Another Afghan Case in the Hague District Court: Universal Jurisdiction over Violations of Common Article 3

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In 2005, the District Court of The Hague convicted two Afghan military officials for torture committed during the Afghan civil war. 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. 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.

As in the previous cases involving (alleged) Afghan torturers/asylum-seekers, the defence predictably challenged the jurisdiction of the Hague District Court. The Dutch Criminal Law in Wartime Act, which governs the acts of wartime torture allegedly committed by Abdullah F., explicitly provided for universal criminal jurisdiction over war crimes committed in non-international armed conflict. But it remained to be seen whether the acts were punishable under international law at the time of commission in the 1980s and 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, obtained over such crimes under international law. If the Hague District Court were to punish Abdullah’s 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. The Hague District Court therefore treaded cautiously: it did not rush to the merits phase, but devoted considerable attention to issues of jurisdiction (Section 1) and individual criminal liability (Section 2).

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 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 deserves following. So does its giving effect to customary international law in the Dutch legal order (Section 4), and its method of analysing evidence – which resulted in the eventual acquittal of the suspect (Section 5).

1. Universal jurisdiction

Abdullah F.’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. 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 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 17th 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.”

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”. The formulation ‘crimes identified by international law as falling within that jurisdiction in matters such as’ is, as Kress noted, indeed relatively indeterminate. 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 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. 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.”. 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. 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.

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 Abdullah F. 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 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 made in a similar case against an alleged Afghan torturer on 14 October 2005, in which it seemed to infer from individual criminal liability for violations of Common Article 3 universal jurisdiction over such violations. 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 behaviour
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. Simma & Paulus, using the modern positivist approach to customary international law
formation referred to supra, have come to the same conclusion. So does the Hague
District Court, yet its analysis is somewhat muddled.

When, 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”. 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.

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. 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.”

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.

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 allegedly committed by the accused in 1982. 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.

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.

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 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.” 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. 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.

### 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. 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.” 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.

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 Tadić 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). 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. Whether the Court did so on purpose, or
rather accidentally, is not entirely clear.

5. Concluding observations

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. These cases are a far cry from the Bouterse judgment (2001),
in which the Dutch Supreme Court decided that acts of (peacetime) torture committed in
1982, at about the same time as the acts allegedly committed by the Afghans, refused to
ascertain whether individual criminal liability and universal jurisdiction existed under
customary international law. Yet what the District Court in Abdullah F. has now given
with one hand, it may have taken away with the other. Without going into the details
of the assessment of the evidence in this case, one observation of the Court 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.”

This observation may have played an important role in the Court’s eventual opinion that
“the question of whether the defendant had ‘effective control’ [over his subordinates’ 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 far-flung situations. The Hague District Court 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.

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Being perpetrated before 1 October 2003, they are not subject to the new Dutch International Crimes Act.


Para. 3(a) of the Resolution. Emphasis added.


Id.


Emphasis added.


Tadić Appeals, supra n 10, paragraphs 96-137.


R v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 3) [2000] 1 AC 147.

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 4 on giving effect to the customary rules on jurisdiction in the domestic legal order.


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


Id., at p. 126.

See Article 31 (3) of the Vienna Convention on the Law of Treaties on treaty interpretation.

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).

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.”

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 immunitéiten en de doorwerking van het internationaal gewoonterecht’, BELGIAN REVIEW OF INTERNATIONAL LAW 211, 240-252 (2004).

Judgment, supra note 2, in fine.