

# Universal Jurisdiction over Genocide and Wartime Torture in Dutch Courts:

An Appraisal of the Afghan and Rwandan cases (2007)

*Cedric Ryngaert*<sup>1</sup>

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<sup>1</sup> Lecturer in international law, Universities of Utrecht and Leuven.

## Introduction

Since the adoption of the International Crimes Act (ICA) in 2003, the Netherlands has been able to prosecute crimes against international humanitarian law under the universality principle.<sup>2</sup> The Act does not, however, have retroactive effect.<sup>3</sup> This implies that crimes committed *before* the entry into force of the ICA on 1 October 2003 could not be prosecuted under the ICA. Nonetheless, pre-ICA legislation already provided for universal jurisdiction over war crimes (and torture),<sup>4</sup> although it remained to be seen whether this jurisdictional grant was compatible with international law. Dutch law did not provide for universal jurisdiction over genocide or crimes against humanity before 2003.

A number of recent Dutch judgments have addressed the question of universal jurisdiction over crimes against international humanitarian law committed before 2003. In three cases against Afghan asylum-seekers charged with torture committed during the Afghan civil war in the 1980s, Dutch courts upheld universal jurisdiction over violations of Common Article 3 of the 1949 Geneva Conventions on the Laws of War. Most of them did so on the ground that Dutch law clearly provided for such jurisdiction, although in one case, the Hague District Court usefully added that international law authorised the Netherlands to exercise universal jurisdiction over violations of Common Article 3.

Two other cases involved Rwandans whose case was referred to the Netherlands by the International Criminal Tribunal for Rwanda (ICTR) under its Completion Strategy. The Rwandans were charged with, *inter alia*, crimes of genocide committed in Rwanda in 1994. In an interlocutory decision on jurisdiction in one of these cases, the Hague District Court dismissed jurisdiction over the defendant, arguing that the Netherlands did not have original jurisdiction over genocide in 1994, or subsidiary jurisdiction under the ICTR's Completion Strategy for that matter. The ICTR thereupon revoked its order referring the other case to the Netherlands, and no future referrals for genocide to Dutch courts are to be expected.

In this article, the judgments in the Afghan and Rwandan cases will be critically examined from an international law perspective. Regarding the question whether the Hague courts hearing the Afghan cases were indeed correct in finding universal jurisdiction over violations of Common Article 3 of the Geneva Conventions, it will be argued that they indeed were, but also that their application of international law left something to be desired (Part I). Regarding the judgment dismissing jurisdiction over the Rwandan genocide (Part II) – which is certainly the best reasoned judgment of those discussed – this author concurs with the Court's assessment that original universal jurisdiction does not obtain over the 1994 Rwandan genocide under Dutch law, and that

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<sup>2</sup> Wet internationale misdrijven, *Stb.* 2003, 270.

<sup>3</sup> See, however, Article 21.2 of the Act, which provides that there is no statute of limitations applicable to the prosecution of acts of torture committed before the entry into force of the Act, and which were punishable under the Act implementing the UN Torture Convention.

<sup>4</sup> Criminal Law in Wartime Act (Wet Oorlogsstrafrecht) *Stb.* 408 (1952); Law implementing the UN Torture Convention (Uitvoeringswet Folterverdrag), *Stb.* 478 (1988).

subsidiary jurisdiction does not obtain over ICTR-referred cases under the Dutch law. Some critical observations will nevertheless be made on the Court's method used to reach those conclusions.

## I. Universal jurisdiction over violations of Common Article 3 of the Geneva Conventions: the Afghan cases

In 2005, the District Court of The Hague convicted two Afghan military officials for torture committed during the Afghan civil war.<sup>5</sup> The same District Court has now acquitted another Afghan military official, Abdullah F., one of the deputies to the Director of the Military Khad in Afghanistan, for lack of proof.<sup>6</sup> In this note, we will not discuss the evidentiary material in- or exculpating the defendant. Rather, we will comment on issues of jurisdiction, criminality and on the effect of customary international law in the domestic legal order raised by the judgment. The judgment against Abdullah F. will be examined in particular, as it is this judgment that contains the most elaborate international law arguments.

Although the 1952 Dutch Criminal Law in Wartime Act, which governs the acts of wartime torture allegedly committed by the accused,<sup>7</sup> explicitly provided for universal criminal jurisdiction over the sort of war crimes committed by the Afghan accused – war crimes committed in a non-international armed conflict – it remained to be seen whether the acts were actually punishable under international law at the time of commission in the 1980s. In addition, it remained to be seen whether secondary universal jurisdiction – *i.e.*, jurisdiction exercised by a bystander State which has no connection with the case whatsoever except for the presence of the presumed offender – obtains, or obtained, over such crimes under international law. Put differently, were violations of Common Article 3 of the Geneva Conventions, which contains the minimum norms of the law of war that have to be respected in any international conflict, crimes against international law, and are, or were, they amenable to universal jurisdiction? If Dutch courts were to punish the Afghan torturers' acts in spite of these acts not being punishable under international law or not being subject to universal jurisdiction, this would entail State responsibility under international law for the Dutch State. Especially the Hague District Court in *Abdullah F.* therefore treaded cautiously: it did not rush to the merits phase, but devoted considerable attention to issues of jurisdiction (as will be discussed in Section I.1) and individual criminal liability (as will be discussed in Section I.2).

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<sup>5</sup> LJN: AV1489 and LJN: AV1163, District Court, 09/751005-04, cases against Hesamuddin Hesam and Habibullah Jalalzoy, 14 October 2005. The judgments were appealed. The appeal judgments are: LJN: AZ9366, Court of Appeal The Hague, 09-751005-04, case against Habibullah Jalalzoy, 29 January 2007; LJN: AZ9365, Court of Appeal The Hague, 09-751004-04 and 09-750006-05, case against Hesamuddin Hesam, 29 January 2007. See for the text of the appeals judgments, 2 HAGUE JUSTICE JOURNAL, number 1 (2007).

<sup>6</sup> LJN: BA9575, District Court The Hague, 09/750001-06, case against Abdullah F., 25 June 2007.

<sup>7</sup> As the acts of torture were perpetrated in the early 1980s, they were not subject to the 2003 International Crimes Act nor to the 1988 Law implementing the UN Torture Convention – both statutes not having retroactive effect.

While the Court's analysis is open to serious criticism (*inter alia* its failure to ascertain whether universal jurisdiction obtained over the alleged crimes at the time of their commission – Section I. 3), its eventual upholding of individual criminal liability for violations of Common Article 3 of the 1949 Geneva Conventions (which sets forth the minimum rules applicable in non-international armed conflicts) as well as of universal criminal jurisdiction over these violations, should be applauded and followed in future decisions. The Court's giving effect to customary international law in the Dutch legal order (Section I.4), and its method of analysing evidence – which resulted in the eventual acquittal of the suspect (Section I.5) – is likewise commendable.

### I.1. Universal jurisdiction

The Afghan accused's alleged crimes were committed in the course of a conflict which can be characterised as a civil war, or to be more legally accurate, an internal or non-international armed conflict. As is well known, from a conventional point of view, the rules of international humanitarian law governing non-international armed conflicts provide less protection than the rules governing international armed conflicts. The exercise of universal jurisdiction over violations of the laws of war committed in non-international armed conflicts is no exception to this. Articles 49/50/129/146 of the 1949 Geneva Conventions provide for obligatory *aut dedere aut judicare*-based jurisdiction over *grave breaches* of the Geneva Conventions, but remain silent on jurisdiction over violations of Common Article 3 of the Convention. Violations of Common Article 3 do not qualify as grave breaches.

In the absence of treaty authorisation to exercise universal jurisdiction, authorisation ought to be ascertained under customary international law. In its influential recent study on customary international humanitarian law, the International Committee of the Red Cross (ICRC) held that, under customary law, States have the right to vest universal jurisdiction in their national courts over war crimes, irrespective of whether these war crimes have been committed in international or non-international armed conflicts.<sup>8</sup> The ICRC noted that “[o]ver the last decade, several persons have been tried by national courts for war crimes committed in non-international armed conflicts on the basis of universal jurisdiction”, and that “[i]t is significant that the States of nationality of the accused did not object to the exercise of universal jurisdiction in these cases.” (*Id.*). The criterion of absence of protest by other States against an assertion of universal jurisdiction by bystander States appears to be the correct one for assessing the lawfulness of the assertion. The rules of jurisdiction indeed protect the interests of States: if the territorial State or the State of nationality of the accused fails to object to a bystander State's exercising jurisdiction, the bystander State's assertion should be deemed lawful under customary

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<sup>8</sup> J.-M. Henckaerts & L. Doswald-Beck, ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW. Vol. I: Rules, Cambridge, Cambridge University Press, 2005, p. 604-605; see also C. Maierhöfer, AUT DEDERE AUT JUDICARE. HERKUNFT, RECHTSGRUNDLAGEN UND INHALT DES VÖLKERRECHTLICHEN GEBOTES ZUR STRAFVERFOLGUNG ODER AUSLIEFERUNG, Berlin, Duncker & Humblot, 2006, pp. 41 *et seq.*

international law. This argument is also made by the District Court in *Abdullah F.*, which held that it “does not see any reference points for the point of view that only in case of “grave breaches” it would be possible to interfere with national sovereignty by exercising universal jurisdiction.”

