20-9-2003

Functie van de NAVO-maatregelen van de Joegoslavië-verdragen o.g.v. hun wet tot implementatie aan het ICTY

→ zie blz 82-83 Universal Jurisdiction → 10 R 58/006/2007 Media die wel in Frankrijk aangeklaagd werd

amnesty international

UNIVERSAL JURISDICTION:

The duty of states to enact and implement legislation

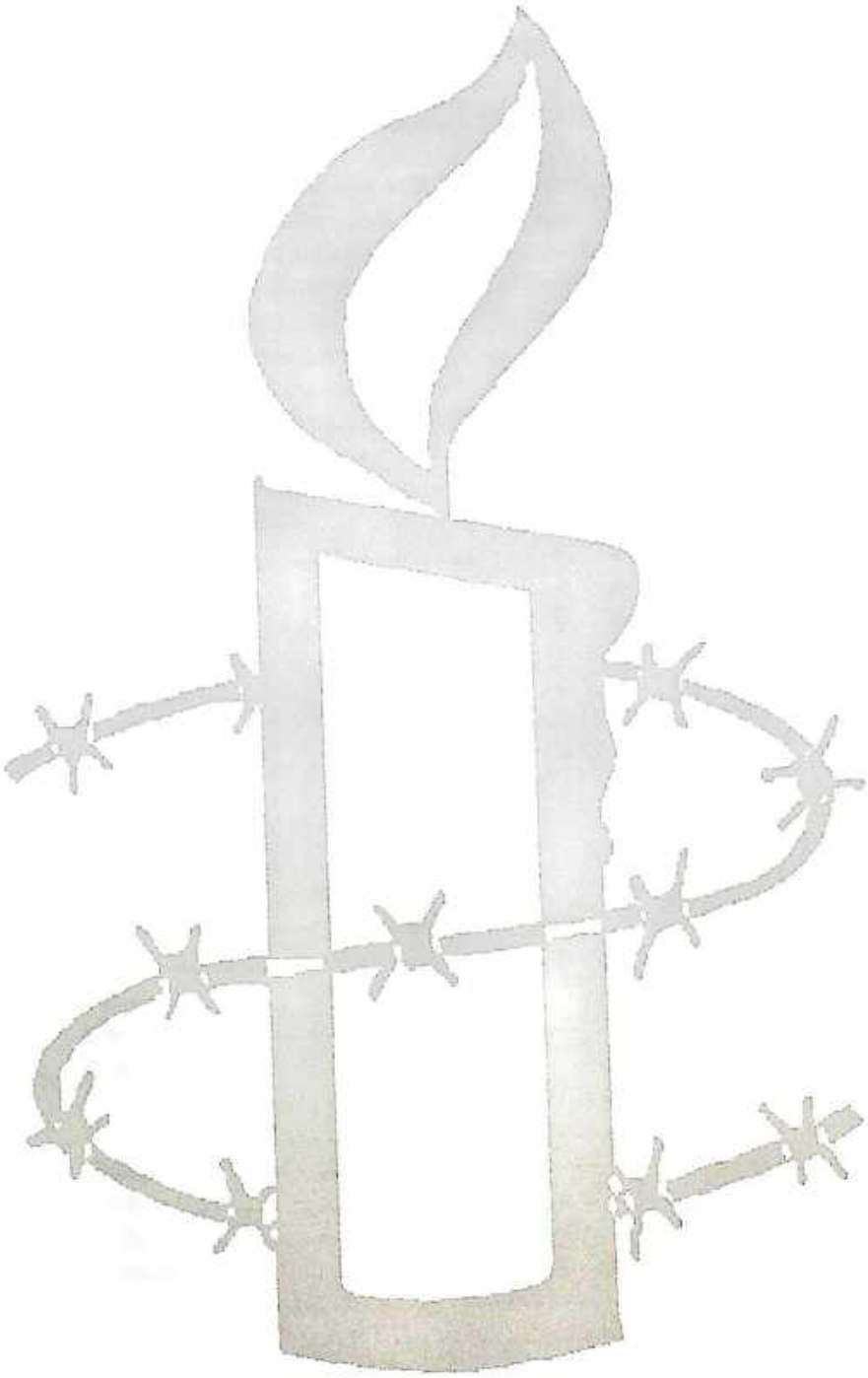
Chapter Four - Part A
(War crimes: State practice at the national level)
(Algeria to Hungary)

"The following are subject to the criminal jurisdiction of Ecuador: . . . (6) Ecuadoreans or foreigners who commit offences against International Law or offences envisioned in International Conventions or Treaties which are in effect at the time, as long as they have not been prosecuted in another State . . ."

Ecuadoran Code of Criminal Procedure of 2000, Art. 18 (6)

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UNIVERSAL JURISDICTION:
The duty of states to enact and enforce legislation - Chapter Four - Part A (Algeria to Hungary)

WAR CRIMES: STATE PRACTICE AT THE NATIONAL LEVEL

I. Types of legislation

At least 120 states have enacted legislation which would appear to permit their courts to exercise universal jurisdiction over conduct amounting to some or all war crimes in certain circumstances. The exact number is difficult to determine and may well be higher, but the absence of authoritative commentary or jurisprudence, as well as ambiguities in wording, in many countries sometimes makes it difficult to say with certainty whether courts may exercise universal jurisdiction over conduct amounting to war crimes. Much of the legislation remains inadequate in terms of the scope of crimes covered, the definitions of those crimes, the principles of criminal responsibility, defences and other obstacles to effective prosecution. However, one can say with some degree of certainty that almost two-thirds of all states permit their courts to exercise universal jurisdiction over some conduct amounting to war crimes and that in many cases that legislation has been in existence for a long time. Redressing the inadequacies in national legislation, as well as persuading states to enact effective legislation in the first place, will be a major challenge in the fight against impunity in the years ahead. Amnesty International sets forth a number of recommendations for action in Chapter Fifteen.

Legislation permitting courts to exercise universal jurisdiction over war crimes usually falls into one of five basic models. Some legislation has provisions which fall into more than one category. The five main models are: express authorization to exercise universal jurisdiction over war crimes, universal jurisdiction over ordinary crimes which would constitute war crimes if committed during armed conflict, universal jurisdiction over crimes defined or listed in treaties, universal jurisdiction over crimes under customary international law or general principles of law and constitutions or legislation directly incorporating international law.

A. Express authorization to exercise universal jurisdiction over war crimes

Older legislation adopting this first model usually provides national courts with universal jurisdiction over ***war crimes under customary international law***, often using the term "laws and customs of war", which traditionally was limited to international armed conflict. Since all grave breaches of the Geneva Conventions and most grave breaches of Protocol I are generally recognized as war crimes under customary international law, such older legislation necessarily covers such grave breaches. Therefore, such laws often will fulfill the obligation of states parties to enact legislation providing for trial of persons suspected of grave breaches, provided that they do not contain limitations which are inconsistent with international law.

However, since the early 1950s, many states have enacted legislation expressly providing national courts with universal jurisdiction over ***grave breaches***. The largest number of these states, mostly members of the ***Commonwealth***, have done so through similar Geneva Conventions Acts. Some of these acts have been updated to give courts universal jurisdiction over grave breaches of Protocol I and serious violations of Protocol II when the states have become parties to those protocols.

Some of the older legislation appears to be limited to ***war crimes committed during international armed conflict***. However, much of the legislation would also permit courts to exercise universal jurisdiction over ***war crimes committed during non-international armed conflict***. This legislation falls into two types. First, in some of the older legislation, the definitions of "armed conflict" or "war crimes" can be ***interpreted*** to include war crimes committed during non-international armed conflict in the light of the contemporary understanding that the scope of war crimes and violations of the laws and customs of war includes war crimes committed in such conflict. Second, in some recent legislation, such as that of ***Belgium, Canada*** and ***New Zealand***, courts are ***expressly*** given universal jurisdiction over war crimes in non-international armed conflict.

B. Universal jurisdiction over ordinary crimes which would constitute war crimes if committed during armed conflict

A large number of states, such as the ***Democratic Republic of the Congo*** and ***Norway***, have enacted legislation using this second model which gives their courts universal jurisdiction over certain ***ordinary crimes under national law***, such as murder and crimes of sexual violence, which could amount to war crimes if committed during an armed conflict. Although such legislation can be used to investigate and prosecute war crimes in a limited number of cases, it is unsatisfactory. First, by treating such conduct as ordinary crimes, it does not recognize their gravity as war crimes and the concern of the international community to prevent and punish them. Second, it fails to take into account the special considerations of armed conflict, as well as special principles of criminal responsibility (such as command and superior responsibility) and prohibitions of certain defences (such as superior orders). Third, such laws do not permit courts to exercise jurisdiction over a wide range of war crimes, such as launching an indiscriminate attack, which do not easily fit within definitions of ordinary crimes. Some states, although not providing universal jurisdiction over ordinary crimes, provide for ***extradition to another state***. In addition, many states have enacted legislation implementing treaties providing for universal jurisdiction over ***crimes of international concern***, such as hostage-taking, some of which can amount to war crimes if they are committed during armed conflict (see Chapter Thirteen, Section II), but this subject is largely beyond the scope of this paper.

C. Universal jurisdiction over crimes defined or listed in treaties

Universal jurisdiction legislation following the third model, which authorizes courts to implement treaty obligations to prosecute persons suspected of crimes defined or listed in treaties (without specifying that they must be war crimes), falls into several basic groups. Some legislation refers to ***treaties simply defining or listing crimes***. Other legislation, such as certain provisions of ***German*** legislation, is more narrow and mentions only those ***treaties defining or listing crimes which require states parties to prosecute suspects***. Some legislation is even more restrictive and applies only to ***treaties that have an extradite or try obligation.*** In most cases, the legislation limits the ***treaties to those the forum has ratified***. However, sometimes the legislation refers to ***any international treaty, even those which have not been ratified by the forum state***, and sometimes even ***without specifying that the treaty must be in force***.

A number of states with universal jurisdiction legislation in this third model have signed, but not yet ratified, certain international humanitarian law treaties. It is important to discuss their legislation for at least two reasons. First, a state which has signed but not yet ratified a treaty is ***obliged under international law not to take any steps which would tend to defeat the object and purpose of the***

treaty pending a decision on ratification.[1] A state which harboured a person suspected of crimes under international law by failing to exercise universal jurisdiction or extradite persons in a state's territory would be acting in a way which would appear to defeat the treaty's object and purpose. Second, some states have not signed or have not ratified such treaties, but the existence of national legislation providing for universal jurisdiction over crimes defined in treaties indicates that when they eventually ratify the treaties, their courts may be able to exercise such jurisdiction over violations. For example, as of 1 September 2001, 112 of the 139 states which have signed the Rome Statute had not yet ratified it, but most have pledged to do so as soon as possible. Not only does that treaty define crimes for the purpose of the Court's jurisdiction, but it also makes clear the duty of every state to investigate and prosecute those responsible for such crimes, without suggesting that the duty is limited to territorial states.[2]

D. Universal jurisdiction over crimes under customary international law or general principles of law

Some states have adopted legislation or issued executive decrees employing the fourth model, which takes two forms. First, some legislation or decrees provide that courts may exercise universal jurisdiction over crimes under international customary law, such as ***Ecuador, Ethiopia, Georgia*** and ***Honduras.*** For example, in many of the trials in Allied military courts and commissions of persons charged with war crimes and crimes against humanity, particularly those of ***Canada,*** the ***United Kingdom*** and the ***United States***, military courts and commissions were authorized to apply international law directly. Second, other legislative provisions or executive decrees have authorized courts to try persons for crimes under general principles of law, such as ***Honduras, the Former Yugoslav Republic of Macedonia, the Philippines*** and ***Tajikistan.***

E. Constitutions or legislation directly incorporating international law

Another group of states provide in their national constitutions or legislation that ***international law, either conventional or customary, is part of national law***, either automatically or after acceptance by the state, and generally overriding national legislation.

Automatic incorporation on ratification. Some states provide in their national constitutions or legislation that ***international law, either conventional or customary, is part of national law***, but do not expressly refer to jurisdiction. In some of these states following this fifth model, such as ***Algeria, Chile,***

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[1] Article 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) of the Vienna Convention on the Law of Treaties provides:

"A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

Most of the provisions of the Vienna Convention, including Article 18, are considered to reflect customary law. Robert Jennings & Arthur Watts, 1 *Oppenheim's International Law* 1199, 1239. (London and New York: Longman 9th ed. 1992) (paperback edition 1996).

[2] In the Preamble, the states parties: (1) declare that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation", (2) state that they are "determined to put an end to impunity for the perpetrators of these crimes" and (3) recall that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".

Egypt, Greece, such provisions have been interpreted, by the government - usually in reports to the Committee against Torture - or by courts or commentators, to permit courts to apply international law directly, including customary law rules or treaty provisions concerning both the definitions of crimes and the exercise of universal jurisdiction, and to investigate and prosecute persons accused of crimes under international law, such as war crimes. In other states with automatic incorporation provisions in their constitutions, reports or statements by the government, such as ***Afghanistan,*** are somewhat ambiguous and, in the absence of further state practice or other evidence, it is not entirely clear whether national courts can exercise universal jurisdiction.[3]

However, in some states today which have such constitutional or legislative provisions, such as ***Senegal,*** courts cannot exercise universal jurisdiction unless both the crime and the penalty are defined in the national criminal code or can only do so in limited circumstances, such as military courts sitting outside the country. In others, courts are likely to be reluctant to do so.

II. Country by country review (Algeria to Hungary)

This section describes legislation and other state practice at the national level in approximately two thirds of all states. Of those countries approximately 120 have legislation permitting their courts to exercise universal jurisdiction to a certain extent over certain conduct amounting to war crimes. In a few states, such as the***Dominican Republic,*** universal jurisdiction is restricted to the rare, but occasionally important (as in the ***United Kingdom*** under the War Crimes Act 1991), situation where the suspect acquires the nationality of the forum state after the crime has occurred. In other countries discussed in this chapter, such as ***Egypt, Mexico,*** the question whether courts may exercise universal jurisdiction over certain conduct amounting to war crimes remains unresolved. In addition to the legislation or draft legislation of countries which are members of the Southern African Development Community (SADC) discussed below, it is expected that most of the other SADC members will include universal jurisdiction over war crimes when they enact implementing legislation for the Rome Statute, including Angola, Namibia and Zambia.[4] This chapter also reviews other state practice, including criminal investigations based on universal jurisdiction in at least 10 countries of war crimes committed since the outbreak of the Second World War.

• ***Algeria:*** There are two possible bases for Algerian courts to exercise universal jurisdiction over grave breaches of the Geneva Conventions, and, possibly, other war crimes.

[3] In the initial report of Afghanistan to the Committee against Torture, U.N. Doc. CAT/C/5/Add.31, 14 February 1992, para. 27, the government stated that Article 145 of the Constitution provided that treaties ratified by Afghanistan had precedence over contrary national law, but in reporting on the extent to which it had implemented Article 5 of the Convention against Torture, it cited only provisions of the Penal Code based on territoriality, active and passive personality and protective jurisdiction (paras 31-32) and in discussing implementation of Article 7 (1), it did not mention any form of extraterritorial jurisdiction.

[4] At the conclusion of the SADC Workshop on Ratification of the Rome Statute of the International Criminal Court in Pretoria (5 to 9 July 1999), ministers adopted the Pretoria Statement of Common Understanding on the International Criminal Court affirming "the need for implementing legislation internally to give effect to the Rome Statute" and recommended "to the relevant authorities the use of the Ratification Kit developed by the SADC Conference on [the] International Criminal Court". The Ratification Kit included a Model Enabling Act, which states in paragraph 5 (ii) that "[a]ny person who commits any of the crimes specified in Articles 6, 7 and 8 [of the Rome Statute] outside (name of the Country) may be prosecuted and punished for that crime in (name of the Country) as if the crime had been committed in (name of Country)". The members of SADC are: Angola, Botswana, Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

First, universal jurisdiction provisions in treaties concerning the status of persons ratified by Algeria are directly enforceable in national courts, so its courts may exercise universal jurisdiction over grave breaches of the Geneva Conventions. As the government has explained,

> "19. Under article 122 of the Constitution, treaties relating to the status of persons are ratified by the President of the Republic after they have been expressly approved by the National People's Assembly. Article 123 adds that 'treaties ratified by the President of the Republic, under the conditions specified in the Constitution, take precedence over the law". . . . No special procedure is required for the incorporation of an international convention into the Algerian system of law. Such a convention becomes an integral part of Algerian law once it has been approved and ratified in accordance with the law. Furthermore, under the Constitution it takes precedence over Algerian legislation.
>
> 20. As a result, treaties which have been duly ratified rank second in the hierarchy of legal provisions, after the Constitution and before the law. A law which is contrary to an international convention cannot be applied because the provisions of the convention take precedence over such a law.
>
> 21. The provisions of a convention which has been ratified in accordance with the law may be invoked directly before the courts."[5]

The Constitutional Council has reaffirmed this principle.[6] In the context of the obligation in Article 7 of the Convention against Torture to extradite or prosecute persons suspected of torture, the government has stated that "in the absence of specific provisions on the subject in Algerian legislation, the provisions of the Convention apply".[7]

Second, Article 584 of the Criminal Procedure Code permits Algerian courts to exercise universal jurisdiction over persons who committed a crime under Algerian law and subsequently acquired Algerian citizenship.[8]

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[5] Initial report of Algeria to the Committee against Torture, U.N. Doc. CAT/C/9/Add.5 (1991), paras 19-21. The government reiterated this interpretation in its second periodic report to the Committee against Torture, U.N. Doc. CAT/C/25/Add.8 (1996), paras 54-55.

[6] The Constitutional Council, in its Decision No. 1 D.L.C.C. 89 of 20 August 1989 concerning the election code, referring to the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights, stated that "every convention becomes an integral part of Algerian law after it has been ratified and published" and "under article 123 of the constitution it takes precedence over Algerian law and any Algerian citizen may invoke it before the courts". Quoted in *Ibid.*, para. 22.

[7] *Ibid.*, para. 82.

[8] Criminal Procedure Code, 1999, Art. 584 ("In the cases envisaged in Articles 582 and 583 above, prosecution or judgment may take place even if the accused has only acquired Algerian nationality after the commission of the felony or misdemeanour."). The original French text reads: *"Dans les cas prévus aux articles 582 et 583 ci-dessus, la poursuite ou le jugement peut avoir lieu même lorsque l'inculpé n'a acquis la nationalité algérienne qu'après l'accomplissement du crime ou délit." Code de procédure pénale, 1999, art. 584.* Article 582 bars a prosecution or a judgment if the suspect is not in Algeria or if the suspect had a final judgment and, in the case of a conviction, has served the sentence, the statute of limitations has expired or a pardon has been given. Article 583 permits couts to exercise jurisdiction over conduct abroad by an Algerian which is a misdemeanour (*délit*), either in Algeria or in the territorial state.

As Algeria has ratified the Geneva Conventions, under this principle its courts may exercise universal jurisdiction over conduct amounting to grave breaches of the Geneva Conventions. As of 1 September 2001 it had not yet signed or ratified Protocols I and II. It has signed the Rome Statute, but it had not yet ratified it as of 1 September 2001. It is not known if Algeria has defined grave breaches or other war crimes as crimes under national law, so prosecutions for these crimes may have to be brought for ordinary crimes, such as murder, abduction, assault or rape.

• ***Antigua and Barbuda:*** It appears that national courts have been able to exercise universal jurisdiction over grave breaches of the Geneva Conventions abroad since 1959.

Although Antigua and Barbuda is not known to have a Geneva Conventions Act, the United Kingdom's Geneva Conventions Act 1957 applied to the West Indies Federation under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below), at least before 1 January 1970. Antigua and Barbuda become independent on 1 November 1981, the day after the Antigua and Barbuda Constitution Order 1981 came into operation.[9] Paragraph 2 (2) of the Transitional Provisions provided that the existing laws were to continue in effect from 1 November 1981 and, as far as is known, the 1959 Order in Council has not been repealed either before or after independence.[10]

Antigua and Barbuda is a party to the Geneva Conventions and Protocol I and II. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it.

• ***Argentina:*** It appears that the Constitution of 1853 (which has undergone several reforms, the last one in 1994) has permitted Argentine courts ever since to exercise universal jurisdiction over conduct amounting to war crimes that is a crime under national law.[11]

The Argentinean Law on Extradition of Foreigners of 1885 (Law 1612) provided in Article 5 for a general obligation *aut dedere aut judicare* for ordinary crimes committed by foreigners outside the territory of Argentina.[12] In 1997 a new Extradition Law was passed which no longer includes a general

[9] The Antigua and Barbuda Constitution Order 1981, No. 1106, made 31 July 1981 and came into operation 31 October 1981, annexing the Constitution of Antigua and Barbuda in Schedule 1 and Transitional Provisions in Schedule 2.

[10] Paragraph 2 (3) of the Transitional Provisions states that "[f]or the purposes of this paragraph the expression 'existing law' means any Act . . . made in pursuance of or continued in force by or under the former Constitution and having effect as part of the law of Antigua on 31st October 1981 and includes any . . . Order in Council . . . made under any such Act . . . to the extent that it so had effect on that date."

[11] Although Argentina has ratified the four Geneva Conventions and Protocols I and II, these treaties have not yet been given special constitutional status under Article 75 (22) of the Constitution (article introduced in 1994). That article provides that treaties on human rights not listed in that provision, "after being approved by Congress, shall require the vote of two-thirds of the totality of the members of each Chamber in order to enjoy standing on the same level as the Constitution." However, Congress has not approved these conventions and protocols pursuant to this special procedure.

[12] Art.5 Law of Extradition of Foreigners (1885). The original text in Spanish reads:
"En los casos en que con arreglo a las disposiciones de esta ley, el Gobierno de la República no deba entregar a los delincuentes solicitados, éstos deberán ser juzgados por los tribunales del país, aplicándoseles las penas establecidas por las leyes a los crímenes o delitos cometidos en el territorio de la República.
La sentencia o resolución definitiva deberá comunicarse al gobierno reclamante."
(For the English translation see under (2) legislation).

obligation *aut dedere aut judicare*. However, that does not necessarily mean that there is no such obligation in the Argentinean legal system.

(1) The Constitution. The government stated in 1996 that

"in conformity with articles 116 and 117 of the Constitution, the Supreme Court has ruled that international custom and the general principles of law - the sources of international law, in accordance with article 38 of the Statute of the International Court of Justice - directly constitute the legal system. In a number of cases, therefore, the Supreme Court has upheld the 'law of peoples' and the 'general principles of international law' in applying various rules of international law."[13]

Therefore, under this doctrine, Argentinean courts can apply customary international law and general principles of international law.

In addition, two constitutional provisions permit Argentine courts to exercise universal jurisdiction over crimes committed abroad.

First, under Article 118 of the Constitution of Argentina, introduced in 1853, Argentine courts may exercise jurisdiction over violations of international norms outside the national borders. Article 118 provides:

> "All ordinary criminal trials not resulting from the power of impeachment granted to the Chamber of Deputies shall be concluded by juries, once this institution is established in the Republic. The proceedings in these trials shall take place in the same Province where the crime was committed; but when the crime is committed outside the borders of the Nation, in violation of international norms, Congress shall determine by a special law the place where the trial is to be held." [14]

According to several commentaries, this provision introduced a century and a half ago indicates that Argentine law considers that international law is a source of law and that its content is not static, but subject to the evolution of international law.[15] A recent court decision confirms this interpretation.[16]

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[13] Core document forming part of the reports of the States Parties : Argentina. 01/07/96. HRI/CORE/1/Add.74, 1 July 1996, para. 45. The original Spanish text reads:

"Asimismo, de conformidad con lo dispuesto en los artículos 116 y 117 de la Constitución Nacional, la Corte Suprema de Justicia de la nación ha entendido que la costumbre internacional y los principios generales de derecho -fuentes del derecho internacional de conformidad con el artículo 38 del Estatuto de la Corte Internacional de Justicia- integran directamente el orden jurídico. Por ello, en numerosas causas, el Alto Tribunal ha hecho mérito del "derecho de gentes" y de los "principios generales del derecho internacional" aplicando diversos institutos del derecho internacional."

[14] The original text and translation (slightly revised here) may be found in Jonathan M. Miller, *Argentina*, in Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. Release 99-6, September 1999). The text of Article 118 in Spanish reads:

"Todos los juicios criminales ordinarios, que no se deriven del derecho de acusación concedido a la Cámara de Diputados se terminarán por jurados, luego que se establezca en la República esta institución. La actuación de estos juicios se hará en la misma provincia donde se hubiere cometido el delito; pero cuando éste se cometa fuera de los límites de la Nación, contra el Derecho de Gentes, el Congreso determinará por una ley especial el lugar en que haya de seguirse el juicio."

This article was previously numbered 102 and introduced in the 1853 Constitution adopted after the overthrow of the dictator, General Juan Manuel de Rojas, the previous year.

