

Universal Jurisdiction and Terrorism

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Abstract

Universal jurisdiction has a relatively long history. There is evidence from the seventeenth century of recourse to this legal institution as a means of avoiding the existence of areas of impunity. State practice, however, is quite recent, emerging from the concepts of war crimes and crimes against humanity. Regardless of how they are classified or categorised, it is within this framework that terrorist acts need to be viewed. The issue of the exercise of universal jurisdiction for crimes classed as terrorism arises when they are qualified by taking into account certain specific acts, such as serious violations of IHL, illegal seizure of aircraft, hostage-taking, kidnapping, acts committed with bombs, etc. Most treaties therefore provide for application of the principle of *aut dedere aut judicare* as a corollary to universal jurisdiction. However, conventional law, general or specific, is not the only basis for the exercise of universal jurisdiction in the case of terrorism offences. The customary basis is also very important, as are the unilateral acts of states when they legislate or pass judgement taking this framework — conventional or not— into account. The purpose of this article is to analyse all such aspects.

Introduction

Any discussion of terrorism must start by addressing the difficulty of identifying the actual subject of debate, given that there is no legal definition of terrorism. One might even speak of ‘terrorisms’¹ or, as Antonio Cassese puts it, a multifaceted criminal notion.² In order to tackle the question of terrorism and universal jurisdiction, we will necessarily have to delimit those terrorist acts to which we are going to refer, given that universal jurisdiction for possible criminal prosecution of such terrorist acts will be dependent on the nature of those acts. Terrorism, even where it is a category of criminal offense, is not always accompanied by a specific typology. The criminalization of terrorism has been the

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¹ Di Filippo, M, “The definition(s) of Terrorism in International Law” in Saul, B, ed, *Research Handbook on International Law and Terrorism*, (Edward Elgar 2014), 3–19.

² Cassese, A, “The Multifaceted Criminal Notion of Terrorism in International Law”, (4)5 *Journal of International Criminal Justice* (2006) 933.

subject of much work in the recent history of international law. However, it has yet to achieve the status it enjoys in some domestic legal orders,³ despite attempts at definition.⁴

For its part, universal jurisdiction is an international legal institution sufficiently understood by experts⁵ but with little experience in state practice. Using Kennett C. Randall's definition, the International Law Association has stated that:

Under the principle of universal jurisdiction, a state is entitled, or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim.⁶

Universal jurisdiction, therefore, is based fundamentally on the existence of the power to judge cases of international concern. Clearly, terrorism—in all its forms—may involve such cases.

For this reason, internal legal systems establish a division between courts. This differentiation of competences admits a specific domestic judge, without any relationship to the offences committed abroad, by and against foreign nationals. The Spanish National Court, for example, is the only court with competence in matters of terrorism. This competence has been defined within the framework of universal jurisdiction as

a principle derived from international law that, based on a supranational interest, enables the domestic courts to exercise, on behalf of the international community, criminal jurisdiction for the prosecution of certain international crimes of first and second degree, regardless of the nationality of the victims and victimizers and the place where they were committed.⁷

We need to define the legal nature of universal jurisdiction linking it with terrorism as a crime under international law. There are certain conventional aspects that justify the application of universal jurisdiction for terrorist acts within the framework of International Humanitarian Law, such as war crimes. However, there are also cases when those terrorist acts may be classified as crimes against humanity. It is easier to find this possible application of universal jurisdiction in the conventional framework of present treaties that specifically provide for terrorist acts, albeit with limitations. However, it is not exclusively confined to the conventional field, given the diverse nature of both universal jurisdiction and the international crime itself which results from the commission of terrorist acts. There are sufficient legal grounds of customary nature and state practice in this area to justify its application. Argentina, Belgium and Spain, to

³ See a brief history of the efforts to criminalize terrorism in Margariti, S, *Defining International Terrorism – between State Sovereignty and Cosmopolitanism* (Springer, Asser Press, The Hague, 2017), 112-124.

⁴ Sau, B, “Definition of “Terrorism” in the UN Security Council: 1985-2004”, 4(1) *Chinese Journal of International Law* (2005) 141, 141–166.

⁵ Cherif Bassiouni, M, “The History of Universal Jurisdiction and Its Place in International Law”, in Stephen Macedo, ed, *Universal Jurisdiction, National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press 2004), 39–63.

⁶ International Law Association, Committee on International Human Rights Law and Practice, *Final Report on the Exercise of Universal Jurisdiction in respect of Gross Human Rights Offences*, London, 2000, 2.

⁷ Spanish National Court, *Amal Hag-Hamdo Case*, 15 December 2017, second legal basis, <webcache.googleusercontent.com/search?q=cache:FFRnjkUqM_wJ:https://confilegal.com/wp-content/uploads/2017/12/Sentencia-Sala-Apelaciones-rechaza-querella-Siria1.doc+&cd=2&hl=es&ct=clnk&gl=it> (accessed 21 April 2018).

mention but a few,⁸ have contributed enormously to the practice of universal jurisdiction and can serve as a basis for analysing practice and making a compendium of internal regulations that allow national courts to assume specific competences for the exercise of universal jurisdiction in this matter.

Like any legal institution, universal jurisdiction needs to be constructed; its boundaries need to be delineated and its content, limits and scope established. In short, it is necessary to enhance the competence of states to exercise universal jurisdiction.⁹ This essay is not intended to enter into greater detail here on the conceptual levels of competence and jurisdiction, among other reasons, because there is already extensive legal literature on both aspects. I shall nonetheless take account of the particularities of these concepts in international law, since, as Professor Sánchez Legido states in his magnificent treatise on universal jurisdiction, these notions are polysemous. As he says ‘one must clarify that, in the context of ‘universal jurisdiction’, the notion of jurisdiction alludes to a core of problems related to the projection of state competences in space’.¹⁰ Moreover, the incursion of domestic law into this legal institution has led to talk of universal criminal and civil jurisdiction, as a corollary to that incursion, given that for international law that dichotomy was not necessary; international law always refers to reparation or satisfaction, whereas here we are talking about criminal sanctions or civil compensation, as if it were internal law. Does this mean that the two areas have become permeable to one other? And will this permeability be projected on the crime of terrorism which suffers from the same endogenous problems?

The methodology, then, is not simple; one must resort to more theoretical aspects, such as the legal nature of the institution and the establishment of standard and practice — both international and national. In this case, the Spanish experience is very useful for the formation of universal jurisdiction in the context of terrorist acts and this is the focus of this essay’s contribution. I shall use a systematic methodology that will enable integration of the applicable legal norms. I shall also draw on primary sources, backed by international and national jurisprudence (from national courts that have already ruled on this matter) and secondary doctrinal sources that allow me to verify the initial hypothesis. Let us now turn to an analysis of these points, in the hope that the results will cast some light on a legal institution that is as much admired as it is reviled.

I. The Conventionality of the Crime of Terrorism as a War Crime and the Exercise of Universal Jurisdiction

The concept of terrorism has proved impossible to define at an international level and very difficult to specify at a regional level¹¹. At national level, each state has defined the concept by incorporating different and even disparate elements. This has led to legal difficulties, *inter alia* with regard to the exercise of extradition.¹²

⁸ Other states have also addressed the regulation and practice of these issues. See, by way of example, Venezuela: Amnistía Internacional, *Venezuela, La lucha contra la impunidad a través de la jurisdicción universal* (Editorial Amnistía Internacional, 2010).

⁹ For an excellent and highly-detailed work on universal jurisdiction, see Inazumi, M, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia 2005).

¹⁰ Sánchez Legido, A, *Jurisdicción universal penal y Derecho Internacional* (Editorial Tirant Lo Blanch 2003), 21.

¹¹ See different definitions and versions in Duffy, H, *The ‘War on Terror’ and the Framework of International Law* (Cambridge University Press 2005), 17-46.

¹² In federal American law alone, twenty-two different definitions have been found. See Maggs, GE, *Terrorism and the Law: Cases and Materials* (George Washington University Law School 2005), 1.

I shall not draw the same distinction as Professor Norberg between international and transnational crimes¹³ given that for the moment, this difference is not relevant to my analysis. I shall instead consider terrorism as a crime of international law, which may therefore be included among crimes eligible for the exercise of universal jurisdiction. Nor shall I consider terrorism as ‘national’ or ‘international’, since no such differentiation is made with regard to the legal right protected under international law. At most, one must accept the framework of competence of the jurisdiction, before coming to universal jurisdiction.¹⁴

As Luz E. Nagle notes, ‘The practices and customs of states regarding terrorism are inconsistent, and the rules applied to terrorism are yet to be settled through the “general assent” of nations’.¹⁵ As the ICRC recognizes:

The current code of terrorist offences comprises 13 so-called ‘sectoral’ treaties¹⁶ adopted at the international level that define specific acts of terrorism.¹⁷ There is also a draft Comprehensive Convention on International Terrorism that has been the subject of negotiations at the UN for over a decade. As has been calculated, the treaties currently in force define nearly fifty offences, including some ten crimes against civil aviation, some sixteen crimes against shipping or continental platforms, a dozen crimes against the person, seven crimes involving the use, possession or threatened use of ‘bombs’ or nuclear materials and two crimes concerning the financing of terrorism’.¹⁸

The first international treaties to make mention of terrorism and terrorist acts were within the framework of International Humanitarian Law. In effect, Art. 33 of the IV Geneva Convention 1949 states that ‘[c]ollective penalties and likewise all measures of intimidation or of *terrorism* are prohibited’ (emphasis added). Art. 4.2 d) of Additional Protocol II prohibits ‘acts of terrorism’ at all times and in all places; and Art. 13-2 also includes a prohibition on ‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population’. This framework of prohibitions entails the commission of war crimes.