The District Court regrettably did not refer to the ICRC study itself. Instead, it cited an equally authoritative resolution of the 17<sup>th</sup> Commission of the *Institut de Droit International* (Krakow session, 2005) on universal criminal jurisdiction. In fact, this resolution was brought to the attention of the Court by the defendant, who believed it supported his argument that universal jurisdiction does not obtain over violations of Common Article 3. The Court, however, reasoned that the resolution proved exactly the opposite, namely “that the experts present in Krakow were of the opinion that universal jurisdiction should also be applicable to other breaches than the so-called “grave breaches””. It inferred this from the paragraph which reads:

“Universal jurisdiction may be exercised over crimes *identified by international law as falling within that jurisdiction* in matters such as genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions for the protection of war victims *or other serious violations of international humanitarian law committed in international or non-international armed conflict.*”<sup>9</sup>

However, for the Court to determine that it “can draw no other conclusion” than that the experts believed that universal jurisdiction also obtains over violations of Common Article 3, violations of which *Abdullah F.* was accused in this case, is not correct. In fact, the experts only believed that it is not excluded that universal jurisdiction could obtain over war crimes committed in non-international armed conflict, but that the precise crimes amenable to universal jurisdiction ought to be “identified by international law as falling within that jurisdiction”. As Kress has pointed out, the paragraph cited above “does not unambiguously support the existence of a *lex lata* allowing the exercise of universal jurisdiction over *all* the crimes under international law”.<sup>10</sup> The formulation ‘crimes identified by international law as falling within that jurisdiction in matters such as’ is, as Kress noted, indeed relatively indeterminate.<sup>11</sup> In sum, in an abstruse paragraph, the *Institut de Droit International* was reluctant to identify a customary norm authorising the exercise of universal jurisdiction over concrete violations of international humanitarian law. Accordingly, the Hague District Court was wrong to rely upon it to support its position that universal jurisdiction obtained over other breaches than grave breaches.

This is not to say that the District Court was wrong to reach the conclusion that universal jurisdiction obtains over other such breaches. In the commentator’s view, universal jurisdiction indeed obtains over violations of Common Article 3. Under a modern

<sup>9</sup> Para. 3(a) of the Resolution. Emphasis added.

<sup>10</sup> C. Kress, ‘Universal Jurisdiction over International Crimes and the *Institut de Droit International*’, 4 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 561, 571 (2006).

<sup>11</sup> *Id.*

positivist understanding of customary international law formation, in order to identify customary norms in the fields of human rights, humanitarian law and the use of force, where State practice is scarce, emphasis may be laid on unambiguous *opinio juris* as may be derived from international institutional practice.<sup>12</sup> Probably unwittingly, the District Court itself played up the importance of *opinio juris* in the face of insufficient State practice, when it pointed out that “it does seem relevant that since 1949 some developments can be pointed out regarding the *general opinions* on universal jurisdiction.”<sup>13</sup> The Court then went on to cite the *Tadić* judgment, in which the ICTY held that bystander States may have the right to punish violators of non-grave breach provisions of the Geneva Conventions, such as Common Article 3.<sup>14</sup> The *Tadić* judgment is in itself not relevant State practice, but it may provide strong *opinio juris* for both the criminality of violations of Common Article 3 and the admissibility of universal jurisdiction obtaining over such violations.

At any rate, the District Court in *Abdullah F.* ought to be credited for its willingness to look for specific international law authorisation for the exercise of universal jurisdiction over violations of Common Article 3. The Court of Appeals in the cases against Hesam and Jalalzoy, by contrast, noted that “[s]upport for the establishment of secondary universal jurisdiction ... may be found in the development of the conventional law after the Second World War,”<sup>15</sup> an argument that does not carry us very far: only anti-terrorism treaties have explicitly provided for such (*aut dedere aut judicare*-based) jurisdiction. The Court of Appeals had previously already refused to review the lawfulness of the grant of universal jurisdiction conferred by the Dutch Criminal Law in Wartime Act in light of customary international law, on the ground that the Dutch Constitution prohibits it from doing so (see *infra* Section I.4)

## I.2. Individual criminal liability

Before further analysing the existence of universal jurisdiction over violations of Common Article 3, notably as early as the 1980s when the Afghan accused allegedly committed the heinous acts, it is useful to examine whether violations of Common Article 3 are/were crimes under international law. The Hague District Court in *Abdullah F.* only discussed individual criminal liability *after* discussing jurisdiction, although the analysis of liability should logically precede the jurisdictional analysis, since, if a violation of Common Article 3 is not a crime in the first place, it would be redundant to ascertain the admissibility of exercising universal jurisdiction over it. However, if it is a crime under international law, such does not necessarily entail universal jurisdiction over it. By separating jurisdiction and ‘legality’ in its legal analysis, the District Court fortunately corrected the mistake it

<sup>12</sup> See, e.g., T. Meron, *THE HUMANIZATION OF INTERNATIONAL LAW*, Leiden/Boston, Martinus Nijhoff, 2006, pp. 360-370.

<sup>13</sup> Emphasis added.

<sup>14</sup> ICTY Appeals Chamber, *Prosecutor v. Tadić*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, available at [www.un.org/icty](http://www.un.org/icty), para. 83.

<sup>15</sup> Court of Appeal, *Jalalzoy*, para. 5.4.3.

made in the *Hesam* case (which was not rectified by the Court of Appeal), when it seemed to infer from individual criminal liability for violations of Common Article 3 universal jurisdiction over such violations.<sup>16</sup> Separate customary law authorisation for both individual criminal liability *and* the exercise of universal jurisdiction should indeed be established, for States may be willing to criminalise certain reprehensible behavior under international law without therefore be willing to allow every single State to bring the perpetrators to justice.

As far as individual criminal liability is concerned, it is lamentable that the District Court in the case against Abdullah F. did not cite *Tadić*, as in this case, the ICTY dwelled at length on the criminality of acts proscribed by Common Article 3. Noting, *inter alia*, that the type of acts listed in Common Article 3 has been found in the past to result in individual criminal liability, the ICTY came to the conclusion that violations of the article indeed constitute criminal offences under customary international law.<sup>17</sup> Simma & Paulus, using the modern positivist approach to customary international law formation used in Section I.1, have come to the same conclusion.<sup>18</sup> So does the Hague District Court, yet its analysis is somewhat muddled.

In discussing the issue of jurisdiction, the District Court consistently notes that violations of Common Article 3 are *not* grave breaches, yet when discussing the issue of criminal liability, it notes that such violations “in case of war *are* described as “grave breaches”” (emphasis added). Grave breaches are amenable to universal jurisdiction by virtue of the first paragraph of Articles 49/50/129/146 of the Geneva Conventions. Violations of Common Article 3 are definitely *not* grave breaches. The correct reasoning is, as the ICTY Trial Chamber held in *Tadić*, that, because “[t]hey are similar in content to acts prohibited by the grave breaches provisions”, they may “entail individual criminal liability”.<sup>19</sup> Because individuals have been held criminally liable for violations of Common Article 3 even *before* the Afghan civil war, as could be inferred from the *Tadić* Trial Chamber holding (para. 68), a finding of individual criminal liability for the acts of torture allegedly committed by Abdullah F. does not violate the principle of *nullum crimen sine lege*. The District Court’s observation that Afghanistan has been a party to the ICCPR since 1983, which prohibits torture, is useful in view of this principle, but not entirely necessary. Indeed, under Article 15 (2) of the ICCPR, a person could be tried and punished “for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.” Violations of Common Article 3 were considered to be crimes under customary international law by the 1980s, and perpetrators could, on that sole basis, incur individual criminal liability.

<sup>16</sup> LJN: AV1489, District Court, 09/751005-04, case against Hesamuddin Hesam, 14 October 2005. See for criticism: G. Mettraux, ‘Dutch Courts’ Universal Jurisdiction over Violations of Common Article 3 *qua* War Crimes”, 4 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 362, 366-369 (2006).

<sup>17</sup> *Tadić* Appeals, *supra* n 13, paragraphs 96-137.

