance with the Convention".[407] In addition, "[a] State's failure to investigate, criminally prosecute, or to allow civil proceedings related to allegations of acts of torture in a prompt manner, may constitute a de facto denial of redress and thus constitute a violation of the State's obligations under article 14."[408] Prosecution therefore has a remedial aspect under the UNCAT. Procedurally, states shall also "ensure the existence of institutions competent to render enforceable final decisions through a procedure established by law to enable victims of torture or ill-treatment to secure redress".[409] Judicial remedy shall always be available, irrespective of other forms of remedy offered, and the process shall provide for victim participation, including access to legal aid and available evidence and information concerning acts of torture.[410] In its practice the CAT Committee has also held that

> "satisfaction should include, by way of and in addition to the obligations of investigation and criminal prosecution under articles 12 and 13 of the Convention, the following remedies, inter alia: verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; an official declaration or judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; and judicial and administrative sanctions against persons liable for the violations."[411]

Importantly, General Comment 3 also refers to States Parties obligation to prosecute or extradite perpetrators found in their territory and holds that the application of Art 14 is not limited to torture crimes which have been committed within the confines of traditional jurisdictional principles. Instead the committee commends state efforts to provide civil remedies for torture committed extraterritorially, especially where the victim lacks access to remedy in the territorial state. The committee states that "article 14 requires States parties to ensure that all victims of

[406] *Kepa Urra Guridi v Spain* [2005] CAT/C/34/D/212/2002 (Committee Against Torture) [6.8].
[407] Committee Against Torture, 'General Comment No. 3 on the Implementation of Article 14 by States Parties' (n 297) para 7.
[408] ibid 17.
[409] ibid 24.
[410] ibid 30.
[411] *Concluding observations on the seventh periodic report of Canada* [2018] CAT/C/CAN/CO/7 (Committee Against Torture) [39].

torture are able to access remedy and obtain redress."[412] The CAT Committee therefore supports the logical but to some extent contested view that the universal criminal jurisdiction enshrined in the UNCAT is complemented by universal civil jurisdiction.[413] States are also bound to ensure that the right to redress is effective, including the removal of impediments to the effective exercise of the right, including but not limited to inadequate national legislation, inadequate measures to ensure the custody of suspects, and immunities and amnesties.[414]

5.4 Right to an Effective Remedy in General International Human Rights Law

Many general and specialized human rights instruments provide for a right to a remedy for human rights violations.[415] Although some of these provisions explicitly include the specific parts of the right to remedy, case law and other practice has been very influential in developing the content of the right. Especially in recent years a fast development has taken place, e.g. in the strengthening of positive procedural obligations to investigate and prosecute violations.[416] Besides the specific rights discussed below, the Van Boven/Bassiouni Principles in general hold e.g. that states are obliged to "respect, ensure respect for and implement international human rights law" and that states are under international law required to ensure that their domestic legal systems make available "adequate, effective, prompt and appropriate remedies, including reparation" as defined in the guidelines.[417] Such remedies include "(a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered; (c) Access to relevant information concerning violations and reparation mechanisms."

5.4.1 Complaint and Investigation

The right to complain and the right to an investigation into alleged severe human rights violations is a fundamental part of the victims' rights regime. The positive state obligations to investigate human rights violations in general and torture in particular have already been discussed in Chapter 2. It can here however be highlighted, that the duties to provide complaint mechanisms and investigate allegations of torture, as well as other severe human rights violations, also have a remedial and not only a preventative character. Under both the case law of the European and Inter-American Court of Human Rights, the obligation to investigate serious human rights violations has a double aim and is connected to both the state's obligation

[412] Committee Against Torture, 'General Comment No. 3 on the Implementation of Article 14 by States Parties' (n 297) para 22. For more on universal civil jurisdiction under Art 14, see e.g. Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 399–404.
[413] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 403f.
[414] Committee Against Torture, 'General Comment No. 3 on the Implementation of Article 14 by States Parties' (n 297) paras 38, 41, 42.
[415] See e.g. International Covenant on Civil and Political Rights Art 2(3); European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 Art 13; African Charter on Human and Peoples' Rights ('Banjul Charter') Art 7(1)(1); American Convention on Human Rights Art 25.
[416] For more on the procedural duties in their preventative character see Chapter 2. Doak (n 378) 159f.
[417] UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law paras 1, 2.

to prevent of future violations and to the right to effective remedy for victims.[418] In relation to the right to effective remedy, the Strasbourg Court has held e.g. that it requires a domestic remedy able to deal with the substance of any 'arguable complaint' and that although "the scope of the obligation under Art 13 varies depending on the nature of the applicant's complaints under the Convention", the right must be effective both *de jure* and *de facto*, and the state may not unjustifiably hinder its exercise through either action or omission. Based on the fundamental nature of the prohibition of torture and the vulnerability of its victims, an effective remedy for such a violation also requires "States to carry out a thorough and effective investigation of incidents of torture".[419]

Also the Human Rights Committee has highlighted the importance of the right to lodge complaints against maltreatment and the prompt and impartial investigation of such complaints to give victims of maltreatment an effective remedy.[420] It has additionally held that states may not deprive individuals of their right to an effective remedy through the issuance of amnesties.[421] The Van Boven/Bassiouni Principles also provide for the right to complain and to have the case investigated. Hereby the principles hold that international human rights law requires states to "[i]nvestigate violations effectively, promptly, thoroughly and impartially".[422] The remedial character of the obligations to provide for complaints and to effectively investigate torture entails that the state obligations can be invoked by individual victims.