In the law of armed conflicts, especially in the context of non-international armed conflicts, a problem is created by the broad scope often given to the concept of terrorism. Therefore, as the ICRC recognizes, ‘the term ‘terrorist act’ should be used, in the context of an armed conflict, only in relation to the few acts specifically designated as such under IHL treaties, and should not be used to describe acts that are lawful or not prohibited by IHL’.¹⁹ Moreover, the ICRC goes on to say,

¹³ Norberg, N, “Terrorism and International Criminal Justice: Dim Prospects for a Future Together” 8(1) *Santa Clara Journal of International Law* (2009) 5.

¹⁴ See, in this regard, Nagle, L E, “Terrorism and Universal Jurisdiction: Opening a Pandora’s Box?”, 27(2) *Georgia State University Law Review* (2011) 13.

¹⁵ Nagle, L, E, “Should Terrorism Be Subject to Universal Jurisdiction?”, 8(1) *Santa Clara Journal of International Law* (2010) 91.

¹⁶ There are currently 18 treaties at universal level.

¹⁷ See all existing multilateral treaties on the subject at <treaties.un.org/doc/source/titles/english.pdf> (accessed 21 April 2018) .

¹⁸ ICRC, 31st International Conference of the Red Cross and Red Crescent Geneva, Switzerland 28 November – 1 December 2011, REPORT: *International Humanitarian Law and the challenges of contemporary armed conflicts*, October 2011, at <icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf> (accessed 21 April 2018) 48–49 (footnotes not in original).

¹⁹ *Ibid*, 51.

While there is clearly an overlap in terms of the prohibition of attacks against civilians and civilian objects under both IHL and domestic law, it is believed that, overall, there are more disadvantages than advantages to additionally designating such acts as ‘terrorist’ when committed in situations of armed conflict (whether under the relevant international legal framework or under domestic law). Thus, with the exception of the few specific acts of terrorism that may take place in armed conflict, it is submitted that the term ‘act of terrorism’ should be reserved for acts of violence committed outside of armed conflict.²⁰

Sassòli argues that these articles are irrelevant to an analysis of terrorism, since they do not reflect the way in which terrorist acts are generally presented. He considers that the perpetrators of terrorist acts do not usually target the people under their power, do not seek to force their (potential) victim to refrain from doing an act and do not act in response to a hostile act.²¹ He, therefore, considers acts directed against the persons in the hands of perpetrators of terrorist acts and terrorist acts directed against the civilian population to be two different things. However, this article contends that such distinction would lead us to the absurd position of not considering hostage-taking or torture to be terrorism, for example, even when their aim is to terrorize. In any case, the Tribunal for the Former Yugoslavia has not applied this distinction, detailing the customary character of the rule, which goes beyond the conventional norm itself.²²

I do appreciate the problem Sassòli highlights; on occasions, in the context of an armed conflict, there may be a legitimacy that would not arise in a situation of non-armed conflict. For example, when an attack is directed against military installations, the classification of the action will differ depending on whether or not an armed conflict existed at the time. While this is certainly true, the classification of the crime is the responsibility of the courts, based on all the variables of the case and the circumstances in which it occurs. In the framework of IHL, not only have these criminal conducts been punished, but the right to exercise universal jurisdiction has been established, since the obligation to try or extradite has been established and no criminal jurisdiction has been excluded. Therefore, the corollary to this obligation *aut dedere aut judicare* and the obligation not to exclude any other criminal jurisdiction is the conventional possibility of using universal jurisdiction. At heart, as Thomas W. Simon states, ‘Universal Jurisdiction gives effect to the obligation *erga omnes* to prosecute universal prohibitions without regard to classical grounds for jurisdiction’.²³ Thus, the four Geneva Conventions of International Humanitarian Law of 12 August 1949, together with Additional Protocol I, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and its Second Additional Protocol of 26 March 1999, and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989 establish the universal jurisdiction, as discussed.

²⁰ *Ibid*, 51.

²¹ Sassòli, M, “La Définition du Terrorisme et le Droit International Humanitaire”, *Revue Québécoise de Droit International* (2007) 34.

²² International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, Appeals Chamber (ICTY), *Prosecutor v. Stanislav Galic*, IT-98-29-A, Judgment, 30 November 2006, para 88.

²³ Simon, TW, *Genocide, Torture and terrorism – Ranking International Crimes and Justifying Humanitarian Intervention* (Palgrave Macmillan 2016), 2.

The principle of universal jurisdiction is explicitly reflected in the four Geneva Conventions of International Humanitarian Law 1949.²⁴ Article 49 of the First Convention, for example, reads:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.²⁵

As can be seen, the scope of this obligation is not limited to the principle of *aut dedere aut judicare* but extends to full universal jurisdiction. Naturally, we must not forget that this only applies to serious infractions. As Flory and Higgins recognizes, 'In that context we could say "terrorism" is a crime which allows universal jurisdiction'.²⁶

In this regard, the International Criminal Tribunal for the Former Yugoslavia has stated that 'the Conventions create universal mandatory criminal jurisdiction between Contracting States'.²⁷ Moreover, we should not ignore the signing on 26 November 1968 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Although it has not been widely ratified,²⁸ the convention shows it to be considered as customary law. Practical proof is given by the trials still continually being brought against war crimes or crimes against humanity committed during World War II and later violations of criminal international law and against which neither an exception of incompetence *ratione temporis* or *rationae personae* or *ratione loci* can be alleged.²⁹

In this sense, in its judgment on the *Klaus Barbie Case* of 20 December 1985,³⁰ the French Court of Cassation deemed crimes against humanity to be imprescriptible, thus considering itself competent to prosecute acts committed during the Second World War.³¹ A similar case arose when an American television station found Erich Priebke on

²⁴ Sandoz, Y, "L'applicabilité du droit international humanitaire aux actions terroristes" in Flauss, J-F, ed, *Les nouvelles frontières du droit international humanitaire, actes du colloque du 12 avril 2002 organisé par l'Institut d'études de droit international de l'Université de Lausanne* (Bruylant: Nemesis 2003).

²⁵ This provision is also included in Article 50, International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 UNTS 85 (Second Geneva Convention); Article 129, ICRC, *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135 (Third Geneva Convention) and Article 146, ICRC, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 (Fourth Geneva Convention).

²⁶ Flory, M and Higgins, R, *Terrorism and International Law* (Routledge 1997), 28.

²⁷ ICTY, *Prosecutor v. Tadic*, IT-94-1-T, Decision on Jurisdiction, 2 October 1995, para 79.

²⁸ The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity has been ratified by 55 States Parties.

²⁹ One might recall the Klaus Barbie Case in France or the Case of the Massacre of the Ardeatine Pits in Italy, for which the French and Italian judicial authorities respectively condemned Barbie and Erick Priebke and Karl Hass, in 1985 and 1998, for acts committed during the Second World War. Further examples can be seen in the proceedings currently underway in Spain against Videla and Pinochet, for events that occurred in the 1970s and 1980s.

³⁰ This judgement can be found in the *Journal de Droit International*, (1986), 129–142.

³¹ For a more detailed study of the circumstances taken into account by the Court, see the study by Wexler, L S, "The interpretation of the Nüremberg Principles by the French Court of Cassation: From Touvier to Barbi and back again", 32 *Columbia Journal of International Law* (1994).

9 May 1994, living in Bariloche, Argentina. Italy requested his extradition, accusing him of the reprisal carried out on 24 March 1944, when, together with Karl Hass, he arrested 335 people and had them shot near the Via Ardeatina in Rome. Priebke and Hass were sentenced to life imprisonment by the Military Court of Rome on 7 March 1998.

According to article 86 of Additional Protocol I 1977, to the four Geneva Conventions 1949:

The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

It therefore refers to an obligation on the High Contracting Parties, whether or not they are parties to the conflict, to ‘repress’ and ‘take measures necessary to suppress all other breaches ... which result from a failure to act when under a duty to do so’ by any State Party.³²

Article 88 of the Protocol requires that the High Contracting Parties ‘shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol’ and

[t]he law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters.

In the framework of serious infringements against cultural heritage in periods of armed conflict, Article 16-2 of the Second Additional Protocol of 26 March 1999, to The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, states as follows:

2. With respect to the exercise of jurisdiction and without prejudice to Article 28 of the Convention:

a. this Protocol does not preclude the incurring of individual criminal responsibility or the exercise of jurisdiction under national and international law that may be applicable or affect the exercise of jurisdiction under customary international law.

Examining this clause closely, we see that it speaks of the exercise of jurisdiction under applicable international law or customary international law, which can only be interpreted as universal jurisdiction. Finally, Article 9 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989, clearly states that: ‘The present Convention does not exclude any criminal jurisdiction exercised in accordance with national law’.