<sup>18</sup> B. Simma & A.L. Paulus, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View’, 93 AM. J. INT’L L. 302 (1999).

<sup>19</sup> ICTY Trial Chamber, *Prosecutor v. Tadić*, Decision on the Defense Motion on Jurisdiction, 10 August 1995, available at [www.un.org/icty](http://www.un.org/icty), para. 68.

### I.3. Universal jurisdiction and retroactivity concerns

While the District Court ascertained, as discussed in the previous section, whether Abdullah F. could be held criminally liable for violations of Common Article 3 *at the time* he allegedly committed the acts, it did not ascertain whether, at that time, his acts were also amenable to universal jurisdiction under customary international law.<sup>20</sup> Instead, it satisfied itself with observing that customary international law – nowadays – provides for universal jurisdiction over violations of Common Article 3. Possibly, the Court believed that a jurisdictional grant is merely procedural in nature, and, accordingly, does not raise retroactivity concerns. In this view, it would suffice that universal jurisdiction over violations of Common Article 3 exists under international law at the time the suspect is prosecuted, and that individual criminal liability attaches to the underlying crime under international law at the time of commission of the act, irrespective of whether universal jurisdiction existed at the time of commission. Allowing the exercise of universal jurisdiction does not create a new crime, as a result of which the principle of legality has arguably no limiting role to play.

In a similar vein, the Spanish National Court refuted in its *Pinochet* judgment of 5 November 1998 the defence's objections relating to the retroactive application of Article 23.4 of the Organic Law of the Judicial Power, which has only provided since 1985 for universal jurisdiction over (amongst others) genocide, whereas the suspect's alleged acts dated back to 1973. The National Court pointed out that the 1985 jurisdictional law "is not a substantive provision of criminal law" as it "does not define or criminalise any act or omission." The court went on to state that the law's effect "is limited to proclaiming Spain's jurisdiction for trying offences defined and punished in other laws," and that the "procedural rule in question applies no unfavourable sanction, nor does it restrict individual rights."<sup>21</sup> This view is not universally shared. In the same case against Pinochet, the UK House of Lords ruled that Pinochet was only extraditable to Spain for his offences for acts committed before September 29, 1988, *i.e.*, the date of entry into force of Section 134 of the Criminal Justice Act, which provided for universal jurisdiction (and international criminal responsibility) over torture.<sup>22</sup> Similarly, in 2001, in the *Bouterse* case, the Dutch Supreme Court (*Hoge Raad*) held that the jurisdictional provisions of the Dutch Criminal Code did not provide for universal jurisdiction in 1982, when the accused allegedly committed his acts of torture, that the 1989 Dutch Torture Convention Implementation Act nowhere gave retroactive effect to the provision on universal jurisdiction, and that, accordingly, there could be no universal jurisdiction over the acts

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<sup>20</sup> Neither did the courts in the *Hesam* and *Jalalzoy* cases regarding the accused's acts, yet they did not address the issue of jurisdiction under international law in the first place.

<sup>21</sup> Order of the Criminal Chamber of the Spanish Audiencia Nacional affirming Spain's Jurisdiction to Try Crimes of Genocide and Terrorism Committed During the Chilean Dictatorship, November 5, 1998 (Appeal No. 173/98, Criminal Investigation No. 1/98), available at <http://www.derechos.org/nizkor/chile/juicio/audi.html>, translated in R. Brody & M. Ratner, *THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN*, The Hague, Kluwer Law International, 2000, p. 99.

<sup>22</sup> *R v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 3)* [2000] 1 AC 147.

allegedly committed by the accused in 1982.<sup>23</sup> Finally, the Belgian Constitutional Court (*Arbitragehof*) held in 2005 that a law extending the scope *ratione loci* of the criminal law is a substantive provision of criminal law to which the prohibition of non-retroactivity applies. On that basis, it annulled a 2003 statute that provided for universal jurisdiction over certain terrorist offences which, at the time of commission (1996), were not amenable to universal jurisdiction.<sup>24</sup>

In this commentator's view, the opinion that jurisdiction should obtain at the time of commission is the correct one. While it is indeed true that a *post factum* jurisdictional grant does not make an act criminal which previously was not, it is no less true that this places an undue onus on the perpetrator: he or she may, on the basis of then valid jurisdictional rules, have anticipated prosecution by the territorial State or the State of its nationality, but not by other bystander States under the universality principle.<sup>25</sup> Legal certainty, which underlies the principle of legality, requires that, upon committing their acts, persons know what laws apply and what legal consequences attach to them. If they know that, at the time of commission, under then valid laws, their acts are *not* amenable to universal jurisdiction, they may decide to commit them (and flee abroad to a State which will possibly not extradite them). Conversely, if they know that their acts *are* amenable to universal jurisdiction, they may, facing denial of a safe haven abroad, refrain from committing them. This mechanism of predictability does not work when the acts become subject to universal jurisdiction only *after* the fact. In that case, the perpetrator did not, and could not, anticipate that he would be prosecuted by a bystander State. Because prosecution under the universality principle was unpredictable for him on the basis of laws applicable at the time of commission, and thus, because he could not make a decision on whether or not to commit the acts in an informed manner, the principle of legality appears to be violated in such a case.

It is not clear whether, as early as the 1980s, even when resorting to the modern approach to customary international law, a customary norm authorising such jurisdiction existed. State practice and *opinio juris* in favour of prosecution of perpetrators of core crimes actually only appeared to emerge after the Cold War, with States only then starting to exercise universal jurisdiction over core crimes, including violations of Common Article 3, and international criminal tribunals only then being established. Nonetheless, this does not mean that States may previously have been opposed to the exercise of universal jurisdiction over violations of Common Article 3. In fact, a permissive rule could hark back to the very adoption of the Geneva Conventions in 1949. As Meron has noted, “[j]ust

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<sup>23</sup> Reprinted in 32 NYIL 287 (2001). Citing constitutional concerns, the Court refused to ascertain whether a norm of customary international law authorised the exercise of universal jurisdiction over torture as early as 1982. See also Section I.4 on giving effect to the customary rules on jurisdiction in the domestic legal order.

<sup>24</sup> Belgian Constitutional Court, *Erdal v. Council of Ministers*, judgment nr. 73/2005, 20 April 2005, *Moniteur belge* 3 May 2005.

<sup>25</sup> See also C. Ryngaert, ‘Het arrest *Erdal* van het Arbitragehof: eindelijk duidelijkheid over de onrechtmatigheid van de retroactieve toepassing van extraterritoriale rechtsmachtuitbreidingen’, (BELGISCH) TIJDSCHRIFT VOOR STRAFRECHT 345, 349 (2005) and OXFORD REPORTS ON INTERNATIONAL LAW IN DOMESTIC COURTS, ILDC 9 (BE 2005).

because the Geneva Conventions created the obligation of *aut dedere aut judicare* only with regard to grave breaches does not mean that other breaches of the Geneva Conventions may not be punished by any State party to the Conventions.”<sup>26</sup> After all, Article 129 (3) of the Third Geneva Convention provides that each State Party “shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches”, and Common Article 1 requires all contracting parties to respect and ensure respect for the Conventions.<sup>27</sup> A rule authorising the exercise of universal jurisdiction over violations of Common Article 3 could thus be found in the Geneva Conventions themselves. Arguably, only to the extent that protest against this liberal interpretation may have arisen, *quod non*, should it probably have been discarded.<sup>28</sup>

#### I.4. Giving effect to the customary rules on jurisdiction in the domestic legal order

All in all, the District Court, in the *Abdullah F.* judgment, comes to the same conclusion as this commentator as far as the issues of jurisdiction and individual criminal liability are concerned. Some critical methodological observations have been made, yet one should not forget to credit the District Court with at least attempting to perform a customary international law analysis, even if it may have done so unknowingly (*see infra*). After all, the Hague Court of Appeal in its judgments against Hesamuddin Hesam and Habibullah Jalalzoy dd. 29 January 2007 *refused* to apply customary international law on the ground that Article 94 of the Dutch Constitution prohibits Dutch judges from reviewing statutes in light of unwritten international law.<sup>29</sup> As a result, Article 3 of the Criminal Law in Wartime Act, which in effect provides for universal jurisdiction over violations of Common Article 3 of the Geneva Conventions since 1952, could, in the Court’s view, not be reviewed in light of the customary international norms on jurisdiction. Admittedly, the upshot of this holding was that the Afghan accused could be prosecuted in the Netherlands for violations of Common Article 3 under the universality principle, a conclusion that we would also have reached. Yet a failure to heed rules of international jurisdiction may cause extremely unwelcome international consequences. As Kuijper pointed out, “[t]he rules relating to jurisdiction of states are so basic to the very existence of the state system itself, that the courts should not in any way encourage an excess of jurisdiction.”<sup>30</sup> If there is one category of customary international law norms that should be given effect in the domestic legal order, it certainly is the category of jurisdictional rules.