5.4.2 Access to Justice and Information

In accordance with the Van Boven/Bassiouni Principles, victims of gross human rights violations have a right to equal access to an effective judicial remedy in accordance with international law, as well as to other remedies such as administrative proceedings in accordance with domestic law. To implement international procedural requirements, states shall disseminate information on available remedies; minimize inconvenience, protect victims and ensure the safety of victims and their families; provide proper assistance to victims seeking access to justice; and make available all appropriate legal, diplomatic and consular means to ensure the fulfilment of the right to effective remedy.[423] During the investigation and other judicial or administrative proceedings, victims "should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation".[424] Victims should also "be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations". States should

[418] Fernández de Casadevante Romani (n 379) 138.
[419] *Aydin v Turkey* [1997] European Court of Human Rights Application no. 23178/94 [103].
[420] Human Rights Committee (n 66) para 14.
[421] Human Rights Committee (n 66).
[422] UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law para 3(b).
[423] ibid 12.
[424] ibid 10.

also inform the general public and, in particular, victims of the rights and remedies provided by international human rights law and "of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access."[425]

Recently, there has at the international level also been a development of the recognition of victims' right to the truth, which according to transitional justice scholarship serves an important role in both individual and collective healing and reconciliation, but which is of course also of high value in determinations of possible prosecution and guilt in the criminal justice process. The right to the truth goes beyond the traditionally recognized right to information, which entails less the receipt of information on the 'full story' of past events and more on information on the judicial process itself. While recognition of a right to the truth has been expressed in the practice of the HRC and the Inter-American Court, the issue has only peripherally arisen before the Strasbourg Court, which can however be expected to view truth finding as a necessary part of the right to an effective remedy.[426] Questions of right to the truth are also relevant in relation to the right to reparation specifically, since truth-finding and the public admission of past wrongs may also have character of reparation.

5.4.3 Right to Reparation

The question of access to justice is also closely connected to the victim's right to reparation for the harm suffered, which is often awarded through judicial proceedings. The obligation for a responsible party to provide reparations to the party which has suffered harm is a fundamental principle of international human rights law, and the principle is also found in the civil and criminal laws of most domestic jurisdictions. Although the harm caused by a rights violation often cannot be undone, especially in the case of serious harm or trauma, reparation should strive to make the violation easier for the victim to deal with. Hereby reparations take a victim-centred approach to the offence by focusing primarily on empowering the victim, rather than on placing a burden on the offender. Reparations do not equate only to financial compensations, but may take a number of different forms.[427] While reparations have for a long time been a part of international law, the regime dealing with them was and to some extent still is inter-state in nature, meaning that states may on behalf of their citizens take action against a second offending state, but have no obligation to redistribute any reparations received to individual victims, all the while individuals have been viewed as lacking a legitimate claim for individual harm at the international level. Through the increased influence of human rights and other developments such as the codification of the law on state responsibility by the International Law Commission, there has however been a shift towards increasing concern for the individual victim. Avenues for individual reparations claims at the international level however remain limited and claims against non-state entities require effective procedures to be in place at the domestic level. With the development of human rights law, principles on reparations have however also been

[425] ibid 24.
[426] Doak (n 378) 180–186.
[427] ibid 207f.

transplanted into human rights standards, where individuals are accorded personality and the right to make claims directly to the violating state.[428]

The Van Boven/Bassiouni Principles proscribe adequate, effective and prompt reparations which shall be proportional to the harm suffered following the gross violation of human rights law. The party which has caused the harm, whether a state or other entity, shall be responsible to provide reparations, but states should also "establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations."[429] Full and effective reparations include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[430] In the present context satisfaction is especially interesting, as it includes e.g. "[v]erification of the facts and full and public disclosure of the truth", "an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim" and "[j]udicial and administrative sanctions against persons liable for the violations".[431] States should also endeavor to create mechanisms allowing for group claims for reparation.[432]

While some forms of reparations such as restitution, compensation and cessation of violations are common, others are less so. The European Court of Human Rights has for example tended to rely mainly on compensation under Art 41 ECHR and refrained from ordering other forms of reparation, despite having recognized that compensation may sometimes be inadequate, especially in the case of violations of Art 2 and 3 ECHR. With time, there has however been a broadening of the concept of reparations to include aspects of procedural obligations such as investigatory and judicial action.[433] Within the Inter-American system, the ACHR explicitly requires beside compensation also other remedial action from the state, giving it a wider scope than within the European system.[434] This difference is visible in the case law of the American Court, which has besides pecuniary and non-pecuniary damages and rehabilitation awarded e.g. the holding of a public ceremony where senior government officials shall recognize the state's international responsibility for the violation of the prohibition of torture. Most remarkably, in a new case from March 2020, the court also ordered Peru to adopt a legally binding protocol on the effective criminal investigation of violence committed against LGBTQ+ persons including the due diligence standards developed in the court's judgement. The court also ordered Peru to change its local/regional security plans to remove references to "eliminate homosexuals and transvestites" since it exasperated discrimination; to provide training on LGBTQ+ rights and due diligence investigations to law enforcement and justice officials; and to implement data collection mechanisms to register cases of violence against the LGBTQ+ community.[435]

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[428] ibid 209–212.
[429] UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law paras 15, 16.
[430] ibid 18. For more on the different kinds of reparations see also para 19-23.
[431] ibid 22(b), (d) and (f).
[432] ibid 13.
[433] Doak (n 378) 217f.
[434] American Convention on Human Rights Art 63(1).
[435] Esdaile, Vicente and Sandoval (n 103); *Azul Rojas Marín y otra vs. Perú* (n 103).