It therefore accepts universal jurisdiction provided it is admitted in domestic law. Obviously in all these international treaties and as we shall see, there is an identification

³² Voneky, S, “The Fight against Terrorism and the Rules of the Law of Warfare”, Walter, C, Voneky, S, Roeben, V and Schorkopf, F, eds, *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Springer 2003).

between jurisdiction and jurisdictional competence. I believe they are referring to jurisdictional competence.

The High Court of Brussels decided to close a case, interpreting that the Belgian Law of 16 June 1993 on the suppression of serious crimes of International Humanitarian Law should only be applied when the defendant is under the territorial jurisdiction of Belgium. This judgement was later overturned by the *Cour de Cassation*, in its judgment of 12 February 2003, which reaffirmed the absolute nature of universal jurisdiction.³³ These divergences sparked parliamentary debate, and the act of 16 June 1993, on the suppression of serious crimes of International Humanitarian Law had to be repealed and replaced by another, the Act of 5 August 2003 on the repression of serious violations of International Humanitarian Law.³⁴ While proposals have been made on the status that should be afforded to authors of terrorist acts in situations of armed conflict,³⁵ they are not relevant to this discussion.

II. The Conventionality of the Crime of Terrorism as a Crime against Humanity and the Exercise of Universal Jurisdiction

The term ‘crimes against humanity’ was first used in 1915 by the allied powers in the First World War, in condemning the mass killing of Armenians by Turkey. After the Second World War, the term was included in the Agreement of the United Kingdom of Great Britain and Northern Ireland, the United States of America, France and the Union of Soviet Socialist Republics for the prosecution and punishment of the major war criminals of the European Axis, signed in London, on 8 August 1945.³⁶

Art. 6-c of this Treaty states that the following acts are crimes coming within the jurisdiction of the Tribunal (the Nuremberg Tribunal):

Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country were perpetrated.³⁷

³³ Cour de Cassation, Section Française, 2e. Chambre, *arrêt de 12 febvrier 2003* at <www.cass.be/juris> (accessed 4 May 2018). On the Belgian experience in this field of universal jurisdiction, see D’Argent, P, “L’expérience belge de la compétence universelle : beaucoup de bruit pour rien?”, 108 *Revue Générale de Droit International* (2004) 597 and ff. Also López-Jacoiste Díaz, M, E, “Comentarios a la ley belga de jurisdicción universal para el castigo de las violaciones graves del Derecho Internacional humanitario reformada el 23 de abril de 2003”, 55(2) *Revista Española de Derecho Internacional* (2003).

³⁴ *Act of 5 August 2003 on the Repression of Serious Violations of International Humanitarian Law* (Belgium) 2003. See the text of the new Act at <ulb.ac.be/droit/cdi/loi2003.html> (accessed 21 April 2018).

³⁵ This question has been raised by Sassòli, M, “La guerre contre le terrorisme, le droit international humanitaire et le statut de prisonnier de guerre”, 39 *The Canadian Yearbook of International Law* (2001) 211.

³⁶ United Nations, *Agreement for the prosecution and punishment of the major war criminals of the European Axis*, 8 August 1945, 82 UNTS 280 (London Agreement).

³⁷ *Ibid.*

A similar definition was included by the International Military Tribunal for the Far East, proclaimed by the Supreme Commander for the Allied Powers at Tokyo, on 19 January 1946 (art. 5-c).³⁸

The Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, which was established on 25 May 1993, includes crimes against humanity among the crimes covered by the Statute (art. 5),³⁹ as does the Statute of the International Criminal Tribunal for Rwanda, which was established on 8 November 1994 (art. 3).⁴⁰ However, no general codification of this kind of crime against humanity was made until the 1998 Rome Statute establishing the International Criminal Court.⁴¹ The Statute offers a definition of crime against humanity for different acts (such as murder, extermination, enslavement, deportation or forcible transfer of population, etc.) when they are committed ‘as part of widespread or systematic attack directed against any civilian population with knowledge of the attack’ (Art. 7). The elements of crimes against humanity may be compatible with those of the crime of terrorism or any terrorist acts codified: the physical element, the contextual element and the mental element.

As I shall explain, there are eighteen international treaties that allude to certain acts of terrorism as crimes of international law.⁴² All of these terrorist acts are perpetrated under conditions to make them classifiable as crimes against humanity (since they include the elements of crimes against humanity). They may, therefore, qualify for universal jurisdiction, without requiring conventional references on the exercise of universal jurisdiction in all cases. Examples include Article 3.3 of the Tokyo Convention on offences and certain other acts committed on board aircraft of 14 September 1963, which ‘does not exclude any criminal jurisdiction exercised in accordance with national laws’; Article 4-3 of The Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970, and Article 5-3 of the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 23 September 1971, Article 3-3 of the New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973, Art. 5-3° of the Convention of New York on the Taking of Hostages of 17 December 1973, Art. 6-5° of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988, Article 5-3 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment of 10 December 1984, and Article 6-2 of the European Convention for the Suppression of Terrorism of 27 January 1977.

While none of these international conventions make explicit mention of the principle of universal jurisdiction, one may deduce from their respective texts the

³⁸ United Nations, *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal*, 8 August 1945, Treaties and Other International Acts Series 1589.

³⁹ UN Security Council, *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, 25 May 1993, S/RES/827.

⁴⁰ UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, 8 November 1994, S/RES/955.

⁴¹ United Nations, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, 2187 UNTS 90.

⁴² For a broader analysis of this question, see Schabas, WA, “Is Terrorism a Crime Against Humanity?”, 8 *International Peace Keeping* (2002), 255 and ff.

imposition of the principle of *aut dedere aut judicare*,⁴³ the preference of jurisdictions in relation to the place of commission of the crime, the nationality of the offender or the place of detention and the reference to any other criminal jurisdiction. According to this paper, these also refer to universal jurisdiction — that is, the possibility that a person may be tried by any state for terrorist acts committed abroad, against nationals or even against non-nationals.⁴⁴ This is also the opinion held by most doctrines, Spanish⁴⁵ or otherwise.⁴⁶ In addition, there have been cases in which it is adjudged that the issue is not the right of the state to universal jurisdiction, but the obligation of *aut dedere aut judicare*, even if this is not formally included in a treaty. This is an advantage to considering some terrorist acts as crimes against humanity.⁴⁷ The consequences of many terrorist acts may be covered by other crimes, such as genocide, torture and these crimes are crimes against humanity.

The German Constitutional Court was called upon to interpret Article 7 of the Convention on the Prevention and Punishment of the crime of genocide of 9 December 1948 (which states that ‘For the purposes of extradition, genocide and the other acts listed in Article III will not be considered as political offenses. The Contracting Parties undertake, in such a case, to grant extradition in accordance with their legislation and current treaties’). The court judged that Germany had an absolute obligation to extradite or prosecute. It also stated that the ‘Federal Republic of Germany would be obliged to comply with an extradition request from Bosnia-Herzegovina’.⁴⁸ In the Scilingo Case of 19 April 2005, the Spanish National Court sentenced the captain of an Argentine Corvette to 640 years in prison for crimes against humanity resulting in 30 deaths with malice aforethought [*alevosía*], illegal detention and torture. This is, therefore, an example of the exercise of universal jurisdiction, for crimes classified as crimes against humanity, committed abroad, by foreign citizens, against foreign citizens.⁴⁹ Crimes against humanity include terrorist acts.⁵⁰

Today, the court would be unlikely to have reached the same conclusion, given that Spain has substantially amended its legislation on the attribution of competence for terrorist offenses for the exercise of universal jurisdiction. In this regard, Art. 23-4º of the Organic Law of Judicial Power lists terrorism as one of the crimes for which Spanish judges may exercise universal jurisdiction, without limitation:

d) Crimes of piracy, terrorism, trafficking in toxic, narcotic or psychotropic substances, trafficking in persons, crimes against the rights of foreign nationals and crimes against the safety of maritime navigation committed in maritime areas

⁴³ Newton, MA, “Terrorist crimes and the *aut dedere aut judicare* obligation” in Van Den Herik, L and Schrijver, N, eds, *Counter-Terrorism Strategies in a Fragmented International Legal Order* (Cambridge University Press 2013).

⁴⁴ The Convention for the Suppression of Trafficking in Persons and Exploitation of the Prostitution of Others of 21 March 1950 clarified the principle of universal jurisdiction.

⁴⁵ See *inter alia* Abellán Honrubia, V, “La responsabilidad internacional de l’individu”, 280 in *Recueil des Cours de l’Academie de Droit International* (1999), 373; Remiro Brotons, A, *El caso Pinochet. Los límites de la impunidad* (Biblioteca Nueva 1999), 56.

⁴⁶ See the separate opinions of the Judges Buergenthal, Kooijmans & Higgins in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) Case*.

⁴⁷ See Newton, MA and Scharf, MP, “Terrorism and Crimes Against Humanity”, in Nadya Sadat, L, ed, *Forging a Convention for Crimes Against Humanity*, (Cambridge University Press 2011), 262–278.

⁴⁸ Bundesverfassungsgericht, *BVerfG, Beschluss vom 12.12.2000 – 2 BvR 1290/99*, 82.

⁴⁹ See a critique of this judgment in Gil, A, “La Sentencia de la Audiencia Nacional en el Caso Scilingo”, *Revista Electrónica de Ciencia Penal y Criminología* (2005) at <criminet.ugr.es/recpc/07/recpc07-r1.pdf> (accessed 21 April 2018).