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<sup>26</sup> T. Meron, *THE HUMANIZATION OF INTERNATIONAL LAW*, Leiden/Boston, Martinus Nijhoff, 2006, p. 125.

<sup>27</sup> *Id.*, at p. 126.

<sup>28</sup> See Article 31 (3) of the Vienna Convention on the Law of Treaties on treaty interpretation.

<sup>29</sup> See the appeals judgments cited in note 1, at para. 5.4.2. The Court of Appeal satisfied itself with ascertaining that Parliament indeed intended to confer universal jurisdiction over violations of Common Article 3 (paragraphs 5.4.3 and 5.4.4).

<sup>30</sup> P.J. Kuijper, ‘From Dyestuffs to Kosovo Wine: from Avoidance to Acceptance by the European Community Courts of Customary International Law as Limit to Community Action’, in I.F. Dekker & H.H.G. Post, eds., *ON THE FOUNDATIONS AND SOURCES OF INTERNATIONAL LAW*, The Hague, TMC Asser Press, 2003, p. 169.

In fact, unlike what the Court of Appeal believed, the Dutch Constitution may not strictly prohibit review of domestic statutes in light of customary international law. While Article 94 of the Constitution effectively only provides that statutory provisions could be set aside in case of incompatibility with treaty law and decisions of international organisations, unwritten international law, as Besselink has noted, *could* have effects in the Dutch legal order to the extent that statutory law explicitly provides for the limiting effects of international law.<sup>31</sup> As it happens, Article 8 of the Dutch Criminal Code provides that the territorial scope of the criminal law (*i.e.*, the exercise of criminal jurisdiction) is restricted “by the exceptions recognised in international law.”<sup>32</sup> By the same token, Article 539a of the Dutch Code of Criminal Procedure provides that the competencies relating to the exercise of the criminal action “could only be exercised insofar as international law [and interregional law] authorise so.” Constitutional law may thus not act as a bar to giving effect to restraining rules of criminal jurisdiction under customary international law.

What is now most ironic about the District Court’s judgment in the *Abdullah F.* case is that the Court believed it applied the Court of Appeal’s holding that it is not possible to test unwritten international law. As a good pupil, it instead looked for relevant *written* rules of international law, and cited the resolution of the *Institut de Droit International* and the *Tadic* judgment. These texts may, to be true, have been *written down*, yet they are therefore not written rules of international law (the category of written rules is, in addition, under Dutch law, restricted to treaty rules and decisions of international organisations pursuant to Article 94 of the Dutch Constitution).<sup>33</sup> At most, they could articulate norms of necessarily *unwritten* customary international law. What the District Court did, in other words, was give effect to customary international law in the Dutch legal order in a disguised manner.<sup>34</sup> Whether the Court did so on purpose, or rather accidentally, is not entirely clear.

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<sup>31</sup> L. Besselink, ‘Internationaal recht en nationaal recht’, in N. Horbach, R. Lefeber & O. Ribbelink, eds., *HANDBOEK INTERNATIONAAL RECHT*, The Hague, TMC Asser Press, 2007, at p. 79.

<sup>32</sup> While Article 8 of the Dutch Criminal Code may, strictly speaking, not apply to such *leges speciales* as the Criminal Law in Wartime Act and the International Crimes Act, it would appear an aberration if this principle were not to be applied *ad analogiam*, given the fact that a finding of extraterritorial jurisdiction over the crimes subject to these laws may, in view of the often politically charged atmosphere of their commission, be much more disruptive of world public order than a finding of extraterritorial jurisdiction over common crimes.

<sup>33</sup> So much seems actually to be conceded by the District Court, where it “leaves aside whether such a Resolution can be considered as a source of written law.”

<sup>34</sup> In Belgium, the Court of Cassation has similarly tried to circumvent the awkward application of customary international law in the face of incompatible domestic law, when in the case against then Israeli Prime Minister Ariel Sharon, it disingenuously relied upon the technique of consistent interpretation to uphold the functional immunity of the accused under international law, although the relevant domestic provision was clearly incompatible with international law and left no room for an interpretation consistent with international law. See for comments: C. Ryngaert, *OXFORD REPORTS ON INTERNATIONAL LAW ON DOMESTIC COURTS*, ILDC 5 (BE 2003). H. Panken, C. Ryngaert & D. Van Eeckhoutte, ‘Het arrest Sharon van het Hof van Cassatie: bouwstenen voor de verdere rol van universele jurisdictie, internationale immuniteiten en de doorwerking van het internationaal gewoonterecht’, *BELGIAN REVIEW OF INTERNATIONAL LAW* 21 1, 240-252 (2004).

### I.5. Concluding observations on the Afghan cases

By upholding individual criminal liability *and* universal criminal jurisdiction over torture committed in non-international armed conflicts, Dutch courts have made a progressive choice in the Afghan cases. Especially the Hague District Court's judgment in *Abdullah F.* deserves mentioning, as it departs from the Dutch Supreme Court's *Bouterse* doctrine (2001) which is echoed in the judgments against *Hesam* and *Jalalzoy*. In *Bouterse*, the Dutch Supreme Court refused to rule on whether individual criminal liability and universal jurisdiction regarding acts of peacetime torture committed in 1982 existed under customary international law. Similarly, in *Hesam* and *Jalalzoy*, the Hague Court of Appeal refused to review a statutory grant of universal jurisdiction over wartime torture in light of customary international law. The Hague District Court in *Abdullah F.*, however, *has* reviewed this grant, and has implicitly given effect to the modern approach to customary international human rights and humanitarian law in the Dutch legal order.

Dutch courts may have been ready to establish universal jurisdiction over violations of Common Article 3 of the Geneva Conventions in the Afghan cases, yet cautiousness has prevailed in the assessment of the evidence against the accused. Without going into the details of the assessment of the evidence in the Afghan cases, one observation of the District Court in *Abdullah F.* merits quotation:

“[This case] concerns events in a society, which in all areas – cultural, technical, economical and political – is so totally different from the Dutch society, that the Court can hardly relate anything to facts and circumstances ‘that are generally known’ and to understanding of common organisation structures and relations, so therefore the Court is obstructed in their assessment of the witness testimonies.”<sup>35</sup>

This observation may have played an important role in the District Court's eventual opinion that “the question of whether the defendant had ‘effective control’ [over his subordinates committed acts of violence and torture against the victims] cannot be answered affirmatively with a sufficient degree of certainty”, an opinion on the basis of which *Abdullah F.* was acquitted.

This structural limitation on the exercise of universal jurisdiction should not be regretted. Western courts almost inevitably face evidentiary constraints when they exercise universal jurisdiction over violations committed in far-flung regions. The District Court in *Abdullah F.* ought to be credited with making these constraints explicit and taking them into account in its analysis of the offender's guilt. The Court reminds us that the global community's fight against impunity should not blind us to the continued role which the presumption of innocence ought to play in a rule-of-law-based society. Even persons accused of having committed the most heinous crimes, such as torture, which may shock the conscience of mankind, are entitled to the presumption. A criminal court should only convict them when their guilt can be established with a sufficient degree of certainty.

<sup>35</sup> Judgment, *supra* n 5, *in fine*.

## II. Universal jurisdiction over genocide: the *J.M.* case

On July 24<sup>th</sup> 2007, the Hague District Court rendered another judgment that touches upon interesting questions of universal jurisdiction.<sup>36</sup> The judgment in the case of *J.M.* was an interlocutory decision concerning the jurisdiction of Dutch courts over crimes of genocide committed in Rwanda in 1994. Before proceeding with the prosecution, the Dutch public prosecutor wanted to make sure that Dutch courts indeed had jurisdiction over genocide charges. In a carefully reasoned opinion, the District Court held that Dutch courts have *no* universal jurisdiction over crimes of genocide under then valid provisions of Dutch criminal law (original jurisdiction). In addition, the Court ruled that Dutch courts have no jurisdiction over genocide derived from the referral of cases from the ICTR to the Netherlands either, in the absence of a treaty from which follows the competency of the Netherlands to take over the prosecution from the ICTR (derivative or subsidiary jurisdiction). In this chapter, we will examine the Court's analysis of both original jurisdiction (Section II.1) and subsidiary jurisdiction (Section II.2). We will concur with the outcome of the Court's analysis, although not necessarily with the method used. In a third section, we will conclude with a discussion of the ICTR Completion Strategy's future (II.3), as dismissal of jurisdiction in the *J.M.* case may adversely affect that strategy on a wider scale.