[15] Alejandro E. Alvarez, Eduardo E. Bertoni & Miguel Boo, *Argentine*, 24, an unpublished paper for the

Moreover, decisions by Argentine courts, including the Supreme Court, recognize that Argentine courts may exercise universal jurisdiction pursuant to Article 118 of the Constitution. The first judge who recognized the primacy of international law under Article 118 (102 at that time) was Judge Shiffrin in 1989.[17]

In February 1995, the Supreme Court declined in the *Peyrú* case to extradite a suspect to Chile on the ground that the crime for which the suspect was sought was not a crime under international law over which Argentine courts could exercise jurisdiction if committed abroad, implicitly recognizing that it could have permitted the extradition in that situation. It declared that

> "The internal norms of federal nature concerning the international jurisdiction of Argentine judges do not authorize the submission to a trial in our country of facts, the object of this request for extradition, being committed abroad; because it neither concerns a crime against international law (Article 118 of the Constitution) nor is it within the scope of Article 1 of the Penal Code [governing the norms of traditional jurisdiction]."[18]

The Supreme Court decision in the *Peyrú* case was cited approvingly by Judge Gustavo Bossert, in his November 1995 judgment in the *Priebke* case, when he approved the extradition from Argentina to Italy of a former German SS officer on charges of war crimes committed in Italy during the Second World War. Judge Bossert also stated that the Congress could not reduce the scope of this constitutional mandate because the authorization for universal jurisdiction found its basis in the Constitution, which authorized the Legislature only to determine the place where the trial would take place.[19] The Supreme

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Etude comparée des criteres de competence juridicionelle en matière de crimes internationaux, Paris, 2 to 3 July 2001.
Sagués, Néstor Pedro, *Los delitos "contra el derecho de gentes" en la Constitución Argentina*, in ED volume 131.

[16] On February 2001 Judge Cavallo in Case Nro. 8686/2000 entitled "Simon, Julio, del Cerro, Juan Antonio s/ sustracción de menores de 10 años":
"Asimismo, la interpretación dinámica del derecho de gentes que aquí se sostiene es la que ha sostenido invariablemente la Corte Suprema de Justicia de la Nación que, desde antiguo, no sólo ha aplicado el derecho de gentes en numerosos casos que le ha tocado resolver, sino que lo ha hecho interpretando a tal derecho conforme éste ha ido evolucionando. Esta interpretación dinámica del derecho de gentes llevó, como veremos, a que la Corte interpretara el art. 118 C.N. como norma que recepta en nuestro derecho interno los postulados modernos del derecho de gentes." (Considerando IV.A)

[17] Quoted from Judge Cavallo decision (Considerando IV.C.2.), see *supra, n.16, "El primer precedente que registra nuestra jurisprudencia en el que se sostuvo que el art. 118 (art. 102 al momento de ese fallo) de la Constitución Nacional implica el reconocimiento de la plena vigencia en nuestro orden interno de las normas referidas a crímenes contra el derecho de gentes, es el conocido voto que el Dr. Leopoldo Schiffrin realizó como miembro de la Cámara Federal de Apelaciones de La Plata al resolver el pedido de extradición de Franz Josef Leo Schwammberger formulado por la República Federal de Alemania (fallo del 30 de agosto de 1989, publicado en ED 135-326)."*

[18] *"...las normas internas de naturaleza federal referentes a la jurisdicción internacional de los jueces argentinos tampoco autorizan a enjuiciar en el país el hecho ocurrido en el extrangero que dio origen al presente pedido de extradición, pues ni se trata de un delito contra el derecho de gentes (artículo 118 de la Constitución Nacional) ni resulta comprendido en las hipótesis normativas de artículo 1 del Código Penal" Peyrú, Diego Alberto s/extradición, resuelta el 23 febrero de 1995, Fallos CSJN 318:126*, para. 6.

[19] *P. 457. I. R.O., Priebke, Erich s/ solicitud de extradición - causa n° 16.063/94, Buenos Aires, 2 de noviembre de 1995*, para. 50. This court said:
"That support for this view is to be found in the fact that, when the Constituent Assembly decided that the Argentinian Republic should have international criminal jurisdiction over *iuris gentium* crimes even when committed outside national boundaries (see p.541.XXIV, 'Peyrú, Diego Alberto - extradition request',

Court found that the Legislature had done this in a law enacted in 1863 establishing a general norm of organization of the jurisdiction of Federal courts. Regarding this finding by the Supreme Court, Judge Bossert stated in the *Priebke* case:

> "51) In contrast to other constitutional systems such as that of the United States of America, in which the Constitution confers on Congress the power to "define and punish ... [o]ffences against the Law of Nations" (Article I, Section 8), its Argentinian counterpart does not grant the National Congress such a prerogative but directly incorporates the provisions of applicable international law on the matter. For this reason, it is obligatory to apply international law in national jurisdiction in accordance with the provisions of Article 21 of the aforementioned Law 48."[20]

In February 2001 Judge Cavallo of the Fourth Federal Criminal Court (*Juzgado Nacional en lo Criminal y Correcional Federal Nro.4*) stated, along the same lines, that Art.118 permits the exercise of universal jurisdiction when the crimes under consideration are crimes against humanity:

"In accordance with the above, Art. 118 of the National Constitution should be understood as incorporating the modern principles of international law, at least those relating to criminal matters (given

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6th 'considering' of the opinion of judges Moliné J O'Connor, Belluscio, Petracchi, Levene, López, Bossert and Boggiano, delivered on 23 February 1995), it only gave the lawmaker the ability to rule on 'where the trial should take place' in those particular circumstances 'by enacting a special law' (Article 18 of the Constitution).

The original Spanish text reads:

"Que este criterio encuentra fundamento en que el constituyente, al fijar la jurisdicción internacional penal de la República Argentina para el juzgamiento de los delitos iuris gentium, aun cuando fuesen cometidos fuera de los límites de la Nación (confr. P.541.XXIV. 'Peyrú, Diego Alberto s/ pedido de extradición', considerando 6° del voto de los jueces Moliné O'Connor, Belluscio, Petracchi, Levene, López, Bossert y Boggiano, resuelta el 23 de febrero de 1995) sólo habilitó al legislador para que en este último supuesto determinase 'por una ley especial el lugar en que haya de seguirse el juicio' (artículo 118 de la Ley Fundamental)."

[20] *Priebke* case, *supra*, n. 19, para. 51. The original Spanish text reads:

"51) Que a diferencia de otros sistemas constitucionales como el de los Estados Unidos de América en el que el constituyente le atribuyó al Congreso la facultad de "definir y castigar" las "ofensas contra la ley de las naciones" (artículo I, Sección 8), su par argentino al no conceder similar prerrogativa al Congreso Nacional para esa formulación receptó directamente los postulados del derecho internacional sobre el tema en las condiciones de su vigencia y, por tal motivo, resulta obligatoria la aplicación del derecho de gentes en la jurisdiccion nacional de conformidad con lo dispuesto por el artículo 21 de la ley 48 ya citado."

P. 457. I. R.O., Priebke, Erich s/ solicitud de extradición - causa n° 16.063/94, Buenos Aires, 2 de noviembre de 1995, para. 51. (citing Art. 21 of Law 48 of 1863 (Jurisdiction and competence of the national courts)).

Art. 21 of Law 48 of1863 (Jurisdiction and competence of national courts) provides:

"National courts and judges shall, in the exercise of their functions, apply the Constitution as the supreme law of the Nation, laws approved or to be approved by Congress, treaties agreed with foreign nations, the particular laws of the Provinces, general laws in force prior to the founding of the Nation and the principles of international law, as required respectively by the cases subject to their jurisdiction, in the given order of priority." (English translation by Amnesty International)

Spanish text reads:

"Los tribunales y jueces nacionales en el ejercicio de sus funciones procederán aplicando la Constitución como ley suprema de la Nación, las leyes que haya sancionado o sancione el Congreso, los tratados con naciones extranjeras, las leyes particulares de las Provincias, las leyes generales que han regido anteriormente a la Nación y los principios del derecho de gentes, según lo exijan respectivamente los casos que se sujeten a su conocimiento, en el orden de prelación que va establecido."

Ley 48, 1863, art. 21 (Jurisdicción y competencia de los tribunales nacionales).

that this norm refers to "crimes" under international law). This interpretation is not only in closest conformity with the literal text of the Constitution (which, rather than establishing a catalogue of crimes and principles under international law, includes language accommodating the evolution of the law) as well as with the idea expressed by Alberdi; it is all the more compelling because it enables the Argentinian Republic and its judicial system to comply with developments in international criminal law to which our country has contributed, as was seen in Chapter III. Moreover, this contribution can be traced back to the men who founded the institutional structure of our Nation, whose commitment to the prosecution of crimes under international law is reflected in Article 118 (formerly 102) of the National Constitution.

This incorporation into Art. 118 of our Constitution requires that national courts apply norms regarding the prosecution of crimes under international law when hearing a case of this nature.

This is the case whether or not the act occurred inside the country, given that Article 118 of the National Constitution extends Argentinian jurisdiction to acts which occurred outside our territorial borders (universal or extraterritorial jurisdiction) when these constitute crimes under international law (crimes against humanity, acts of genocide, etc.)."[21]

In addition to Article 118, Article 75 (22) of the Constitution (introduced in 1994) expressly provides that "treaties and agreements take precedence over laws".[22]

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[21] The original Spanish text reads:

"Conforme lo hasta aquí expuesto, debe entenderse que el art. 118 de la Constitución Nacional recepta los postulados modernos del derecho de gentes, al menos los referidos a materia criminal (dado que dicha norma se refiere a "delitos" contra el derecho de gentes). Ello no sólo es lo que mejor se concilia con la letra del texto constitucional (que no establece un catálogo de las infracciones y de los principios del derecho de gentes sino que contiene una expresión que permite captar la evolución de la materia) y con la concepción que expresaba Alberdi, sino que, además, esa interpretación se impone, dado que es la que permite a la República Argentina, y a su sistema jurídico, estar acorde con el desarrollo que el derecho penal internacional ha observado y al que nuestro país ha contribuido tal como se ha visto en el Capítulo III. Por otra parte, dicha contribución parece provenir de los hombres que fundaron la organización institucional de nuestra Nación, cuyo compromiso con la persecución de los crímenes contra el derecho de gentes quedó reflejado en el artículo 118 (ex 102) de la Constitución Nacional.

Esta recepción que realiza nuestra Constitución en el art. 118 impone que los tribunales nacionales deban aplicar las normas relativas a la persecución de crímenes contra el derecho de gentes cuando tengan que juzgar un hecho de esa naturaleza.

Ello será así tanto si el hecho ocurrió dentro como fuera de nuestro país dado que el art. 118 de la Constitución Nacional extiende la jurisdicción argentina a hechos ocurridos fuera de nuestras fronteras territoriales (jurisdicción universal o extraterritorial) cuando ellos constituyen crímenes contra el derecho de gentes (crímenes contra la humanidad, actos de genocidio, etc.)."

Causa Nro. 8686/2000 caratulada "Simon, Julio, Del Cerro, Juan Antonio s/sustracción de menores de 10 años" del registro de la Secretaría Nro. 7 del Juzgado Nacional en lo Criminal y Correccional Federal Nro. 4.(Considerando IV.A)

[22] Constitution of 24 August 1994, Art. 75 (22) (English translation in third periodic report to the Committee against Torture, U.N. Doc. CAT/C/34/Add.5, para. 1). The original Spanish reads:

" Corresponde al Congreso:

(...)

22.- Aprobar o desechar tratados concluidos con las demás naciones y con las organizaciones internacionales y los concordatos con la Santa Sede. Los tratados y concordatos tienen jerarquía superior a las leyes.

La Declaración Americana de los Derechos y Deberes del Hombre; la Declaración Universal de Derechos Humanos; la Convención Americana sobre Derechos Humanos; el Pacto Internacional de Derechos Económicos, Sociales y Culturales; el Pacto Internacional de Derechos Civiles y Políticos y su Protocolo Facultativo; la Convención sobre la Prevención y la Sanción del Delito de Genocidio; la Convención Internacional sobre la Eliminación de todas las Formas de Discriminación Racial; la Convención sobre la Eliminación de todas las Formas de Discriminación contra la Mujer; la Convención contra la Tortura y otros Tratos o Penas Crueles, Inhumanos o Degradantes; la Convención sobre los Derechos del Niño; en las condiciones de su vigencia, tienen jerarquía constitucional, no derogan

(2) Legislation. Argentina was one of the first states (apparently, only Austria, Hungary and San Marino had earlier legislation providing for universal jurisdiction over all or most crimes in their penal codes) to enact legislation imposing an *aut dedere aut judicare* obligation with regard to foreigners found in its territory suspected of committing ordinary crimes abroad. Article 5 of the extradition law enacted in 1885 provided:

"In cases in which, under the provisions of this Act, the Government of the Republic is not bound to hand over the offenders requested, they shall be tried by the county's courts and sentenced to the penalties specified by law for crimes or offences committed within the territory of the Republic. (...)"[23]

Argentines (which had acquired the Argentine nationality before the commission of the crime) though could not be extradited to a foreign country under any circumstances.[24]

Although some have contended that the Extradition Law of 1885 had been repealed in 1888 when the Code of Penal Procedure (*Código de Procedimiento en Materia Penal*) entered into force through

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artículo alguno de la primera parte de esta Constitución y deben entenderse complementarios de los derechos y garantías por ella reconocidos. Sólo podrán ser denunciados, en su caso, por el Poder Ejecutivo Nacional, previa aprobación de las dos terceras partes de la totalidad de los miembros de cada Cámara.

Los demás tratados y convenciones sobre derechos humanos, luego de ser aprobados por el Congreso, requerirán del voto de las dos terceras partes de la totalidad de los miembros de cada Cámara para gozar de la jerarquía constitucional."

[23] Extradition Law of 20 August 1885, Art. 5 (English translation available from CAT/C/5/Add.12/Rev.1 para.67). The Spanish original reads as follows:

"En los casos en que con arreglo a las disposiciones de esta Ley el Gobierno de la República no deba entregar a los delincuentes solicitados, éstos deberán ser juzgados por los tribunales del país, aplicándose las penas establecidas por las leyes a los crímenes o delitos cometidos en la República.(...)"

Ley 1.612 (del 25 de Augusto de 1885), Art. 5.

Several related provisions in this law make it clear that it imposed an *aut dedere aut judicare* obligation on Argentina regardless whether the person sought was an Argentine citizen or a foreigner, so that, in cases extradition of a foreign suspect was refused (for example, because of concerns about unfair trial) and a prosecution was not barred by a restriction in Article 3, Argentina would have had to exercise universal jurisdiction. Article 3 of that law provided that Argentina was required to refuse extradition in the case of Argentine citizens, political crimes or crimes related to them, crimes committed in Argentina, crimes where the suspect had previously been tried abroad and crimes where a prosecution would be barred by a statute of limitations. Article 4 imposed the condition that if the person sought was a slave in the requesting state that extradition would be granted only if the requesting state agreed to try the person as free and to always consider the person as such. Article 9 provided that "[i]f the request is made for a foreigner to be extradited for offences committed in territory other than that of the requesting power, extradition shall only be granted in cases where Argentine law permits offences committed outside the territory to be prosecuted." Article 11 indicated the appropriate priority among requesting states for persons not citizens of Argentina.

[24] Art.3 Law of Extradition of Foreigners 1612 (1885). The original text in Spanish reads:

"No se concederá la extradición:

1. Cuando el reclamado fuese un ciudadano argentino natural o naturalizado antes del hecho que motive la solicitud de extradición.

. . . .

3. Cuando los delitos hubiesen sido cometidos en territorio de la República. . . .

4. Cuando los delitos, aunque cometidos fuera de la República, hubiesen sido perseguidos y juzgados definitivamente en ella."

Law 2372[25] the government itself has rejected this interpretation . It declared in 1989 that, "[t]hus, where extradition is inoperative, the obligation to prosecute exists"and confirmed that Article 5 of the Extradition Law of 1885 was still in force.[26]

However, after being in effect for more than a century, in 1997 Law 1612 and the articles on extradition in Law 2372 were expressly repealed by Law 24767 and the general obligation *aut dedere aut judicare* of former Article 5 is not to be found in the current extradition law.[27]

Nevertheless, Argentina may still be able to exercise universal jurisdiction over war crimes on the sole basis of Article 118 of the Constitution and on the basis of customary international law and general principles of international law permitting national courts to exercise universal jurisdiction..

As of 1989, Argentina appears to have implemented the *aut dedere aut judicare* obligations on a number of occasions, although it is not entirely clear whether it was based on the extradition law, the treaties directly under the Constitution or on the basis of implementing legislation.[28] In 1997, the government stated that "Argentina applies the principle *aut dedere aut punire*, as laid down in the international agreements that are binding on it. In cases where no agreement exists, the principle applies

[25] According to a leading expert on extradition Law 1612 would have been repealed by Law 2372 (lex posteriori derogat anteriori). The Supreme Court has been contradictory on that matter. Law 2372 established a right for nationals to choose whether to be prosecuted or extradited in Art.669.

[26] Revised version of initial report to Committee against Torture, U.N. Doc. CAT/C/5/Add.12/Rev.1, 11 August 1989, para. 67. The government stated in its supplementary report to the Committee, U.N. Doc. CAT/C/17/Add.2, 14 July 1992, that there had been no change in this information. At the time of the revised initial report in 1989, Article 5 had not been abrogated.. According to the Argentinean representative: "The Argentine Extradition Act (No.1,612) has been partly abrogated by the provisions contained in articles 646-647 of the Code of Criminal Procedure. However, article 5 of the Act may not be considered to have been abrogated as its contents are not expressly governed by procedural legislation which does not, in fact expressly abrogate Act No. 1,612 (Supreme Court decision 293:64)." Revised version of initial report, para. 70

[27] In 1997, the pioneering 1885 law was repealed by the *Ley de cooperación internacional en materia penal, Ley 24767, 13 de enero de 1997, Boletin Oficial de la República Argentina, 16 de enero de 1997*) (Law on International Cooperation in Penal Matters, Law No. 24,767, Official Bulletin of Argentina, 16 January 1997), Art. 123. The new Law also confirms the right of nationals to choose whether to be extradited or prosecuted in Art.12. The original text in Spanish reads:

> *"Si el requerido para la realización de un proceso fuese nacional argentino, podrá optar por ser juzgado por los tribunales argentinos, a no ser que fuere aplicable al caso de un tratado que obligue a la extradición de nacionales.*
> *La calidad de nacional argentino deberá haber existido al momento de la comisión del hecho, y deberá subsistir al momento de la opción.*
> *Si el nacional ejerciere esta opción, la extradición será denegada. El nacional será entonces juzgado en el país, según la ley penal argentina, siempre que el Estado requirente preste conformidad para ello, renunciando a su jurisdicción, y remita todos los antecedentes y pruebas que permitan el juzgamiento.*
> *Si fuere aplicable al caso un tratado que faculta la extradición de nacionales, el Poder Ejecutivo, en la oportunidad prevista en el artículo 36, resolverá si se hace o no lugar a la opción."*
> *Artículo 12 Ley 24767.*

[28] The government stated in 1989 that the rule of *aut dedere aut judicare* "has already been implemented in respect of other treaties [in addition to the Genocide Convention, the Hague and Montreal Conventions and the Convention against Torture]," citing a decision of the Supreme Court, Case No. 37,044, 14 June 1983, relating to this obligation under the 1961 Single Convention on Narcotics Drugs. Revised initial report, *supra*, n. 26, para. 73. The government stated in its supplementary report to the Committee against Torture, *supra*, n. 26, para. 29, that there had been no change in this information.

to nationals, and also in respect of acts having consequences within its territory."[29]
Later on the government stated that

> "[s]everal provisions of the [Torture] Convention were devoted to the characterization of torture as an extraditable offence and, in full recognition of that principle, the Argentine legislature had adopted Act No. 24,767 on international cooperation in criminal matters on the basis of reciprocity and guarantee of due process, and subject to certain conditions."[30]

Therefore, at a minimum, Argentine courts can exercise universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I.[31]

Argentina has ratified the Geneva Conventions and Protocols I and II. It has also ratified the Rome Statute and Congress is expected to enact implementing legislation in 2001. Argentina has not defined war crimes as crimes under national law, so prosecutions based on universal jurisdiction would have to be based on ordinary crimes, such as murder, abduction, assault and rape.[32] However, a draft bill to amend the Code of Military Justice to include rules of international humanitarian law is now pending.[33]

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[29] Third periodic report of Argentina to the Committee against Torture, U.N. Doc. CAT/C/34/Add.5, para. 21.

[30] Spanish version: *"La Convención contra la Tortura dedica varios de sus apartados a considerar la tortura como un delito extraditable y así lo entiende y aplica la República Argentina, cuyo poder legislativo ha sancionado la Ley No 24767 de cooperación internacional en materia penal que establece la reciprocidad y las garantías del debido proceso, con sujeción a ciertas condiciones."* (SUMMARY RECORD of the 303 Session, Argentina. 9/12/97. CAT/C/SR.303 the State representative stated in paragraph 9).

[31] For the text of a government statement to the Committee against Torture indicating that jurisdictional provisions of the Convention against Torture are self-executing, see Chapter Ten, Section II. *A fortiori*, the jurisdictional provisions concerning grave breaches of the Geneva Conventions and Protocol I are self-executing under Argentine law. Therefore, the somewhat narrower statement in 1997 concerning the scope of the *aut dedere aut judicare* obligation should not be interpreted as rejecting the previous statements or jurisprudence.

[32] In the Priebke case judges Julio S. Nazareno and Eduardo Moline O'Connor stated the following when discussing whether Priebke could be extradited for crimes that were not implemented in Argentinean legislation in a traditional manner:
41) (...) That is why their [modern humanitarian treaties] clauses are presumed to be applicable and have therefore been deemed by legal doctrine to be, on the whole, clear and complete enough to be directly enforcable by States parties and individuals with no need for direct implementation (...)
42) That the fact that the description of the offence given in the aforesaid international instruments does not determine the nature and length of the penalty is not an impediment to reaching this conclusion because, under the current state of international relations, the fact that the documents themselves do not do so is in keeping with the mode of implementation recognized in that sphere for criminal offences of that kind, .
Spanish original:
"41) (...) De allí que sus [los tratados humanitarios modernos] cláusulas gozan de la presunción de operatividad y así han sido consideradas por la doctrina por ser, en su mayoría claras y completas para su directa aplicación por los Estados partes e individuos sin necesidad de implementación directa (...)
42) Que no obsta a esta conclusión que la descripción típica contenida en los mentados instrumentosnternacionales no establezca la naturaleza de la pena ni su monto pues su falta de determinación en los propios documentos responde a la modalidad de implementación que infracciones de contenido penal de esa naturaleza reconocen en ese ámbito, conforme al estado actual de las relaciones internacionales."

[33] José Consigli & Gabriel Valladares, *Correspondents' Reports - Argentina*, 3 Y.B. Int'l Hum. L. (2000) (forthcoming).

• ***Armenia:*** Armenian courts may exercise universal jurisdiction over war crimes recognized in treaties ratified by Armenia when the conduct violates national law. The origins of this legislation can be traced back to Russian universal jurisdiction legislation in 1903 (see Chapter Two, Section II.A).

Article 6 of the Armenian Constitution provides that "[i]nternational treaties that have been ratified form an integral part of the legal system of the Republic. If such a treaty contains provisions which differ from those laid down in legislation, the provisions of the treaty shall apply."[34]

Article 14 of the current Criminal Code provides that foreign citizens or stateless persons who have committed offences outside Armenia are criminally responsible under the Criminal Code when they have committed an offence referred to in an international treaty ratified by Armenia, if they have not been tried for that offence in a foreign state.[35] There appears to be no requirement that the treaty mentioning the offence provide for universal jurisdiction.

Armenia is a party to the Geneva Conventions and Protocols I and II. It is a successor state to the USSR and would, therefore, be considered as bound by the Hague Convention IV. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. Armenia is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. It is not known if Armenia has provided that war crimes are crimes under national law, so prosecutions may have to be for ordinary crimes, such as murder, abduction, assault and rape.

• ***Australia:*** Australian courts may exercise universal jurisdiction over a limited number of war crimes committed during the Second World War and grave breaches of the Geneva Conventions and Protocol I.[36]

War crimes during the Second World War. Section 12 of the War Crimes Act, 1945 provided Australian courts with active personality jurisdiction and limited universal jurisdiction (with respect to victims who were "British or subjects or citizens of any power allied or associated with his Majesty in any war") over war crimes as defined in Section 3.[37] That section defined a war crime as:

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[34] Constitution of the Republic of Armenia, 5 July 1995, Art. 6, para. 5. English translation quoted in Armenia's second periodic report to the Committee against Torture, U.N. Doc. CAT/C/43/Add.3 (1999), para. 10. A similarly worded translation can be found in Gisbert H. Flanz, *Republic of Armenia, Booklet 2, in* Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. November 1996) (Release 96-7).

[35] Criminal Code, adopted 7 March 1961, as amended 1994, Art. 14.

[36] The discussion of Australian legislation and jurisprudence draws upon a number of sources, including: Luc Reydams, *Australia,* a chapter in his book, *Universal Jurisdiction in International Law* (Oxford: Oxford University Press) (forthcoming); Gillian Triggs, *Australia's War Crimes Trials: All Pity Choked*, in Timothy L. H. McCormack & Gerry J. Simpson, eds, *The Law of War Crimes: National and International Approaches* 123, 131-134 (The Hague: Kluwer Law International 1997.

[37] An Act to provide for the Trial and Punishment of War Criminals, No. 48 of 1945, assented to 11 October 1945, § 12. Section 12 read:

> "The provisions of this Act shall apply in relation to war crimes committed, in any place whatsoever, whether within or beyond Australia, against British subjects or citizens of any Power allied or associated with His Majesty in any war, in like manner as they apply in relation to war crimes committed against persons who were at any time resident in Australia."