⁵⁰ Úbeda-Portugués, JE, “El Terrorismo como Crimen Contra la Humanidad”, 26(54) *Temas Socio-Jurídicos* (2008) 16–38.

in the cases provided for in the treaties ratified by Spain or the normative instruments of an international organization of which Spain is a member.⁵¹

Thus, the only restriction is that such acts must be ‘provided for in the treaties ratified by Spain or the normative instruments of an international organization of which Spain is a member’. Curiously, however, the following section establishes a specific type which it also calls ‘terrorism’, but for which it establishes many more limitations:

e) Terrorism, in any of the following circumstances:

1. Proceedings are brought against a Spanish national;
2. Proceedings are brought against a Spanish national or a foreigner who habitually resides or is present in Spain, or against any individual who does not fall into one of these categories but who collaborates with a Spanish national or with a foreigner residing or present in Spain to commit a terrorist offence;
3. The crime is committed on behalf of a legal person whose registered office is in Spain;
4. The victim had Spanish nationality at the time when the crime was committed;
5. The crime is committed with the aim of unlawfully influencing or determining the actions of any Spanish authority;
6. The crime is committed against an institution or agency of the European Union that is headquartered in Spain;
7. The crime is committed against a vessel or aircraft flying the Spanish flag; or
8. The crime is committed against Spanish official facilities, including Spanish embassies and consulates.

For these purposes, a Spanish official facility means any permanent or temporary facility in which Spanish authorities or public officials carry out their public functions⁵².

The same is true in relation to terrorist acts against the security of international civil aviation (in the cases provided for in the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed in Montreal on 23 September 1971, and in its Supplementary Protocol signed in Montreal on 24 February 1988) or on the physical protection of nuclear materials (provided that it has been committed by a Spanish citizen).

Within the framework of international law, it has not been possible to reach an agreement on a definition of the crime of terrorism, which could have constituted a *hostis humani generis* or *delicta iuris gentium* created in the Statute of Rome establishing the International Criminal Court. However, in Resolution E of Annex I to the Final Act of Rome, the United Nations Plenipotentiaries recognise that: ‘terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community’.⁵³

Similarly, Resolution E of the Diplomatic Conference of the Plenipotentiaries of the United Nations on the Establishment of an International Criminal Court

Recommends that a Review Conference pursuant to article 123 of the Statute of the International Criminal Court consider the crimes of terrorism (...) with a view

⁵¹ Articles 23 and 24, *Organic Law 6/1985, of 1 July, on the Judiciary* (Spain) 1985.

⁵² *Ibid.*

⁵³ United Nations, *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, 17 July 1998, A.CONF.183/10.

to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.⁵⁴

Why is it important to consider that some terrorist acts may constitute crimes against humanity? The answer is simple: by doing so, we pave the way for the exercise of universal jurisdiction.⁵⁵ Judge Garzón has acknowledged that

regarding the inclusion of organizations, there is no doubt regarding the suitability of para-state, paramilitary and terrorist organisations, provided that the acts created in Article 7 are part of a generalized and systematic attack against a sector of the civilian population, forming part of a preconceived plan directed against that sector, determined by its permanent or transitory characteristics (trade union, corporate cultural, economic, national, racial characteristics, etc.) For all these reasons, in cases such as terrorism by Islamic organisations, ETA, the IRA, FARC, etc., their actions may in some cases be classified as crimes against humanity and be submitted to the International Criminal Court.⁵⁶

However, for a crime of terrorism to constitute a crime against humanity certain specific circumstances are required. Emilio Cárdenas lists three:

- First, it must be framed in a wider, extended and systematic strategy. It must be part of a flow of terrorist attacks, with some central or higher element of planning — that is to say, it cannot simply consist of an isolated episode.
- Second, it must involve violent attacks perpetrated against the civilian population, since attacks targeting the military may constitute war crimes, depending on the circumstances.
- Third, there must be knowledge and intent on the part of the perpetrators — clearly a frequent condition.⁵⁷

Those who commit such crimes may therefore be assured of universal persecution preventing their impunity.⁵⁸ For example,

September 11 is different because of its context and its magnitude. By its sheer size, its wantonness, its ferocity, its callousness, its suddenness, the means used, the thousands of innocent civilians destroyed in minutes, September 11 qualifies as a crime against humanity, a category which, unlike ‘terrorism’, is well defined in international law and carries the common responsibility of humankind.⁵⁹

⁵⁴ *Ibid.*

⁵⁵ Remiro Brotóns, A, “Terrorismo, Mantenimiento de la Paz y Nuevo Orden”, 53(1) *Revista Española de Derecho Internacional* (2001) 128–129.

⁵⁶ Garzón, B, *El Terrorismo y el Estatuto de Roma*, (3rd edn, Ediciones de La Tierra 2002), 138.

⁵⁷ Cárdenas, EJ, “El Terrorismo Internacional, Crimen de Lesa Humanidad”, 2 *Agenda Internacional* (2004) 47–48.

⁵⁸ Robertson, G, *Crimes Against Humanity. The Struggle for Global Justice* (2nd ed, Penguin Books 2002), 25.

⁵⁹ Mallet, C, “The Original Sin: “Terrorism” or “Crime Against Humanity”?”, 34(2) *Case Western Reserve Journal of International Law* (2002) 246–247.

Moreover, as the international criminal tribunal has concluded ‘[e]ven an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution’.⁶⁰

With regard to this analysis, very significant international jurisprudence exists considering acts of terrorism to be crimes against humanity.⁶¹ For example, in the *Sebenica case*, the ICTY characterised ‘the crimes of terror and the forcible transfer of the women, children and elderly at Potocari as constituting crimes against humanity’.⁶² In the *Kvočka case*, the ICTY states that the use of concentration camps to terrorise Muslims, Croats and other non-Serbs detainees was considered to be a crime against humanity.⁶³ In the *Tadic Case*, the ICTY considered that the creation of an atmosphere of terror in the camps was a form of persecution.⁶⁴

III. Specific International Treaties Against Terrorism and the Implicit Authorization of the Exercise of Universal Jurisdiction for their Persecution and Repression

As already stated, several international conventions have been signed at a universal level. These include the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed in Tokyo on 14 September 1963; the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed in Montreal on 23 September 1971, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, signed in New York on 14 December 1973, the International Convention against the Taking of Hostages, signed in New York on 17 December 1979, the Convention on the Physical Protection of Nuclear Materials, signed in Vienna on 26 October 1979, the Protocol for the Suppression of Unlawful Acts of Violence at Airports serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971, signed in Montreal, on 24 February 1988, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, signed in Rome on 10 March 1988, the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, signed in Rome on 10 March 1988, the Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed in Montreal, on 1 March 1991, the International Convention for the Suppression of Terrorist Bombings, signed in New York, on 15 December 1997; the International Convention for the Suppression of the Financing of Terrorism, signed on 9 December 1999, the International Convention for the Suppression of Acts of Nuclear Terrorism, signed in New York, on 13 April 2005; the Amendment to the Convention on the Physical Protection of Nuclear Materials, signed in Vienna on 8 July 2005; the Protocol relating to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, signed in London, on 14 October 2005, the Protocol Relating to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, signed in London, on 14 October 2005, the Convention for the Suppression of Unlawful

⁶⁰ ICTY, *Prosecutor v Tadic*, Judgement, IT-94-17, 7 May 1997, para 649.

⁶¹ See the analysis by Arnold, R, “The Prosecution of Terrorism as a Crime Against Humanity”, 64 *ZaoRV* (2004) 987–992.

⁶² ICTY, *Prosecutor v Krstic*, TC Judgment, IT-98-33, 2 August 2001, para 607.

⁶³ ICTY, *Prosecutor v Kvočka*, TC Judgement, IT-98-30/1, 2 November 2001, para 117.

⁶⁴ ICTY, *Prosecutor v Tadic*, Second amended Indictment, IT-94-1-I, 14 December 1995, para 4.

Acts Related to International Civil Aviation, signed in Beijing, on 10 September 2010, and the Supplementary Protocol to the Convention for the Suppression of Unlawful Seizure of Aircraft, signed in Beijing, on 10 September 2010.⁶⁵ At a regional level, too, there are other Conventions such as the European Convention on the Repression of Terrorism, signed in Strasbourg, on 27 January 1977, and the Inter-American Convention against Terrorism, signed in Washington, on 3 June 2002.

Do any of these international conventions mention the possibility of exercising universal jurisdiction? The first thing to note is that these international agreements are only operative when the acts committed have a transnational element, that is, they do not operate when the terrorist act is committed within a state, by and against citizens of that state.⁶⁶ To take just one example, Article 3 of the International Convention for the Suppression of Terrorist Bombings 1997 expressly states that

This Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis under article 6, paragraph 1, or article 6, paragraph 2, of this Convention to exercise jurisdiction, except that the provisions of articles 10 to 15 shall, as appropriate, apply in those cases.⁶⁷

However, the fundamental bases of all these treaties against terrorist acts are intended to prevent impunity from occurring because there may be spaces where the pursuit and/or prosecution for these crimes may be avoided. Therefore, the principle of territoriality (which entitles the territorial state, including its ships and aircraft, to take pertinent penal actions) will operate. The principle of active nationality may also operate when the crime has been committed abroad by a national, against whom criminal action may be taken, in the event that there is no possibility of extraditing own citizens. The principle of passive nationality may also operate, i.e. when the victim has previously been a national.