### II.1. Original jurisdiction over genocide

Pursuant to Articles 2 and 3 of the Dutch International Crimes Act (2003), Dutch courts have universal jurisdiction over genocide. However, as the suspect committed his alleged acts in 1994, before the entry into force of the International Crimes Act, which has no retroactive effect, the Hague District Court needed to ascertain whether Dutch courts had universal jurisdiction over genocide as early as 1994, either under statutory law or under international law.

As far as statutory law is concerned, the Court observed correctly that under the pre-2003 legislation, Dutch courts had no universal jurisdiction over crimes of genocide. The Dutch statute implementing the Genocide Convention only provided for extraterritorial jurisdiction over Dutch nationals committing genocide outside the Netherlands (active personality principle),<sup>37</sup> and former Article 3 of the Dutch Criminal Law in Wartime Act only applied to Dutch nationals committing genocide (in wartime) outside the Netherlands, to persons committing genocide against Dutch nationals (passive personality principle), and to crimes of genocide harming Dutch interests (protective principle). Unlike in the Afghan cases concerning universal jurisdiction over violations of Common Article 3 of the Geneva Conventions, there was no statutory authorisation to exercise universal jurisdiction, and the District Court therefore dismissed jurisdiction on statutory grounds.

<sup>36</sup> LJN: BB0494, District Court The Hague, 09/750009-06 + 09/750007-07, case against *J.M.*, 24 July 2007.

<sup>37</sup> Article 5 of this statute (*Uitvoeringswet Genocideverdrag*, statute of 2 July 1964, *Stb.* 1964, 243).

While a statute may not provide for universal jurisdiction, a rule of international law may do just that. It goes to the Court's credit that it did not neglect the international dimension of jurisdiction. Not unsurprisingly though, the Court, citing constitutional constraints, was not willing to review statutory law (which did not provide for universal jurisdiction over genocide) in light of relevant customary international norms.<sup>38</sup> In so doing, it seemed to reverse its *Abdullah F.* decision, in which, as discussed in Section I.4, it paid only lip-service to the prohibition of reviewing statutory law in light of unwritten international law. The Court's apparent willingness to apply customary law in *Abdullah F.* could, however, be explained by the fact that such application could result in a *restriction* of the ambit of Dutch statutory law, which explicitly provided for universal jurisdiction over violations of Common Article 3 of the Geneva Conventions. In *J.M.*, by contrast, the application of customary international law would not lead to jurisdictional restraint, but, quite on the contrary, could lead to jurisdictional *expansion*: Dutch statutory law did *not* provide for universal jurisdiction, whereas customary international law could.

It is understandable that States are more willing to give effect to prohibitive rules of jurisdiction than to permissive rules or rules of obligatory jurisdiction. Applying the latter rules would widen the reach *ratione loci* of a State's laws, thereby putting a strain on prosecutorial resources and possibly causing international conflict. In Section I.4, we have argued that prohibitive rules, these are rules limiting jurisdictional excess, ought to be given effect in the domestic legal order in view of the importance of jurisdictional delimitation for stable international relations between sovereign States. Because the stability argument does not apply to international rules providing for the expansion of a State's jurisdiction – it is indeed improbable that jurisdictional expansion serves international stability (in the classical “sovereignist” understanding) – the application of such rules in the domestic legal order should be viewed with more suspicion.

If, however, the rule providing for more expansive jurisdiction is an *obligatory* one, it *should* be applied in the domestic legal order and it *should* prevail over incompatible domestic law like prohibitive rules of jurisdiction, which have the same obligatory effect, should. Customary rules of jurisdiction, unlike conventional rules, are ordinarily not obligatory, though. They mostly *authorise* a State to exercise jurisdiction short of *obliging* it to do so. States may act upon that authorisation but they are not required to. Unlike with respect to obligatory rules, States could not be faulted for not providing for jurisdiction under merely permissive rules. State legislatures may take the legitimate *political* decision not to grant their courts jurisdiction. Because of the political nature of such a decision, State courts should not be allowed to overrule it and set aside a domestic statute which does not provide for jurisdiction in favour of a permissive norm of customary international law that does. Deciding otherwise would amount to giving the judiciary a political decision-making role.

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<sup>38</sup> As the Genocide Convention does not (explicitly) provide for universal jurisdiction over genocide (*see* Article 6 of the Genocide Convention *a contrario*), international law authorisation for the exercise of such jurisdiction ought to be sought in customary law.

As pointed out, Dutch penal law did in 1994 not provide for universal jurisdiction over genocide. And, as far as customary international law is concerned, while it has been argued that States are *obliged* to exercise universal jurisdiction over crimes of genocide,<sup>39</sup> in view of the scarcity of State practice the rule that a State is (merely) *authorised* to exercise such jurisdiction probably represents the better argument.<sup>40</sup> Combining these two observations – absence of domestic authorisation and presence of international authorisation – in light of the foregoing, one ought to conclude that Dutch courts should not give effect to the international authorisation and dismiss jurisdiction on the basis of statutory law.

This is, however, not what the District Court in *J.M.* did. It considered that incompatible statutory law always prevails over customary law, and that, hence, ascertaining customary international law would be irrelevant: even if a customary norm granting universal jurisdiction to Dutch courts were to be found, it could never prevail over the clear text of Dutch penal law, which does not authorise the exercise of universal jurisdiction over genocide.<sup>41</sup> Of course, the District Court could not have done much else: Article 94 of the Dutch Constitution, as also construed by the courts, prohibits customary international law from prevailing over incompatible domestic law, and there is no statutory law explicitly providing for the expansion of domestic jurisdiction in accordance with international law.<sup>42</sup> Our above analysis, which does full justice to the demands of international law, may thus not apply in the Dutch context.

It may be noted that our analysis and the District Court's analysis actually yield the same result: dismissal of jurisdiction. However, this is only so because the relevant customary norm is merely a permissive norm (*authorising* the exercise of universal jurisdiction over genocide). If the relevant norm were an obligatory norm (*requiring* the exercise of jurisdiction), the result would have been different. Under our analysis,

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<sup>39</sup> See, e.g., Principle 14 (1) of the Brussels Principles Against Impunity and for International Justice (“By virtue of international law, any state has the obligation to exercise universal jurisdiction in relation to the presumed author of a serious crime from the moment the said presumed author is present on the territory of that state.”); M.S. Myers, ‘Prosecuting Human Rights Violations in Europe and America: How Legal System Structure Affects Compliance with International Obligations’, 25 MICH. J. INT’L L. 211, 222 (2003) (arguing that “all nations are now considered bound by customary international law to prosecute crimes that have achieved *jus cogens* status”).

<sup>40</sup> See, e.g., the German Constitutional Court's ruling that, while Article VI of the Genocide Convention may not contain a *duty* to prosecute, it did not, in view of Article I of the Convention (which obliges States Parties to prevent and punish genocide) rule out the *competence* of States to prosecute (BverfG, *Jorgic*, 2 BvR 1290/99, 12 December 2000, EuGRZ 76, 81). See also International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia* (Serbia and Montenegro), Provisional Measures, separate opinion Judge Lauterpacht, *I.C.J. Rep.* 1993, 325, 443 (holding that the definition of genocide in Article I of the Genocide Convention was intended “to permit parties, within the domestic legislation that they adopt, to assume universal jurisdiction over the crime of genocide – that is to say, even when the acts have been committed outside their respective territories by persons who are not their nationals.”).

<sup>41</sup> Para. 43 of the judgment.

<sup>42</sup> As pointed out in Section I.4, Dutch statutory criminal law explicitly provides for the limiting effects of the international law of jurisdiction, and relevant customary norms could therefore be given effect in the Dutch legal order in spite of the text of Article 94 of the Dutch Constitution.

jurisdiction would be established, and under the District Court's analysis, jurisdiction would be dismissed.