5.4.4 Right to Justice?

Next the question arises whether a victim can invoke the right to an effective remedy to demand that their perpetrator be prosecuted and punished for their crimes – do victims have a right to justice? As opposed to in relation to other procedural obligations such as the obligation to investigate, the obligation to punish perpetrators of serious human rights violations arguably does not enjoy consensus among the international human rights law bodies as a measure of individual rights protection.[436] This means that the right for victims to demand prosecution and punishment of their perpetrators may not be a universally recognized aspect of the right to an effective remedy as interpreted by the general human rights regimes covered.

Within the Inter-American system, it has been established that the right to a fair trial under Art 8 applies also in relation to the party accusing a suspect of a crime and that such guarantees include where appropriate a right to prosecution and punishment of a perpetrator.[437] The question may however remain somewhat unsettled in other human rights regimes, as the Human Rights Committee and the Strasbourg Court have despite being to some extent influenced by the jurisprudence of the Inter-American Court been hesitant to consider the exercise of criminal measures as a matter relating to individual rights.[438] For example the ECtHR has in relation to the right to fair trial under Art 6 held that "the Convention does not confer any right, as demanded by the applicant, to "private revenge" or to an *actio popularis.* Thus, the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently".[439] However, in a series of cases regarding serious human rights violations committed in Turkey, the ECtHR has recognized a level of individual right to prosecution under the right to an effective remedy in Art 13 ECHR.[440] In other cases, the court has however refused to consider procedural errors as violations of a victim's right to prosecution and even expressly stated that e.g. Art 2 does not entail an individual right to prosecution and punishment.[441]

The Van Boven/Bassiouni Principles, which clarify existing human rights obligations, hold that states have in the case of gross human rights violations constituting crimes under international law, such as torture, "a duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him."[442] The principles therefore hold that states have procedural obligations in relation to international crimes, but does not clarify explicitly whether the obligation to prosecute entails an individual right. However, considering the principles' victim centered nature and their purpose to enhance the protection of victims' rights, it seems logical to assume

[436] Seibert-Fohr (n 104) 190.
[437] *Genie-Lacayo v Nicaragua* [1997] Inter-American Court of Human Rights Series C 30 [74]; *Blake v Guatemala* [1998] Inter-American Court of Human Rights Series C 36 [96–97]. *Bámaca-Velásquez v Guatemala* [2000] Inter-American Court of Human Rights Series C 70 [201]. Within the Inter-American human rights system also the specialized instrument IACPPT is of relevance.
[438] Seibert-Fohr (n 104) 191.
[439] *Perez v France* [2004] European Court of Human Rights Application no. 47287/99 [70].
[440] Aldana-Pindell (n 385) 634.
[441] See e.g. ibid 643; *Zavoloka c Lettonie* [2009] European Court of Human Rights Application no. 58447/00 [34]; Peters (n 383) 267f.
[442] UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law para 4.

that it is meant to reflect an individual right, which is however limited by the requirement that there exists sufficient evidence, a determination which will in practice be up to the relevant national authorities. Also the recognition of reparation through 'verification and full and public disclosure of the truth', and 'a judicial decision restoring the dignity and rights of the victim' may speak for the recognition of a right to prosecution under the Basic Principles.[443]

Under general human rights law there is therefore an emerging individual right to demand prosecution of an alleged perpetrator of gross human rights violations including torture when the necessary evidence is available and other legitimate requirements are fulfilled. Such a right to justice has been accepted by some but not equally by all major human rights systems and cannot be held to be a part of customary international law.[444] Victims of torture are therefore generally able to demand an effective remedy, but cannot as a part of that right demand criminal proceedings. This however does not preclude the existence of the objective duty to prosecute as discussed in Chapter 2, only limits it to a preventative rather than remedial obligation.

5.5 Impact on Universal Jurisdiction over Torture

From the above examination, it is clear that there is within international human rights law a range of rights regarding complaint mechanisms, investigation, access to justice and information, as well as adequate reparations for victims of torture. Although the victims' rights under the Torture Convention are classified under two articles, only one of which deals with the 'right to remedy', the various state obligations enshrined all constitute parts of the right to an effective remedy under international human rights law. Within the treaty regime of the UNCAT, these individual rights intermingle with the state's objective procedural obligations to exercise universal jurisdiction through criminal justice measures, and the two sides of the coin are mutually enforcing. The provisions also highlight the rights-based system the Torture Convention is built on, giving further support for the need for symbiosis between human rights and universal jurisdiction in the fight against torture and other serious human rights violations.