"(a) a violation of the laws and usages of war ; or
(b) any war crime within the meaning of the instrument of appointment of the Board of Inquiry appointed on the third day of September, One thousand nine hundred and forty-five, under the National Security (Inquiries) Regulations (being Statutory Rules 1941, No. 35, as amended by Statutory Rules 1941, No. 74 and 114 and Statutory Rules 1942, No. 273),
commited in any place whatsoever, whether within or beyond Australia, during any war."[38]

The term "any war" was defined in Section 3 as "any war in which His Majesty has been engaged in since the second day of September, One thousand nine hundred and thirty-nine". Subsection (a) included violations of Hague Convention IV; subsection (b) included the illustrative list in the Report of the 1919 Paris Peace Conference Commission. Over 1,000 trials were conducted under this legislation (see Chapter Two, Section III.A) between 1945 and 1951, when Australia stopped prosecuting war crimes committed during the Second World War.

In 1987, a committee of inquiry found that persons who were suspected of serious war crimes during the Second World War were residing in Australia.[39] When, as a result of public pressure, Australia then decided to resume such prosecutions, the legislation was extensively amended to address some of its procedural defects, such as the provision for trials of civilians in military courts. However, in contrast to the 1945 legislation which applied to most war crimes committed anywhere in the world after 1 September 1945, the War Crimes Act, 1945 (as amended by the War Crimes Amendment Act, 1988) (the 1988 Act) is limited to a restricted group of war crimes committed only in Europe during the Second World War.[40] Section 6 (3) of the 1988 Act provides:

"An act is a serious crime if:
(a) it was done at a particular time outside Australia; and
(b) the law in force at that time in some part of Australia was such that the act would, if it had been done at that time in that part, be a serious crime by virtue of sub-section (1)."

Section 7 (1) and (3) defines when a serious crime is a war crime extremely restrictively by requiring proof of an intent to persecute or a genocidal intent, neither of which are elements of war crimes.[41] Section 11 provides that only an Australian citizen or resident can be charged under the 1988

[38] *Ibid.*, § 3.

[39] Review of Materials Relating to the Entry of Suspected War Criminals into Australia (1987) (Menzies Report).

[40] Section 9 (1) of the 1988 Act provides:
"A person who:
(a) on or after 1 September 1939 and on or before 8 May 1945; and
(b) whether as an individual or as a member of an organization; committed a war crime is guilty of an indictable offence against this Act."
Section 5 defines a war as one "in so far as it occurred in Europe in the period beginning on 1 September 1939 and ending on 8 May 1945."

[41] Section7 of the 1988 Act states:
"(1) A serious crime is a war crime if it was committed:
(a) in the course of hostilities in a war;
(b) in the course of an occupation;
(c) in pursuing a policy associated with the conduct of a war or with an occupation; or
(d) on behalf of, or in the interests of, a power conducting a war or engaged in an occupation.
....

Act, but the person need not have been a citizen or resident of Australia at the time of the crime. Therefore, the 1988 Act restricts the scope of universal jurisdiction its courts may exercise to persons present in Australia for some period of time who were suspected of a limited class of war crimes committed in Europe during the Second World War against victims who were "British or subjects or citizens of any power allied or associated with his Majesty in any war". The 1988 Act is one of the rare instances when a state has restricted the scope of universal jurisdiction legislation. Jurisdiction under the 1988 Act does not include non-resident suspects who are only temporarily in Australia on a tourist or transit visa.

A specialunit was established to investigate and prosecute persons suspected of committing war crimes within the meaning of the 1988 Act, and three prosecutions were commenced; one was dismissed for lack of evidence and the others because the accused were not fit to stand trial.[42] That unit was later disbanded.[43] As a result, Australia was unprepared to assist in criminal investigations of Konstantin Kalejs, suspected of war crimes in Latvia during the Second World. In one of the three cases, *Polyukhovich*, the Commonwealth of Australia argued that

> "The Act discharges an international obligation or meets an international concern that persons alleged to be guilty of war crimes and crimes against humanity be sought out, brought to trial and upon conviction, punished, irrespective of the place where the crime was committed or where the alleged offender is found and irrespective of the citizenship or residence of the alleged offender or the victim."[44]

Similarly, the two judges which addressed the question of universal jurisdiction concluded, after reviewing state practice, that any state could exercise such jurisdiction over war crimes. In that case, Judge Brennan recognized that Australia could exercise universal jurisdiction over crimes under international law, such as war crimes, as an incident of its national sovereignty:

> "33. . . . Australia's international personality would be incomplete if it were unable to exercise a jurisdiction to try and to punish offenders against the law of nations whose crimes are such that their subjection to universal jurisdiction is conducive to international peace and order. As the materialdrawn from international agreements and UNGA resolutions acknowledges, international law recognizes a State to have universal jurisdiction to try suspected war criminals whether or not that State is under an obligation to do so and whether or not there is any international concern that the State should do so.
>
> . . . .
>
> 37. . . . War crimes, being violations of the laws and customs of war, thus consist in acts which

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(3) A serious crime is a war crime if it was:
(a) committed:
(i) in the course of political, racial, or religious persecution; or
(ii) with intent to destroy in whole or in part a national, ethnic, racial or religious group, as such; and
(b) committed in the territory of a country when the country was involved in a war or when the territory of the country was subject to an occupation."

[42] *Polyukhovich v. Commonwealth of Australia*, (1991) 172 CLR 501, F.C. 91/026 (Australian High Court 14August 1991)(*obtainable from*http://www.austlii.edu.au/au/cases/cth/high_ct/172clr501.html)(dismissal forlack of evidence); *Malone v.Berezowsky*, File No. 91/25241 (Adelaide Magis. Ct. 16 July 1992) (unfit to stand trial); *Heinrich Wagner* case (unfit to stand trial) (Discussed in Triggs, *supra*, n.36,131-134.

[43] Triggs, *supra*, n.36, 34.

[44] *Polyukhovich* (Brennan, J.) (paraphrasing the argument of the government), para. 22.

transgress the limitations imposed by those laws and customs. Such transgressions are universally condemned and are internationally recognized as crimes which can be tried according to international law by the courts of any nation into whose hands the offender falls."[45]

Similarly, in the same case Judge Toohey stated:

"Whether the rationale for the universality principle lies in the proposition that those committing certain offences lose their national character and are therefore subject to any state's jurisdiction, or whether it lies in the fundamental nature of the crime - its particular gravity and heinousness (see Randall, at pp 792-795; In re List (Hostages Trial) (1948) 15 Annual Digest 632, at p 636; Attorney-General of Israel v. Eichmann (1962) 36 ILR 5, 277 (Supreme Court), at pp 282-283; (1961) 36 ILR 18 (District Court), at p 50), there appears to be general agreement that war crimes and crimes against humanity are now within the category subject to universal jurisdiction: see Brownlie, at pp 305, 562; Kobrick, at pp 1522-1523, 1529; Randall, at p 800; Wagner, at p 905 (with respect to war crimes)."[46]

Grave breaches of the Geneva Conventions and Protocol I. In addition to this legislation, Australia enacted the Geneva Conventions Act 1957, which, as amended by the Geneva Conventions Amendment Act 1991, provides in Article 7 for universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I:

"(1) A person who, in Australia or elsewhere, commits, or aids, abets or procures the commission by another person of, a grave breach of any of the Conventions or of Protocol I is guilty of an indictable offence.
(2) [list of grave breaches omitted]
(3) This section applies to persons regardless of their nationality or citizenship."[47]

Article 6 (1) of the act provides that it "has extra-territorial operation according to its tenor". Decisions whether to prosecute are not made by an independent prosecutor, but by a political official, the Attorney General.[48]

Australia is a party to the Geneva Conventions and Protocols I and II. It has signed the Rome Statute and has drafted implementing legislation to be enacted in connection with ratification. The current text of the bill defining crimes within the jurisdiction of the International Criminal Court provides for universal jurisdiction over war crimes.[49]

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[45] *Ibid.* (Brennan, J.), paras 33, 37.

[46] *Ibid.* (Toohey, J.), para. 28.. However, neither judge was convinced that as of 1942-1943 there was an *aut dedere aut judicare* obligation concerning war crimes.

[47] Geneva Conventions Act 1957, as amended by the Geneva Conventions Amendment Act 1991, § 7 (1) - (3).

[48] *Ibid.*, § 7 (6) ("An offence against this section shall not be prosecuted in a court except by indictment in the name of the Attorney-General.").

[49] International Criminal Court (Consequential Amendments) Bill 2001, A Bill for an Act to amend the *Criminal Code Act 1995* and certain other Acts in consequence of the enactment of the *International Criminal Court Act 2001*, and for other purposes, Exposure Draft, L:\Treaties folder\Treaties reviews\International Criminal Court\Legislation\exdraft CA Bill 220801.doc 30/8/2001 3:29 PM, Schedule 1- Amendment of the Criminal Code Act 1995, § 268.123 (1) (Geographical jurisdiction) (*obtainable from* http://www.aph.gov.au/house/committee/jsct). That

• ***Austria:*** Almost two centuries ago, Austria became the first state, as far as is known, to have enacted legislation providing for universal jurisdiction over ordinary crimes under national law (for the scope of this legislation, see Chapter Two, Section II). Two provisions of the current Austrian Penal Code, based on that 1803 legislation, would permit courts to exercise universal jurisdiction over certain conduct which, if committed during armed conflict, could amount to war crimes. These legislative provisions are butressed by Article 9 (1) of the Constitution, which provides that "[t]he generally recognized rules of International Law are valid parts of Federal Law," although this provision may not be a sufficient independent ground for exercising universal jurisdiction.[50]

First, paragraph (1) of Article 64 (Punishable acts abroad, which are punished without consideration for the law of the scene of the crime) of the Penal Code provides that

> "[t]he following crimes committed abroad are punished under Austrian criminal law irrespective of the criminal law of the scene of the crime: . . . (6) other punishable acts which Austria is under an obligation to punish even when they have been committed abroad, irrespective of the criminal law of the scene of the crime".[51]

Second, to the extent that there may be certain war crimes which Austria is not under an obligation to punish when committed abroad, Austrian courts might rely on another provision of the Penal Code when the conduct would be criminal if it had occurred in Austria. However, there are three requirements which must be met before a court can exercise jurisdiction. Paragraph 1of Article 65 (Punishable acts abroad, which are only punished if they are subject to a punishment under the law of the scene of the crime) of the Penal Code provides that courts may exercise universal jurisdiction over offences committed abroad, provided that (1) the acts are also punishable in the place where they are committed (double criminality requirement), (2) the suspect, if a non-national, is present in Austria and (3) he or she cannot be extradited to the other state for reasons other than the nature and characteristics of the offence.[52] However, crimes under international law are not political offences.

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provision reads: "Section 15.4 (extended geographical jurisdiction - Category D) applies to genocide, crimes against humanity and war crimes." The current wording of Section 15.4 describes the extended geographical jurisdiction of Category D as follows:

"If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:

(a) whether or not the conduct constituting the alleged offence occurs in Australia; and

(b) whether or not a result of the conduct constituting the alleged offence occurs in Australia."

This provision does not contain the restriction found in other extended geographical jurisdiction provisions in Section 15.4 to Australian citizens, so it would apply to anyone and therefore give Australia universal jurisdiction over genocide, crimes against humanity and war crimes.

[50] The Federal Constitutional Law, as amended to No. 68/2000 of 8 August 2000, Art. 9 (1). The English translation is in Gisbert H. Flanz, *Austria, Booklet 1, in* Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Ocean Publications, Inc. December 2000) (Release 2000-8, Gisbert H. Flanz trans.).

[51] English translation by Amnesty International.

[52] Article 65.1 provides:

"Acts other than those mentioned in §§ 63 and 64 that have been committed abroad are subject, insofar as the acts are also liable to punishment under the law of the scene of the crime, to Austrian criminal law:

. . . .

2. If at the time of the act the perpetrator was a foreigner, trespassed within the country and for a reason other than the nature or feature of his act is not extradited abroad.

(2) The punishment is to be determined so that the perpetrator is not disadvantaged as regards the overall effect compared to the law of the scene of the crime.

Austria is a successor state to Austria-Hungary and would, therefore, be considered as bound by Hague Convention IV. Austria has ratified both the Geneva Conventions and Protocols I and II. Austria has ratified the Rome Statute.

• ***Azerbaijan:*** The courts of Azerbaijan can exercise universal jurisdiction over war crimes under legislation whose origins can be traced back to Russian universal jurisdiction legislation of 1903 (see Chapter Two, Section II.A). This legislation is reinforced by Article 16 of the Constitution, which provides that "[t]he Republic of Azerbaijan, in accordance with the universally recognized standards of international law establishes its relationship with other states on the basis of . . . fulfilment in good faith of international obligations."[53]

Article 12 of the Azerbaijan Criminal Code, which entered into force on 1 September 2000, contains three different bases for courts to exercise universal jurisdiction over certain conduct amounting to war crimes, whether committed in international or non-international armed conflict. This article provides:

> "(1) Citizens of the Azerbaijan Republic and stateless persons who permanently reside on the territory of Azerbaijan shall be held criminally responsible under the present Code for the act (action or inaction) committed outside the territory of the Azerbaijan Republic, if this act is considered as a crime by the legislation of the Azerbaijan Republic, as well as by the legislation of the foreign state where the crime was committed and if they have not been tried in a foreign State for this crime.
>
> (2) Foreigners and stateless persons might be held criminally responsible under the present Code in case of commitment of a crime outside the territory of the Azerbaijan Republic against the citizens of the Azerbaijan Republic, against the interests (advantages) of the Azerbaijan Republic, as well as in cases covered by international treaties to which the Azerbaijan Republic is a party and if they have not been tried in a foreign State for this crime.
>
> (3) Foreigners and stateless persons who committed crimes against peace and humanity, war crimes, terrorism, driving away an aircraft, taking hostages, tortures, marine piracy, illegal circulation of drugs and psychotropous substances, counterfeiting or producing or selling false securities, directing attacks against the persons or international organizations who enjoy the international protection, crimes related to radioactive materials, other crimes punishment for which results from the international treaties to which the Azerbaijan Republic is a party, not depending on the place of commitment of the crime, shall be held criminally responsible and punished under the present Code."[54]

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(3) If there is no penal authority at the scene of the crime, then it suffices if the act is punishable under Austrian law.
(4) The liability to punishment lapses however:
1. If the liability to punishment of the act is cancelled under the law of the scene of the crime;
2. If the perpetrator has been finally acquitted or otherwise released from prosecution by a court of the state in which the act was committed;
3. If the perpetrator has been finally convicted by a foreign court and the punishment has been totally enforced or, if it has not been enforced, has been waived or its enforceability has been barred by limitation under the foreign law."

[53] Constitution of Azerbaijan, Art. 151.

[54] Azerbaijan Criminal Code, entered into force 1 September 2000, Art. 12 (English text in ICRC International Humanitarian Law Database, *obtainable from* http://www.icrc.org/ihl-nat).

Azerbaijan is a party to the Geneva Conventions, but as of 1 September 2001 it had not yet ratified Protocols I and II. It has not signed the Rome Statute and had not yet ratified it as of 1 September 2001. It has, however, provided that a number of war crimes are crimes under national law.[55] Statutes of limitations do not apply to war crimes.[56]

• ***Bahamas:*** The courts of the Bahamas have been able to exercise universal jurisdiction over grave breaches of the Geneva Conventions committed abroad since 1959.

Although the Bahamas does not have a Geneva Conventions Act, the United Kingdom's Geneva Conventions Act 1957 applied to the West Indies Federation, of which the Bahamas was a member, under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below), at least before 1 January 1970. The Bahamas became independent on 10 July 1973. The Bahamas Independence Order 1973 continued existing laws, including the 1959 Order in Council, in effect.[57] In 1988, the Bahamas enacted legislation supplementing the Order in Council providing for appeals by prisoners of war and protected internees for serious crimes.[58]

The Bahamas is a party to the Geneva Conventions and Protocol I and II. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it.

• ***Barbados:*** The courts of Barbados have been able to exercise universal jurisdiction over grave breaches of the Geneva Conventions committed abroad since 1959.

Article 3 of the Geneva Conventions Act of 1980 states:

"(1) A grave breach of any of the Geneva Conventions of 1949 that would, if committed in Barbados, be an offence under any law of Barbados, constitutes an offence under that law when committed outside Barbados.

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[55] Azerbaijan Criminal Code, Art. 115 (Violations of laws and customs of war), Art. 116 (Violations of the norms of international humanitarian law in time of an armed conflict), Art. 117 (Negligence or giving criminal order in time of armed conflict), Art. 118 (Pillage) and Art. 119 (Abuse of protected signs).

[56] Azerbaijan Criminal Code, Art. 75. Azerbaijan is also a party to the Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

[57] The Bahamas Independence Order 1973, Statutory Instruments 1973, No. 1080, made 20 June 1973, coming into operation 10 July 1973 (*obtainable from* http://www.georgetown.edu/pdba/Constitutions/Bahamas/bahamas.html), Section 4. That section provided in relevant part:

"1. Subject to the provisions of this section, the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Bahamas Independence Act 1973(b) and this Order.

....

"In this section "existing law" means any law having effect as part of the law of the Bahamas Islands immediately before the appointed day (including any law made before the appointed day and coming into operation on or after that day)."

[58] 2 The Statute Law of the Bahamas (1799-1987) in force on the 30th of June, 1987, as amended by the Statute Law Revision Act, 1987 (1988), ch. 88, Geneva Conventions (Supplementary), An Act entitled The Geneva Conventions (Supplementary) Act, adopted 18 May 1961. Previously, the United Kingdom's Geneva Conventions Act applied to the Bahamas under the Geneva Conventions Act (Colonial Territories) Order in Council 1959 (for the text, see the discussion of United Kingdom legislation in this chapter).

(2) A person who commits a grave breach of any of the Geneva Conventions of 1949 described in subsection (1) may be tried and punished by any court in Barbados that has jurisdiction in respect of similar offences in Barbados as if the grave breach had been committed in Barbados.
(3) No proceedings in respect of a grave breach of any of the Geneva Conventions of 1949 shall be instituted in Barbados without the consent in writing of the Director of Public Prosecutions.
(4) In this section 'grave breach of any of the Geneva Conventions of 1949' means any of the grave breaches referred to [in the four Geneva Conventions attached as schedules to the legislation]."[59]

Barbados is a party to the Geneva Conventions and Protocol I and II. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it.

• ***Belarus:*** Belarus courts can exercise universal jurisdiction over war crimes under two legislative provisions whose origins can be traced back to Russian universal jurisdiction legislation of 1903 (see Chapter Two, Section II.A). They are buttressed by Article 8 of the Constitution of 1996, which provides in relevant part that "[t]he Republic of Belarus recognizes the supremacy of the universally recognized principles of international law and ensures that its laws comply with such principles", although no jurisprudence or commentary suggests that Article 8, standing alone is sufficient to give courts universal jurisdiction.[60].

First, paragraph 1 of Article 6 (The application of the present Criminal Code to persons having committed violations outside the territory of the Republic of Belarus) provides that the Code imposes criminal responsibility on stateless persons who are permanent residents who have committed violations abroad if these acts are punishable in the state where they were committed and the persons concerned were not prosecuted in that state.[61]

Second, Article 6 (4) states that the Criminal Code imposes criminal responsibility on a person for certain war crimes listed in Article 6 (3) who has not been tried for those crimes in the territorial state and who is prosecuted in Belarus.[62] Article 6 (3) provides that the present Code applies, independently of criminal legislation in force in the territory where the crime was committed, to the following crimes: production, stockpiling or proliferation of prohibited means of warfare (Art. 129), employment of weapons of mass destruction (Art. 134), violation of the laws and customs of war (Art. 135), criminal violation of the norms of international humanitarian law in armed conflict (Art. 136), failure to act and issuing a criminal order during armed conflict (Art. 137) and other crimes committed outside the territory of Belarus

[59] Previously, the United Kingdom's Geneva Conventions Act 1957 applied to the West Indies Federation, of which Barbados was a member, under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below), at least before 1 January 1970.

[60] The Constitution of the Republic of Belarus, 27 November 1996. The English translation is in *Republic of Belarus, in* Gisbert H. Flanz, *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. May 1997) (Release 97-3) (Inter-University Associates, Inc. trans.).

[61] Belarus Criminal Code of 24 June 1999, entered into force 9 July 2000, Art. 6. The summary of the provisions of the articles of the Code cited is based on an English translation by Amnesty International and a French translation of the relevant parts of the Criminal Code that is available from the ICRC IHL database: http://www.icrc.org/ihl-nat.

[62] Criminal Code, Art. 6 (4). It states that in the cases envisaged in paragraphs 2 and 3 of Article 6, the Criminal Code establishes criminal responsibility for a person if that person has not been tried in a foreign state and is prosecuted in Belarus.

which can be prosecuted by virtue of an international treaty binding on Belarus.[63] The wording appears to make all persons suspected of these crimes subject to the jurisdiction of national courts in the circumstances identified in Article 6 (4).

Belarus is a party to the Geneva Conventions and Protocols I and II. It has not signed the Rome Statute and as of 1 September 2001 had not yet ratified it. Article 85 provides that war crimes listed above are not subject to statutes of limitation. Belarus is also a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

• ***Belgium*** : Belgian courts may exercise universal jurisdiction over war crimes in international or non-international armed conflict under customary international law and pursuant to statute and they have exercised such jurisdiction in several cases. Although the legislation providing for such jurisdiction was put into question at one point in the middle of 2001, the government has determined that the law should be retained and other countries, particularly in the European Union, should be encouraged to adopt similar legislation.

(I) Legislation. A law enacted on 16 June 1993, *Loi relative à la repression des infractions graves aux Conventions de Genève du 12 aout 1949 aux Protocoles I et II du 8 juin 1977* (1993 law), gave courts universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I and violations of Protocol II, all of which have been ratified by Belgium. That law was amended in February 1999 by the *Loi relative à la répression des violations graves du droit international humanitaire* (Act Concerning the Punishment of Grave Breaches of International Humanitarian Law) which expanded its scope to include genocide in Section 1 of Article 1and crimes against humanity in Section 2 of that article (see Chapter Six, Section II and Chapter Eight, Section II). Section 3 of Article 1 defines the war crimes subject to Belgian jurisdiction.[64] Although the war crimes included in Section

[63] Criminal Code, Art. 6 (3).

[64] The 1993 law was amended on 10 February 1999 to change its name to *Loi relative à la répression des violations graves du droit international humanitaire* and to expand its scope to include genocide and crimes against humanity. The law renumbered the 1993 section dealing with war crimes. Section 3 of Article 1 of the amended version concerning war crimes provides:
"The grave breaches listed below which cause injury or damage, by act or omission, to persons or objects protected by the Conventions signed at Geneva on 12 August 1949 and approved by the Act of 3 September 1952, and by Protocols I and II additional to those Conventions adopted at Geneva on 8 June 1977 and approved by the Act of 16 April 1986, shall - without prejudice to the criminal provisions applicable to breaches committed out of negligence - constitute crimes under international law and be punishable in accordance with the provisions of the present Act:

1° willful killing;

2° torture or other inhuman treatment, including biological experiments;

3° willfully causing great suffering or serious damage to physical integrity or health;

4° compelling a prisoner of war, a civilian person protected by the Convention relative to the Protection of Civilian Persons in Time of War or a person protected in that same respect by Protocols I and II additional to the international Geneva Conventions of 12 August 1949 to serve in the forces of a hostile power or adverse party;

5° depriving a prisoner of war, a civilian person protected by the Convention relative to the Protection of Civilian Persons in Time of War or a person protected in that same respect by Protocols I and II additional to the international Geneva Conventions of 12 August 1949 of the right to a regular and impartial trial in accordance with the contents of those provisions;

6° the unlawful deportation, transfer or movement, or unlawful detention of a civilian person protected by the Convention relative to the Protection of Civilian Persons in Time of War or of a person protected in that same respect by Protocols I and II additional to the international Geneva Conventions of 12 August 1949;

3 includes many of the war crimes listed in Article 8 of the Rome Statute, in a number of respects the definitions provide greater protection to civilians and other protected persons.[65] Somewhat confusingly,

7° hostage-taking;

8° extensive destruction and appropriation of property not justified by military necessity as permitted by international law and carried out unlawfully and wantonly;

9° acts and omissions not justified in law which are likely to endanger the physical or mental health and integrity of persons protected by one of the Conventions relative to the protection of wounded, sick and shipwrecked persons, in particular any medical procedure which is not indicated by the state of health of such persons or not consistent with generally accepted medical standards;

10° other than where justified under the conditions provided for in subparagraph 9°, acts which consist in carrying out on persons referred to in subparagraph 9°, even with their consent, physical mutilations, medical or scientific experiments or the removal of tissue or organs for transplantation, except in the case of donations of blood for transfusion or of skin for grafting, provided that such donations are voluntary, consented to and intended for therapeutic purposes;

11° making the civilian population or individual civilians the object of attack;

12° launching an indiscriminate attack affecting the civilian population or civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated, without prejudice to the criminal nature of the attack whose harmful effects, even where proportionate to the military advantage anticipated, would be inconsistent with the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience;

13° launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause loss of human life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated, without prejudice to the criminal nature of the attack whose harmful effects, even where proportionate to the military advantage anticipated, would be inconsistent with the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience;

14° making non-defended localities or demilitarized zones the object of attack;

15° making a person the object of attack in the knowledge that he/she is hors de combat;

16° the perfidious use of the distinctive emblem of the red cross;

17° the transfer by the occupying power of parts of its own civilian population into the territory it occupies, in the case of an international armed conflict, or by the occupying authority in the case of a non-international armed conflict;

18° unjustifiable delay in the repatriation of prisoners of war or civilians;

19° indulging in practices of apartheid or other inhuman or degrading practices based on racial discrimination and resulting in outrages upon personal dignity;

20° directing attacks against clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, where there is no evidence of the adverse party having violated the prohibition of using such objects in support of the military effort, and where such objects are not located in the immediate proximity of military objectives.