Finally, the principle of conventional universal jurisdiction operates when the perpetrator of a terrorist act committed abroad is in national territory and cannot be extradited or when the state does not wish to extradite him, in exercise of the Principle of *aut dedere aut judicare*.⁶⁸ For example, Article 8 of the 1997 International Convention for the Suppression of Terrorist Bombings, states that:

⁶⁵ All of the mentioned Conventions can be consulted at < unodc.org/tldb/es/universal_instruments_list_NEW.html > (accessed 21 April 2018).

⁶⁶ According to Article 3 UN General Assembly, *United Nations Convention against Transnational Organized Crime: resolution / adopted by the General Assembly*, 8 January 2001, A/RES/55/25: “an offence is transnational in nature if:

(a) It is committed in more than one State;

(b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;

(c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or

(d) It is committed in one State but has substantial effects in another State.”

⁶⁷ Article 3, United Nations, *International Convention for the Suppression of Terrorist Bombings* (1997) 2149 UNTS 256.

⁶⁸ Hesenov, R, “Universal Jurisdiction for International Crimes - A Case Study”, *Eur J Crim Policy Res* (2013) 276–277 at <link.springer.com/content/pdf/10.1007%2Fs10610-012-9189-8.pdf> (accessed 21 April 2018). For a list of the numerous treaties on international criminal law that contain the obligation *aut dedere aut judicare*, see Bassiouni, MC, and Wise, EM, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Brill & Nijhoff 1995).

The State Party in the territory of which the alleged offender is present shall, in cases to which article 6 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.⁶⁹

This is also consistent with certain resolutions of the Security Council, such as Resolution 1373 (2001), in which the Council incorporates the principle of *aut dedere aut judicare*, determining that states must ‘ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice’. Resolutions 1456 (2003), 1566 (2004) and 1963 (2010) of the Security Council expressly specify the principle of *aut dedere aut judicare*.⁷⁰ This obligation to exercise the principle of *aut dedere aut judicare*, where *judicare* is understood as prosecution, is a general principle that generates an obligation of result.⁷¹ While it is true that the legal institution of universal jurisdiction need not necessarily be identified with the principle of *aut dedere aut judicare*, the direct link is obvious, as the Report on the Obligation to Extradite or Judge (*aut dedere aut judicare*) by Mr. Zdzislaw Galicki, Special Rapporteur of the United Nations, in 2006 clearly states.⁷² After all, the principle *aut dedere at judicare* derives from the principle of universality.⁷³ Therefore, the principle of *aut dedere aut judicare* implies an implicit qualification for the exercise of universal jurisdiction.

IV. Non-Conventional Grounds for the Application of Universal Jurisdiction for Acts of Terrorism

Like any other international legal norm, the powers attributed to the state for the exercise of universal jurisdiction may have the nature of customary law and even general international law, as a legal principle. A state could, therefore, exercise its right to universal jurisdiction—even in the absence of a conventional norm to protect it—on the grounds of customary norms or legal principles of international law.

Professor Sánchez Legido has conducted a rigorous study of the degree of consensus among conventional parties, to determine whether the presence of the principle of universal jurisdiction can be observed in general international law. He concludes that there are

signs pointing to the existence of a general consensus, in favour of universal jurisdiction, only with respect to the serious infractions provided for in the 1949

⁶⁹ Article 8, *International Convention for the Suppression of Terrorist Bombings*, *supra* nt 67.

⁷⁰ See an analysis in Bianchi, A, “Security “Council’s Anti-Terror Resolutions and Their Implementation by Member States”, 4(5) *Journal of International Criminal Justice* (2006) 1044–1073. Also, Plachta, M, “The Lockerbie Case: the role of the Security Council in enforcing the principle *aut dedere aut judicare*”, 12(1) *European Journal of International Law* (2001) 125–140.

⁷¹ Betti, S, “The duty to bring terrorists to justice and discretionary prosecution”, 4(5) *Journal of International Criminal Justice* (2006) 1104–1116.

⁷² United Nations, Galicki, Z, REPORT: *The Obligation to Extradite or Prosecute*, Doc. A/CN.4/571, 7 June 2006, at <legal.un.org/ilc/documentation/spanish/a_cn4_571.pdf> (accessed 21 April 2018).

⁷³ Henzelin, M, *Le principe de l’universalité en droit pénal international. Droit et obligation pour les États de poursuivre et juger selon le principe de l’universalité* (Helbing & Liechtenhahn 2000).

Geneva Conventions and Additional Protocol I, torture, human trafficking, drug trafficking and crimes against the safety of air navigation.⁷⁴

That is to say, he includes terrorist acts in the context of armed conflicts, torture or terrorist acts against air navigation. Professor Legido's doctrine is only partially valid although I understand his grounds for this statement. I have nothing to add on war crimes (especially when they become crimes against humanity), torture or crimes against air navigation (I would also include maritime navigation). I believe that in addition to genocide, he ignores other crimes related to terrorism, which today would not be excluded.

The basis of universal jurisdiction, then, even for conventionally established crimes, must be exclusively conventional for the crimes recognized in these international treaties. Today, one could not maintain that the principle of universal jurisdiction cannot be applied to the crime of genocide or the use of non-conventional weapons or bombs on the grounds that they are not covered by convention. The same is true for torture, for example. Moreover, the International Criminal Tribunal for the former Yugoslavia stated that

at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime.⁷⁵

Kamminga, for example, recognizes that even

States not parties to the Convention against Torture are entitled, but not obliged, to exercise universal jurisdiction in respect of torture on the basis of customary law... Perpetrators of torture committed in states that are not parties to the Convention against Torture may therefore be brought to trial elsewhere on the basis of universal jurisdiction.⁷⁶

Subsequently, the connection between torture and terrorist acts is very clear.

One general principle of law is of key importance to our analysis, *Delicta puniri reipublicae interest* (The punishment of crimes is in the public interest).⁷⁷ Obviously, this general principle of law may be transposed to the international legal order since it

⁷⁴ Sánchez Legido, A, *supra* nt 10, 84.

⁷⁵ ICTR, Trial Chamber, *Prosecutor v. Furundžija*, Judgment, IT-95-17/1-T, 10 December 1998, para 156.

⁷⁶ International Law Association, Committee on International Rights Law and Practice, Kamminga, MT, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences (Final ILA Report)*, London, 2000, 8.

⁷⁷ This principle is addressed by Mans Puigarnau, JM, *Los Principios Generales del Derecho – Repertorio de Reglas, Máximas y Aforismos Jurídicos con la Jurisprudencia del Tribunal Supremo de Justicia*, Bosch (Casa Editorial 1957), 131.

recognizes a fundamental value that informs all or part of a legal system.⁷⁸ From this perspective, universal jurisdiction is not a *prima facie* general principle of international law; rather, as a consequence of the *delicta puniri reipublicae interest* principle, it falls within the area of International Criminal Law. This, therefore, is a legal principle of International Criminal Law deduced from a general principle of law, but also induced by recognition of that principle. As Luis Peraza Parga recognizes, ‘the principle of universal jurisdiction is easy to explain, but complicated to interpret and execute’.⁷⁹

Some authors have questioned whether all states have an interest in combatting terrorism.⁸⁰ Indeed, there may be states that harbour or protect terrorists for their own interests. However, as Judge Tanaka stated in his dissenting opinion in the Judgment of the International Court of Justice in the Matter of South-West Africa, ‘the recognition of a principle by civilized nations (...) does not mean recognition by *all* civilized nations, nor does it mean recognition by an official act such as a legislative act’.⁸¹ These principles can, therefore, be deduced or induced, and their recognition or discovery is linked to jurisprudence, to doctrine or to the subjects of the legal system, through their own practice or unilateral acts.

Universal jurisdiction is a specific principle of International Criminal Law. It is therefore an abstract proposal that lends support to the idea that if a norm of International Criminal Law is violated (through acts classed as terrorist acts), those interested in the reestablishment of that norm must all be its subjects. It is the very basis by which states are obliged not to recognize unlawful situations. Furthermore, if we consider that these are serious violations of human rights, involving terrorist acts, which have an aspect that necessarily derives from natural law, then a legal principle can be said to exist attributing competence to the state for the exercise of universal jurisdiction against terrorist acts.

Universal jurisdiction is thus an ontological element of international law that determines the existence of and requirement for what is just. It is, then, an imperative of social awareness. In this sense, it is a legal principle. As Yoram Dinstein put it some years ago, individual responsibility means subjection to criminal sanctions. Dinstein states:

When an individual human being contravenes an international duty binding him directly, he commits an international offence and risks his life, liberty or property. Hence, international human duties are inextricably linked to the development of international criminal law.⁸²

However, the existence of the principle of universal jurisdiction is not sufficient for its exercise or for the attribution of powers to a judge to try the matters involved therein. It also requires an internal law attributing competence or, at the very least, a minimum practice that could be invoked as a basis for the existence of the principle in those systems that allow it. Is this, then, a subsidiary principle? This would appear to be the logical deduction if it is viewed as a corollary of the principle of *aut dedere aut judicare*. Nevertheless, the duty to *aut dedere aut judicare* is exclusively conventional in nature. In this conventional context, therefore, this obligation *aut dedere aut judicare* is a corollary of

⁷⁸ Schwarzenberger, G, “The Fundamental Principles of International Law”, 87 *RCADI* (1955) 201.