While victims' right to an effective remedy are in situations in which the offence has been committed abroad likely to face similar arguments of extraterritorial inapplicability as discussed in Chapter 2,[445] their impact cannot be immediately dismissed. Although the individual victim's right to be protected from torture may have been violated without connection to the prospective forum state and outside its jurisdiction in the meaning of human rights law, the procedural rights of victims which are to be fulfilled after the offence itself has taken place may fall squarely within the control jurisdiction of a prospective forum state, when the victim is present in the state or otherwise under its control. In such a case, the state is under its human rights law obligations bound to fulfil the victim's right to an effective remedy in accordance with the rights outlined above, which in turn may oblige the state to exercise universal jurisdiction to e.g. investigate the crime in order not to violate its human rights obligations. The individual right to an effective remedy for torture may therefore have an impact on the state's exercise of universal

[443] ibid 22.
[444] Peters (n 383) 256f.
[445] See section 2.2.4.

jurisdiction. Both the procedural right to an effective remedy, entailing an obligation for states to provide effective local remedies for human rights violations, and the duty to compensate victims of torture offences are also considered to be a part of customary international law.[446]

The issue of whether there exists an individual right to justice is relevant in the context of universal jurisdiction, since the lack of general recognition for a right to justice limits the obligation to prosecute to a preventive, not remedial, obligation. This arguably makes the obligation less relevant in a case where the suspect is not permanently present on the state's territory, meaning that any torture committed by the suspect in the future is unlikely to fall within the territorial jurisdiction of the state in question and therefore within its immediate preventative obligations. The non-recognition of a right to justice in international human rights law therefore seems to support the existence of a presence requirement in a human rights-based model of universal jurisdiction, at least as far as prosecution is concerned. While a right to justice is not recognized per se, the many other victims' rights discussed may also be of interest in discussing universal jurisdiction, such as the right to the truth and reparations in the form of satisfaction through truth telling, official recognition of the violation and access to justice.

The Van Boven/Bassiouni Principles mention the exercise of universal jurisdiction as a measure through which states should fulfil their obligation to prosecute perpetrators of gross human rights violations where appropriate. They however explicitly limit their holding by stating that states shall implement provisions for universal jurisdiction "where so provided in an applicable treaty or under other international law obligations." A similar wording is adopted in relation to the facilitation of extradition or surrender of suspects to other states or international judicial bodies, and the provision of judicial assistance and protection of victims.[447] While obligations to exercise universal jurisdiction as discussed clearly exist under the Torture Convention, their customary status, which is discussed in the following chapter, will determine whether such an 'other international law obligation' exists for non-States Parties to the UNCAT. The inclusion of the obligation to prosecute and the establishment of universal jurisdiction where so provided in the victim-centered principles however further enhances the interconnection between human rights protection and fulfilment, and criminal law mechanisms.

Despite the various standards discussed, the lack of access to effective remedy remains a pervasive issue. As held by Doak: "It is becoming increasingly apparent that in order to fully realise [victims'] rights within the criminal justice system, we may need to rethink some of our most entrenched structures and practices".[448] One small way of rethinking may be to more closely connect universal jurisdiction to international human rights standards, including victims' right to an effective remedy.

[446] Peters (n 383) 186; Katharine Shirley, 'The Duty to Compensate Victims of Torture under Customary International Law' (2004) 14 International Legal Perspectives 30, 35f.
[447] UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law para 5.
[448] Doak (n 378) 204.

6 Resolving the Paradox: Constructing a Human Rights Centred Approach to Universal Jurisdiction

6.1 Introduction

As has been determined in Chapter 3, the first step in adopting a human rights based approach to universal jurisdiction is overcoming the interpretation of universal jurisdiction as primarily a state entitlement, which follows with the international criminal law understanding of the concept, and adopting an accountability and transparency approach by examining the existence of state obligations to exercise universal jurisdiction. While compulsory, conditioned and primary universal jurisdiction exists under the treaty law of the Torture Convention, it remains to be considered whether such obligations can be considered to exist under customary international law. An examination of the customary status of such an obligation is followed by a presentation of the most central aspects as to the formulation of a human rights based conception of universal jurisdiction.

6.2 Customary Law Obligation to Establish and Exercise Universal Jurisdiction?

While the determination of the existence, content and scope of norms of customary international law is often an exercise of argumentation rather than of objectively 'finding' norms which have been in existence the whole time,[449] two main approaches to the process are discussed in the practice of international tribunals and doctrine, namely *induction* and *deduction*.[450] Although it has been argued that international tribunals such as the ICJ in practice often do not apply either of the approaches, but simply rely on assertion to establish principles of customary international law,[451] the separation between induction and deduction is a useful tool to illustrate the arguments for and against the existence of customary compulsory universal jurisdiction in torture cases.

6.2.1 Inductive Approach

As determined in Chapter 3, the traditional view of universal jurisdiction in general under customary international law is that the principle entails a state entitlement, but not an obligation. It has therefore been held that although the universal jurisdiction under the Torture Convention is compulsory when the presence requirement is fulfilled, such an obligation does not exist under customary international law in relation to torture offences.[452] While it can be argued that the Torture Convention, which was preceded by the Declaration on the Protection of All

[449] LoGiacco (n 132).
[450] The approaches have already been discussed above, see section 2.3.
[451] Talmon (n 130).
[452] See e.g. International Law Association Committee on International Human Rights Law and Practice (n 56) 410; 'The AU-EU Expert Report on the Principle of Universal Jurisdiction' (n 196) para 9; *Prosecutor v. Furundžija (Trial Chamber Judgement))* (n 60).