The acts listed in subparagraphs 11°, 12°, 13°, 15°, and 16° shall be regarded as grave breaches within the meaning of this Article where they bring about death or cause serious injury to the physical integrity or health of one or more persons."

Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law [10 February 1999], 38 Int'l Leg. Mat. 918 (English translation and introductory note giving a brief legislative history of the 1999 law by Stefaan Smis and Kim Van der Borght). The original French text of Section 3 is reproduced in the following footnote.

[65] The original French text of Section 3 reads:

"§ 3. Constituent des crimes de droit international et sont réprimées conformément aux dispositions de la présente loi, les infractions graves énumérées ci-après, portant atteinte, par action ou omission, aux personnes et aux biens protégés par les Conventions signées à Genève le 12 août 1949 et approuvées par la loi du 3 septembre 1952 et par les Protocoles

I et II additionnels à ces Conventions, adoptés à Genève le 8 juin 1977 et approuvés par la loi du 16 avril 1986, sans préjudice des dispositions pénales applicables aux autres infractions aux conventions visées par la présente loi et sans préjudice des dispositions pénales applicables aux infractions commises par négligence:

1° l'homicide intentionnel;

2° la torture ou les autres traitements inhumains, y compris les expériences biologiques;

3° le fait de causer intentionnellement de grandes souffrances ou de porter des atteintes graves à l'intégrité physique, à la santé;

4° le fait de contraindre à servir dans les forces armées de la puissance ennemie ou de la partie adverse un prisonnier de guerre, une personne civile protégée par la convention relative à la protection des personnes civiles en temps de guerre ou une personne protégée à ce même égard par les Protocoles I et II additionnels aux Conventions internationales de Genève du 12 août 1949;

5° le fait de priver un prisonnier de guerre, une personne civile protégée par la Convention sur la protection des personnes civiles en temps de guerre ou une personne protégée à ce même égard, par les Protocoles I et II additionnels aux Conventions internationales de Genève du 12 août 1949, de son droit d'être jugé régulièrement et impartialement selon les prescriptions de ces dispositions;

6° la déportation, le transfert ou le déplacement illicites, la détention illicite d'une personne civile protégée par la Convention sur la protection des personnes civiles en temps de guerre ou une personne protégée à ces mêmes égards par les Protocoles I et II additionnels aux Conventions internationales de Genève du 12 août 1949;

7° la prise d'otages;

8° la destruction et l'appropriation de biens, non justifiées par des nécessités militaires telles qu'admises par le droit des gens et exécutées sur une grande échelle de façon illicite et arbitraire;

9° les actes et omissions, non légalement justifiés, qui sont susceptibles de compromettre la santé et l'intégrité physique ou mentale des personnes protégées par une des Conventions relatives à la protection des blessés, des malades et des naufragés, notamment tout acte médical qui ne serait pas justifié par l'état de santé de ces personnes ou ne serait pas conforme aux règles de l'art médical généralement reconnues;

10° sauf s'ils sont justifiés dans les conditions prévues au 9°, les actes consistant à pratiquer sur les personnes visées au 9°, même avec leur consentement, des mutilations physiques, des expériences médicales ou scientifiques ou des prélèvements de tissus ou d'organes pour des transplantations, à moins qu'il s'agisse de dons de sang en vue de transfusions ou de dons de peau destinée à des greffes, pour autant que ces dons soient volontaires, consentis et destinés à des fins thérapeutiques;

11° le fait de soumettre la population civile ou des personnes civiles à une attaque;

12° le fait de lancer une attaque sans discrimination atteignant la population civile ou des biens de caractère civil, en sachant que cette attaque causera des pertes en vies humaines, des blessures aux personnes civiles ou des dommages aux biens de caractère civil, qui seraient excessifs par rapport à l'avantage militaire concret et direct attendu, sans

all three crimes are identified as "breaches", rather than crimes.

Article 2 provides for punishments, up to a maximum of life imprisonment. Article 3 provides that persons who manufacture, hold or transport instruments, devices or objects used to commit or facilitate the commission of a grave breach identified in Article 1 shall be punished as if they had committed the grave breach. Article 4 defines ancillary crimes of ordering, proposing, inciting, participating, failing to prevent or end and attempting grave breaches, although it does not expressly provide for command and superior responsibility for such breaches. Section 1 of Article 5 excludes political, military or national interest or necessity as a justification of a grave breach. Section 2 of Article 5 provides that superior

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préjudice de la criminalité de l'attaque don't les effets dommageables, même proportionnés à l'avantage militaire attendu, seraient incompatibles avec les principes du droit des gens, tels qu'ils résultent des usages établis, des principes de l'humanité et des exigences de la conscience publique;

13° le fait de lancer une attaque contre des ouvrages ou installations contenant des forces dangereuses, en sachant que cette attaque causera des pertes en vies humaines, des blessures aux personnes civiles ou des dommages aux biens de caractère civil, qui seraient excessifs par rapport à l'avantage militaire concret et direct attendu, sans préjudice de la criminalité de l'attaque don't les effets dommageables même proportionnés à l'avantage militaire attendu seraient incompatibles avec les principes du droit des gens, tels qu'ils résultent des usages établis, des principes de l'humanité et des exigences de la conscience publique;

14° le fait de soumettre à une attaque des localités non défendues ou des zones démilitarisées;

15° le fait de soumettre une personne à une attaque en la sachant hors de combat;

16° le fait d'utiliser perfidement le signe distinctif de la croix rouge;

17° le transfert dans un territoire occupé d'une partie de population civile de la puissance occupante, dans le cas d'un conflit armé international, ou de l'autorité occupante dans le cas d'un conflit armé non international;

18° Le fait de retarder sans justification le rapatriement des prisonniers de guerre ou des civils;

19° le fait de se livrer aux pratiques de l'apartheid ou à d'autres pratiques inhumaines ou dégradantes fondées sur la discrimination raciale et donnant lieu à des outrages à la dignité personnelle;

20° le fait de diriger des attaques contre les monuments historiques, les oeuvres d'art ou les lieux de culte clairement reconnus qui constituent le patrimoine culturel ou spirituel des peuple auxquels une protection spéciale a été accordée en vertu d'un arrangement particulier alors qu'il n'existe aucune preuve de violation par la partie adverse de l'interdiction d'utiliser ces biens à l'appui de l'effort militaire, et que ces biens ne sont pas situés à proximité immédiate d'objectifs militaires.

Les faits énumérés aux 11°, 12°, 13°, 14°, 15° et 16° sont considérés comme infractions graves au sens du présent article, à la condition qu'ils entraînent la mort, ou causent une atteinte grave à l'intégrité physique ou à la santé d'une ou plusieurs personnes." (Text reproduced from ICRC National Implementation Database).

orders are not a defence to genocide, a crime against humanity as defined in the act or a grave breach of the Geneva Conventions or Protocol, but it fails to exclude superior orders as a defence to violations of common Article 3 or of Protocol II of other international humanitarian law. Section 3 of Article 5 expressly states that "[t]he immunity attributed to the official capacity of a person does not prevent the application of the present Act."[66] However, certain principles of criminal responsibility applicable to ordinary crimes are applicable to crimes under the 1999 law.[67] Article 8 provides that statutes of limitation do not apply to breaches of Article 1 of the Act.[68]

Article 7 expressly provides for universal jurisdiction over any of the breaches in the 1999 Act. The first paragraph of that article states that "[t]he Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed."[69] Article 9 provides that when Belgium is in a state of war, breaches of the 1999 Act fall within the jurisdiction of military courts.[70]

Belgium has also ratified Hague Convention IV and the Rome Statute. War crimes under customary international law were not included in the legislation. However, independently of this legislation, Belgian courts may have universal jurisdiction over war crimes under international customary law.[71]

(2) Investigations and prosecutions. There have been a number of criminal investigations and prosecutions in Belgium based on universal jurisdiction for war crimes committed abroad.

Ndayambaje, Kanyabashi and Higaniro arrests. Criminal investigations were opened by an investigating magistrate in February 1995 based on the 1993 law concerning violations of Protocol II and other crimes under international law in Rwanda. As a result of this investigation, three Rwandans, Elie Ndayambaje, Joseph Kanyabashi and Alphonse Higaniro, were arrested in June 1995. The International Criminal Tribunal for Rwanda (Rwanda Tribunal) asked Belgium for a *dessaissement* (decision not to proceed) while it carried out its preliminary inquiries. In January 1996, the Rwanda Tribunal asked for the first two persons to be transferred to the Tribunal, which subsequently occurred. The third, Alphonse Higaniro, was subsequently tried and convicted of war crimes (see below).

Ndindiliyimana arrest. In January 1996, another Rwandan, Augustin Ndindiliyimana, was arrested

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[66] *Ibid.*, Art. 5, § 3. The original French text reads: *"L'immunité attachée à la qualité officielle d'une personne n'empêche pas l'application de la présente loi"*

[67] *Ibid.*, Art. 6 (providing that without prejudice to Articles 4 and 8, provisions of Book I of the Penal Code from Article 70) shall apply to the 1999 Act).

[68] *Ibid.*, Art. 8 ("Article 21 of the Introductory Part of the Code of Penal Procedure and Article 91 of the Penal Code, relative to the statutory limitation of public prosecutions and penalties, shall not be applicable to the breaches listed in Article 1 of the present Act."). The original French text reads: *"Ne sont pas applicables aux infractions prévues à l'article 1er de la présente loi, l'article 21 du Titre préliminaire du Code de procédure pénale et l'article 91 du Code pénal relatifs à la prescription de l'action publique et des peines."*

[69] *Ibid.*, Art. 7. The original French text reads: *" Les juridictions belges sont compétentes pour connaître des infractions prévues à la présente loi, indépendamment du lieu ou celles-ci auront été commises."*

[70] *Ibid.*, Art. 9.

[71] David, Eric, *Principes de droit des conflits armés* (Bruxelles: Presses Universitaires deBruxelles 1994). 709 (citing Article 1 and the legislative history of the 1993 law indicating that the legislation was not intended to exclude other violations of international humanitarian law).

at the request of the Rwanda Tribunal and transferred to the Tribunal on 22 April 2000.

Trial and conviction of Higanirio, Ntezimana, Mukangango and Kizito. Vincent Ntezimana was indicted by the 40th Chamber of the Tribunal of First Instance in Brussels on 22 July 1996 for grave breaches of the Geneva Conventions and violations of Protocols I and II in the Prefecture of Butare in Rwanda between 6 April and 27 May 1994.[72] In June 2000, he, Alphonse Higaniro Sister Gertrude Mukangango and Sister Julienne Kizito were committed for trial before the Brussels Court of Azzizes (*la Cour d'assises de Bruxelles-Capitale*) pursuant to the 1993 law on charges of war crimes during international armed conflict and other crimes under international law. All four were permitted to remain at liberty pending trial, which started on 16 April 2001. Alphonse Higaniro was convicted of all charges and sentenced to 20 years in prison; Sister Gertrude Mukangango was sentenced to 15 years in prison; Sister Julienne Kizito was convicted of all charges and sentenced to 12 years in prison; and Vincent Ntezimana was convicted on some of the charges, but acquitted on others and sentenced to 12 years in prison.[73]

Kabila, Yerodia and others. On 11 April 2000, a Belgian investigating judge (*juge d'instruction*) issued an international arrest warrant against Abdulaye Yerodia Ndombasi, then Minister of Foreign Affairs of the Democratic Republic of the Congo (DRC). He was charged with incitement to commit war crimes and crimes against humanity based on alleged appeals to civilians in August 1998 to chase and kill enemy forces in a manner which indicated that he meant all persons of Tutsi origin, including civilians, as well as combatants. Yerodia travelled to many countries after the warrant was issued, but no state appears to have tried to arrest him.

On 17 October 2000, the DRC filed an application in the International Court of Justice against Belgium on two grounds. First, it claimed that Belgium had violated "the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the Organization of the United Nations, as laid down in Art. 2, para. 1 of the Charter of the United Nations." Second, it contended that Belgium had violated "the diplomatic immunity of the Minister of Foreign Affairs of a sovereign State." The DRC also asked for provisional measures pending the outcome of the investigation, specifically: "an order for the immediate discharge of the arrest warrant". The argument on the application took place from 20 to 23 November 2000.

Although Abdulaye Yerodia Ndombasi was replaced on 21 November, during the course of the argument, and appointed to a new post, the Court in its Order of 8 December 2000 declined to dismiss the case, as requested by Belgium, since the arrest warrant was still outstanding. The Court also decided by a vote of 15 to 2 that the DRC would not suffer "irreparable prejudice" in the immediate future and that there was no "degree of urgency" warranting provisional measures. The Court did not decide the merits of the case, but expressed the desire that "the issues before the Court should be decided as soon as possible" and set an expedited briefing schedule, requiring the parties to address the questions of jurisdiction, admissibility and the merits.[74] Oral arguments on the merits are scheduled for 15 October

[72] The case was reported, with the name of the accused and certain victims omitted as: *Le génocide du Rwanda. Poursuites en Belgique. La plume est serve mais la parole est libre . . ., Journal des proces, N°310, 20 septembre 1996, 28.*

[73] *Cour d'assises de l'arrondissement administratif de Bruxelles-Capitale (obtainable from* http://www.asf.be/AssisesRwanda2/fr/fr_VERDICT_verdict.htm). *Génocide rwandais : les quatres accusés reconnus coupables, Le Monde, 8 juin 2001.* For press reports covering each day of the trial, see *La Libre, Le génocide rwandais aux assises (obtainable from* <http://www.lalibre.be>).

[74] The briefing schedule, as subsequently modified, required the DRC to file its memorial on X 2001 and

2001.[75]

Ariel Sharon. At the beginning of June 2001, a complaint was filed by a dozen Belgians, Lebanese Moroccans and Palestinians alleging that Ariel Sharon, as Minister of Defence, was responsible for war crimes during the killings at the Shatila and Shabra refugee camps in Lebanon in 1982.[76] On 18 June 2001, a second complaint was filed alleging that he was responsible for war crimes and other crimes under international law.[77] On 1July 2001, the prosecutor requested that the case against Ariel Sharon be declared admissible.[78] The court subsequently agreed the investigation was receivable and opened an investigation at the beginning of July 2001. However, on 7 September 2001, it was reported that pending the determination of a challenge by a Belgian lawyer, Michèle Hirsch, apparently acting on Ariel Sharon's behalf, the investigation was suspended.[79]

Reaffirmation of the importance of the legislation in the fight against impunity. For a brief moment in the middle of June, when the Belgian legislation had been criticized by those who attacked the consideration by the prosecution of complaints against Prime Minister Ariel Sharon alleging that he had been responsible for war crimes, crimes against humanity and genocide in connection with the killings at two refugee camps near Beirut in 1982, government ministers debated whether the legislation should be amended.[80] However, after extensive discussion of the merits of the legislation in Parliament and within the government, Belgium has decided not to weaken the law in any way and, instead, to urge other states, particularly in Europe, to adopt similar legislation.[81]+

• ***Belize:*** It appears that courts of Belize have been able to exercise universal jurisdiction over grave breaches of the Geneva Conventions abroad since 1959.

The United Kingdom's Geneva Conventions Act 1957 applied to British Honduras under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see

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Belgium its counter-memorial on 17 September 20001.

[75] *Case Concerning the Arrest Warrant of 11 April 2001 (Democratic Republic of the Congo v. Belgium),* General List No. 121, Press Release, 12 April 2001.

[76] *Ariel Sharon sera-t-il jugé en Belgique?, La Libre, 6 juin 2001.*

[77] *Plainte avec constitution de partie civile, Bruxelles, 18 juin 2001. See also* BELGA, *Vingt-Trois plaintes contre Ariel Sharon, La Libre, 18 juin 2001.*

[78] AFP, *La plainte visant M. Sharon recevable, selon le parquet de Bruxelles, Le Monde,* 2 July 2001; AFP, *Belgian prosecutors put forward case against Israel's Sharon,*1 July 2001; AFP, *La plainte visant M. Sharon recevable, selon le parquet de Bruxelles,* 2 July 2001; Reuters, *Belgian Magistrate mulls trial for Ariel Sharon,* 5 June 2001; Baudouin Loos Philippe Regnier, *Plaintes en série contre Sharon à Bruxelles, Le Soir, 19 juin 2001; RTBF website, Sharon: la diplomatie belge dans ses petits souliers, 19 juin 2001.*

[79] *Suspension de l'instruction de la plainte en Belgique contre Sharon,* AFP, 7 September 2001; Investigation of Belgian civil case against Ariel Sharon suspended, AFP, 7 September 2001.

[80] *See, for example, Ariel Sharon sera-t-il jugé en Belgique?, La Libre,* 6 June 2001 (citing statement by the Foreign Minister that it was necessary to amend the law).

[81] On 18 July 2001, the Belgian Foreign Minister, Louis Michel, indicated that the question of whether the law should be amended would be put on hold for at least six months during Belgium's Presidency of the European Union. *Belgium postpones reform of universal competence law,* BBC, 18 July 2001. Then, on 27 August 2001, the Prime Minister, Guy Verhofstadt, declared that there was no question about changing the law, but, instead, Belgium would propose that other states should amend their legislation. *La rentré politique étonnante de Guy Verhofstadt,* 27 August 2001.

discussion of United Kingdom legislation below), at least before 1 January 1970. Belize became independent on 21 September 1981. Article 134-1 of the Constitution of Belize provides that the existing laws in force on the day of independence were to continue in effect and, as far as is known, the 1959 Order in Council has not been repealed either before or after independence.[82]

Belize is a party to the Geneva Conventions and Protocol I and II. It has ratified the Rome Statute, but as of 1 September 2001 it had not yet enacted implementing legislation.

• ***Bolivia:*** Bolivian courts can exercise universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I and, possibly, other war crimes as well.

Article 1 (7) of the Bolivian Penal Code gives national courts universal jurisdiction to try crimes committed abroad which the state has pledged by treaty to punish. It provides:

> "This Code shall be applicable to: . . . (7) offences that the Republic of Bolivia is obliged to punish by treaty or convention, even when they have not been committed on Bolivian territory."[83]

There is no requirement in Article 1 (7) that a suspect be in Bolivia before a prosecutor can initiate an investigation, but it is not clear whether this provision requires that the treaty expressly provide for universal jurisdiction or simply that the treaty require prosecution.

As regards the hierarchy of international treaties in the legal system the Bolivian Constitution states in Article 228 that the Constitution is the supreme law of the national legal system and that courts, judges and authorities shall apply it with preference over any other resolutions.[84] In Article 120 it is stated that one of the attributions of the Constitutional Court is to decide on whether international treaties are in accordance with the Constitution.[85] Those provisions may be subject to various interpretations. It has not been possible to locate any jurisprudence concerning that issue. However, reportedly, discussions are taking place in Bolivia on whether to reform the Constitution in order to give international treaties on human rights a constitutional status (among others those would include the Inter-American Convention on Enforced Disappearances, the Genocide Convention and the Convention against Torture).

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[82] Constitution of Belize (text in Jefri Jay Ruchti, *Belize, in* Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. May 1997) (Release 97-3), Art. 134-(1) ("Subject to the provisions of this Part, the existing laws shall notwithstanding the revocation of the Letters Patent and the Constitution Ordinance continue in force on and after Independence Day and shall then have effect as if they had been made in pursuance of this Constitution but they shall be construed with such modifications[,] adaptations[,] qualifications and exceptions as may be necessary to bring them into conformity with this Constitution."). Article 134-(6) states that "the expression 'existing law' means any . . . Order of Her Majesty in Council . . . having effect as part of the law, of Belize immediately before Independence Day 9including any such law made before that day and coming into operation or after that day".

[83] *"Código Penal, Art. 1. (En cuanto al espacio). Este Código se aplicará: . . . 7. A los delitos que por tratado o convención de la República se haya obligado a reprimir, aún cuando no fueren cometidos en su territorio."* (English translation by Amnesty International).

[84] The original text in Spanish of Article 228 reads: *"La Constitución Política del Estado es la Ley Suprema del ordenamiento jurídico nacional. Los tribunales, jueces y autoridades la aplicarán con preferencia a las leyes ,y éstas con preferencia a cualesquiera otras resoluciones"*. (the original text in Spanish is *obtainable from* http://cervantesvirtual.com/portal/constituciones/pais.formato?pais=Bolivia).

[85] The original text in Spanish reads: *"Son atribuciones del Tribunal Constitucional conocer y resolver (...) la constitucionalidad de tratados o convenios con gobiernos extranjeros u organismos internacionales".*

Bolivia has ratified Hague Convention IV, the Geneva Conventions and Protocols I and II. Bolivia has signed the Rome Statute, but had not yet ratified it by 1 September 2001. Bolivia does not appear to have defined war crimes as crimes under national law, so prosecutions for war crimes may have to be brought for ordinary crimes, such as murder, abduction, assault or rape.[86] Bolivia is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and Article 34 of the Penal Procedure Code of 1999 states in Article 34 that: "Priority will be given to the application of the rules regarding the statute of limitations contained in international treaties and covenants."[87] War crimes are not defined as crimes in the Penal Code, so prosecutions would have to be for ordinary crimes such as murder, abduction, assault and rape.

• ***Bosnia and Herzegovina:*** Separate criminal codes apply in the two parts of the country, but both provide courts with universal jurisdiction over war crimes in international and non-international armed conflict. Indeed, courts of the former Yugoslavia had been able to exercise universal jurisdiction over ordinary crimes since 1929 (see Chapter Two, Section II.A). Bosnia and Herzegovina is a party to the Geneva Conventions and Protocols I and II. It has not signed the Rome Statute and as of 1 September 2001 it had not yet ratified it.

In the ***Federation of Bosnia and Herzegovina***, courts may exercise custodial universal jurisdiction over crimes under the law of the Federation which are punishable in the territorial state by five years' imprisonment or more. Article 133 (2) of the Criminal Code of the Federation of Bosnia and Herzegovina provides:

> "Criminal Legislation of the Federation applies to a foreigner who commits a criminal offence abroad against another country or a foreigner, for which the law of that country prescribes imprisonment for a term of five years or a heavier penalty, provided that the perpetrator is found on the territory of the Federation. Unless stipulated otherwise in this Code, the court in such cases may not pronounce a punishment which would be heavier than the one provided by the law of the country in which the criminal offence has been committed."[88]

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[86] A sub-commission on the reform of the Penal Code of the Permanent National Commission for the Application of International Humanitarian Law (CPADIH) (*Comisión Permanente de Aplicación del Derecho Internacional Humanitario*) has drafted proposed amendments to the Penal Code to include serious violations of international humanitarian law. Gabrielle Valladares, *Correspondents' Reports - Bolivia*, 3 Y.B. Int'l Hum. L. (2000) (forthcoming).

[87] Spanish text reads: *"Tendrán aplicación preferente las reglas sobre prescripción contenidas en tratados y convenios internacionales" (Código de Procedimiento Penal. Ley Nr. 1970 de 25 de marzo de 1999 publicado el 31 de mayo, in force since 31 may 2001)*
Obtainable from http://www.reformapenal.gov.bo/

[88] Criminal Code of the Federation of Bosnia and Herzegovina with comment of new solutions and with registrar of notions (Sarajevo: Federalno Ministarstvo Pravde 1998), Art. 133 (2). For the venue of such cases, see Code of Criminal Procedure with comment of new solutions and with registrar of notions (Sarajevo: Federalno Ministarstvo Pravde 1998), Arts 25 -27. The official commentary explains that the new Criminal Code of the Federation "represents a new and modern unification of the old Criminal Code of the former SFRY and recent Criminal Code of R BiH", the concept and content of which "are, to the highest possible extent, adjusted to the new constitutional provisions and numerous international acts which contain universal and modern standards of law" and that the reform was intended to implement "the rules and standards of the new contemporary legislation contained in numerous international conventions and other binding international acts." *Explanation of new solutions in the Criminal Code of the Federation of BiH,* Criminal Code of the Federation of Bosnia and Herzegovina with comment of new solutions and with registrar of notions 627 (Sarajevo: Federalno Ministarstvo Pravde 1998).