The question may arise here whether the District Court's application of Article 94 of the Dutch Constitution was appropriate. Is there indeed a conflict between a customary norm that would authorise (*c.q.* oblige) the exercise of universal jurisdiction over genocide, and a domestic statute that remains silent on the exercise of such jurisdiction? Could one infer from Parliament's silence that it opposes the exercise of universal jurisdiction over genocide? The District Court believes one could, and that the domestic and the customary international norm are incompatible. Yet it is not a given that silence equals opposition. Parliament may only have provided for universal jurisdiction over genocide as late as 2003, but this may not imply that it believed such jurisdiction to be overbroad *before* 2003. Arguably, if it could be established that Parliament did not oppose universal jurisdiction over genocide in 1994 (when the suspect committed his alleged acts in Rwanda) but merely failed to act upon the international law authorisation to exercise jurisdiction, there may have been no incompatibility between Dutch law and customary international law at the time of commission of the alleged acts. When there is no incompatibility, it is generally accepted that customary law could be given effect in the Dutch legal order without transformation being required.<sup>43</sup>

To answer this question, it should be recalled that, when preparing the International Crimes Act in 2001-2002, the Dutch Parliament refused to give retroactive effect to the grant of universal jurisdiction over genocide<sup>44</sup> (as also noted by the District Court),<sup>45</sup> holding that "it is very difficult, if not impossible, to determine until what time the criminalisation [and grant of jurisdiction] ought to be applied retroactively, because it is very difficult to determine, and open to much discussion, what the status of (unwritten) international law is at any given time."<sup>46</sup> Quite likely, Parliament had the same view of customary international law in 1994. Quite likely, therefore, it had difficulties in determining whether universal jurisdiction obtained over genocide back in 1994. Because of this uncertainty, it may not have wanted its courts to establish universal jurisdiction over genocide. Accordingly, even if there actually were a customary international law authorisation to establish such jurisdiction, the Netherlands ought to be presumed not to have acted upon it. If no clear intent of Parliament to give extraterritorial application to a statute could be discerned, Dutch law ought to be presumed *not* to apply extraterritorially.<sup>47</sup>

As a result, there may indeed be incompatibility between Dutch law and customary international law, and Dutch law therefore prevails over the customary norm pursuant to

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<sup>43</sup> Besselink, *supra* n 29, at p. 78.

<sup>44</sup> Kamerstukken II, 2001-2002, 28 337, nr. 3, pp. 24-25.

<sup>45</sup> Para. 31 of the judgment.

<sup>46</sup> *See supra* n 42 (own translation).

<sup>47</sup> The presumption against extraterritoriality, a principle of foreign relations law, is mainly of Anglo-Saxon origin. *See* for U.S. applications: *EEOC v. Arabian Am. Oil. Co.*, 499 U.S. 244 (1991); *Foley Bros., Inc., v. Filardo*, 336 U.S. 281 (1949).

Article 94 of the Constitution. Yet even if one takes issue with Article 94, as we do, and one has customary law prevail over Dutch law, universal jurisdiction over genocide would not obtain: as argued *supra*, customary law only sets forth an *authorisation* to exercise jurisdiction which the Netherlands was in no way required to act upon. Only when customary law were to set forth an *obligation, quod non*, would universal jurisdiction over genocide in the Dutch legal order have obtained before the enactment of the International Crimes Act in 2003.

Only in one case so far has a judge invoked authorisation to exercise universal jurisdiction under customary international law in the absence of statutory authorisation. In the Belgian *Pinochet* case, investigating judge Vandermeersch ruled in November 1998 that universal jurisdiction, even *in absentia*, obtained over Pinochet's alleged crimes, qualified as crimes against humanity, even though Belgian law at the time did not provide for universal jurisdiction over such crimes.<sup>48</sup> He justified his finding of jurisdiction on the ground that "in international humanitarian law, the risk does not so much seem to reside in national authorities reaching beyond their jurisdiction but rather in their looking for pretexts to justify their having no jurisdiction, thereby leaving the door open for impunity for the gravest crimes (which is surely contrary to the *raison d'être* of rules of international law)".<sup>49</sup>

Vandermeersch's decision may have served the legal fight against impunity, but it had a *political* whiff. His activism should at first sight be disapproved of: it is *Parliament*, a political branch, and not the judiciary, that has to decide whether to act upon customary law authorisation to exercise jurisdiction. Nonetheless, the Belgian Parliament may actually not have opposed the exercise of universal jurisdiction over crimes against humanity in 1998. In 1997, a bill had already been introduced in Parliament so as to bring the crime of genocide within the scope of Belgium's universality law,<sup>50</sup> and a government amendment was formulated in December 1998 adding crimes against humanity<sup>51</sup> after Belgium had ratified the Rome Statute of the International Criminal Court on 10 September 1998. On 10 February 1999, a statute was eventually adopted providing for universal jurisdiction over both genocide and crimes against humanity.<sup>52</sup> There was thus a flurry of contemporaneous legislative activity in Belgium seemingly approving of more expansive assertions of universal jurisdiction, also with retroactive effect, when Judge Vandermeersch rendered his decision upholding universal jurisdiction under customary

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<sup>48</sup> Investigating Magistrate Brussels, *Pinochet*, November 6, 1998, REVUE (BELGE) DE DROIT PENAL 278 (1999), reprinted in J. Wouters, BRONNENBOEK INTERNATIONAAL RECHT, Antwerp, Intersentia, 2000, at p. 135 (« qu'il existe une règle coutumière du droit des gens, voire de jus cogens, reconnaissant la compétence universelle et autorisant les autorités étatiques nationales à poursuivre et à traduire en justice, en toutes circonstances, les personnes soupçonnées de crimes contre l'humanité. »).

<sup>49</sup> *Id.* ("en droit humanitaire, le risque ne semble pas tellement résider dans le fait que les autorités nationales outrepassent leur compétence mais bien plutôt dans le réflexe qu'elles auraient de rechercher des prétextes pour justifier leur incompétence, laissant ainsi la porte ouverte à l'impunité des crimes les plus graves (ce qui est assurément contraire à la raison d'être des règles de droit international)").

<sup>50</sup> *Parl. St.* Senaat 1998-99, nr. 1-749/1.

<sup>51</sup> *Parl. St.* Senaat 1998-99, nr. 1-749/2.

<sup>52</sup> *Moniteur belge*, 23 March 1999.

international law over crimes against humanity. This is an essential difference with the Dutch situation, where no political willingness was apparent to either give retroactive effect to a universality law or to act upon customary law authorisation to exercise universal jurisdiction over genocide at the time of the Rwandan genocide.

## II.2. Derivative jurisdiction over genocide: ICTR referral of cases to the Netherlands

Even though the District Court had no original jurisdiction over crimes of genocide committed in 1994, it could, alternatively, have *derivative* or *subsidiary* jurisdiction on the basis of Article 4a, al. 1 of the Dutch Criminal Code, which provides that “Dutch criminal law applies to anyone against whom the criminal prosecution has been transferred to the Netherlands by a foreign State on the basis of a treaty which grants the Netherlands jurisdiction to prosecute.”<sup>53</sup> As it happened, the case against the suspect, J.M., had been referred to the Netherlands by the ICTR (Prosecutor) in the framework of the Tribunal’s Completion Strategy, which requires it to finish its activities by 2010.<sup>54</sup> While the Netherlands had adopted a statute regarding cooperation with the ICTY and the ICTR in 1994,<sup>55</sup> it did not provide for the referral of cases from the ICTY and the ICTR – referral only being contemplated years later by the criminal tribunals. Article 4a of the Dutch Criminal Code was therefore controlling. Pursuant to this provision, the referral could only create jurisdiction for Dutch courts provided that the ICTR could be characterised as “a foreign State” and that the referral had its legal basis in a treaty.

Obviously, the ICTR, a creation of the UN Security Council, is not a State. The District Court, however, *did* characterise the ICTR as a State, on the ground that “the Netherlands has been cooperating for years with the [International Criminal] Tribunals as if they were foreign States”.<sup>56</sup> In fact, as the Court pointed out, in a similar case, concerning the referral of Michel Bagaragaza, another Rwandan genocide suspect, from the ICTR to the Netherlands, the Dutch Government had construed Article 4a of the Criminal Code to *include* the ICTR.<sup>57</sup> Quite reasonably, the District Court held that the Government did not object to equating the ICTR with “a foreign State” with a view to the application of Article 4a of the Criminal Code – rather on the contrary – and that the Court did therefore not make a political choice when extending the scope of application of the said provision.<sup>58</sup>

The characterisation of the ICTR as a foreign State did not suffice for Dutch courts to have jurisdiction over the suspect, though, since jurisdiction should be based on a *treaty*

<sup>53</sup> Own translation. Original Dutch text: “De Nederlandse strafwet is toepasselijk op ieder tegen wie de strafvervolgning door Nederland van een vreemde staat is overgenomen op grond van een verdrag waaruit de bevoegdheid tot strafvervolgning voor Nederland blijkt.”

<sup>54</sup> See Security Council Resolutions 1503 (2003) and 1534 (2004).

<sup>55</sup> Statute of 21 April 1994, *Stb.* 4 May 1994.

<sup>56</sup> Para. 59 of the judgment.

<sup>57</sup> Para. 58 of the judgment.