Persons from Torture, at the time of adoption codified existing international obligations, such obligations did not include compulsory universal jurisdiction, which was only introduced through the UNCAT.[453] This is supported by the Habré judgement of the ICJ, in which the court indirectly expressed that the obligations enshrined in the UNCAT were not a part of customary law at the time of the adoption of the Torture Convention, by determining that Senegal was only bound to exercise universal jurisdiction over crimes committed after the entry into force of the Torture Convention.[454] This also seems natural considering that the Torture Convention entailed the first human rights codification of compulsory universal jurisdiction,[455] but it does not preclude that a customary obligation has emerged since the convention's adoption. Today, the Torture Convention has been ratified by 169 and signed by 5 of the 193 UN member states,[456] which indicates that a large majority of states are willing to accept the compulsory establishment and exercise of universal jurisdiction in relation to torture offences. Treaty ratification alone is however not enough to merit the classification of a norm as customary. Considering the lack of both consistent practice and declaratory acceptance of compulsory universal jurisdiction outside the treaty system, the argument stands on shaky ground, at least as far as one prescribes to a traditional inductive process for the determination of customary international law.

There has however been a development through which some domestic courts have begun to find states to be obliged to exercise universal jurisdiction over certain international crimes. In Argentina, the Federal Court of Appeals of the city of Buenos Aires has in a case regarding crimes committed by the Franco-regime in Spain held that the state is under international human rights standards on the right to justice and effective judicial protection obliged to provide victims of serious international crimes access to effective remedy in its courts even when this requires the exercise of universal jurisdiction. Although the Appeals Court held that such a right could be fulfilled by providing victims with access to the domestic system of private prosecution, the following investigation relied heavily on the involvement of an investigating judge, who issued a large number of international arrest warrants against Spanish nationals suspected of committing crimes during the Franco-era.[457] The court's holding illustrates how victims' rights to an effective remedy can impact the state's exercise of universal jurisdiction. In South Africa, the Constitutional Court has dealt with the question to what extent the South African Police Service has a duty to investigate alleged crimes against humanity of torture committed in Zimbabwe by foreign nationals against other foreign nationals.[458] The court held that based on the South African domestication of the Rome Statute the relevant crimes had become crimes under national law; and highlighted the importance and *jus cogens* nature of the prohibition of torture as well as the obligation to prosecute torture crimes.[459] The court then

[453] The Declaration did not include jurisdictional obligations, see UNGA, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
[454] See *Arrest Warrant case* (n 175) paras 100–102.
[455] Nowak, *The United Nations Convention against Torture: A Commentary* (n 1) 196.
[456] As of 8 May 2020. 'UN Human Rights Treaties, Status of Ratification: Interactive Dashboard' (n 65).
[457] Langer and Eason (n 26) 800–803.
[458] *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] Constitutional Court of South Africa ZACC 30 [4–5].
[459] ibid 33–39.

stated that based on "the international nature of the crime of torture, South Africa, in terms of… the Constitution and various international, regional and sub-regional instruments, is required, where appropriate, to exercise universal jurisdiction in relation to these crimes as they offend against the human conscience and our international and domestic law obligations."[460] Such an obligation was also considered to exist under customary international law. In addition, the presence requirement enshrined in the domestic law was stated to apply only in relation to the prosecution in front of a South African court, in accordance with the prohibition of trials *in absentia*, but did not hinder the launching of an investigation in the suspect's absence.[461]

A finding that there could be a customary obligation to exercise universal jurisdiction over certain international crimes is neither revolutionary nor groundbreaking. The ICRC has to date not found an obligation to establish universal jurisdiction to exist in customary international law as it does under treaty-law. It has however established that where a state has in national law used its right to provide universal jurisdiction, it is under customary international law bound to apply such jurisdiction to investigate and where appropriate prosecute war crimes.[462] States are also as a matter of customary international law bound to cooperate with other states to facilitate accountability to the extent possible, including *aut dedere aut judicare*, where the necessary jurisdiction exists.[463] Since grave breaches include e.g. torture when committed in the context of an armed conflict and such obligations are not controversial internationally, their existence and recognition could pave the way for obligatory universal jurisdiction for torture as a stand-alone crime.[464] Developments toward the recognition of obligatory universal jurisdiction may also open the door for the recognition of such customary obligations in relation other international crimes in the future.

There remain today many ambiguities and unclarities surrounding the concept of universal jurisdiction at large. Following the traditional inductive approach to the determination of customary international law, the arguments supporting the existence of a customary duty to exercise universal jurisdiction over the crime of torture therefore seem at the moment to be mainly limited to the world of *de lege ferenda*, rather than an expression of international law *de lege lata*. This is especially the case considering the international debate on the issue of universal jurisdiction, which e.g. in the UN General Assembly and its Sixth Committee has been undertaken annually for a decade and which lacks an immediate end in sight due to a perceived impasse in the discussions.[465] There is also still a general apprehension toward blurring lines between different fields of international law, which despite developments to the contrary, remains a strong tradition in the field of public international law. As the law stands today, Non-States Parties to the Torture Convention are therefore under the inductive approach

[460] ibid 40.
[461] ibid 43–49.
[462] ICRC (n 214) Rule 158: Prosecution of War Crimes.
[463] ibid Rule 161: International Cooperation in Criminal Proceedings.
[464] First Geneva Convention Art 50; Second Geneva Convention Art 51; Third Geneva Convention Art 130; Fourth Geneva Convention Art 147; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) Art 11, 85.
[465] See e.g. UN General Assembly, 'Sixth Committee (Legal) - 74th Session: The Scope and Application of the Principle of Universal Jurisdiction, Summary of Work' (2019) <https://www.un.org/en/ga/sixth/74/universal_jurisdiction.shtml>; Jalloh (n 29) para 12.

entitled but not obliged to exercise universal jurisdiction over torture. As has been pointed out, such states are however in clear minority, as most states today have ratified the UNCAT.