Certain war crimes, including crimes under customary international law, are defined as crimes under the Federation Criminal Code and it appears that the relevant provisions do not limit applicability to crimes committed during international armed conflict.[89] Article 126 of the Criminal Code provides that war crimes are not subject to statutes of limitations.[90] The official commentary on these provisions explains that "the introduction of those provisions is an obligation towards the international community".[91]

In the ***Republika Srpska***, Article 123 (2) of the Criminal Code of the Republika Srpska provides for custodial universal jurisdiction over any crime punishable by at least five years' imprisonment, provided the suspect is not extradited to another state:

> "Criminal legislation of the Republika Srpska applies to a foreigner who commits a criminal offence abroad against another country or foreigner, for which the law of that country prescribes imprisonment for a term of five years or a heavier penalty, provided the perpetrator is found on the territory of the Republika Srpska and does not get extradited to the other country. Unless it is stipulated otherwise in this Code, the court in such a case may not impose a heavier punishment than the one provided by the law of the country in which the criminal offence has been committed."[92]

The Criminal Code prohibits a number of war crimes.[93]

There are several conditions which must be satisfied before a court may exercise jurisdiction under Article 123 (2). A prosecution may not be instituted if the suspect has served a sentence abroad for the crime, if the suspect has been released by a final and binding decision of a foreign court or if the territorial state requires the prosecution to be instituted by a personal complaint and no complaint has been filed.[94]

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[89] Criminal Code of the Federation of Bosnia and Herzegovina with comment of new solutions and with registrar of notions (Sarajevo: Federalno Ministarstvo Pravde 1998), Art. 154 (War Crimes Against Civilians), Art. 155 (War Crimes Against the Wounded and Sick), Art. 156 (War Crimes Against Prisoners of War), Art. 157 (Organizing a Group and Instigating the Commission of Genocide and War Crimes), Art. 158 (Unlawful Killing or Wounding the Enemy), Art. 159 (Marauding), Art. 160 (Using Forbidden Means of Warfare), Art. 161 (Violating the Protection Granted to Bearers of Flags of Truce), Art. 163 (Cruel Treatment of the Wounded, Sick and Prisoners of War), Art. 164 (Destruction of Cultural and Historical Monuments),

[90] Bosnia and Herzegovina is also a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

[91] *Explanation of new solutions in the Criminal Code of the Federation of BiH,* Criminal Code of the Federation of Bosnia and Herzegovina with comment of new solutions and with registrar of notions 651(Sarajevo: Federalno Ministarstvo Pravde 1998).

[92] Criminal Code of the Republika Srpska, entered into force 1 October 2000, Art. 123 (2).

[93] Criminal Code of the Republika Srpska, Art. 443 (War Crimes against Civilians), Art. 434 (War Crimes against the Wounded and Sick), Art. 453 (War Crimes against Prisoners of War), Art. 435 (War Crimes Committed by Use of Forbidden Means of Warfare), Art. 437 (Organizing a Group and Instigating the Commission of Genocide and War Crimes), Art. 429 (Unlawful Killing or Wounding [of] the Enemy), Art. 439 (Marauding), Art. 440 (Violating the Protection Granted to Bearers of Flags of Truce), Art. 441 (Cruel Treatment of the Wounded, Sick and Prisoners of War) and Art. 442 (Unjustified Delay of Repatriation of Prisoners of War), Art. 443 (Destruction of Cultural and Historical Monuments) and Art. 445 (Misuse of International Emblems).

[94] Paragraph 2 of Article 124 (Special Preconditions for Prosecution) provides:
"In the cases stipulated under articles 122 [crimes committed by citizens abroad] and 123 of this Code, the prosecution shall not be instituted if:
1) the perpetrator has served the punishment he was sentenced to abroad;
2) the perpetrator has been freed by a final and binding decision of a foreign court;

Although the general rule is that the crime must also be punishable under the law of the territorial state, it may be prosecuted pursuant to Article 124 (4) if the act at the time it was committed was considered a criminal offence under general legal principles accepted by the international community at the time it was committed and the Republic Public Prosecutor then authorizes a prosecution.[95] War crimes are not subject to statutes of limitations.[96] The wording of the articles concerning amnesties and pardons suggests that the immunity from prosecution where a suspect has benefited from an amnesty or received a pardon applies only to amnesties or pardons issued by the Republika Srpska, not to foreign amnesties or pardons.[97]

• ***Botswana:*** The courts of Botswana have been able to exercise universal jurisdiction over persons suspected of grave breaches of the Geneva Conventions abroad since 1959.

Article 3 (1) of the Botswana Geneva Conventions Act, 1970 provides:

"Any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the scheduled conventions as is referred to in the following articles respectively of those conventions, that is to say - [list of grave breaches provisions of the four Geneva Conventions] shall be guilty of an offence . . ."[98]

Previously, the United Kingdom's Geneva Conventions Act 1957 applied to Botswana under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below), which applied to the Bechuanaland Protectorate, at least before 1 January 1970.

Botswana is a party to the Geneva Conventions and Protocols I and II. It has ratified the Rome Statute, but as of 1September 2001 it had not yet enacted implementing legislation.

• ***Brazil:*** Brazilian civilian may exercise universal jurisdiction over some conduct amounting to grave breaches of the Geneva Conventions and Protocol I, and possibly other war crimes, under certain conditions.

Article 7 (Part II) (a) of the Brazilian Criminal Code provides that national courts have custodial universal jurisdiction to try crimes which were committed abroad and which Brazil is obliged to repress

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3) according to the law of the foreign country, the prosecution is initiated on a personal complaint, and such complaint has not be[en] filed."

[95] Article 124 (4) provides:
"It is only after the approval of the Republic Public Prosecutor that prosecution may be instituted in the Republika Srpska in cases referred to under Article 123, paragraph 2 of this Code, regardless of the law of the country in which the criminal offence has been committed, if at the time of the commission the act in question was considered a criminal offence in accordance with the general legal principles recognized by the international legal community."

[96] Criminal Code of Republika Srpska, Art. 116.

[97] *Ibid.*, Arts 117 (Amnesty) and 118 (Pardon).

[98] Botswana Geneva Conventions Act, 1970. Article 3 (1) requires the consent of the Attorney-General to commence proceedings under the Act. The Act does not contain a statute of limitations, but it is not known if statutes of limitations applicable to other crimes apply to grave breaches.

under a treaty. The suspect must be in Brazil, the act must also be punishable in the territorial state (double criminality), extradition for the crime must be authorized under national law and the suspect must not have been acquitted, have completed a sentence or have been pardoned. It appears that this provision may include treaties which simply require prosecution, without an *aut dedere aut judicare* obligation. Article 7 (Part II) (a) provides:

> "The following shall be subject to Brazilian law, even though committed abroad:
> . . . . II - crimes (a) which through treaty or agreement Brazil is obliged to repress, . . .
> Section 2. In the circumstances in subsection II, the application of Brazilian law shall depend on the concurrent existence of the following conditions:
> (a) the agent is on national territory,
> (b) the act is also punishable in the country in which it was performed,
> (c) the crime is included among those for which Brazilian law authorizes extradition,
> (d) the agent has not been acquitted abroad or has not completed his sentence,
> (e) the agent has not been pardoned abroad or the penalty has not been extinguished, in accordance with the most favourable law, for any other reason."[99]

It also appears that this provision would include ordinary crimes which would constitute war crimes if committed during armed conflict.[100]

However, it is possible that the *Código Penal Militar* (Military Penal Code), which prohibits some conduct which could amount to war crimes, may apply extraterritorially only Brazilians and foreign members of the Brazilian armed forces during armed conflict. Article 7 provides that military penal law applies to conduct abroad, when not prohibited by treaties and when the suspect has not previously been tried by a foreign court:

> "The military penal code is applicable, without prejudice to conventions, treaties and rules of international law, to crimes committed, in whole or in part, within national territory or outside it, even if, in this case, the perpetrator is being tried or has been judged by a foreign justice system."[101]

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[99] Criminal Code, Art. 7 (Part II) (a) (English translation by Amnesty International.).The original text in Portuguese reads:

> *"Art. 7° - Ficam sujeitos à lei brasileira, embora cometidos no estrangeiro:*
> *(...)*
> *II - os crimes:*
> *a) que, por tratado ou convenção, o Brasil se obrigou a reprimir;*
> *b) praticados por brasileiro;*
> *c) praticados em aeronaves ou embarcações brasileiras, mercantes ou de propriedade privada, quando em território estrangeiro e aí não sejam julgados."*

[100] The government has explained that "[c]rimes committed in foreign countries, which Brazil committed itself to suppress by means of Treaty or Convention, such as torture, are also subject to Brazilian law." Initial report of Brazil to Committee against Torture, U.N. Doc. CAT/C/9/Add.16, 18 August 2000, para. 101. For the full text of this statement, see Chapter Ten, Section II.

[101] Military Penal Code, Decree-Law No. 1.001, of 21 October 1969, published in the official gazette of 21 October 1969, Art. 7 (all English translations of the Military Penal Code in this memorandum by Amnesty International). The original text in Portuguese reads:

> *"Aplica-se a lei penal militar, sem prejuízo de convenções, tratados e regras de direito internacional, ao crime cometido, no todo ou em parte, no território nacional, our fora dele, ainda que, neste caso, o agente esteja sendo processado ou tenha sido julgado pela justiça estrangeira."*

Código Militar Penal, Decreto-lei n. 1.001, de 21 de outubro de 1969, publicado no Diário Oficial da União,

Article 11 provides that the Military Penal Code applies to members of foreign armed forces when this is authorized by international treaties or conventions, but it is not clear whether Article 11 simply clarifies that foreigners serving in the Brazilian armed forces are subject to the Military Penal Code or whether it is an express extension of Brazilian extraterritorial jurisdiction to such persons, by implication excluding other foreigners not mentioned in the Military Penal Code who have committed a crime abroad:

> "Foreign military personnel, when on commission or in training in the armed forces, are subject to the Brazilian military penal code, subject to the provisions of international treaties or conventions."[102]

Under Article 10 of the Military Penal Code, during armed conflict, a number of bodies of law are considered military crimes: crimes specified in the Code as applying during wartime, military crimes during peacetime, crimes in foreign occupied territory and crimes committed in zones of military operation.[103] Peacetime crimes within the scope of Article 10 which could include war crimes if committed during armed conflict include: homicide, genocide, infliction of bodily harm and sexual offences.[104] Wartime

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de 21-12-1969, Art. 7º.

[102] Military Penal Code, Art. 11. The original text in Portuguese reads:
"Os miltares estrangeiros, quando em comissão ou estágio nas forças armadas, ficam sujeitos à lei penal militar brasileira, ressalvado o disposto em tratados ou convenções internacionais."
Código Militar Penal, Art. 11º.

[103] Military Penal Code, Art. 10. It provides:
"In times of war, military crimes are considered to be:
I – those especially prescribed under this Code for times of war;
II – military crimes prescribed for times of peace;
III – crimes prescribed under this Code, although they may also exist with the same definition under a common or special penal code, whosoever the perpetrator may be, when practised:
a) in national or foreign militarily occupied territory;
b)in any place, if they jeopardise or could jeopardise preparation, efficiency or military operations, or in any other way attempt against the security of the Country outside its boundaries or if they could expose it to danger;
IV – crimes defined under a common or special penal code, although not prescribed under this Code, when practised in a zone of effective military operations or in militarily occupied foreign territory."
The original text in Portuguese reads:
"Consideram-se crimes miitares, em tempo de guerra:
I - os especialmente previstos neste Código para o tempo de guerra;
II - os crimes militares previstos para o tempo de paz;
III - os crimes previstos neste Código, embora também o sejam com igual definição na lei penal comum ou especial, quando praticados, qualquer que seja o agente:
a) em território nacional, ou estrangeiro, militarmente ocupado;
b) em qual lugar, se comprometem ou podem comprometer a preparação, a eficiência ou as operações militares ou, de qualquer outra forma, atentam contra a segurança externa do País ou podem expô-la a perigo;
IV - os crimes definidos na lei penal comum ou especial, embora não previstos neste Código, quando praticados em zona de efetivas operações militares ou em território estarangeiro, miitarmente ocupado."
Cádigo Militar Penal, Art. 10º.

[104] Military Penal Code, Book I (*Dos crimes militares em tempo de paz*) (Military crimes in peacetime), Title IV (*Dos crimes contra a pessoa*) (Crimes against the person): Chapter I (*Do homicído*) (Homicide), Arts 205 - 207; Chapter II (*Do genócidio*) (Genocide), Art. 208; Chapter III (*Da lesão corporal e da rixa*) (Bodily harm and affray), Arts 209 - 211; Chapter IV (*Da periclitação da vida ou da saúde*) (Endangering life or health), Arts 212 - 213; Chapter V (*Dos crimes contra a honra*) (Crimes against honour), Arts 214-221; Chapter VI (*Dos crimes contra a libertade*) (Crimes against liberty), Arts 222 - 231; Chapter VII (*Dos crimes sexuais*) (Sexual crimes), Arts 232 -237.

crimes which could amount to war crimes include: homicide.[105] The definition of wartime (*Tempo de guerra*) speaks of declarations of war or recognition of a state of war, traditionally concepts associated with international armed conflict, but it is not known if this term would receive an interpretation in keeping with the contemporary law of armed conflict, which includes non-international armed conflict.

Brazil is a party to Hague Convention IV, the Geneva Conventions and Protocols I and II. It has signed the Rome Statute and is expected to ratify it in 2001.

• ***Bulgaria:*** Bulgarian courts have been able to exercise universal jurisdiction over ordinary crimes since 1896 (see Chapter Two, Section II.A). They may now exercise universal jurisdiction over certain conduct amounting to war crimes under two provisions of the Bulgarian Penal Code. These two legislative provisions are reinforced by Article 5 (4) of the 1991 Constitution, which provides:

> "International treaties, ratified constitutionally, promulgated, and made effective by the Republic of Bulgaria, are part of the country's internal laws. They take precedence over conflicting legislation."[106]

First, Article 6 (1) of the Penal Code provides that "the Penal Code shall also apply to foreign citizens who have committed abroad crimes against peace and humanity, whereby the interests of another state or foreign citizens have been affected".[107] Section II (Crimes against the Laws and Customs of Waging War) of Chapter Fourteen of the Penal Code (Crimes against Peace and Humanity) lists a broad range of war crimes as crimes under national law.[108] These war crimes include certain crimes committed during non-international armed conflict.

Second, Article 6 (2) states that "[t]he Penal Code shall also apply to other crimes committed by foreign citizens abroad, where this is stipulated in an international agreement, to which the Republic of Bulgaria is a party".

Bulgaria is a party to Hague Convention IV, the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but had not yet ratified it as of 1 September 2001. Bulgaria is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and the Penal Code excludes statutes of limitations for war crimes.[109] The Penal Code provides for the

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[105] Military Penal Code, Book II (*Dos crimes militares em tempo de guerra*) (Military crimes in war time), Title III (*Dos crimes contra a pessoa*) (Crimes against the person): Chapter I (*Do homicído*) (Homicide), Art. 400; Chapter II (*Do genocídio*) (Genocide), Arts 401 - 402; Chapter III (*Da lesão corporal*) (Bodily harm), Art. 403; Title V (*Do rapto e da violência carnal*) (Rape and sexual violence), Arts 407 - 408.

[106] Constitution of the Republic of Bulgaria, 12 July 1991, Art. 5 (4) (English translation in Gisbert H. Flanz, *Republic of Bulgaria, in* Albert P. Blaustein & Gisbert H. Flanz, *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc.) (Release 92-3, May 1992).

[107] Bulgarian Penal Code of 1968, as amended 1999, Art. 6 (1).

[108] Bulgarian Penal Code, Art. 410 (inhumane treatment of wounded, sick and shipwrecked persons), Art. 411 (inhumane treatment of civilians), Art. 413 (misuse of the Geneva emblems), Art. 414 (damage to cultural property) and Art. 415 (prohibited methods of warfare).

[109] *Ibid.*, Art. 79 (2) in Chapter Nine (Lapse of Penal Prosecution and of Imposed Punishment). That paragraph states: "Not excluded by prescription shall be the penal prosecution and the serving of punishment with respect to crimes against peace and humanity." Chapter Fourteen (Crimes against Peace and Humanity) (Arts 407 to 418) includes crimes against peace, war crimes, genocide and *apartheid*.

recognition of official immunity, but only insofar as the immunity is consistent with international law.[110] The rule of *ne bis in idem* does not preclude a trial in Bulgaria of someone previously tried abroad, although the sentence of the foreign court shall be taken into account.[111] Although Article 79 (1) (3) of the Penal Code prohibits prosecutions where an amnesty exists, it appears to be intended to apply only to amnesties granted by Bulgaria.[112] Command and superior responsibility is recognized to a limited extent.[113]

• ***Burundi:*** National courts have been able to exercise universal jurisdiction over conduct which takes place abroad amounting to war crimes since 1981.

Article 4 of the Decree-Law No. 1/6 of 4 April 1981 provides for universal jurisdiction over any conduct abroad which would be a crime under Burundi law with a penalty of two or months' imprisonment, unless the suspect is extradited and provided that the Prosecutor's Office (*Ministère Public*) requests a prosecution. That article provides:

> "Every crime [*infraction*] committed abroad and for which Burundi law imposes a penalty of imprisonment of more than two months may be prosecuted and tried unless extradition procedures are implemented. A prosecution may only be instituted at the request of the Prosecutor's Office."[114]

If the crime committed abroad carries a penalty of less than five years' imprisonment, the request for prosecution must have been preceded by a complaint by the victim or an official denunciation by the authorities of the territorial state; a prosecution is barred if the suspect has been tried and there has been a final judgment or, after a conviction, has received a pardon or amnesty; and a prosecution may not proceed unless the accused is in Burundi.[115] Thus, it may be possible to charge a person suspected of

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[110] *Ibid.*, Art. 3 (2) ("The issue of the liability of foreign citizens who enjoy immunity with respect to the penal jurisdiction of the Republic of Bulgaria shall be decided in compliance with the norms of international law adopted thereby.")

[111] *Ibid.*, Art. 8 ("The sentence of a foreign court for a crime to which the Bulgarian Penal Code is applicable shall be taken into consideration in the cases specified in an international agreement to which the Republic of Bulgaria is a party.").

[112] *Ibid.*, Art. 79 (1) (3) ("Penal prosecution and the serving of punishment shall be excluded: . . . 3. where an amnesty has followed.").

[113] *Ibid.*, Art. 419 ("In accordance with the differentiation under the preceding article punished shall be also a person who consciously allows his subordinate to commit a crime provided for in this Chapter."). The wording of this article is not entirely clear, which may be the result of an ambiguity or error in the translation, as the preceding article deals only with certain aspects of the crime of *apartheid*, and the reference to crimes in Chapter Fourteen suggests that the term "article" should be in the plural and cover all the articles in the Chapter.

[114] Decree-Law No. 1/6 of 4 April 1981 reforming the Penal Code, Art. 4 (English translation by Amnesty International). The original text reads:

"Tout infraction commise à l'étranger et pour laquelle la loi burndaise prévoit une peine de servitude pénale de plus de deux mois peut être poursuivie et jugée sauf application des dispositions légale sur l'extradition. La poursuite ne peut être intentée qu'a la requête du Ministère Public."

Décret-loi n° 1/6 du 4 avril 1981 portant réforme du code pénal, art. 4.

[115] *Ibid.*, Art. 5. The original text reads:

"Quand l'infraction est commise à l'étranger contre un particulier et que la peine maximum prévue par la loi du Burundi est de cinq ans de servitude pénale au moin, cette requête doit être prédée d'une plainte de la partie offensée ou d'une dénonciation officielle de l'autorité du pays où l'infraction a été commise. Toutefois, pour les infractions autres que celles attentatoires à la sûreté de l'Etat, celles relative à la contrefaçon des sceaux de l'Etat et des monnaies nationales, aucune poursuite n'a lieu si

a crime abroad who is outside the country, but no further proceedings to prosecute the person may occur until the person is found in Burundi.

Burundi is a party to the Geneva Conventions and to Protocols I and II. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. It has not been possible to obtain a copy of the Penal Code to determine whether it provides that war crimes are crimes under national law, but the wording of Article 4 of the 1981 decree-law makes it clear that it includes any conduct that is a crime under national law, so it would cover conduct such as murder or rape that is a war crime when committed during armed conflict. In addition, a draft law was prepared in 1997 to establish procedures for the prosecution and trial of persons responsible for acts committed since 21 October 1993 that are defined and punishable under the Penal Code and constitute war crimes, including violations of the fourth Geneva Convention and Protocols I and II and war crimes as defined in the Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes against Humanity, or are crimes under the Penal Code committed in connection with events related to genocide and crimes against humanity.[116]

Official immunities are recognized only to the extent that they are consistent with international law.[117]

• ***Cameroon:*** There appear to be two provisions in the Cameroon Penal Code of 1975 which would permit courts to exercise universal jurisdiction over some conduct which could amount to a war crime if committed in armed conflict. These two legislative provisions are reinforced by Article 45 of the Constitution, which provides that "[d]uly approved or ratified treaties and international agreements shall, following their publication, override national laws, provided the other party implements the said treaty or agreement".[118] The reciprocity requirement appears directed at bilateral, not multilateral, treaties and it is possible that it may have no bearing on multilateral treaties.

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l'inculpé justifie qu'il a été jugé définitivement à l'étranger et, en cas de condamnation, qu'il a subi, prescrit sa peine, obtenu sa grâce ou son amnistie. Saufpour les infractions attentatoires à la sûreté de l'Etat et de contrefaçon des sceaux de l'Etat ou de falsification de monnaies nationales, la poursuite n'a lieu que si l'inclulpé est au Burundi."

Ibid., art. 5.

[116] *Decret-loi N° 1/.../...du.../.../1997 portant procédures de poursuites et de mise en jugement des personnes coupable de crimes de genocide ou de crimes contre l'humanité, art. 1.* That article reads:

"La présente loi a pour objet l'organisation des procédures de poursuites et de mise en jugement des personnes coupables d'actes commis à partir du 21 Octobre 1993, actes qualifés et sanctionnés par le Code Pénal et qui constituent:

a) Soit des crimes de génocide ou des crimes contre l'humanité tels que définis dans la Convention du 9 Décembre 1948 sur la prévention et la répression du crime de génocide, dans la Convention de Genève du 12 Août 1949 relative à la protection des personnes civiles en temps de guerre et les Protocoles additionnels ainsi que dans la Convention du 26 Novembre 1968 sur l'imprescriptibilité des crimes de guerre et des crimes contre l'humanité;

b) Soit des infractions visées au Code Pénal, qui ont été commises en relation avec les événements entourant le génocide et les crimes contre l'humanité."

As of 1 September 2001 it appears that this law has yet to be enacted.

[117] Penal Procedure Code of 1974, as amended1998, Art. 5 ("Procedural actions provided by this Code may be applied with regard to persons who enjoy immunity from the penal jurisdiction of the Republic of Bulgaria, only in compliance with the norms of international law.") (English translation by SOFIA).

[118] Law No. 96-06 of 18 January to amend the Constitution of 2 June 1972, published in the Official Gazette, 30 January 1996, Article 45. Official English version in*Republic of Cameroon, in*Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: June 1997) (Release 97-4 - Inter-University Associates, Inc. trans.).

First, Paragraph 1 of Section 10 (Offence Abroad by Citizen or Resident) states that "[t]he criminal law of the Republic shall apply to any act or omission abroad by a citizen or resident which is punishable by the law of the place of commission and is defined as a felony or as a misdemeanour by the law of the Republic."[119]

Second, Section 2 (General and special application) provides that "[t]his Code and every provision of criminal law shall be subject to the rules of international law and to all treaties duly promulgated and published." Therefore, all criminal law in Cameroon is subject to customary international law and to treaties, such as the Geneva Conventions, which provide for universal jurisdiction. Indeed, the official commentary to Section 11 (International Offences), which expressly provides for universal jurisdiction over only four crimes (piracy, traffic in persons, slave trade and narcotics trafficking) suggests that ratification of a treaty is sufficient to provide courts with jurisdiction without implementing legislation. It explains that

> "Section 11 applies Cameroon law to the acts listed even if committed abroad and by a foreigner because of their international gravity. This is the expression of the cooperation of the courts of all countries against infractions interesting the human race as a whole. . . . It must not be forgotten that the list may be added to bilaterally or even multilaterally by treaty - section 2 (1)."[120]

Cameroon is a party to the Geneva Conventions and Protocols I and II. It has signed the Rome Statute and has announced that it intends to ratify it in 2001. It is not known if the Penal Code excludes statutes of limitations for war crimes, but Cameroon is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

• ***Canada:*** Canadian courts can exercise universal jurisdiction over war crimes in international and non-international armed conflict.

(1) Legislation. There are four relevant legislative provisions which provide or provided universal jurisdiction over war crimes.

The 1945 War Crimes Regulations (Canada) and the Act respecting War Crimes of 31st August, 1946. Immediately after the Second World War, Canadian military courts were able to exercise universal jurisdiction over war crimes, pursuant to the 1945 War Crimes Regulations (Canada).[121] Section

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[119] Penal Code, Sec. 10 (1) of the Republic of Cameroon (1 August 1975). The official French version states: *"La loi pénale de la République s'applique aux faits commis à l'étranger par un citoyen ou par un résident, à condition qu'ils soient punissables par la loi du lieu de leur commission et soient qualifiés crimes ou délits par les lois de la République".*
République Unie du Cameroun, Code Pénal, Art. 10 (1). According to the official commentary to Section 10, it will be up to the courts to determine as a question of fact whether a person is a resident, with the main criteria being "the foreigner's habitual presence in Cameroon, a stay with some degree of permanence and stability", and other useful indications being "[t]he practice of some permanent occupation, and the payment of income tax". It adds that "[n]either the tourist nor the passing traveller, even on business, count as resident".

[120] Although the government has not argued that Cameroon courts may exercise universal jurisdiction over other crimes under international law in treaties to which Cameroon is a party, no court is known to have ruled on the scope of this provision. See discussion of these provisions in Part Four, Section III.