<sup>58</sup> Para. 57 *juncto* para. 59 of the judgment.

regarding the referral of ICTR cases. While there are a number of European treaties regarding the transfer of criminal proceedings creating jurisdiction for Dutch courts, there does not seem to be a treaty explicitly providing for the referral of ICTR cases. The public prosecutor creatively argued that the UN Charter in conjunction with the ICTR Statute, and the Genocide Convention, could qualify as relevant treaties. Yet the District Court demurred: in its view, there is no treaty basis creating Dutch jurisdiction to prosecute cases referred by the ICTR to UN Member States. For one, while the ICTR Statute provides for a general obligation of cooperation of UN Member States with the ICTR, it does arguably not provide for the referral of ICTR cases to the Member States.<sup>59</sup> The UN Security Council resolutions laying the groundwork for the ICTR's Completion Strategy, for their part, only *call on* Member States to take over cases from the ICTR, but do not imply an obligation to that effect, in the Court's view.<sup>60</sup> For another, the District Court construed the International Court of Justice's statement that "the obligation each State ... has to prevent and to punish the crime of genocide is not territorially limited by the [Genocide] Convention",<sup>61</sup> as not relating to questions of jurisdiction over genocide, but only to States' general duty to safeguard society from the crime of genocide.<sup>62</sup>

It is somewhat surprising that the District Court so readily equated the ICTR with a foreign State and so readily refused to find a legal basis in the UN Security Council resolutions on the ICTR's Completion Strategy. Admittedly, a Security Council resolution is not a treaty. It rests, however, on a treaty, the UN Charter – a fact that the District Court also appeared to recognise. The Court instead laid heavy emphasis on the fact that the relevant resolutions do not *oblige* States to take over cases.<sup>63</sup> However, neither does the 1972 European Convention on the Transfer of Proceedings in Criminal Matters. What appears relevant is that the conventions on the transfer of proceedings in criminal matters contain a specific procedural framework on the transfer of cases, and that some of them, such as the 1977 European Convention on the Suppression of Terrorism, explicitly create a new jurisdictional ground in case of non-extradition.<sup>64</sup> The Security Council resolutions do not set forth a specific procedural framework on the referral of cases by the ICTR to UN Member States, nor do they explicitly grant jurisdiction to UN Member States so as to enable them to prosecute ICTR cases.

The absence of a specific procedural framework should not serve as an obstacle to the Netherlands having jurisdiction to prosecute. After all, Article 4a of the Criminal Code does not require a treaty to be very specific. Arguably, the Security Council is authorised to provide for the general framework, while leaving the details to the ICTR. The question regarding the creation of a new jurisdictional ground is trickier. Did the resolutions provide for jurisdiction for Member States' courts to prosecute suspects referred by the ICTR

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<sup>59</sup> Para. 75 of the judgment. *See* Article 28 of the ICTR Statute.

<sup>60</sup> Para. 82 of the judgment.

<sup>61</sup> ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, 11 July 1996, para. 31.

<sup>62</sup> Paras. 86-87 of the judgment.

<sup>63</sup> Para. 82 of the judgment.

<sup>64</sup> Article 7 of this Convention.

where such jurisdiction did not exist before? It should be recalled that resolution 1503 calls on the international community to assist national jurisdictions, as part of the completion strategy, in improving their capacity to prosecute cases referred by the ICTR,<sup>65</sup> and resolution 1534 calls on the ICTR Prosecutor to determine which cases should be proceeded with and which should be referred to competent national jurisdictions.<sup>66</sup> These resolutions do clearly not require that Member States provide for jurisdiction over ICTR-transferred cases which they could not prosecute under existing municipal law. The correct interpretation one ought to give to the resolutions is that they set forth the framework for the referral of cases by the ICTR either to States that may exercise original universal jurisdiction over the crimes committed in Rwanda, or to States that have subsequently specifically provided for subsidiary jurisdiction over ICTR-referred cases. This could also be inferred from Rule 11*bis* of the ICTR's Rules of Evidence and Procedure, the rule that provides the procedural framework for referrals to national jurisdictions. This rule sets forth, under (A), that a case could be transferred from the ICTR to a State (i) in whose territory the crime was committed; or (ii) in which the accused was arrested; or (iii) *having jurisdiction and being willing and adequately prepared to accept such a case*. A case could clearly not be transferred to *any* State: only States that unambiguously have jurisdiction, either original or subsidiary, over the case under their own laws qualify.

Doubtless, States are not required to establish jurisdiction over ICTR-referred cases. The ICTR Trial Chamber held in *Prosecutor v. Michel Bagaragaza* (2006) that, in determining whether the State to which the ICTR case would be referred has jurisdiction, it “must be satisfied that an adequate legal framework exists which could criminalise the alleged behaviour of the Accused,”<sup>67</sup> without *requiring* that State to introduce an adequate legal framework.<sup>68</sup> In *Bagaragaza*, the ICTR found that Norway, which had been willing to take over the case after the ICTR Prosecution had submitted a request to that effect, did not have jurisdiction *ratione materiae* over the crime of genocide,<sup>69</sup> without faulting Norway for not having jurisdiction.<sup>70</sup>

<sup>65</sup> Operational paragraph 1 of Resolution 1503 (2003).

<sup>66</sup> Operational paragraph 4 of Resolution 1534 (2004).

<sup>67</sup> ICTR, *Prosecutor v. Michel Bagaragaza*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway, Case No. ICTR-2005-86-R11*bis*, 19 May 2006, para. 12.

<sup>68</sup> The ICTR only stated that “strong public policy reasons favor the involvement of other countries [than the countries where the accused committed his crimes or was arrested] in the prosecution of the Accused because it would be a manner of educating people in other countries on the lessons to be learned from the Rwandan genocide and would promote the development of ideas to prevent future similar tragedies.” (*Id.*, at para. 7).

<sup>69</sup> Norway allegedly had universal jurisdiction over ordinary crimes under national law, such as homicide. The ICTR, however, considered that crimes of genocide “are significantly different in terms of their elements and their gravity from the crime of homicide”. Specific intent would notably not be required for the crime of homicide under Norwegian criminal law. The ICTY, noting that the fact that Norwegian criminal law did not provide for the crime of genocide directly affects the finding of jurisdiction *ratione materiae*, therefore found that such jurisdiction for the alleged acts of genocide did not exist under Norwegian law, and denied the motion for referral of the *Bagaragaza* case to Norway. *Id.*, at para. 16 *juncto* para. 13.

<sup>70</sup> Under Rule 11*bis* of the ICTR's Rules of Evidence and Procedure, the ICTR Trial Chamber determines whether a case should be referred to national authorities. While the Trial Chamber indeed intervened in the *Bagaragaza* case, it did not in the *J.M.* case – which was referred directly by the Prosecution. The Hague District Court ruled in the case that the Prosecution, being an independent organ of the ICTR, has an implicit

Rather than emphasising the purported absence of a procedural framework for referral of cases from the ICTR to UN Member States, or the fact that the relevant Security Council resolutions do not oblige States to take over ICTR cases, the District Court could have made more explicit that the resolutions and the ICTR rules do not create subsidiary jurisdiction over crimes of genocide *per se*, but merely encourage the referral of cases to States which have original (universal) jurisdiction over crimes of genocide, or to States which explicitly create jurisdiction over ICTR-referred cases in the framework of the ICTR Completion Strategy.

### II.3. A future for referrals under the ICTR Completion Strategy

We concurred with the outcome of the Hague District Court's decision in the *J.M.* case, although we did not entirely concur with the method used. We understand, however, that, regarding the question of original jurisdiction, the District Court was restricted in its options by Article 94 of the Constitution. Were it not for the role played by this article, which, interpreted *a contrario*, prohibits reviewing statutory law in light of customary international law, we would have reasoned that customary international law may have *authorised* the exercise of universal jurisdiction over genocide as early as 1994, but that the Netherlands had not acted upon that authorisation. Regarding the question of subsidiary jurisdiction over cases referred by the ICTR to the Netherlands, we would have pointed out that relevant international legal instruments only enable referral of ICTR cases to States which have original universal jurisdiction over genocide or statute-based subsidiary jurisdiction over ICTR-referred cases. Nonetheless, like the Hague District Court, we would have dismissed jurisdiction for Dutch courts, whether on a subsidiary or original basis.

The upshot of the *J.M.* case is that the ICTR could not refer cases to the Netherlands insofar as the suspect is charged with genocide. Insofar as he is charged with other international crimes, notably war crimes, referral is possible, for Dutch courts have universal jurisdiction over war crimes, also if committed in non-international armed conflicts, as discussed in Section I. In fact, *J.M.* was additionally charged with war crimes under Article 8 of the Criminal Law in Wartime Act, and also with torture under Articles 1 and 2 of the Law Implementing the UN Torture Convention.

As a result of the Hague District Court's judgment dismissing Dutch jurisdiction over crimes of genocide committed in Rwanda in 1994, the ICTR revoked its order transferring the ICTR case against Michel Bagaragaza to the Netherlands (13 April 2007)<sup>71</sup> and requested that the Netherlands arrest and transfer Bagaragaza to the tribunal. Like

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competence to autonomously request referral without review by the Trial Chamber. District Court judgment, para. 100.