6.2.2 Deductive Approach

However, should one accept and adopt a deductive approach to the determination of customary international law in the present case, the situation may be different. In the present case, where state practice is fragmented and there seems to be little agreement on even some of the basic aspects of the issue, the deductive approach may offer valuable clarification, and the approach is especially interesting considering the approach of this thesis, which seeks to formulate a coherent understanding of the system of international law. The deductive approach, which allows one to logically deduce the existence of a customary norm based on other existing norms and the assumption that the international legal system must create a coherent system of norms, allows other kinds of arguments besides strict state practice and *opinio juris* to be invoked.

Scholars have on different grounds argued for the existence of a customary duty to provide and exercise universal jurisdiction over torture offences. Certain authors have e.g. argued that the *jus cogens* nature of the prohibition of torture entails not only positive obligations to ensure accountability, but also the obligation to exercise universal jurisdiction. E.g. Bassiouni has, while recognizing that state practice does not hold up to what has been expressed in scholarly writings and that impunity for *jus cogens* crimes has historically been wide-spread, held that:

> "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… Thus, recognizing certain international crimes as jus cogens carries with it the duty to prosecute or extradite… and universality of jurisdiction over such crimes… Above all, the characterization of certain crimes as jus cogens places upon states the obligatio erga omnes not to grant impunity to the violators of such crimes."[466]

Others have argued that a state obligation to exercise jurisdiction over a perpetrator of international crimes present in the state's territory could be derived from the principle of state sovereignty, irrespective of where such crimes have been committed. Since the state is within its territory the exclusive sovereign, impunity enjoyed within such territory would according to the theory be attributable to the state. A state which fails to provide accountability for such crimes would therefore have acquiesced to the commission of international crimes or other serious violations of human rights, thereby damaging the common interests of the international community.[467] According to this argument, the state would therefore by reference to its exclusive sovereign control over its territory under customary law be obliged to take measures to ensure accountability for perpetrators of international crimes present within its territory.

In addition, it has in the present thesis been argued that the human rights obligations in relation to both the individual right to an effective remedy, including a right to investigation and access

[466] M. Cherif Bassiouni, 'International Crimes: "Jus Cogens" and "Obligatio Erga Omnes"' (1996) 59 Law and Contemporary Problems 63, 65f.
[467] Inazumi (n 8) 143f.

to justice, and the state's procedural obligation are in cases which may involve the exercise of universal criminal jurisdiction, not necessarily limited by the jurisdictional limits of general human rights obligations. In relation to such positive obligations which are to be fulfilled after the commission of the torture crime itself, such as investigation and prosecution of the crime, the state's control over the situation, which is the determinative aspect of jurisdiction under international human rights law, is however no longer determined by where the crime was committed, but must logically be dependent on the state's possibilities to fulfil the positive obligations. In relation to torture, both procedural obligations and victim's rights are at least to a certain extent also recognized as a part of customary international law, binding on all states. By extension, where a crime of torture has been committed outside the traditional jurisdictional bases, but the human rights obligations of a prospective forum state are activated e.g. through the victims' or perpetrator's presence within the state's territorial jurisdiction or other effective control, a state is under its human rights obligations bound to exercise its jurisdiction over the crime in question. Deriving compulsory universal jurisdiction from an obligation to prosecute, such as that under general human rights law, is also in line with the accountability regime within the Torture Convention, whereby the cornerstone of the system consists of the obligation *aut dedere aut judicare*, and universal jurisdiction essentially entails a tool for the fulfilment of the obligation to prosecute, where extradition is untenable. A human rights-based understanding of universal jurisdiction based on the principles of accountability and transparency therefore requires the recognition of a customary international law obligation to exercise universal jurisdiction to fulfil the positive obligations the state owes both to the public at large and to individual victims.

6.3 Human Rights Centred Universal Jurisdiction

Should a human rights centred approach be adopted in considering and perhaps further developing the principle of universal jurisdiction, the compulsory nature of such jurisdiction is however not the only aspect of importance from a human rights standpoint. In which other ways would the human rights centred approach built on the human rights standards discussed in the present thesis shape the future development of the universal jurisdiction principle?