[121] War Crimes Regulations (Canada), promulgated by Order in Council, 30 August 1945. The 1945 Regulations were similar to the British Royal Warrant of 14 June 1945, Army Order 81/45 (for the text and scope, see the entry on the United Kingdom in this chapter). An authoritative commentary has stated that the 1945 Regulations were limited in scope than the British Royal Warrant since they did not provide for jurisdiction over crimes against

6 (1) of the War Crimes Regulations gave the convening officer the power to arrest a person when it was believed the suspect had "at any place committed a war crime". However, it appears that the only prosecutions by Canadian military courts were based on crimes committed against members of the Canadian armed forces.[122] New prosecutions in Commonwealth countries were then stopped on 31 August 1948 (see Chapter Two, Section III.B).

The Geneva Conventions Act 1965, as amended 1991. Canada ratified the Geneva Conventions and in 1965 enacted the Geneva Conventions Act, Section 3 (1) of which provides for universal jurisdiction over grave breaches of the Geneva Conventions.[123] Section 3 (2) of the Geneva Conventions Act provides that proceedings can be brought with respect to a grave breach "whether or not the person is in Canada".[124] Decisions whether to prosecute are not made by an independent prosecutor but by a political official, the Attorney General.[125]

After it was discovered in the early 1980s that many persons suspected of committing war crimes and crimes against humanity as members of Axis forces during the Second World War, the public outcry led the government in 1985 to establish a commission to investigate. The Commission of Inquiry on War Criminals (Deschênes Commission) compiled a list of 883 suspects and issued a comprehensive report which recommended enactment of legislation to permit prosecutions of such suspects.[126] Article 7 of the

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humanity and aggression. United Nations War Crimes Commission, 4 *Law Reports of Trials of War Criminals* 126 (London: H.M.S.O. 1948). Regulation 3 stated: "The custody, trial and punishment of persons charged with or suspected of war crimes shall, on and after the date hereof, be governed by these Regulations." Regulation 2 (f) defined a war crime as "a violation of the laws or usages of war committed during any war in which Canada has been or may be engaged at any time after the ninth day of September, 1939". The 1945 Regulations were subsequently re-enacted by the Act respecting War Crimes of 31st August, 1946 (10 George VI Chap. 73). The Act was to continue into force until a day fixed by proclamation of the Governor in Council. It is not known if the Act is still in force.

[122] Commission of Inquiry on War Criminals, Report - Part I: Public 25 (Ottawa: Canadian Government Publishing Centre 1986) (Deschênes Report).

[123] The current text of Section 3 (1) of the Geneva Conventions Act of 1965, as amended in 1991, R.S. c. G-3, s.1, now includes universal jurisdiction over grave breaches of Protocol I and serious violations of Protocol II. It provides:

> "Every person who, whether within or outside Canada, commits a grave breach referred to in Article 50 of Schedule I, Article 51 of Schedule II, Article 130 of Schedule III, Article 147 of Schedule IV or Article 11 or 85 of Schedule V is guilty of an indictable offence, and
> (a) if the grave breach causes the death of any person, is liable to imprisonment for life; and
> (b) in any other case, is liable to imprisonment for a term not exceeding fourteen years."

[124] Section 3 (2) provides:

> "Where a person is alleged to have committed an offence referred to in subsection (1), proceedings in respect of that offence may, whether or not the person is in Canada, be commenced in any territorial division in Canada and that person may be tried and punished in the same manner as if the offence had been committed in that territorial division."

[125] Section 3 (4) provides:

> "Proceedings with respect to an offence referred to in subsection (1), other than proceedings before a service tribunal as defined in section 2 of the Natioanl Defence Act, may only be commenced with the personal consent in writing of the Attorney General of Canada or the Deputy Attorney General of Canada and be conducted by the Attorney General of Canada, or counsel acting on behalf thereof."

[126] Deschênes Report, *supra, n.123*,827. Although the Commission expressed doubt whether customary or conventional international law authorized Canada to exercise universal jurisdiction over persons suspected of war crimes committed during the Second World War, it declared that Canada could do so "inasmuch as war crimes are violations of the general principles of law recognized by the community of nations, which art. 11 (g) of the *Canadian*

Canadian Criminal Code, enacted in response to the Commission's recommendations, provided for universal jurisdiction over war crimes and crimes against humanity committed outside Canada that if committed in Canada would have been an offence under Canadian law at the time of the act or omission (for cases under this legislation, see below).[127] In 1991, Section 3 (1) of the Geneva Conventions Act of 1965 was amended to provide for universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I and serious violations of Protocol II.[128]

Canada has ratified the Rome Statute. In July 2000, it enacted the Crimes against Humanity and War Crimes Act to implement the Rome Statute, in part by expressly providing that a person present in Canada suspected of previously committing one or more of the crimes in Articles 6, 7 and 8 pursuant to Article 8 of the Act "may be prosecuted".[129] It is not entirely clear whether this provision limits the exercise of universal jurisdiction to custodial universal jurisdiction. The plain wording of the Act would suggest that the police or prosecutor could open an investigation with a view to requesting extradition to Canada before a prosecution was commenced pursuant to an indictment and some Canadian lawyers have suggested that this interpretation may well be correct. However, several of the government officials connected with the drafting of this provision have claimed that there would be no jurisdiction to open an investigation if a

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Charter of Rights and Freedoms has enshrined in the Constitution of Canada." *Ibid.*, 132.

[127] Article 7 of the Canadian Criminal Code 1985, c. C-46, as amended by R.S.C. 1985, c. 30 (3rd Supp.), s. 1, provides:

"7. (3.71) Notwithstanding anything in this Act or any other Act, every person who, either before or after the coming into force of this subsection, commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at the time of the act or omission shall be deemed to commit that act or omission in Canada at that time if,

(a) at the time of the act or omission,

(i) that person is a Canadian citizen or is employed by Canada in a civilian or military capacity,

(ii) that person is a citizen of, or is employed in a civilian or military capacity by, a state that is engaged in an armed conflict against Canada, or

(iii) the victim of the act or omission is a Canadian citizen or a citizen of a state that is allied with Canada in an armed conflict; or

(b) at the time of the act or omission, Canada could, in conformity with international law, exercise jurisdiction over the person with respect to the act or omission on the basis of the person's presence in Canada and, subsequent to the time of the act or omission, the person is present in Canada." (Text reproduced from ICRC National Implementation Database).

[128] See footnote 125.

[129] Crimes Against Humanity and War Crimes Act, Section 8 provides:

"A person who is alleged to have committed an offence under section 6 or 7 may be prosecuted for that offence if

(a) at the time the offence is alleged to have been committed,

(i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity,

(ii) the person was a citizen of a state that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a state,

(iii) the victim of the alleged offence was a Canadian citizen, or

(iv) the victim of the alleged offence was a citizen of a state that was allied with Canada in an armed conflict; or

(b) after the time the offence is alleged to have been committed, the person is present in Canada."

Although the wording of Section 8 (b) is open to the interpretation that a prosecutor could seek the extradition of a person in order to commence a prosecution, it has not been so interpreted by those participated in the drafting of this provision.

suspect was not present in Canada. It is likely that the correct interpretation of the phrase "may be prosecuted" will have to await judicial determination whether the police or prosecutor had jurisdiction to conduct such a preliminary investigation, but it remains to be seen whether the police or a prosecutor will attempt to do so. Another problem with the Act is that it authorizes a number of impermissible defences, including the defence of superior orders to war crimes under certain circumstances.[130] Section 48 of the Act provides that no person subject of requests for surrender by the International Criminal Court or the Yugoslav or Rwanda Tribunals "may claim immunity under common law or by statute from arrest or surrender", thus, leaving by implication the ability to claim any official immunity with respect to prosecution in Canada or to a request for extradition. It appears that statutes of limitation do not apply to crimes in the Act.

Section 8 (b) provides that "[a] person who is alleged to have committed an offence under section 6 or 7 [command and superior responsibility] may be prosecuted for that offence if . . . after the time of the offence is alleged to have been committed, the person is present in Canada."[131] It is not entirely free from doubt about whether this sub-section provides for custodial universal jurisdiction or not. Several government officials involved in the drafting of this provision have said that it meant that neither the police nor a prosecutor could open a preliminary criminal investigation concerning crimes committed abroad defined in sections 6 and 7 or seek extradition of a suspect unless the suspect had been in Canada after the offence. Other experts in Canadian law have concluded that section 8 (b) simply meant that a prosecution pursuant to an indictment could not proceed unless the suspect had been in Canada after the offence, but that it did not prevent a preliminary police or prosecutorial investigation or a request for extradition before entry into Canada. Such an interpretation of the meaning of prosecution would be consistent with how this term is used in another Commonwealth country, New Zealand.[132] This issue will need to be resolved by a court.[133]

It is not a justification, excuse or defence under the Act if the offence was committed in obedience

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[130] Crimes against Humanity and War Crimes Act, Art. 11 ("In proceedings for an offence under any of sections 4 to 7, the accused may, subject to sections 12 to 14 and to subsection 607 (6) of the *Criminal Code*, rely on any justification, excuse or defence available under the laws of Canada or under international law at the time of the proceedings."); Art. 14 (authorizing, in a slightly modified form, the defence of superior orders for war crimes in prosecutions in Canadian courts which, under Article 33 of the Rome Statute, applies only to proceedings in the International Criminal Court). The Committee against Torture has criticized these provisions (see Chapter Ten, Section II).

[131] Crimes Against Humanity and War Crimes Act, Sec. 6 (b).

[132] In New Zealand, a person may be charged and arrested without the consent of the Attorney-General to a prosecution, but the consent of the Attorney-General is required for a prosecution. Section 13 (Attorney-General's consent to prosecutions required) states:

" (1) Proceedings for an offence against section 9 or section 10 or section 11 may not be instituted in any New Zealand court without the consent of the Attorney-General.

(2) Despite subsection (1), a person charged with an offence against section 9 or section 10 or section 11 may be arrested, or a warrant for his or her arrest may be issued and executed, and the person may be remanded in custody or on bail, even though the consent of the Attorney-General to the institution of a prosecution for the offence has not been obtained, but no further proceedings can be taken until that consent has been obtained."

[133] Since the Crimes against Humanity and War Crimes Act does not amend or repeal the Geneva Conventions Act, criminal proceedings can still be brought for grave breaches even when the suspect is not in Canada, thus, permitting a prosecutor to seek an indictment and to request extradition of a person believed to be responsible for grave breaches.

to or in conformity with the law of the place where it was committed.[134] There is no provision in the Act concerning statutes of limitation and it is not clear if statutes of limitation apply to crimes in the Act. Consent of a political official, the Attorney General or Deputy Attorney General is required to commence proceedings, but no criteria are spelled out to guide the official in making this political decision.[135] In addition, contrary to the principle of international law recognized in the Nuremberg and Tokyo Charters, the 1996 Draft Code of Crimes and the Statutes of the Yugoslavia and Rwanda Tribunals, the Act provides that superior orders are a defence to war crimes in certain circumstances.[136] Section 12 appears to prevent foreign judgments of guilt or innocence and pardons being used as bars to prosecution in Canada for crimes against humanity, but it is silent on whether the Attorney General or Deputy Attorney General in making the political decision whether to prosecute or not for crimes against humanity may take into account foreign amnesties or other measures of impunity.[137]

(2) Investigations and prosecutions. In the period from 1987 to 1992, four criminal prosecutions were instituted under Article 7 of the Criminal Code in Canadian civilian courts, based on universal jurisdiction over non-Canadians accused of war crimes against humanity during the Second World War, but none led to a conviction.[138] The acquittal in one of those cases, the *Finta* case, was upheld on appeal by the Court of Appeal and then in 1994 by the Supreme Court.[139] In part because of the restrictive interpretation of Section 7 by Canadian courts, the government announced a change in January 1995 in approach from emphasizing criminal prosecution to seeking revocation of citizenship, similar to the approach in the United States.[140] As part of this effort, 1,651 cases were reviewed, and although "all cases are evaluated for both criminal prosecution as well as revocation proceedings", none led to a prosecution.[141] In the autumn of 1997, the government conducted a review of its War Crimes Program and on 21 July 1998 announced that 14 cases from the Second World War would be initiated over the next

[134] Crimes Against Humanity and War Crimes Act, Sec. 13.

[135] Crimes Against Humanity and War Crimes Act, Art. 9 (3).

[136] Crimes Against Humanity and War Crimes Act, Art. 14 (incorporating the defence of superior orders as defined solely for purposes of proceedings before the International Criminal Court in Article 33 of the Rome Statute).

[137] Section 12 provides:
"(1) If a person is alleged to have committed an act or omission that is an offence under this Act, and the person has been tried and dealt with outside Canada in respect of the offence in such a manner that, had they been tried and dealt with in Canada, they would have been able to plead *autrefois acquit*, *autrefois convict* or pardon, the person is deemed to have been so tried and dealt with in Canada."
(2) Despite subsection (1), a person may not plead *autrefois acquit*, *autrefois convict* or pardon in respect of an offence under any of sections 4 to 7 if the person was tried in a court of a foreign state or territory and the proceedings in that court
(a) were for the purpose of shielding the person from criminal responsibility; or
(b) were not otherwise conducted independently or impartially in accordance with the norms of due process recognized by international law, and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person to justice."

[138] Canada's War Crimes Program, *Annual Report 1999-2000*, 3.

[139] *R. v. Finta*, 28 C.R (4th) 265, 297 (1994) (holding that Canadian courts could exercise jurisdiction for war crimes committed abroad when they satisfied requirements under national law). *See* Judith Hippler Bello & Irwin Cotler, *International Decisions: Regina v. Finta*, 90 Am. J. Int'l L. 460 (1996).

[140] Canada's War Crimes Program, *Annual Report 1999-2000*, 3-4.

[141] *Ibid.*, 4.

three years and that additional cases would be developed.[142] Significantly, both the Department of Justice and the Royal Canadian Mounted Police received additional funding to investigate and prosecute cases of crimes committed abroad since the Second World War.[143]

• ***Chile:*** It appears that there may be three bases for Chilean courts to exercise universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I and, possibly, other crimes under international law.

First, courts may directly apply international treaties. Article 5 of the Chilean Constitution recognizes as limits on sovereignty "the respect for the essential rights originating from human nature" and provides that "[i]t is the duty of State agencies to respect and promote rights guaranteed by this Constitution and by international treaties ratified by Chile and in force."[144] The Supreme Court of Justice of Chile has recognized in the *Pedro Enrique Poblete Cordoba* case that it is possible under Article 5 of the Constitution to apply directly the provisions of international treaties to which Chile is a party and which are in force. The Supreme Court cited the *aut dedere aut judicare* obligations of the Geneva Conventions, which strongly suggests that Article 5 permits the direct application of jurisdictional as well as substantive provisions of international treaties.[145]

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[142] *Ibid.*, 6.

[143] *Ibid.*

[144] *Constitución, Art. 5. "La soberanía reside esencialmente en la Nación. Su ejercicio se realiza por el pueblo a través del plebiscito y de elecciones periódicas y también, por las autoridades que esta Constitución establece. Ningún sector del pueblo ni individuo alguno puede atribuirse su ejercicio. El ejercicio de la soberanía reconoce como limitación el respeto a los derechos esenciales que emanan de la naturaleza humana. Es deber de los órganos del Estado respetar y promover tales derechos, garantizados por esta Constitución, así como por los tratados internacionales ratificados por Chile y que se encuentren vigentes."* (English translation and original text in Jay. A. Sigler, Albert P. Blaustein, Jacqueline M. Ross, Carol Tenney & Jefri Jay Ruchti, *Chile*, in Albert P. Blaustein & Gisbert H. Flanz, eds, *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. 1991)).

[145] After noting that the obligations of states parties under the Geneva Conventions included the obligation to search for persons who were suspected of committing grave breaches in order to bring them before their own courts, the Supreme Court declared that,

> "as a consequence, the State of Chile took upon itself in the aforementioned Conventions the obligation of guaranteeing the security of persons who might be participating in armed conflicts within its territory, especially if they were detained, it being forbidden to take measures designed to cover up wrongs committed against specific persons or to ensure that their perpetrators remain unpunished, especially bearing in mind that international agreements should be fulfilled in good faith. As regards the Convention its aim is to guarantee the basic rights emanating from human nature, its application should be pre-emininent, since this Supreme Court has repeatedly recognized when passing sentence 'that, as is clearly shown in the official historical record of how the constitutional norm contained in article 5 of the Fundamental Charter was established, the internal sovereignty of the State of Chile is limited by the rights which emanate from human nature: values which stand above any law which the State authorities, including the Constituent Power itself, might pass, and which means that they cannot be disregarded.'. . .
>
> In such circumstances, the failure to apply such provisions constitutes an error in law which must be corrected by means of this appeal, especially if it is borne in mind that, under the principles of international law, international treaties must be interpreted and applied by States in good faith; from which it there follows that, unless the respective Conventions have been denounced, domestic law should comply with them and that the legislator should ensure that any new laws comply with the said international instruments so that any transgression of their principles is avoided . . .".

Pedro Enrique Poblete Cordoba, Judgment, Rol 469-98 (Sup. Ct. Chile 9 September 1998), para. 10 (English translation by Amnesty International; another English translation is in 2 Y.B. Int'l Hum. L. 485 (1999)).

Second, independently of this constitutional provision, Article 6 (8) of the *Código Orgánico de Tribunales* (Code on Organization of the Courts) provides that

> "[t]he Chilean courts shall exercise jurisdiction over the following crimes and offences committed outside national territory: . . . (8) those covered in treaties signed with other States".[146]

The wording of Article 6 (8) appears broad enough to permit Chilean courts to exercise universal jurisdiction over war crimes committed abroad that are defined in treaties, even if those treaties do not expressly provide for universal jurisdiction over those crimes. Therefore, it is possible that Chilean courts may be able to exercise universal jurisdiction over violations of common Article 3 or Protocol II. However, although it has not been possible to locate any jurisprudence or authoritative commentaries on the question, the government has stated that Chilean courts can exercise universal jurisdiction over violations of human rights treaty norms without any implementing legislation.[147]

Chile is a party to the Geneva Conventions and Protocols I and II. It has signed Hague Convention IV, but has not yet ratified it. Chile has signed the Rome Statute, but had not yet ratified it as of 1 September 2001. Chile has not enacted laws providing that grave breaches of the Geneva Conventions or of Protocol I and other violations of these treaties and of Protocol II are crimes under national law. Doubts in some quarters about whether prosecutions for grave breaches or other violations were possible led the government to appoint an Inter-Ministerial Commission for the Implementation of Humanitarian Law (*Comisión Nacional de Derecho Humanitario*), created by Ministerial Decree n. 1229 of 31 August 1994. That commission is reported to be preparing draft legislation to define grave breaches and other violations of these treaties to be crimes under national law.

Third, Article 3 of the Military Justice Code of 1925 provides military courts with universal jurisdiction over occupied territory and crimes committed by soldiers.[148] Apparently, the Military Justice Code, which

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[146] *"Quedan sometidos a la jurisdicción chilena los crímenes y simples delitos perpetrados fuera del territorio de la República que a continuación se indican; . . . 8) Los comprendidos en los tratados celebrados con otras potencias, . . . ". Código Orgánico de Tribunales, Art. 6.* (English translation by Amnesty International). Obtainable from http://www.cajpe.org.pe/rij/bases/legisla/chile/codotch.htm

[147] Initial report of Chile to the Committee against Torture, U.N. Doc. CAT/C/7/Add.2 (1989), para. 118 (for the text, see Chapter Ten, Section II).

[148] *Libro Primero: De los tribunales militares; Titulo I: Disposiciones generales, Art. 3. "Los Tribunales Militares de la República tienen jurisdicción sobre los chilenos y extranjeros, para juzgar todos los asuntos de la jurisdicción militar sobrevengan en el territorio nacional.*
Igualmente tienen jurisdicción para conocer de los mismos asuntos que sobrevengan fuera del territorio nacional, en los casos siguientes:
1° Cuando acontezcan dentro de un territorio ocupado militarmente por las armas chilenas;
2° Cuando se trate de delitos cometidos por militares en el ejercicio de sus funciones o en comisiones del servicio;
3° Cuando se trate de delitos contra la soberanía del Estado y su seguridad exterior o interior." (Original text on ICRC IHL Implementation Database, *obtainable from* http://www.icrc.org/ihl-nat)

("The Military Courts of the Republic have jurisdiction over Chileans and foreigners in order to pass judgment on all matters of military jurisdiction which might arise within the national territory.

They also have jurisdiction to try the same matters when they arise outside national territory in the following cases:

1. When they occur within a territory which militarily occupied by the Chilean armed forces;
2. When they concern offences committed by soldiers in the course of duty or when undertaking military assignments;
3. When they concern offences against the sovereignty of the State and its external or internal security." Military Justice Code, Art. 3.) (English translation by Amnesty International).

includes a number of war crimes listed in the 1907 Hague Convention and Regulations as crimes under national law in Book III, Title III (Crimes against International Law), has not been amended in more than three-quarters of a century. Article 261 provides that certain war crimes are crimes under national law.

• ***China:*** It appears that Chinese courts may exercise universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I, and, possibly, over other violations of these treaties and of Protocol II.

Article 9 of the Criminal Code states that "[t]his law is applicable to the crimes specified in international treaties to which the [People's Republic of China] is a signatory state or with which it is a member and the [People's Republic of China] exercises criminal jurisdiction within its treaty obligations."[149] Since the Geneva Conventions and Protocol I impose *aut dedere aut judicare* obligations and require states to repress other violations, it appears that the exercise universal jurisdiction by Chinese courts over persons suspected of grave breaches - and, possibly, other violations - who are not extradited would be within its treaty obligations. A prior judgment abroad concerning the same crime does not automatically bar a prosecution, although it can act as a bar or be taken into account in mitigation when sentencing.[150] Although a statute of limitations of 20 years ordinarily applies to the most serious crimes, it can be disregarded if the Supreme People's Procurate decides otherwise.[151]

In addition, it appears that courts in the ***Hong Kong Special Administrative Region*** may exercise universal jurisdiction over grave breaches of the Geneva Conventions. Although Hong Kong is not known to have a Geneva Conventions Act, the United Kingdom's Geneva Conventions Act 1957 applied to the Colony of Hong Kong under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below), at least before 1 January 1970. Hong Kong was returned to China in 1997. On 23 February 1997, the Standing Committee of the National People's Congress dealing with matters related to the transfer decided that existing law, except law that was in contravention of the Basic Law of Hong Kong would remain in effect and the Basic Law promulgated on 4 April 1997 spelled out which laws fell into this category and the 1959 Order in Council was not listed.[152]

Similarly, courts in another special autonomous region, ***Macau***, may exercise universal jurisdiction over grave breaches of the Geneva Conventions. Article 5 of the Macau Criminal Code of 1998 provides for universal jurisdiction in two situations: when a foreign resident of Macau commits a crime abroad that is a crime in the place where it occurred and when anyone commits a crime where Macau is obliged by an international agreement or the dictates of judicial cooperation to apply its law to the crime. It states

[149] Criminal Law of the People's Republic of China, adopted by the Second Session of the Fifth National People's Congress on 1 July 1979 and amended by the Fifth Session of the Eighth National People's Congress on 14 March 1997, Art. 9 (*obtainable from:* http://www.qis.net/chinalaw/prclaw60.htm). A similarly worded English translation can be found in Wei Luo, ed., *The 1997 Criminal Code of the People's Republic of China: With English Translation and Introduction* (Buffalo, New York: William S. Hein & Co., Inc.).

[150] *Ibid.*, Art. 10.

[151] *Ibid.*, Art. 87.

[152] Decision of the Standing Committee of the National People's Congress on Treatment of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted at the 24th Sess., Standing Comm. of 8th National People's Congress, 23 February 1997; Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted at 3rd Sess. of 7th National People's Congress on 4 April 1990, promulgated by Order No. 26 of the President of the People's Republic of China on 4 April 1997, effective 1 July 1997.

in relevant part:

"1. Unless provided for to the contrary by an international agreement enforceable in Macau or in accordance with the dictates of judicial cooperation, the criminal law of Macau shall also apply to acts committed outside Macau:

. . . .

c) By a resident of Macau against a non-resident, or by a non-resident against a resident, provided that:

(1) the party is in Macau,

(2) The act would also be punished by the legislation of the place where it was committed, except where no punitive power acts in that place, and

(3) It constitutes a crime which permits the handing over of the agent and this cannot be granted, .

. . .

2. The criminal law of Macau also applies to acts committed outside Macau provided that the obligation to try them results from an international agreement enforceable in Macau or in accordance with the dictates of judicial cooperation."[153]

China is a party to the Geneva Conventions and Protocols I and II. It has not signed the Rome Statute and as of 1 September 2001 it had not yet ratified it.

• ***Colombia:*** Colombian courts can exercise universal jurisdiction over war crimes when the conduct is a crime under national law and certain other conditions are satisfied.

Paragraph 6 of Article 16 (Extraterritoriality) of the Colombian Penal Code (*Código Penal*), Law 599 of 2000, in force since July 2001, provides that Colombian courts have jurisdiction over certain crimes committed abroad by foreigners against other foreigners, when the suspect is within Colombian territory, under certain circumstances. That article provides:

"The Colombian Penal Code shall apply to:

. . . .