⁷⁹ La Insignia, Parga, LP, *La Jurisdicción Universal y el Ejemplo del Tribunal Constitucional Español*, October 2005, at <lainsignia.org/2005/octubre/int_006.htm> (accessed 21 April 2018).

⁸⁰ Morris, M, “Arresting Terrorism: Criminal Jurisdiction and IR” in Bianchi, A, ed, *Enforcing International Law Norms Against Terrorism* (Hart Publishing 2004), 68.

⁸¹ C.I.J., *Recueil*, 1951, 23 (emphasis added).

⁸² Dinstein, Y, “International Criminal Law”, 5 *Israel Yearbook on Human Rights* (1975) 55.

the principle of universal jurisdiction, whereas in the context of the general norms of international law, it is not. It is true that there is doctrine, albeit very qualified, which considers that the circumstances exist to establish a requirement to apply an *in fieri* rule of customary law, such as the acceptance of the *aut dedere aut judicare* duty, as stated in the preliminary report on the Obligation to Extradite or Judge (*aut dedere aut judicare*) by Zdzislaw Galicki, Special Rapporteur of the United Nations, in 2006.⁸³ However this cannot be conclusively stated at this time.

Perhaps, as we shall see, this duty to *aut dedere aut judicare* might be called —as Jaume Ferrer does— universal (or conditional) territorial jurisdiction,⁸⁴ which would explain the confusion. The invocation of the principle of universal jurisdiction might, therefore, be seen to be what some writers call a delegated principle. In this regard, however, I fully share Jean-Michael Simon's idea, when he says that it is not a matter of 'delegating a competence' but rather that this interest constitutes *per se* a sufficiently relevant contact in legal terms.⁸⁵ When universal jurisdiction is viewed as a corollary of the principle of *aut dedere aut judicare*, the obligation for the state is resolved with its obligation in the right of option. On the contrary, when the source of the principle of universal jurisdiction takes the form of a general norm, no duty is generated on the state, but rather, a right. Professor Sánchez Legido develops this idea, and he relies on doctrine, international jurisprudence, the position of the United Nations' International Law Commission and, even, the position of some cases of domestic law.⁸⁶

Luis Benavides considers that the principle of universal jurisdiction is an exceptional jurisdiction and an auxiliary principle, although he does not believe that the jurisdiction of the territorial state should take precedence⁸⁷ — a very important issue when it comes to the commission of terrorist acts. It cannot, therefore, be solely the corollary to the principle of *aut dedere aut judicare*, since this, assumes a duty of option, within the framework of the conventional. As Professor Benavides points out, universal jurisdiction is the result of the state's right to exercise this jurisdiction over the commission of certain international crimes, such as terrorist acts, but without obligation.

On the contrary, the principle of *aut dedere aut judicare* implies a duty of option or alternative within the conventional framework in which it is established. Indeed, Professor Benavides offers an interesting table showing the differences between the two legal institutions. Other differences include the fact that universal jurisdiction is a principle based on customary international law, which applies exceptionally to a limited number of crimes in all states. In the meantime, the principle of *aut dedere aut judicare* is a provision of the treaties, which today extends to more than twenty conventions applying to very different crimes, which can only be invoked by the States Parties.⁸⁸ One may or may not share his opinion, but one cannot deny that it is well grounded. However, we should consider that, today, the terrorist acts to which both principles can be applied coincide. For example, the legal basis for the existence of war crimes is not exclusively conventional. The same is true for genocide (where, incidentally, the Convention does

⁸³ United Nations, Galicki, Z, REPORT: *The Obligation to Extradite or Prosecute*, UN Doc A/CN.4/571, 7 June 2006, at <legal.un.org/ilc/documentation/spanish/a_cn4_571.pdf> (accessed 21 April 2018).

⁸⁴ Lloret, JF, "Impunidad versus inmunidad de jurisdicción: la sentencia del Tribunal Internacional de Justicia de 14 de febrero de 2002 (República Democrática del Congo contra Bélgica)", 18 *Anuario de Derecho Internacional* (2002) 315.

⁸⁵ Simon, JM, "Jurisdicción Universal. La perspectiva del Derecho Internacional Público" 4 *Revista Electrónica de Estudios Internacionales* (2002) 34–35.

⁸⁶ Sánchez Legido, A, *supra* nt 10, 254–258.

⁸⁷ Benavides, L, "The Universal Jurisdiction Principle: Nature and Scope", 1 *Anuario Mexicano de Derecho Internacional* (2001) 32.

⁸⁸ *Ibid*, 36.

not include the principle of *aut dedere aut judicare*), torture and many others. For this reason, among other considerations, the principle of reciprocity does not operate.

I therefore do not fully share the opinion of those, like Eric David,⁸⁹ who consider that the *aut dedere aut judicare* principle can be applied to genocide (like any terrorist act to which universal jurisdiction may be applied, as the International Tribunal for the former Yugoslavia does with respect to war crimes)⁹⁰ even if it is not expressly recognized in the 1948 Convention. I do believe, in contrast, that the principle of universal jurisdiction can be applied to it, since the legal basis is the violation of a rule of *ius cogens*, which is customary and not exclusively conventional in nature.⁹¹

This difference between the principle of universal jurisdiction and the principle of *aut dedere aut judicarem* is so important that it means that many writers (including leading magistrates of the International Court of Justice) have been unable to distinguish between the two principles. This has led some authors to consider that the application of the principle of universal jurisdiction requires the physical presence of the accused in the territory of the state in which it is being exercised, as if dealing with the principle of *aut dedere aut judicare*, for which such physical presence is required.⁹²

This is also the position of the International Law Commission of the United Nations, as stated in its last draft of 1996 on the Code of Crimes against the Peace and Security of Mankind. In Article 9, entitled ‘Obligation to extradite or prosecute’ (which in itself gives some idea of the IDC’s identification of the principle of universal jurisdiction with the principle of *aut dedere aut judicare*), the latter principle is specifically identified as a conventional principle (of the Code) which would force extradition or prosecution⁹³. This formulation, which by dint of repetition is becoming a classic, requires no further commentary. However, in his comments on Art. 8, the general rapporteur states that

Jurisdiction over the crimes covered by the Code is determined in the first case by international law and in the second case by national law. As regards international law, any State party is entitled to exercise jurisdiction over an individual allegedly responsible for a crime under international law set out in articles 17 to 20 who is present in its territory under the principle of ‘universal jurisdiction’ set forth in Article 9.⁹⁴

One can see how States Parties identify the two principles as one. I have already expressed my opinion on this matter. These are two principles of a different nature. In the conventional framework, the *aut dedere aut judicare* principle is a corollary of the principle of universal jurisdiction. In any case, had these statements been made in 2018 rather than 1996, they might have been quite different, since in the intervening time there have been increasing data pointing to other considerations, including internal rules and the jurisprudence of numerous domestic courts. The International Court of Justice had an opportunity to rule on this aspect yet failed to do so. I am referring to the Yerodia

⁸⁹ David, E, *Principes de droits des conflits armés* (3rd ed, Bruylant 2002), 668.

⁹⁰ ICTY, *Prosecutor v Blaškić*, Judgment, IT-95-14, 29 October 1997, para 29.

⁹¹ See also Kelly, MJ, “Cheating justice by cheating death: the doctrinal collision for prosecuting foreign terrorists - passage of *aut dedere aut judicare* into customary law and refusal to extradite based on the death penalty”, 20(3) *Arizona Journal of International and Comparative Law* (2003) 491–532.

⁹² On these issues see the magnificent analysis by Sánchez Legido, A, *supra* nt 10, 268–293.

⁹³ International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind with commentaries*, 5 July 1996, (48th plenary meeting) UN Doc A/51/10.

⁹⁴ *Ibid*, 29 comment on Article 8, para 7.

Ndombasi case, in which Congo brought a case against Belgium for its attempt to apply universal jurisdiction against A. Yerodia Ndombasi, the Congolese Minister of Foreign Affairs, for international crimes.⁹⁵ However, the basis of the case is different, since it involves immunity from jurisdiction rather than from universal jurisdiction. In this regard, it is interesting to note the new article 12 bis of the Belgian Code of Criminal Procedure, introduced by an act of 5 August 2003, which recognizes that the Belgian courts will be competent to try serious breaches of International Humanitarian Law (to which the law expressly refers) when a conventional or customary international law allows Belgium to prosecute the authors.⁹⁶

As we can see, the subsequent conclusion is that Belgium formally recognizes the possibility that there are customary international rules that allow it to prosecute defendants not under its jurisdiction for war crimes or crimes against humanity. In my personal judgement, therefore, judicial proceedings can be initiated, in application of the principle of universal jurisdiction, by an internal judicial body of a state, even when the accused is not physically present within its territory. This would not be possible if it were the *aut dedere aut judicare* principle that was being applied. The *aut dedere aut judicare* principle is different in nature and requires the physical presence of the person against whom the request for extradition has been made. In other words, the state has an obligation to choose one option or another, which is not the same as the right of the state to initiate the procedure of universal jurisdiction. This does not mean that the prosecution can be carried out in absentia, which is a practice prohibited by many internal legal systems and opposed by international human rights law.