In chapter 5 it has been determined that victims of torture lack a generally recognized right to justice, entailing prosecution and punishment, in international human rights law. Where a state in question is not bound by a human rights instrument prescribing such a right, the procedural obligation to prosecute therefore relies only on the objective state obligation which is based on a preventative rather than remedial interest. This is interesting in considering whether compulsory universal jurisdiction under a human rights framework would apply in the absence of the perpetrator, but based on the presence of the victim. Since it has previously been argued that the state's human rights obligations in relation to ensuring a victim's right to an effective remedy become applicable as soon as the victim is present within the state's jurisdictional control, rights of a remedial character require the exercise of universal jurisdiction *in absentia*. This applies to the rights discussed in Chapter 5, but not to the right to justice. The presence of the victim in a prospective forum state does therefore not activate an obligation to prosecute,

which instead would require the presence of the perpetrator, due to the preventative character of the obligation. Universal jurisdiction would therefore under a human rights centred framework apply *in absentia* only to a certain point in the procedure, similarly to what was held by the Constitutional Court of South Africa.[468] While early exercise of universal jurisdiction such as investigations and the issuance of arrest warrants must take place even *in absentia*, a human rights-based universal jurisdiction would not be such as to require the criminal trials themselves to take place *in absentia.* This is in line with the risks trials *in absentia* pose to the rights of the accused and which are recognized within international human rights law. While some human rights regimes recognize the possibility of trials *in absentia*, international human rights law also includes a multitude of requirements which must be fulfilled for such trials to comply with the right to fair trial. E.g. under the ICCPR trials *in absentia* are only allowed in exceptional cases.[469] Requiring them in all torture cases would therefore not be tenable or in accordance with human rights standards.

This entails that under the human rights centred approach, the obligation to exercise universal jurisdiction is broader in relation to investigation than prosecution. However, once the jurisdictional requirement activating the state's human rights obligations is fulfilled, the victim's right to access to justice and reparation must be fulfilled. According to what has been discussed previously, the obligation to exercise universal jurisdiction *in absentia* would therefore be activated by the presence of the victim within the jurisdictional control of the state. This in turn limits the state's obligation to investigate and take other procedural steps to crimes which have a victim-established link with the prospective forum state, entailing that a state is not obliged to investigate all alleged torture offences of the world. The full human rights centred model would therefore be based on two options: i) compulsory universal jurisdiction conditioned on the presence of the suspect – state obligations to investigate, prosecute and punish the crime, or ii) compulsory universal jurisdiction *in absentia* activated by the presence of victims, requiring effective investigation and fulfilment of the available rights to effective remedy, but not prosecution. The *in absentia* obligations could in practice be fulfilled e.g. through the adoption of a complementary preparedness approach to universal jurisdiction, through the carrying out of structural investigations based on complaints brought by victims and in other ways ensuring the right to an effective remedy as much as practically possible in accordance with the state's obligation of conduct.[470]

From a human rights perspective, to ensure the efficiency of universal jurisdiction as a tool in the fight against torture, it should also be legally considered a primary form of jurisdiction, as is today generally considered to be the case for permissive universality. The opposite finding would risk undermining the goal of preventing impunity by making the exercise of universal jurisdiction conditioned on the production of proof of the lack of other relevant jurisdictions capable and willing to ensure accountability. However, in practice the territorial state is

[468] See section 6.2. *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* (n 458).
[469] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2. rev. ed., Engel 2005) Art 14, para 62.
[470] On the complementary preparedness approach, see section 3.6.1.2.

generally best placed to gather evidence and secure an efficient trial, thereby safeguarding the human rights of both victims and the perpetrator. Preference should therefore in practice be given to the state with the best possibilities of carrying out the steps of the criminal process. From a practical and political point of view, it would therefore be best practice to apply universal jurisdiction only as a supplementary tool when accountability cannot be ensured in other ways. To make this possible, a certain amount of flexibility is required in the system, without however undermining the duty to ensure accountability. Compulsory universal jurisdiction therefore needs to be combined with an option to defer the exercise of jurisdiction to a state better placed to deal with the situation, e.g. as under the Torture Convention through extradition of the suspect to another jurisdictional state, as well as safeguards protecting against deferral to states which are in practice unwilling or unable to ensure accountability.

Even when the jurisdictional state does not have access to sufficient evidence to start proceedings in the case, it would under a human rights centred approach, in order to ensure the efficient fight against torture, be required to cooperate with other jurisdictional states and international bodies, such as the ICC or independent bodies gathering evidence to accommodate possible judicial processes at domestic level or before international tribunals.[471] International cooperation in torture cases could facilitate the wider fight against impunity, but also strengthen the human rights access of both victims and perpetrators. It could e.g. contribute to more efficient administration of justice through the pooling of evidence and by allowing for wider victim participation, e.g. in cases such as that of Syria, where torture victims have since escaping the country spread out over a large number of states. Requiring states to engage in good faith international cooperation is also in line with the values underpinning the UN system and the international human rights regime at large, making such a requirement a natural and indispensable part of a human rights centred approach to torture accountability.[472]

Just as the human rights centred approach requires universal jurisdiction to be governed by norms on situations in which its application is compulsory to fulfil the state's positive human rights obligations, human rights also place limits on the exercise of jurisdiction, regulating when it cannot be exercised legally. Hereby both human rights principles, such as equality and non-discrimination; transparency; and accountability, and individual rights, e.g. the rights to fair trial and the prohibition of arbitrary arrest, define the legal limits for the use of universal jurisdiction and must be considered continually in its exercise. Also general principles such as *ne bis in idem* and the international law on immunities place legal limits on universal jurisdiction and must be taken into account. In addition, the Torture Convention provides that decisions on whether criminal proceedings are to be undertaken in relation to suspected torture offences shall be made in the same way as in relation to serious crimes under domestic law and that usual evidentiary standards must apply also where universal jurisdiction is exercised.[473]

[471] E.g. the International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011, better known as 'IIIM' or 'the Mechanism'. See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law paras 4 & 5.
[472] Charter of the United Nations Art 1(1), 1(3), 55; Universal Declaration of Human Rights, 1948 Art 22.
[473] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art 7(2).