6. Any foreigner who has committed an offence outside Colombia against a foreigner, as long as the following conditions are met:

(a) That he is present on Colombian territory;

(b) That the crime is punishable in Colombia by a minimum prison sentence of not less than three

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[153] Macau Criminal Code of 1998, Art. 5 (Acts committed outside Macau) (English translation by Amnesty International). The original text in Portuguese reads:

"Salvo disposição em contrário constante de convenção internacional aplicável em Macau ou de acordo no domínio da cooperação judiciária, a lei penal de Macau é ainda aplicável a factos practicados fora de Macau:

. . . .

c) Por residente de Macau contra não-residente, ou por não-residente contra residente, sempre que:

(1) O agente for encontrado em Macau;

(2) Os factos forem também puníveis pela legislação do lugar em que tiverem sido praticados, salvo quando nesse lugar não se exercer poder punitivio; e

(3) Constituírem crime que admita entrega do agente e esta não possa ser concedida . . .

. . . .

2. A lei penal de Macau é ainda aplicável a factos praticados fora de Macau sempre que a obrigação de os julgar resulte de convenção internacional aplicável em Macau ou de acordo no domínio da cooperação judiciária."

Código Penal de Macau, Imprensa Oficial de Macau, 1998, Art. 5° (Factos praticados fora de Macau).

years;
(c) That the crime is not a political offence, and
(d) That if extradition has been requested, it has not been granted by the Colombian Government. When extradition has not been accepted there may be a criminal trial. In the case referred to in this part 6 there will be no criminal process except upon complaint or petition by the Attorney General of the Nation and only provided there has been no foreign trial."[154]

This provision would appear to give Colombian courts jurisdiction over war crimes committed abroad by non-nationals where the conduct would amount to a crime under Colombian law with a penalty of at least three years' imprisonment, but only if the victim made a complaint or the Attorney General authorized a prosecution and the suspected had not previously been tried. There is no requirement that a request for extradition have been made and refused.

As regards the hierarchy of international treaties in the Colombian legal system the relevant articles are to be found in the Constitution of 1991 (reformed in 1997). Article 4 of the Constitution states:

"The Constitution is norm of norms. In case of incompatibility between the Constitution and the law or other legal norm the constitutional provisions shall be applicable..."[155]

A number of legal experts have argued that an integrated interpretation of these articles reveals that the wording "or other legal norm" in Article 4 excludes international treaties on human rights ratified by Colombia since Article 93 expressly provides that

"[i]nternational treaties and conventions ratified by Congress, which recognize human rights and prohibit its limitation under states of emergency, shall prevail in the internal legal order. Rights and duties recognized in this Constitution shall be interpreted in accordance with international treaties on human rights ratified by Colombia."[156]

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[154] *"La ley penal colombiana se aplicará: . . .*
6) Al extranjero que haya cometido en el exterior un delito en perjuicio de extranjero, siempre que se reúnan estas condiciones:
a) Que se halle en territorio colombiano;
b) Que el delito tenga señalada en Colombia pena privativa de la libertad cuyo mínimo no sea inferior a tres años;
c) Que no se trate de delito político, y
d) Que solicitada la extradición no hubiere sido concedida por el gobierno colombiano. Cuando la extradición no fuere aceptada no habrá lugar a proceso penal.
En el caso a que se refiere el presente numeral no se procederá sino mediante querella o petición del Procurador General de la Nación y siempre que no hubiere sido juzgado en el exterior." Law 599 of 2000 issuing a new Penal Code, promulgated on 24 July 2000, effective July 2001. *Diario Oficial, Nº 44097.*
The wording of the former Penal Code *Código Penal (Decreto-Ley 100 de 1980) Art. 15 (6)* was the same except for a minor change (while the former Article used the term *numeral* in the last paragraph the new one uses *ordinal*) . (English translation by Amnesty International).

[155] The original text in Spanish text reads: Art. 4: *"La Constitución es norma de normas. En todo caso de incompatibilidad entre la Constitución y la ley u otra norma jurídica, se aplicarán las disposiciones constitucionales...".*
The original text in Spanish is *obtainable from* http://www.presidencia.gov.co/webpresi/constitucion/framdown.htm.

[156] The original text of Article 93 in Spanish text reads:
"Los tratados y convenios internacionales ratificados por el Congreso, que reconocen los derechos humanos y que prohiben su limitación en los estados de excepción, prevalecen en el orden interno.

Therefore, it appears that in case of conflict between the internal norms providing for the exercise of jurisdiction and the equivalent norms provided by treaties ratified by Congress the latter will prevail.

Moreover, Article 9 of the Constitution establishes that :"The foreign relations of the State are based on national sovereignty, on respect for the self-determination of peoples and on the recognition of the principles of International Law accepted by Colombia" [157]

Hence, this constitutional doctrine gives added support to the principle of universal jurisdiction reflected in Article 16 (6) of the Penal Code.

Colombia has signed Hague Convention IV, but has not yet ratified it. It is a party to the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but as of 1 September 2001, it had not yet ratified it, although the government reportedly hopes to be able to ratify it by the end of 2001. A number of war crimes are made crimes under national law when committed during "armed conflict", which would appear to include non-international armed conflict.[158]

Los derechos y deberes consagrados en esta carta, se interpretarán de conformidad con los tratados internacionales sobre derechos humanos ratificados por Colombia".

[157] The original text in Spanish of Article 9 reads: *" Las relaciones exteriores del Estado se fundamentan en la soberanía nacional, en el respeto de la autodeterminación de los pueblos y en el reconocimiento de los principios del Derecho Internacional aceptados en Colombia".*

[158] *Ley 599 (2000) Libro Segundo (Parte Especial). Titulo II. DELITOS CONTRA PERSONAS Y BIENES PROTEGIDOS POR EL DERECHO INTERNACIONAL HUMANITARIO. Capítulo Unico.* (The original text in Spanish is *obtainable from* http://www.unifr.ch/derechopenal/ljcolombia/l1t2cu.htm).

Under Law 599 of 2000, all of the following crimes are punishable by at least three years' imprisonment "when occasioned by and committed in the course of armed conflict": *Art.135 Homicidio en persona protegida* (Homicide of a protected person within the meaning of the treaties on international humanitarian law ratified by Colombia); *Art. 136 Lesiones en persona protegida* (Injury to the physical integrity of health of a protected person within the meaning of the treaties on international humanitarian law ratified by Colombia); *Art. 137 Tortura en persona protegida* (torture of a protected person); *Art. 138 Acceso carnal violento en persona protegida* (Carnal access by means of violence, committed against a protected person); *Art. 139 Actos sexuales violentos en persona protegida* (Violent sexual acts against a protected person); *Art. 141 Prostitución forzada o esclavitud sexual* (Forced prostitution or sexual slavery of a protected person); *Art. 142 Utilización de medios y métodos de guerra ilícitos* (Use of illegal means or methods of war, that is, those which are prohibited or which are designed to cause unnecessary suffering or loss or superfluous evils); *Art. 143 Perfidia* (Perfidy); *Art. 144 Actos de terrorismo* (Acts of terrorism, that is, committing or ordering to be committed indiscriminate or excessive attacks or targeting the civilian population with attacks, reprisals, or acts or threats of violence whose main objective is to terrorize the civilian population); *Art. 145 Actos de barbarie* (Acts of barbarity to the extent not already covered, including allowing no quarter, attacking non-combatants, abandoning the wounded or sick, carrying out acts designed to leave no survivors or killing the sick or wounded or other acts of barbarity prohibited by the international treaties ratified by Colombia); *Art. 146 Tratos inhumanos y degradantes y experimentos biológicos en persona protegida* (Inhuman and degrading treatment and biological experiments, committed against protected persons); *Art. 147 Actos de discriminación racial* (Acts of racial discrimination, including the practice of racial segregation, or carrying out inhuman or degrading treatment based on other distinctions of an unfavourable character which violate human dignity); *Art. 148 Toma de rehenes* (Hostage taking); *Art. 149 Detención ilegal y privación del debido proceso* (Illegal detention and denial of due process); *Art. 150 Constreñimiento a apoyo bélico* (Forced military service of a protected person); *Art. 151 Despojo en el campo de batalla* (Plunder of the belongings of a corpse or of a protected person); *Art. 152 Omisión de medidas de socorro y asistencia humanitaria* (Failure to provide aid and humanitarian assistance to protected persons when there is a duty to provide such aid and assistance); *Art. 153 Obstaculización de tareas sanitarias y humanitarias* (Impeding health and humanitarian work); *Art. 154 Destrucción y aprropiación de bienes protegidos* (Destruction and appropriation of protected property); *Art. 155*

• ***Costa Rica:*** It appears that Costa Rican courts can exercise universal jurisdiction over war crimes in both international and non-international armed conflict.

Article 7 of the 1970 Penal Code (*Código Penal*) provides for custodial universal jurisdiction over criminal conduct covered by human rights treaties. It states that

> "[r]egardless of the regulations in force in the place where the punishable act is committed and of the nationality of the perpetrator, punishment under Costa Rican law shall be applicable to . . . anyone who commits other punishable acts against human rights covered by the treaties signed by Costa Rica or by this Code."[159]

This provision would appear to include violations of humanitarian law, as well as violations of human rights recognized in treaties, even where the treaty does not expressly provide for universal jurisdiction. Article 8 requires that the suspect be present in the territory and provides that a criminal prosecution may only be brought by "the relevant bodies".[160]

Costa Rica is a party to the Geneva Conventions and Protocols I and II. It has ratified the Rome Statute, but had not yet enacted implementing legislation as of 1 September 2001. Article 374 of the Penal

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Destrucción de bienes e instalaciones de carácter sanitario (Destruction of medical equipment and installations, without any justification of overriding military necessity, and without having taken prior adequate and timely protective measures); *Art. 156 Destrucción o utilización ilícita de bienes culturales y de lugares de culto* (Destruction or illicit use of cultural property or places of worship, without any justification of overriding military necessity, and without having taken prior adequate and timely protective measures); *Art. 157 Ataque contra obras e instalaciones que contienen fuerzas peligrosas* (Attacks against works or installations which contain dangerous forces, including dams, dikes, electrical power plants, nuclear or other works or installations wich contain dangerous forces, without any justification of overriding military necessity); *Art. 159 Deportación, expulsión, traslado o desplazamiento forzado de población civil* (Deportation, expulsion, transfer or forced displacement of the civilian population, without military justification); *Art. 160 Atentados a la subsistencia y devastación* (Acts designed to deny subsistence and devastation, by attacking, rendering useless, retaining or taking properties or means indispensable to the subsistence of the civilian population); *Art. 161 Omisión de medidas de protección a la población civil* (Omission of means of protection for the civilian population, by those required to provide such means); *Art. 162 Reclutamiento ilícito* (Illegal recruitment, that is, recruiting or forcing minors to participate directly or indirectly in hostilities or armed actions); *Art. 163 Exacción o contribuciones arbitrarias* (Imposing arbitrary exactions or contributions); *Art. 164 Destrucción del medio ambiente* (Destruction of the environment, by means or methods designed to cause extensive, lasting and severe damage to the environment).

[159] *Código Penal, Art. 7. "Independientemente de las disposiciones vigentes en el lugar de la comisión del hecho punible y de la nacionalidad del autor, se penará conforme a la ley costarricense a quienes cometan actos de piratería, genocidio, falsifiquen monedas, títulos de crédito, billetes de banco y otros efectos al portador; tomen parte en la trata de esclavos, mujeres o niños; se ocupen del tráfico de estupefacientes o publicaciones obscenas y a quienes cometan otros hechos punibles contra los derechos humanos previstos en los tratados suscritos por Costa Rica, o en este Código."* Obtainable from http://www.poder-judicial.go.cr/salatercera/leyes/leyes1.htm. (English translation by Amnesty International.).

[160] *"Para que los delitos a que se contrae el artículo 5 sean perseguibles en Costa Rica, se require únicamente la acción del Estado.*

En los contemplados en los artículos 6 y 7, es necesario que el delincuente esté en el territorio nacional.

Además en los casos del artículo 6, se procederá con la simple querella del ofendido y en los del artículo 7 sólo podrá iniciarse la acción penal, mediante instancia de los órganos competentes. Código Penal, Artículo 8 (Cuándo pueden ser perseguidos los delitos mencionados anteriormente). (English translation by Amnesty International).

Code provides for a sentence of ten to 15 years' imprisonment for

> "anyone who directs or belongs to organizations of an international nature which are engaged in the trafficking of slaves, women or children or . . . carry out acts of terrorism or breach the provisions of treaties on human rights protection to which Costa Rica is a signatory".[161]

• ***Côte d'Ivoire:*** National courts may exercise universal jurisdiction over conduct amounting to war crimes committed in any zone of military operations against stateless persons and refugees.

National legislation is reinforced by Article 87 of the Constitution, which provides that "[t]he Treaties or Agreements regularly ratified have, on their publication, an authority superior to that of the laws, provided, for each Treaty or Agreement, that it is applied by the other party". There appears to be no jurisprudence or commentary on this article and it does not appear to provide an independent basis for universal jurisdiction.[162] Although the reciprocity clause appears to be addressed to bilateral, rather than multilateral, treaties, the effect of that provision on multilateral treaties is not known.

Article 11 of the Military Penal Procedural Code (Law No. 74-350) of 26 November 1974 extends the jurisdiction of military courts to felonies (*crimes*) and misdemeanours (*délits*) committed anywhere by enemy nationals or their agents against Ivoirean nationals, soldiers serving under the national flag and stateless persons and refugees on the territory of the Republic or in any zone of military operations. It states:

> "By way of derogation from articles 9 and 10, the military courts have jurisdiction in all the following cases:
> 1. Crimes and offences not justified by the laws and customs of war, committed in any location since the opening of hostilities by nationals of an enemy country or their agents:
> a) Either against an Ivorian national, a member of the military serving or having served under the Ivorian flag, or a stateless person or refugee in the territory of the Republic or in any war zone;
> b) Or to the detriment of any of the above-mentioned persons or any Ivorian legal person."[163]

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[161] *Código Penal, Artículo 374. "Se impondrá prisión de diez a quince años a quienes dirigieren o formaren parte de organizaciones de carácter internacional dedicadas a traficar con esclavos, mujeres o niños, drogas estupefacientes o realicen actos de terrorismo o infrinjan disposiciones previstas en los tratados suscritos por Costa Rica para porteger los derechos humanos." (Delitos de carácter internacional).* (Así modificada la numeración de este artículo por el numeral 185, inciso a), de la ley No.7732 de 17 de diciembre de 1997, que lo traspasó del 372 al 374) (English translation by Amnesty International).

[162] The Constitution of the Republic of Côte d'Ivoire, adopted at the Referendum of 23 July 2000, Art. 87 (English translation in *Republic of Côte d'Ivoire, in* Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Ocean Publications, Inc. September 2000) (Release 2000-6 Inter-University Associates, Inc. trans.).

[163] Article 11 (1) provides:
"Par dérogation aux articles 9 et 10, relèvent dans tous les cas des juridictions militaires :
1. Les crimes et délits non justifiés par les lois et coutumes de la guerre commis en tout lieu depuis l'ouverture des hostilités par les nationaux ennemis et leurs agents :
a) Soit à l'encontre d'un ressortissant ivoirien, d'un militaire servant ou ayant servi sous le drapeau ivoirien, d'un apatride ou réfugié sur le territoire de la République ou dans toute zone d'opération de guerre ;
b) Soit au préjudice d'une personne visée ci-dessus ou de toute personne morale ivoirienne."
(Text reproduced from ICRC National Implementation Database - English translation by Amnesty International).

Côte d'Ivoire is a party to the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but had not yet ratified it as of 1 September 2001.

• ***Croatia:*** The courts of the former Yugoslavia had been able to exercise universal jurisdiction over ordinary crimes since 1929 (see Chapter Two, Section II.A). Today, Croatian courts may exercise universal jurisdiction over conduct amounting to war crimes in two situations.

These legislative provisions are reinforced by Article 134 of the Constitution, which provides that

> "International agreements concluded and ratified in accordance with the Constitution and made public are par of the Republic's internal legal order and are with respect to their legal effect above the law [*iznad zakona*]. Their provisions can be changed or repealed only under conditions and in the way specified in them, or in accord with the general rules of international law."[164]

First, under paragraph 1 of Article 14 (Applicability of Criminal Legislation to Criminal Offenses Committed Outside the Territory of the Republic of Croatia) of the *Kazneni Zakon* (Criminal Code) of 1997, Croatian courts may exercise universal jurisdiction over anyone who commits a crime which Croatia is required to punish under international law:

> (1) The criminal legislation of the Republic of Croatia shall apply to anyone who, outside its territory, commits:
>
> . . . .
>
> -a criminal offense which the Republic of Croatia is bound to punish according to the provisions of international law and international treaties or intergovernmental agreements[.]"[165]

Second, Article 14 (4) and (5) impose an *aut dedere aut judicare* obligation on its courts to exercise custodial universal jurisdiction over persons found in Croatia who are suspected of committing crimes under national law abroad which are punishable by at least five years' imprisonment in the territorial state in cases where the foreigner is not extradited.[166] Article 14 (4) and (5) of the Code provide:

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[164] Constitution of the Republic of Croatia of 22 December 1990, Art. 134 (English translation in Gisbert H. Flanz, *Republic of Croatia, in* Albert P. Blaustein & Gisbert H.Flanz,eds,*Constitutions of the Countries of the World* (Dobbs Ferry, New York: Ocean Publications, Inc. May 1992) (Release 92-3).

[165] Criminal Code of Croatia, Art. 14 (Applicability of Criminal Legislation to Criminal Offenses Committed Outside the Territory of the Republic of Croatia) (English translations of Criminal Code by Amnesty International).

[166] The government of Croatia has informed the Committee against Torture that

> "[t]he Republic of Croatian has adopted the principle of universal applicability of the Criminal Code. Thus, pursuant to this principle, the Croatian Criminal Code applies to foreign nationals who have committed a criminal act against any other State or any national thereof outside the territory of the Republic of Croatia. In these cases, Croatian penal legislation applies to the foreigner who has committed a criminal act in a foreign country for which that person, pursuant to Croatian legislation, can be sentenced to a five-year term or more if he/she is situated on the territory of the Republic of Croatia and is not to be extradited to the respective foreign country."

Second periodic report of Croatia to the Committee against Torture, U.N. Doc. CAT/C/33/Add.4, 24 June 1998, para.93. It further explained:

> "99. The principle of *aut dedere, aut judicare*, stipulated in article 7 of the Convention [against Torture] is also incrporated in the Croatian legal system. . . .
>
> 100. If the evidence shows that the crime has been committed in a foreign country and the extradition has not been approved, a public attorney will, bring criminal charges against the foreigner. This request has to be submitted to the competent county court. In this manner, the Croatian legal system guarantees that

"(4)The criminal legislation of the Republic of Croatia shall be applied to an alien who, outside the territory of the Republic of Croatia, commits against a foreign state or another alien a criminal offense for which, under the law in force in the place of crime, a punishment of five years of imprisonment or a more severe penalty may be applied.
(5) In the cases referred to in paragraphs 2 [active personality] and 3 [protective jurisdiction] of this Article,the criminal legislation of the Republic of Croatia shall be applied only if the perpetrator of the criminal offense is found within the territory of the Republic of Croatia, or has been extradited to it, and in the case referred to in paragraph 4 of this article, only if the perpetrator is found within the territory of the Republic of Croatia and is not extradited to another state." [167]

Croatia is a party to the Geneva Conventions and Protocols I and II. It has ratified the Rome Statute, but as of 1 September 2001, it had not yet enacted implementing legislation. Croatia has provided that a number of war crimes are crimes under national law.[168] It is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes under International Law and war crimes are not subject to statutes of limitation.[169] However, there are a number of conditions which restrict the scope of universal jurisdiction under Article 14 (4), but not Article 14 (1). A prosecution under Article 14 (4) may not be instituted if the suspect has served a sentence in full imposed abroad; has been acquitted, pardoned or exempted by a statute of limitations; the law of the territorial state requires that a victim institute the proceedings and this was not done; or the conduct was not criminal in the place where it occurred, except when it was a criminal offence under general principles of law and the Attorney General authorizes the proceedings.[170]

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a person, whose extradition has been denied, will be prosecuted and put on trial as any other person in accordance with the principles of the pending Criminal Code."

Ibid., paras 99-100.

[167] Criminal Code of Croatia of 1997, Art. 14 (4) and (5) (English translation by Amnesty International).

[168] *Ibid.*, Art. 158 (War Crime against the Civilian Population); Art. 159 (War Crime against the Wounded and Sick); Art. 160 (War Crime against Prisoners of War); Art. 161 (Illegal Killing and Wounding of Enemy); Art. 162 (Illegal Seizure of Property from the Dead and Wounded on Battlefield); Art. 163 (Forbidden Means of Warfare); Art. 164 (Violation of Negotiator); Art. 165 (Harsh Treatment of the Wounded, Sick and Prisoners of War); Art. 166 (Unjustified Postponement of Repatriation of Prisoners of War); Art. 167 (Destruction of Cultural Property and Objects Containing Cultural Property); Art. 168 (Misuse of International Signs). English translations of these articles supplied by the ICRC office in Zagreb of the Criminal Code are *obtainable from* http://www.icrc.org/ihl-nat.

[169] *Ibid.*, Art. 18 (2) ("The non-applicability of the criminal legislation of the Republic of Croatia [because of the statute of limitations in Article 18 (1)] does not refer to the criminal offences of . . . war crimes, as referred to in Articles 158, 159 and 160 of this Code, or other criminal offences which, pursuant to international law, are not subject to the statute of limitations."); Art. 18 (3) ("No statutory limitation shall apply to the execution of punishment pronounced on a perpetrator of criminal offences . . . of war crimes as specified in Articles 158, 159 and 160 of this Code, or other criminal offences which, pursuant to international law, are not subject to the statute of limitations.").

[170] Criminal Code, Art.16 (Particularities Regarding the Institution of Criminal Proceedings for Criminal Offenses Committed Outside the Territory of the Republic of Croatia). That article states:
"(1) In the cases specified in article 14, paragraphs 3 and 4 of this Code, criminal proceedings for the purposes of applying the criminal legisaltion of the Republic of Croatia shall not be instituted:
-if the prepetrator has served in full the sentence imposed on him in a foreign state;
-if the perpetrator has been acquitted by a final judgment in a foreign state, or if he has beeen pardoned, or if the statutory time limitation has expired under the law in force at the place of crime;
-if, under the law in force at the place of crime, criminal proceedings may be instituted only upon a motion, a consent or a private charge of the person against whom the criminal offense had been committed, and such a motion was not made or a private charge was not was not brought, or the consent was not given.
(2) If, in the cases specified in article 14, paragraphs 2, [3?]and 4 of thisCode such an act does not

• ***Cuba:*** There are two bases for Cuban courts to exercise universal jurisdiction over conduct abroad which would amount to war crimes and would violate Cuban law.

First, Article 5.1 of the Cuban Penal Code (*Código Penal*) of 1987, based on legislation first proposed in 1926, states that Cuban criminal law applies to non-citizens resident in Cuba who commit a crime abroad if they are found in Cuba and are not extradited.[171] That article provides:

"The Cuban Criminal Law applies to Cubans and to non-citizens resident in Cuba who commit a criminal offence abroad, if they happen to be in Cuba or have been extradited [there]."[172]

Second, Article 5.3 of the Penal Code provides that Cuban criminal law applies to foreigners and to non-citizens not resident in Cuba who commit a crime abroad if they are found in Cuba and not extradited under certain conditions. That provision states:

"The Cuban Criminal Law is applicable to foreigners and non-citizens not resident in Cuba who commit a crime abroad and are in Cuba and not extradited, as it is to those residing in the territory of the State where the acts were perpetrated or in any other State as long as the act is also punishable in the place where it occurred. This last requirement is not applicable if the act constituted a crime against the fundamental interests, political or economic, of the Republic or against humanity, human dignity or collective health, and subject to it not being pursuable by virtue of international treaties."[173]

Prosecutions based on Article 5.3 "may proceed only at the request of the Minister of Justice".[174]

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constitute a criminal offense under the law in force in the country of the perpetration, criminal proceedings may be instituted only upon the approval of the State Attorney of the Republic of Croatia.
(3) In the case referred to in Article 14, paragraph 4 of this Code, when the committed act is not punishable under the law in force in the country in which it was committed but is deemed to be a criminal offense according to the general principles of law of the international community, the StateAttorney of the Republic of Croatia may authorize the institution of criminal proceedings in the Republic of Croatia and the application of criminal legislation of the Republic of Croatia."

[171] The term non-citizens (*personas sin ciudadanía*) probably means stateless persons (see discussion of a similar term in Loatian legislation).

[172] Penal Code, Art. 5.1 (English translation by Amnesty International) (apparently, this provision covers persons extradited to Cuba, although the text is not clear). The original Spanish text reads:
"La ley penal cubana es aplicable a los cubanos y personas sin ciudadanía residentes en Cuba que cometan un delito en el extranjero, si se encuetran en Cuba o son extraditados."
Código penal, artículo 5.1.

[173] Penal Code, Art. 5.3 (English translation by Amnesty International). The original Spanish text reads:
"La ley penal cubana es aplicable a los extranjeros y personas sin ciudadanía no residentes en Cuba que cometan un delito en el extranjero, si se encuentran en Cuba y no son extraditados, tanto si residen en el territorio del Estado en que se perpetran los actos como en cualquier otro Estado y siempre que el hecho sea punible también en el lugar de su comisión. Este último requisito no es exigible si el acto constituye un delito contra los intereses fundamentales, políticos o económicos, de la República, o contra la humanidad, la dignidad humana o la salud colectiva, o es perseguible en virtud de tratados internacionales."
Código penal, artículo 5.3.