<sup>71</sup> ICTR, *Prosecutor v. Michel Bagaragaza*, Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands, Case No. ICTR-2005-86-11bis, 13 April 2007. See for a summary: A. Marong, "The ICTR transfers Michel Bagaragaza to the Netherlands for Trial", ASIL Insight, June 18, 2007.

J.M., Bagaragaza was also prosecuted for genocide by the Netherlands. On 17 August 2007, the Dutch public prosecutor decided to retransfer the *Bagaragaza* case to the ICTR.<sup>72</sup> It may be noted that, in its *Bagaragaza* order of 13 April 2007, the ICTR Trial Chamber held that it was “not the competent authority to make a binding determination as to which treaty ... is a treaty from which the power to prosecute genocide follows for the purposes of Article 4a of the Dutch Criminal Code.”<sup>73</sup> It left that to the Hague District Court,<sup>74</sup> and did not rule out that the District Court would dismiss jurisdiction.<sup>75</sup> Now that the District Court dismissed jurisdiction in the similar *J.M.* case, the Dutch prosecution of Bagaragaza for genocide was bound to fail, and revoking the referral was the only option.

The *Bagaragaza* proceedings epitomise the shambles in which the policy of referrals to bystander States under the ICTR’s Completion Strategy now finds itself. While both Norway and the Dutch Government were willing to take over the case against Bagaragaza from the ICTR, referral eventually proved impossible because neither Norway nor the Netherlands had jurisdiction over crimes of genocide committed in Rwanda in 1994. In fact, as far as original jurisdiction is concerned, only few States provided for universal jurisdiction over genocide as early as 1994. Possibly only Spain<sup>76</sup> and Germany<sup>77</sup> did. States such as Norway, Denmark and Austria provide(d) for universal or representational jurisdiction over any crime, although it then remains to be seen whether genocide was actually explicitly criminalised in their municipal law.<sup>78</sup> In Norway, for one, it was not, as highlighted in the 2006 *Bagaragaza* decision of the ICTR Trial Chamber (see Section II.2).

Some States that *nowadays* provide for universal jurisdiction over genocide may, however, be willing to take over ICTR cases, and their courts may indeed be willing to uphold that jurisdiction relating to crimes committed in 1994 on the ground that a jurisdictional law is a procedural law to which the principle of legality does not apply. In Section I.3, we have disapproved of this method, and so has the Dutch Parliament and the Hague District Court in the *J.M.* case.

<sup>72</sup> Press communication Openbaar Ministerie, available at <http://www.om.nl/nieuws/archief/2007/8/32126/>.

<sup>73</sup> ICTR, *Bagaragaza*, *supra* n 66, para. 28.

<sup>74</sup> It was itself, however, satisfied that the Genocide Convention and the UN Charter in conjunction with the ICTR Statute and relevant Security Council resolutions are indeed such treaties. *Id.*

<sup>75</sup> *Id.*, at para. 30 (noting that, *inter alia*, Rule 11bis (F) – which empowers the Chamber to revoke referral at the request of the Prosecutor – serves “as a potential remedy in the event that a competent court in the Netherlands determines that it does not have jurisdiction to prosecute Mr. Bagaragaza for genocide”).

<sup>76</sup> Article 23.4 (a) of the Organic Law of the Judicial Power (1985).

<sup>77</sup> § 6.1 *iuncto* § 220a *Strafgesetzbuch*.

<sup>78</sup> *See, e.g.*, Section 8 (6) of the Danish Criminal Code; Section 65 (1) (2) of the Austrian Penal Code. It may be noted that in 1994, the Austrian *Oberlandesgericht* of Linz premised jurisdiction over Dusko Cvjetkovic, a Bosnian Serb accused of genocide, on Section 65 (1) (2) of the Austrian Penal Code. *Oberlandesgericht Linz*, 1 June 1994, AZ 9 Bs 195/94 (GZ 26 Vr 1335/94-30), confirmed by the *Oberste Gerichtshof* of Vienna, 13 July 1994, 15 Os 99/94-6 at 5 and 6.

Alternatively, States, or rather their courts, may establish subsidiary jurisdiction over crimes of genocide committed in Rwanda in 1994 either under general provisions regarding the treaty-based transfer of proceedings in criminal matters, or under specific provisions on ICTR referral. The Hague District Court in *J.M.* has rejected the former option, and so do we. Regarding the latter option, no State has, to my knowledge, so far modified its law so as to give a jurisdictional basis to referrals under the ICTR Completion Strategy. Such modification may be spurred by the Dutch cases, though. Prosecutions of ICTR-referred cases that have their legal basis in a statute that explicitly provides for jurisdiction over such cases ought to survive legal challenges. Subsidiary jurisdiction over a case ought legitimately to obtain when the State or entity that referred the case has original jurisdiction, when there is an international framework providing for referral of the case, and when the State or entity taking over the case has adopted a municipal legal instrument providing for jurisdiction over referred cases in the event that referral is not obligatory under international law. All ICTR referrals meet the former two requirements, since the ICTR obviously has original jurisdiction over crimes of genocide committed in Rwanda under its Statute, and since relevant Security Council resolutions in conjunction with the ICTR's Completion Strategy, as *inter alia* laid down in ICTR Rule 11*bis*, provide for an international framework for referrals. As States are not obliged to take over ICTR-referred cases, however, such cases could only be prosecuted when States have statutorily granted their courts jurisdiction to that effect. What we can glean from the District Court's judgment in *J.M.* is that, if the ICTR Completion Strategy is not to be a failure, the ICTR should urge the few UN Member States that have shown their willingness to take over ICTR cases to make sure that their courts have municipal jurisdiction to prosecute them.

### III. Final concluding observations

In the Afghan and Rwandan cases, two distinct jurisdictional questions were addressed. In the Afghan cases, the courts grappled with the question of whether the municipal law authorisation to exercise jurisdiction over violations of Common Article 3 of the Geneva Conventions was compatible with international law. In the Rwandan cases, the court had to decide whether, in spite of the absence of specific municipal law authorisation to exercise jurisdiction over genocide, jurisdiction could be premised on international law authorisation. Accordingly, the Afghan cases revolved around *limits* to exercising jurisdiction under international law, whereas the Rwandan cases revolved around *opportunities* to exercise jurisdiction under international law.

Both the Afghan and Rwandan cases, however, highlight the irreducible importance of municipal law for the effects of international law and international arrangements within the domestic legal order. In all cases, Article 94 of the Dutch Constitution, which prohibits Dutch courts from reviewing incompatible statutory law in light of customary international law, played a prominent role. In the Afghan cases, Dutch courts refused to review the 1952 Dutch Criminal Law in Wartime Act in light of customary international law norms possibly prohibiting the exercise of universal jurisdiction over violations of the laws of war committed in non-international armed conflicts – although in *Abdullah F.*, the Hague

District Court tried to circumvent Article 94 in a questionable manner. In the case against the Rwandan suspect J.M., the District Court refused to ascertain whether contemporaneous customary international law set forth an obligation or authorisation to exercise universal jurisdiction over genocide, arguing that customary international law could not prevail over municipal law. The Court pointed out, in addition, that, despite the international arrangements taken by the ICTR to enable the referral of cases to bystander States, and the endorsement of the ICTR Completion Strategy by the UN Security Council, municipal law did not sufficiently provide for Dutch jurisdiction over ICTR-referred cases (a “treaty” on the transfer of proceedings from the ICTR to the Netherlands, in the sense of Article 4a of the Dutch Criminal Code, being absent). Thus, in both the Afghan and the Rwandan cases, the jurisdictional analysis under international law was seriously hampered by inhospitable municipal law provisions on the effect of international law and international arrangements in the domestic legal order.

As shown in the Afghan and Rwandan cases, the unwillingness to give international law its full effect cuts both ways for the fight against impunity. If the municipal law provision takes more progressive options than international law, as is illustrated by the Afghan cases, the human rights movement will cheer. In these cases, jurisdiction did obtain under municipal law whereas it probably would not have under the traditional approach to customary international law. If, however, the municipal law provision takes more conservative options, as is illustrated by the Rwandan cases, the human rights movement will jeer. In these cases, jurisdiction did *not* obtain under municipal law, although it may have obtained under customary international law. This is despite the fact that the international community may have intended to give subsidiary jurisdiction over ICTR-referred cases which States were willing to prosecute. International lawyers, for their part, will only cheer if municipal courts give effect to international legal norms to their full extent, whether they are conventional or customary. Sadly, since the primacy of international law is not fully acquired in the Dutch legal order, we have to postpone our cheers.