This principle which safeguards fundamental principles such as equality before the law and the right to fair trial is therefore also important also under a human rights centred approach. Since domestic systems may however vary greatly on the issue, the principle could be strengthened further by also including a reference to international human rights and criminal law standards. In the same way it is of course also of extreme importance that other safeguards to protect the rights of suspects, such as the prohibition of ill-treatment during e.g. custody and investigation are upheld in accordance with all relevant international human rights standards, including those enshrined in the Torture Convention.

Overall, from a human rights perspective, the human rights centred model which emerges from a consideration of relevant rights and duties is rather similar to the model enshrined in the Torture Convention. The exception from such similarity is the question of universal jurisdiction *in absentia*, the exercise of which would in the human rights based model be required to fulfil the aspects of the right to an effective remedy, not including prosecution, when victims fall within the control-based jurisdiction of the state. The human rights centred model could therefore be described as *compulsory primary conditioned universal jurisdiction in absentia*, since the obligatory *in absentia* application of universal jurisdiction is conditioned on the presence of victims.

6.4 Concluding Remarks and Way Forward

Although international criminal law has developed rapidly during the past decades through e.g. the creation of international criminal tribunals, the primary forum for accountability for international crimes remains courts at the domestic level. This is especially true in relation to torture as a stand-alone crime, which is not covered by the *ratione materiae* jurisdiction of the ICC.[474] To enhance the struggle against torture in the long-term, national jurisdictions are therefore indispensable and must make significant strides to end impunity for torture offences. Hereby universal jurisdiction is an important part of the puzzle. However, to enhance the protection of human rights it is neither enough nor in accordance with the fundamental human rights principles such as transparency and accountability to rely on the traditional conception of universal jurisdiction as a state entitlement, which states can apply when they so wish, unless clearly in contravention of international law. To strengthen the legitimacy and efficiency of universal jurisdiction as a tool in the fight against torture a human rights centred approach to the principle is therefore required. The centre of such an approach are states' existing human rights obligations, which states are bound by in all their actions and in relation to everyone within their jurisdiction, and which therefore cannot be disregarded in decisions concerning the exercise of the state's criminal jurisdiction.

In practice, universal jurisdiction must be applied concurrently with other forms of jurisdiction, not only in the interest of human rights protection and efficiency of the criminal process, but also e.g. in the interest of national reconciliation in the territorial state. This requires a certain amount of flexibility to be built in to the system providing for compulsory universal jurisdiction,

[474] Rome Statute of the International Criminal Court (last amended 2010) Art 5.

to allow a custodial state to defer the exercise of jurisdiction to the jurisdictional state with the best chances of providing a fair and effective investigation and trial, as well as effective remedies for victims. Such flexibility should however not undermine the goal of the obligation or allow for political manoeuvring in the exercise of universal jurisdiction, which would further contribute to the existing critiques against the principle. The international community must strive to cooperate and provide assistance to states to ensure accountability for torture crimes, by e.g. supporting forum states in conducting effective criminal proceedings respecting international standards on fair trial guarantees, irrespective of which basis their jurisdiction is based on. Since proceedings using universal jurisdiction are often both practically and politically difficult, it is very important that territorial states fulfil their existing obligations to ensure accountability and receive support in doing so, since accountability under universal jurisdiction is in practice only necessary where the territorial state is unwilling or unable to ensure accountability.

Perhaps most of all, the principle of universal jurisdiction however needs to be governed by a clear legal framework, which would define the concept itself, its legal limits and the situations in which its application is compulsory, so as to strengthen the international rule of law and limit both over and under extension of jurisdiction based on e.g. political motives. Considering the importance of human rights protection in the system of international law, the only way to ensure the legitimacy of such a framework is to place human rights at its center. Hereby, the model for universal jurisdiction enshrined in the Torture Convention could provide an example for the future development of both customary law in relation to torture and of general standards on the exercise of universal jurisdiction over other international crimes. Since it has throughout this thesis been argued that the human rights standards applied in the formulation of the model, as well as compulsory universal jurisdiction are already a real, if underutilized, part of the regime of international law, a human rights centred model of universal jurisdiction does not necessarily rely only on the development of new standards on universal jurisdiction. Instead, such a model can be constructed from the existing state obligations, as long as human rights are allowed to play a central and active role in the decisions and frameworks surrounding universal jurisdiction and accountability for torture and other international crimes.

Ultimately, the concept of and international law on universal jurisdiction continues to develop. Indeed, it may come to do so even at a fast pace, as international interest for ensuring accountability mounts, globalisation enhances the interconnectedness between states and traditional jurisdictional bases continue to be undermined by the lack of states' adherence to positive procedural obligations under human rights law. Developments of the principle of universal jurisdiction are also likely to be impacted by the recent decision to include the topic in the ILC long-term programme of work,[475] although results from such a process may take time to materialise, including due to the contested nature of the principle. In the meantime, all jurisdictional states need to take a proactive role and cooperate in the fight against torture and impunity, and firmly base their decisions and acts on their existing human rights obligations.

[475] See e.g. Jalloh (n 29); International Law Commission, 'About the Commission, Programme of Work' <https://legal.un.org/ilc/programme.shtml> accessed 9 May 2020.

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