Universal jurisdiction rests on the doctrine that the defendant is not prosecuted in the country in which he is a national or where he resides; acting subsidiarily, and in order to prevent impunity, another state may request his or her presence and make that request within the framework of a procedure for which it is competent under its internal legislation, under conventional international legislation or under the customary norm based on the principle of universal jurisdiction. As Professor Reinoso Barbero says,⁹⁷ the principle of universal jurisdiction cannot contradict other norms. As for the customary nature of universal jurisdiction, in the case of terrorist acts, we must logically proceed to examine the practice of states. The Israeli Supreme Court, in the *Eichman Case*, argued that the basis of its jurisdiction is customary law. However, at the time when the judgment was served, on 20 May 1962, no other judgment on the matter of genocide had ever been issued to establish the *opinio iuris* required by a customary norm⁹⁸. Nonetheless, the Supreme Court of Israel concluded that such crimes ‘violated the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilized nations’.⁹⁹

Most qualified authors have also established that universal jurisdiction is a general rule of a customary nature,¹⁰⁰ although there are others, who, with less ground,¹⁰¹ refute

⁹⁵ ICJ, *Judgment of 14 February, 2002*; Henzelin, M, “La compétence pénale universelle : Une question non résolue par l’arrêt Yerodia”, 107 *Revue Générale de Droit International Public* (2002) 819.

⁹⁶ The exact wording of this aspect of Belgian law is as follows: “...les juridictions belges sont également compétentes pour connaître des infractions commises hors du territoire du Royaume et visées par règle de droit international conventionnelle ou coutumière liant la Belgique, lorsque cette règle lui impose, de quelque manière que ce soit, de soumettre l’affaire à ses autorités compétentes pour l’exercice des poursuites”.

⁹⁷ Barbero, FR, *Los principios generales del Derecho en la jurisprudencia del Tribunal Supremo* (Editorial Dykinson 1987), 114–115.

⁹⁸ District Court of Jerusalem, *Attorney General of Israel v. Eichmann*, *International Law Report* vol. 36, 1962.

⁹⁹ *Id.*, 277.

¹⁰⁰ Among many others, see Rodley, N, *The Treatment of Prisoners under International Law* (2nd ed, Clarendon Press 1999), 130-133; Bodansky, D, “Human Rights and Universal Jurisdiction” in Gibney,

this finding. Professor Fletcher, for example, does not believe that customary law serves as a basis for criminal justice; in his opinion, the principle of *non bis in idem* is often at stake. The great concern of such writers involves the rights of the accused.¹⁰² Although I appreciate these arguments, I do not share them; in international law, custom is a very important source of law and, therefore, also of International Criminal Law. Indeed, the Statute of the International Criminal Court accepts customary norm as applicable law.¹⁰³

Some have argued that this norm is only practised in Western Europe and should not therefore be taken to signify a practice generally accepted as a right. This might well appear to be true, given the various cases taken in Spain, France,¹⁰⁴ Belgium, the United Kingdom and the Netherlands.¹⁰⁵ Moreover, it may be true that all the cases brought before the different jurisdictions have proved complex, among other reasons because they cover new ground with respect to ordinary criminal systems. However, Human Rights Watch believe that the fair and effective exercise of universal jurisdiction is achievable where there is the right combination of appropriate laws, adequate resources, institutional commitments and political will.¹⁰⁶

However, as I have said, this is a question of appearance; although it is true that most of the cases in which the exercise of universal jurisdiction could be invoked have taken place in the European legal world, many other states throughout the world are doing the same. They include Mexico, in the case of Manuel Cavallo, who was extradited to Spain for crimes against humanity, Afghanistan, which allowed British police officers to investigate the commission of crimes against humanity on its territory and Ghana, Chad, Togo and Guatemala, all of which allowed Belgian officers to investigate crimes subject to universal jurisdiction on their own territory.¹⁰⁷ It is, therefore, important to note that the application of universal jurisdiction, in addition to the many considerations that may be inferred from the different legal instruments, represents a customary norm that has been transposed into the internal order of many states, including Spain.

Giulia Pinzauti considers that the existence of an international norm, in this customary case, which establishes universal jurisdiction, is sufficient for an internal tribunal to be accused of acting *ultra vires*.¹⁰⁸ As I have stated, I believe she is correct; however, jurisdiction and lack of competence of a specific internal tribunal are two distinct issues. The principle of universal jurisdiction cannot be questioned on the

M, *World Justice: U.S. Courts and International Human Rights* (Westview Press 1991); Gilbert, G, "Crimes Sans Frontières: Jurisdictional Problems in English Law", 61 *British Yearbook of International Law* (1992) 63, 415, 423, 424; or in French doctrine Huët, A, and Koering-Joulin, R, *Droit pénal international* (Presses Universitaires de France 1994), 191.

¹⁰¹ Universal jurisdiction has been contested by Henry Kissinger, who even called it "judicial tyranny". See Kissinger, H, "The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny" in *Foreign Affairs*, July/August 2001. This opinion was rebutted by Roth, K, "The Case for Universal Jurisdiction" *Foreign Affairs*, September/October 2001.

¹⁰² Fletcher, G, "Against Universal Jurisdiction", 1 *Journal of International Criminal Justice* (2003) 580–584.

¹⁰³ See in this regard my work, Fernández Sánchez, PA, "El derecho aplicable por la Corte Penal Internacional" in Carrillo Salcedo, JA, ed, *La Criminalización de la Barbarie: la Corte Penal Internacional* (Ed. Consejo General del Poder Judicial 2000), 245-265.

¹⁰⁴ Stern, B, "La Compétence Universelle en France – le Cas des Crimes commis en ex-Yougoslavie et au Rwanda", 40 *German Yearbook of International Law* (1997) 280 et seq.

¹⁰⁵ On the exercise of universal jurisdiction throughout Europe, see Human Rights Watch, *Universal Jurisdiction in Europe, The State of the Art*, vol. 18, No. 5 (D), June 2006.

¹⁰⁶ *Ibid.*

¹⁰⁷ All these cases are fully documented in the aforementioned report by Human Rights Watch.

¹⁰⁸ Pinzauti, G, "An Instance of Reasonable Universality", 3(5) *Journal of International Criminal Justice* (2005) 1092–1105.

grounds of the incompetence of the judges of a given state to try acts committed during periods of armed conflict that may be classed as internal. Indeed, in the *Tadic Case*, the Tribunal for the Former Yugoslavia reminds us that:

customary international law imposes criminal liability for serious violations of common article 3, as supplemented by other general principles and rules on the protection of victims of human rights violations. internal armed conflicts.¹⁰⁹

This precisely entails the application of the principle of universal jurisdiction, which is not only a conventional norm provided for in many international treaties (as already deduced), but corresponds to a well-established *opinio iuris*.¹¹⁰ Indeed, the grounds adduced by the Israeli Court in the Eichmann Case, were as follows:

The 'right to punish' the accused by the State of Israel arises ... from two cumulative sources: a universal source (pertaining to the whole of mankind) which vests the right to prosecute and punish crimes of this order in every state within the family of nations; and a specific national source which gives the victim nation the right to try any who assault their existence.¹¹¹

Moreover, the existence or absence of the State of Israel at the time of the commission of crimes is not even questioned. In this sense, the Israeli Court ignored even conventional obligations, centring the basis of its argumentation on customary law, when it stated that

Israel has the faculty [...] as the guardian of international law and agent for its implementation, to prosecute to the appellant. This being the case, no significance attaches to the fact that the State of Israel did not exist when the crimes were perpetrated.¹¹²

In *Demjanjuk v. Petrovski*, the United States Court of Appeals, in 1985,¹¹³ decided to accede to Israel's request to extradite the former guard of a Nazi concentration camp, also based on the principle of universal jurisdiction, despite the fact that the crime the crime did not occur either on the territory of the United States or of Israel and had not been committed by or against Israeli citizens. This case was cited in the appeal proceedings in the Pinochet Case, before the British House of Lords, where Lord Browne-Wilkinson said:

[t]he *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences *jus cogens* may be punished by any state because the offenders are

¹⁰⁹ ICTY, *Prosecutor v Tadic*, Decision on the defence motion for interlocutory appeal on jurisdiction, IT-94-I-AR72, 2 October 1995, paras 132, 69–70.

¹¹⁰ See in this respect Gutiérrez Espada, C, "El Derecho Internacional Humanitario y los conflictos internos (Aprovechando el Asunto TADIC)", 68 *Revista Española de Derecho Militar* (1996), 13 and ff., especially 32 and ff.

¹¹¹ 1st. District Court of Jerusalem, *Attorney General of Israel v. Eichmann*, *International Law Report* 36, 1962, para 39.

¹¹² *Id.*, 304.

¹¹³ US Court of Appeal, Sixth Circuit, *Demjanjuk v Petrovsky*, 776 F., Second 571, 1985, cert. Denied, 475, U.S. 1016, 1986.

‘common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution’.¹¹⁴

The famous *Filartiga* Case, among others, confirmed this view, given that a US Federal Court tried Mr. *Filartiga*, a former member of the Paraguayan political police, despite the fact that the crimes had not been committed in the territory of the United States and did not involve US citizens.¹¹⁵

The principle of universal jurisdiction, including within the framework of terrorist acts, has been sufficiently invoked by states (and not only by Western European states) to construct it as part of the *corpus iuris* of international law.¹¹⁶ It is true that there is a growing tide of fear regarding the exercise of universal jurisdiction due to the political problems it might raise. It is perhaps for this reason that the EU Directive on combatting terrorism provides states with a wide margin of appreciation to establish their jurisdiction over the offenses covered in the directive.¹¹⁷

There are already many internal rules in place allowing the exercise of universal jurisdiction, without requiring its use to be bound to international treaties. Some refer to specific crimes, such as the Austrian Criminal Code,¹¹⁸ the Organic Act of the Spanish Judiciary (which lists certain crimes, including terrorism, although with limitations, in addition to others provided for in binding treaties for Spain), the Belarusian model (similar to Spain’s), the Belgian model,¹¹⁹ the Canadian model¹²⁰ and the Danish model.¹²¹ Others expressly mention this type of jurisdiction by referring to its general rules. This is the case of Croatia,¹²² the Honduran Criminal Code,¹²³ the Ethiopian Criminal Code,¹²⁴ the Finnish Criminal Code¹²⁵ and the Criminal Code of Tajikistan.¹²⁶

¹¹⁴ See this case in *International Legal Material*, No. 38, 589.

¹¹⁵ US Court of Appeal, Second Circuit, *Filartiga v Pena-Irala*, 630 F., Second 876, 1980, para 881–883.

¹¹⁶ The first case on the African continent, in which universal jurisdiction was invoked, was Senegal. See Cissé, A, “Droit sénégalais” in Cassese, A, and Delmas-Marty, M, eds, *Juridictions nationales et crimes internationaux* (Press Universitaires de France 2002), 437 and ff.

¹¹⁷ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L88/6.

¹¹⁸ See the case brought before the Austrian courts on universal jurisdiction in Marschik, A, “The Politics of Prosecution: European National Approaches to War Crimes” in McCormack, TLH and Simpson, GJ, eds, *The Law of War Crimes, National and International Approaches* (Kluwer 1997), 79–81.

¹¹⁹ See *Loi relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions, 16 June 1993* in *Moniteur Belge*, 5 August 1993.

¹²⁰ See Supreme Court of Canada, *Regina v. Finta*, 24 March 1994. For commentary on this case, see Cotler, I, 90 *American Journal of International Law* (1996) 460. For a more recent example, see Torroja Mateu, H, “La competencia de la jurisdicción canadiense en materia de crímenes de Derecho Internacional: el trayecto hacia un *refugio inseguro*”, 11 *Revista Electrónica de Estudios Interacionales* (2006) 10.

¹²¹ See Supreme Court of Denmark, *Prosecution v. Refik Saric*, in *Ugeskrift for Retsvaesen* 195, 15 August 1995, para 838.

¹²² “... provisions of international law and international treaties or intergovernmental agreements”.

¹²³ “... or when the principles of international law allow courts to exercise such jurisdiction”.

¹²⁴ *Article 17, Criminal Code* (Ethiopia) 2010, *Proclamation No. 414/2004* (Ethiopia) 2004, “Any person who has committed in a foreign country: a) an offence against international law or an international offence specified in Ethiopian legislation, or an international treaty or a convention to which Ethiopia has adhered (...) shall be liable to trial in Ethiopia in accordance with the provisions of this Code”.

¹²⁵ “...is based on an international agreement binding on Finland or on another statute or regulation internationally binding on Finland”.

¹²⁶ “... a) they have committed a crime provided for by the rules of international law recognized by the Republic of Tajikistan or by international treaties and agreements”.

However, recognizing the principle of universal jurisdiction only for certain crimes does not mean that the principle is not applicable to others.¹²⁷ There can be no contradiction between internal norms and international ones; if there were such discrepancies, it might generate international liability. By this I mean that it is desirable for states, in the exercise of their sovereignty, to be able to resort to universal jurisdiction for some crimes; however, if there are other crimes to which, at international level, universal jurisdiction applies, the states cannot use internal law as grounds for violating an international conventional norm.¹²⁸

The Spanish courts can try cases involving criminal acts committed by foreign nationals abroad, in cases of genocide¹²⁹ (Article 607 of the Criminal Code)¹³⁰ or the unlawful seizure of aircraft (Articles 39 and 40 of Law 29/1964, Criminal and Procedural of Air Navigation),¹³¹ which is classed as a terrorist act. We can see, then, that in these crimes, Spanish jurisdiction is very broad and does not rely exclusively on conventional rules and accepts universal jurisdiction. The Spanish courts can also try crimes committed abroad by foreign nationals against the property, rights or interests of a Spanish national, with explicit reference (Article 23.4 LOPJ)¹³² to the crime of terrorism and the crime of torture. The judges of the National Court have presided over several proceedings against Pinochet¹³³ and against the Argentine military,¹³⁴ despite internal laws on due obedience or amnesties in their respective countries.¹³⁵

On 19 April 2005, the Spanish National Court issued a judgment against former Argentine naval officer Adolfo Scilingo,¹³⁶ sentencing him to 640 years in prison for crimes against humanity committed during the last Argentine military government (1976 – 1983). Despite the attention it received, this was the first sentence to condemn a foreign national for crimes committed abroad against foreign nationals, in application of the principle of universal jurisdiction.

However, this ruling received different reactions in the doctrine. Tomuschat, for example, considers that the grounds are not universal jurisdiction, as the sentence claims, arguing that the crimes committed by Scilingo were neither acts of genocide nor terrorism, but crimes against humanity for which Spanish national law does not provide this type of jurisdiction. The only possible argument of the National Court was the

¹²⁷ On crimes against humanity, see Peyro Llopis, A, *La competencia universal en matière de crimes contre l'humanité* (Bruylant 2003).

¹²⁸ In this regard, Article 27, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 is clear: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

¹²⁹ Recall that, strictly speaking, the UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948 78 UNTS 277 of which Spain is a party, does not include the principle *aut dedere aut judicare*, and therefore Spain, conventionally speaking, is not obliged to include this principle in its internal order.

¹³⁰ *Organic Law No. 10/1995 of November 23, 1995, as amended up to Law No. 4/2015 of April 27, 2015* (Spain) 2015.

¹³¹ *Ley 209/1964, de 24 de diciembre, Penal y Procesal de la Navegación Aérea* (Spain) 1964.

¹³² *Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial* (Spain) 1985.

¹³³ Spain, Order of the Criminal Chamber of the National Court of 4 November 1998, and Spain, Order of the Criminal Chamber of the National Court of 5 November 1998.

¹³⁴ See the cases of the Argentine military Ricardo Miguel Caballo & Adolfo Scilingo (Judgment of the Criminal Chamber of the National Court, of 19 April 2005).

¹³⁵ Note that the Supreme Court of Argentina, in the Simon Case, of 14 June 2005, declared the Due Obedience and Clean Slate laws to be unconstitutional.

¹³⁶ Gil, A, "The Flaws of the Scilingo Judgement", 3(5) *Journal of International Criminal Justice* (2005) 1082–1091.

perpetrator's presence on Spanish soil, having arrived in the country to testify in another trial relating to the so-called 'death flights'.¹³⁷

Conclusion

The international crime of terrorism has only relatively recently been created. Numerous international treaties establish the possibility of the exercise of universal jurisdiction. For example, in the framework of International Humanitarian Law, war crimes specifically classed as terrorist acts and even those terrorist acts whose human consequences are mentioned, expressly include the possibility of the exercise of universal jurisdiction, which goes beyond the simple application of the principle of *aut dedere aut judicare*.

This is also the case when the classification of terrorist acts coincides with crimes against humanity. In addition, there are specific terrorist acts for which international law has provided international treaties that generate obligations, including the principle of *aut dedere aut judicare* and even the exercise of its parent principle of universal jurisdiction.

Today, no one would argue that torture or genocide or terrorism constitute assaults only on individual victims. Rather, they are considered to have a collective victim: the international community. Therefore, their criminalisation cannot be limited to the territory of the state with jurisdiction over the victim, the offender or the commission of the facts, but to the entire territory of the planet.

This is reflected in the attitude of the states in international scenarios, or in their own internal legal systems, as well as in some jurisprudence and much of the doctrine. It has served, then, as a *ratio decidendi* for numerous internal rules and in numerous court cases. The corollary of the principle of universal jurisdiction in the conventional framework is the duty of *aut dedere aut judicare*, which differs from its parent principle in that it imposes an obligation of option, while the parent principle takes the form of law without constituting a legal obligation. The legal principle of universal jurisdiction has served as a basis for states to initiate a process of affirmation of the norm, through which it has been incorporated into the legal order in the form of customary norms.

Such legal manifestations can be seen in the amendments and incorporations being made to domestic legal systems, in the acceptance of cooperation in judicial or police assistance when it comes to the exercise of this jurisdiction by other states, in the lack of persistent objectors to the generality of the customary norm, etc.

Obviously, the *opinio iuris* of this norm is clearly determined by the position of the subjects of the right. It is constructed by their stances in international organizations, their internal legal reforms and their attempts to limit it. However, it is also true that some states, more out of fear than reason, are beginning to turn away from establishing specific competences for their own courts, even if they cannot renounce the universal jurisdiction, to which they are subject by their own *opinio iuris*.

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¹³⁷ Tomuschat, C, "Issues of Universal Jurisdiction in the Scilingo Case", 3(5) *Journal of International Criminal Justice* (2005) 1074–1081.