[174] Penal Code, Art. 5.5: "The sentence or part of the sentence served by the offender abroad for the same crime shall be discounted from the sentence imposed by the Cuban court; but where this is not possible because of the difference in category between the two sentences, the penalty shall be calculated in the manner which the

Sentences that have been served or partially served abroad for the same crime are credited to any sentence imposed by a Cuban court.[175]

The Penal Code, after defining genocide in Article 116 (1), states in Article 116 (2) that

"[t]he same punishment shall be incurred by anyone who, contrary to the provisions of international law, bombs, machine-guns or carries out atrocities against defenceless civilians population."[176]

According to Art.121 a prosecution under Art. 116 may only proceed at the request of the Minister of Justice.

Cuba has ratified the Geneva Conventions and Protocols I and II. It has not signed the Rome Statute and as of 1 September 2001 had not yet ratified it. It is not known if the Penal Code excludes statutory limitations for war crimes, but Cuba is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

• ***Cyprus:*** There are at least two provisions in the 1972 Cyprus Criminal Code which would give courts universal jurisdiction over war crimes.

Frist, Section 5 (1) (e) (v) of the Criminal Code 1972 provides that

"[t]he Criminal Code and any other law establishing an offence are applicable to all offences committed . . . (e) in any foreign country by any person where the offence . . .(v) is one of the offences for which, under any International Treaty or Convention binding on the Republic, the law of the Republic is applicable".[177]

This article does not require the presence of the suspect in the territory. Article 5 (2) provides that "[n]o prosecution will be brought in the Republic in respect of an offence committed in a foreign country where the accused person tried in that country for that offence was convicted or acquitted."

Cyprus is a party to the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but had not yet ratified it as of 1 September 2001. This legislation permits Cypriot courts to exercise

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court considers fairest."
(English translation by Amnesty International).
The original Spanish text reads:
"En los casos previstos en el apartado 3 de este artículo, sólo se procede a instancia del Ministro de Justicia."
Código penal, artículo 5.5.

[175] Penal Code, Art. 5.4 (English translation by Amnesty International). The original Spanish text reads:
"La sanción o la parte de ella que eldelincuente haya cumplido en el extranjero por el mismo delito, se le abona a la impuesta por el tribunal cubano; pero si, dada la diversidad de clases de ambas sanciones, esto no es posible, el cómputo se hace de la manera que el tribunal conidere más justa."
Código penal, artículo 5.4.

[176] Penal Code, Art. 116 (2). The original Spanish text reads:
"En igual sanción incurre el que, violando las normas del Derecho Internacional, bombardee, ametralle o ejerza sevicia sobre la población civil indefensa."
Código penal, artículo 116 (2).

[177] Criminal Code 1972, § 5 (1) (e) (v) (English translation by Amnesty International).

universal jurisdiction over violations of the Geneva Conventions and Protocol I now, and, possibly, over crimes which fall within the jurisdiction of the International Criminal Court when Cyprus ratifies the Rome Statute and it enters into force.

Second, independently of Section 5 (1) (e) (v), Cyprus has enacted legislation giving courts universal jurisdiction over grave breaches of the Geneva Conventions.[178] Subsequently, it extended such jurisdiction to over serious violations of Protocol I.[179] Previously, the United Kingdom's Geneva Conventions Act 1957 applied to Cyprus under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below), which applied to Cyprus, at least before Cyprus became independent on 16 August 1960.

• ***Czech Republic:*** There are three possible bases for Czech courts to exercise universal jurisdiction over certain conduct amounting to war crimes. These legislative provisions date to proposals made in the former Czechoslovakia in 1926 (see Chapter Two, Section II.A).

First, Section 19 of the Criminal Code provides that Czech law applies to certain war crimes

[178] Law ratifying certain international treaties agreed in Geneva on 12 August 1949, providing for their enforcement and provisions for other related issues, Law No. 40/1966, Art. 4 (Amnesty International translation of a difficult to read faxed version). That article states:

"(1) Whoever, independently of his nationality, commits within or outside the Republic's [territory] a serious [illegible word] violation or participates, or associates [himself] or persuades another to commit a serious violation of provisions of the Geneva Conventions among the following articles of the related conventions, which are: [listing the grave breaches provisions of the Geneva Conventions] is guilty of an offence and in case of his conviction -

(i) if the serious violations referred to are premeditated murder of a protected person under the Convention, is subject to a life sentence;

(ii) in the case of other serious violations referred to above, is subject to a maximum sentence of 14 years' imprisonment."

[179] Article 4 of the 1979 law provides:

" (1) Any person, irrespective of nationality, who commits within or without the Republic any serious violation of the provisions of the Protocol or connives with , assists or incites another to commit such a violation is guilty of an offence and in the event of his conviction-

(i) where the aforesaid serious violation amounts to premeditated homicide of a person protected by the provisions of the Protocol, he shall be subject to the penalty of life imprisonment;

(ii) where another violation is involved, as stated above, he shall be subject to the penalty of imprisonment for a term not exceeding fourteen years.

(2) Where an offence falling within the prescription of this article is committed outside the Republic, the perpetrator may be proceeded against, charged, tried and punished for this offence anywhere in the Republic as if the offence had been committed in this country; and the offence for all purposes connected with the trial or punishment thereof is deemed to have been committed in this country.

(3) Where in court proceedings conducted pursuant to this Law a question should arise as to the circumstances in which this application is warranted under Article 1, paragraphs 3 and 4 of this Protocol, the Minister shall address such question; and a certificate evidencing any relevant decision and bearing the signature of the Minister or another acting on his behalf shall be admitted as documentary proof, and this shall be deemed to be signed until such time as the contrary is proved."

Law ratifying Additional Protocol I to the Geneva Conventions of 12 August 1949 (Protocol I) and providing for other related matters, Number 43 of 1979, Annex One of the Official Gazette of the Republic, No. 1518 of 12 May 1979. (English translation by Amnesty International).

Article 5 provides: "In any court proceedings conducted pursuant to article 4, the procedural provisions in force at the time on the trial of offences by criminal courts shall be applicable.". *Ibid.*

committed abroad by foreign nationals and stateless persons not resident in the Czech Republic. That section states in relevant part:

> "The Czech law shall apply when determining liability to punishment for . . . use of a forbidden weapon and unpermitted conduct of war (section 262), cruelty in war (section 263), persecution of citizens (section 263a), plunder in an area of military operations (section 264), abuse of internationally-recognized and state insignia (section 265) . . . even if such a crime was committed abroad by a foreign national (an alien) or a stateless person who does not reside (i.e. has no permanent permit to reside) on the territory of the Czech Republic."[180]

Second, Section 20 (1) of the Criminal Code requires courts to exercise custodial universal jurisdiction over crimes committed abroad by aliens or stateless persons not resident in the Czech Republic, provided that the act is criminal in the place where it occurred and the suspects are not extradited:

> "Czech law shall also be applied to determine the punishability of an act committed abroad by an alien or a stateless person who is not a resident of the Republic, if:
>
> (a) the act is also punishable under the law in force in the territory where it was committed; and
>
> (b) the offender is apprehended on the territory of the Republic and is not extradited to a foreign State for criminal prosecution."[181]

Paragraph 2 of Section 20 provides that a person convicted pursuant to this provision may not be sentenced to a more severe punishment than that provided under the law of the place where the crime occurred.[182] In addition, Section 18 (1) (b) provides: "Czech law shall be applied to determine the punishability of an act committed abroad by a Czech citizen or stateless resident of the Republic."[183]

Third, in addition to other provisions giving courts custodial universal jurisdiction over crimes under Czech law that are crimes in the territorial state, Section 20a (1) of the Criminal Code provides:

> "Czech law shall also be applied to determine the punishability of an act when this is provided by a promulgated international treaty by which the Czech Republic is bound."[184]

It is not clear whether this paragraph means that the treaty simply needs to define the act as criminal or whether it is more restrictive and requires that the treaty both define the act as criminal and expressly provide for universal jurisdiction. If the former, then all war crimes defined in treaties to which the Czech Republic is a party would be subject to universal jurisdiction under this paragraph; if the latter, then only

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[180] Criminal Code, No. 140/1961, § 19 (English translation in *Criminal Code "Trestní zákon"* (Prague: Trade Links June 1999).

[181] Criminal Code, No. 140/1961, § 20 (1) (English translation in the initial report of the Czech Republic to the Committee against Torture, U.N. Doc. CAT/C/21/Add.2 (1994), para. 55). A similar translation appears, with a brief commentary, in *Criminal Code "Trestní zákon"* (Prague: Trade Links June 1999).

[182] Criminal Code, No. 140/1961, § 20 (2) (English translation in *Criminal Code "Trestní zákon"* (Prague: Trade Links June 1999).

[183] Criminal Code, Section 18 (1) (b) (English translation in the initial report of the Czech Republic to the Committee against Torture, U.N. Doc. CAT/C/21/Add.2 (1994), para. 53).

[184] Criminal Code, Section 20a (1) (English translation in the initial report of the Czech Republic to the Committee against Torture, U.N. Doc. CAT/C/21/Add.2 (1994), para. 54).

war crimes such as grave breaches of the Geneva Conventions and Protocol I where the treaty provides for universal jurisdiction would be included.

Another ambiguity is found in paragraph 2 of Section 20a, which provides that Sections 17 to 20 do not apply when their applicability is not provided for by a treaty to which the Czech Republic is a party:

> "The provisions of section 17 to 20 shall not apply if it is not admitted under a promulgated international agreement binding on the Czech Republic."[185]

The exact scope of this paragraph is not clear in the English translation. It is not clear whether it means that sections 17 to 20 do not apply unless there is an express authorization to exercise universal jurisdiction in a treaty binding on the Czech Republic or simply that they do not apply if such a treaty prohibits universal jurisdiction.

The Czech Republic is a party to the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. Czech law defines certain war crimes as crimes under national law.[186] The government has stated that violations of the Geneva Conventions of 1949 and other war crimes can be prosecuted.[187] The Czech Republic is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and the Criminal Code excludes statutes of limitations for war crimes, crimes against humanity, genocide and torture.[188]

• ***Democratic Republic of the Congo (formerly Zaire):*** It appears that national courts have been able to exercise universal jurisdiction over war crimes, when such conduct amounts to a violation of national law, since 1960.

Article 3 of Book 1, Section 1 of the Penal Code of Zaire (*Code Pénal Zairois*) (1982), which is believed to be still in effect, provides for custodial universal jurisdiction over crimes committed outside national territory which are punishable by more than two months, unless the suspect is extradited. The prosecution must be authorized by the State Prosecutor's Office, but if the offence is punishable under

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[185] Criminal Code, No. 140/1961, § 20a (2) (English translation in *Criminal Code "Trestní zákon"* (Prague: Trade Links June 1999).

[186] Criminal Code, § 262 (Use of a Forbidden Weapon or an Unpermitted Form of Combat); § 263 (Wartime Cruelty); § 263a (Persecution of a Population); § 264 (Plunder in a Theatre of War); § 265 (Misuse of Internationally Recognized Insignia and State Insignia) (English translation in *Criminal Code "Trestní zákon"* (Prague: Trade Links June 1999).

[187] Second periodic report of the Czech Republic to the Committee against Torture, U.N. Doc. CAT/C/38/Add.1, 22 June 2000, para. 21 (the translation of this paragraph into English is not entirely clear).

[188] Criminal Code, § 67a (English translation in *Criminal Code "Trestní zákon"* (Prague: Trade Links June 1999). It provides:

> "Expiry of a period of negative prescription shall not extinguish liability to punishment for:
> (a) the crimes stipulated in Chapter X [], with the exception of a crime under section 261;
> (b) the crimes of terror (sections 93 and 93a), causing common danger [section 179 (2) and (3)], murder (section 219), harming someone's health [sections 221 (2) (b), (3) and (4), and 222], restricting personal freedom(section 232), unlawful taking of a person abroad (section 233) and breaking into someone's home [section 238 (2) and (3)] if any such crime is committed in circumstances which result in it being regarded as a war crime or a crime against humanity, under the rules of international law;
> (c) a crime under section 1 of the Peace Protection Act, No. 165/1950 Coll., promulgated on 20 December 1950."

national law by a sentence of at least five years' imprisonment, the prosecution must have been based on a complaint by the victim or the territorial state. Article 3 states:

> "Anyone who, outside Zaïre, commits an offence for which the law of Zaïre stipulates a period of penal servitude of more than two months, can be prosecuted and tried in Zaïre, except where legal provisions on extradition apply.
>
> Such prosecution may be brought only on the application of the public prosecutor.
>
> When an offence is committed against an individual and the maximum penalty stipulated by the law of Zaïre is at least five years' penal servitude, such application must be preceded by a complaint on the part of the injured party or an official complaint on the part of the authorities of the country where the offence was committed.
>
> However, for offences other than those contained in Title VIII and the first two sections of Title III of Book Two of the Criminal Code, no proceedings may be brought if the accused establishes that he was tried with a final judgment and, in the event of a judgment against him, that he has served his sentence or that the limitation period for its enforcement has expired, or that he has been granted a pardon.
>
> Except in the circumstances provided for by Title VIII and the first two sections of Title III of Book Two of the Criminal Code, proceedings may be brought only if the accused party is present in Zaïre."[189]

The Democratic Republic of the Congo is a party to the Geneva Conventions and to Protocol I. It has signed the Rome Statute, but it had not yet ratified it as of 1 September 2001. Articles 501 and 502 of the Penal Code provide that certain violations of the laws and customs of war are war crimes under national law. However, it appears that these specific provisions apply only to persons who have committed a war crime against a national or against a refugee in the national territory. Nevertheless, nothing in the wording of Article 3 suggests that it would not permit the exercise of universal jurisdiction over other persons when the conduct during armed conflict violated other national law, such as murder, assault or rape. Indeed, Article 388 provides that the provisions of Part Three of the Penal Code are without prejudice to the criminal prosecution of other conduct which amounts to violations of common law and particularly those which are violations of the laws and customs of war and international treaties.[190]

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[189] Penal Code of Zaire, Book 1, Section I, Art. 3 (Decree of 27 June 1960, Art. 1, M.C., 1st Part, 1960, 2242. (English translation by Amnesty International) (*Code Pénale Zairois, Livre premier, Section I, art. 3:*

"Toute personne qui, hors du territoire du Zaïre, s'est rendue coupable d'une infraction pour laquelle la loi zaïroise prévoit une peine de servitude pénale de plus de deux mois, peut être poursuivie et jugée au Zaïre, sauf application des dispositions légales sur l'extradition.

La poursuite ne peut être intentée qu'à la requête du ministère public.

Quand l'infraction est commise contre un particulier et que la peine maximum prévue par la loi zaïroise est de cinq ans de servitude pénale au moins, cette requête doit être précédée d'une plainte de la partie offensée ou d'une dénonciation officielle de 'l'autorité du pays où l'infraction a été commise.

Toutefois, pour les infractions autres que celles du titre VII et des deux premières sections du titre III du deuxième livre du code pénal, aucune poursuite n'a lieu si l'inculpé justifie qu'il a été jugé définitivement à l'étranger et, en case de condamnation, qu'il a subi ou prescrit sa pein ou obtenu sa grâce.

Sauf dan les cas prévus par le titre VIII et les deux premières sections du titre III du deuxième livre du code pénal, law poursuite n'a lieu que si l'inculpé est trouvé au Zaïre."

Title VIII of Book Two of the Penal Code (Articles 181 to 220) deal with state security offences and Sections I and II of Book Two of the Penal Code (Articles 79 to 102) deal with property crimes, so neither is relevant here.

[190] *Le Code pénal zaïrois, dispositions legislatives et reglementaires misses à jour au 31 mai 1982, 1983, Troisième partie - Des infractions et des peines applicables par les juridictions des forces armées, extrait de l'ordonnance-loi n. 72/060 du 25 septembre 1972 portant institution d'un Code de justice militaire, Art. 388:*

• ***Denmark:*** There are several provisions of the Danish *Straffeloven* (Penal Code), which give courts universal jurisdiction over certain conduct abroad which could amount to war crimes if committed during armed conflict. A Danish court has used one of these provisions to convict a foreigner for conduct abroad amounting to grave breaches of the Geneva Conventions.[191]

(1) Legislation. First, Section 8 (5) of the Danish Penal Code provides for universal jurisdiction over violations abroad of international treaties requiring Denmark to institute criminal proceedings. It states

> "The following acts committed outside the territory of the Danish state, shall also come within Danish criminal jurisdiction, irrespective of the nationality of the perpetrator,
>
> . . . .
>
> (5) where the act is covered by an international convention in pursuance of which Denmark is under an obligation to start legal proceedings[.]"[192]

Second, Section 8 (6) of the Penal Code provides for universal jurisdiction over acts committed in other countries that are crimes in the territorial state and offences carrying a penalty of more than one year of imprisonment under Danish law:

> The following acts committed outside the territory of the Danish state, shall also come within Danish criminal jurisdiction, irrespective of the nationality of the perpetrator,
>
> . . . .
>
> (6) where transfer of the accused for legal proceedings in another country is rejected, and the act, provided it is committed within the territory recognized by international law as belonging to a foreign state, is punishable according to the law of this state, and provided that according to Danish law the act is punishable with a sentence more severe than one year of imprisonment."[193]

Section 8 (6) of the Penal Code permits courts to exercise universal jurisdiction over some conduct, such as murder and rape, that is an ordinary crime under national law in Denmark and the territorial state, amounting to war crimes. Although Section 8 (6) does not expressly require that an extradition request have been made and refused, but simply that the transfer have been rejected, Danish commentators have stated that this requirement is implied.[194] It is not clear, however, that such a request was made and

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"Sans préjudice de la répression pénale des faits qui constituent des infractions de droit commun et notamment de ceux qui sont contraires aux lois et coutumes de la guerre et aux conventions internationales, sont punies conformément aux dispositions du présent Livre les infractions d'ordre militaire ci-après."

[191] The discussion of Danish legislation and jurisprudence in this memorandum is based in part on the following sources: Marianne Holdgaard Bukh, *Prosecution before Danish Courts of Foreigners Suspected of Serious Violations of Human Rights or Humanitarian Law*, 6 Eur. Rev. Pub. L. 339 (1994); Maison, Rafaëlle, *Le premiers cas d'application des dispositions pénales des Conventions de Genève par les juridictions internes*, 6, Eur. J. Int'l L. 260 (1995); Luc Reydams, *Denmark*, an unpublished chapter in his book, *Universal Jurisdiction in International Law* (Oxford: Oxford University Press) (forthcoming).

[192] Danish Penal, Art. 8 (5) (all English translations of the Code are from Gitte Høyer, Martin Spencer & Vagn Greve, *The Danish Criminal Code: English Version* (Copenhagen: DJØF Publishing 1999)). The Penal Code was enacted in 1930 and amended at least 50 times since; Article 8 (5) was added in 1986 and has not been amended since.

[193] *Ibid.*, Art. 8 (6).

[194] Bukh, *supra, n.192*,346; *Implementation of International humanitarian law by Denmark: Report by*

denied by any state in the one case under this section involving grave breaches of the Geneva Conventions (see discussion below). Decisions whether to prosecute under Section 8 are not taken by an independent prosecutor, but by a political official, the Minister of Justice.[195]

Third, Danish courts may exercise universal jurisdiction over alien residents for serious crimes committed outside the territory of any state and over nationals and residents of Nordic countries present in Denmark for crimes committed in a foreign state where the act also violated the law of the territorial state. Section 7 of the Penal Code reads:

> " (1) Acts committed outside the territory of the Danish state by a Danish national or by a person resident in the Danish state shall also be subject to Danish criminal jurisdiction in the following circumstances, namely;
>
> 1) where the act was committed outside the territory recognized by international law as belonging to any state, provided acts of the kind in question are punishable with a sentence more severe than simple detention; or
>
> 2) where the act was committed within the territory of a foreign state, provided that it is also punishable under the law in force in that territory.
>
> (2) The provisions in Subsection (1) above shall similarly apply to acts committed by a person who is a national of, or who is resident in Finland, Iceland, Norway or Sweden, and who is present in Denmark."[196]

There is no clear definition of residence for the purpose of Section 7.[197]

Although an earlier version of the Penal Code had been used to convict a foreigner of grave breaches of the Geneva Conventions outside Denmark (see discussion of this case below), it is not clear if other violations of international humanitarian law treaties or war crimes under customary international law would be punishable under Danish law. Indeed, the Penal Code as it was in force in 1997 was criticized by the Danish Red Cross and others on the ground that not all war crimes were crimes under Danish law, that requests for extradition had to have been made and denied and that superior orders were a defence (see discussion below of critical comments by the Danish Red Cross). Statutes of limitation appear to apply to all or most crimes in the Penal Code.[198]

Denmark is a party to Hague Convention IV, the Geneva Conventions and Protocols I and II. It has ratified the Rome Statute, but had not yet enacted implementing legislation as of 1 September 2001. However, Danish legislation providing for the ratification of the Rome Statute gives the Ministers of

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the International Law Committee of the Danish Red Cross, 320 Int'l Rev. Red Cross 583 (1997), Recommendations, § 2.

[195] *Rigsadvokatens Meddelelse 7/1992*, circular letter of the Director of Public Prosecution 7/1992 (cited in Reydams, *supra, n.192*..

[196] *Ibid.*, Art. 7.

[197] Lars Bo Langsted, Vagn Greve & Peter Garde, *Criminal Law in Denmark* 45 (The Hague/London/Boston: Kluwer Law International 1998) ("In order to be a 'resident' in Denmark and thus protected from extradition/in danger of being prosecuted in Denmark the person in question must have settled in Denmark. There is no exact time-limit in these matters. Persons who have been granted political asylum in Denmark are residents in the Danish State. Decisive for Danish jurisdiction is not the status of the offender at the time of the crime, but the status at the time of the prosecution.").

[198] Penal Code, §§ 93-97. It is not clear if statutes of limitation apply to crimes carrying a penalty of more than 15 years' imprisonment.

Foreign Affairs and Justice broad powers to implement various obligations related to cooperation with the International Criminal Court and it is not clear what further legislation is necessary.[199]

The Military Criminal Code, of 1973, as amended 1998, appears to provide a limited form of universal jurisdiction over certain war crimes committed by members of foreign military forces who have committed such crimes abroad and are subsequently interned in Denmark. Section 2 of the Military Criminal Code provides that "[w]here the punishable act was committed outside the territory of the Danish State, this Act shall also apply."[200] Section 5 (2) states that, in addition to applying to current and former service personnel, "[t]his Act shall, furthermore, cover foreign military persons who are interned in this country and other persons who, pursuant to an international agreement entered into by Denmark, are entitled to treatment like the former."[201] Section 6 provides that during time of war the Act also applies to the following:

"1) any person who serves in the military defence or follows a unit thereof;
2) prisoners of war as well as medical troops and chaplains who are detained to assist these unless otherwise provided under current international agreements;
3) any person who is found guilty of one of the criminal offences mentioned in sections 24-25 and 30-36."[202]

Section 24 prohibits the war crime of stealing from the dead and Section 25 prohibits abuse of medical personnel and use of prohibited weapons of war.[203] Sections 30 to 36 are offences against the efficiency of Danish military forces.[204]

Section 12 of the Penal Code provides that "[t]he application of the provisions of Sections 6 - 8 of this Act shall be subject to the applicable rules of international law." According to a commentary on the Code, "[t]his rule allows international law to take precedence over national rules", and it argues that certain foreign officials, including diplomats, heads of state and their suites and foreign military forces are immune from prosecution in Denmark.[205]

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[199] See Statute for the International Criminal Court, Law No. 20, proposed to the Danish Parliament on 4 October by the Minister of Foreign Affairs, Niels Helveg Petersen.

[200] Military Criminal Code, Act No. 2t April 1973, as amended by Act No. 195 of 3 May 1978 (unofficial translation issued by the Ministry of Defence, Copenhagen, 22 May 1998), § 2.

[201] *Ibid.*, § 5 (2).

[202] *Ibid.*, § 6.

[203] *Ibid.*, § 24 (2) ("Any person who unlawfully takes an object from a person killed through an act of war shall be punishable for theft."); § 25 ("Any person who in time of war abuses or fails to respect any badge or designation that is restricted to personnel, institutions and materiel designed to give assistance to wounded or sick persons shall be punishable by fine, lenient imprisonment or up to 12 year's imprisonment. Any person who uses war instruments or procedures the application of which violates an international agreement entered into by Denmark or the general rules of international law shall be liable to the same penalty.").

[204] *Ibid.*, §§ 30-36. It appears that extraterritorial jurisdiction under the Military Penal Code of 1973 as it stood in 1994 - in contrast to the Penal Code - with respect to foreigners was limited to attacks against Danish military personnel (Article 25) and against foreign military personnel who cooperate with Danish forces (Article 3). Bukh, *supra*, n. 192, 347.

[205] Lars Bo Langsted, Vagn Greve & Peter Garde, *Criminal Law in Denmark* 46 (The Hague/London/Boston: Kluwer Law International 1998).

In 1997, the International Law Committee of the Danish Red Cross issued a report analyzing the Denmark's implementation of international humanitarian law. Although it found that Section 5 of Article 8 of the Danish Penal Code "complies fully with international humanitarian law" with respect to grave breaches of the Geneva Conventions and Protocol I, it noted that otherwise "[c]riminal prosecution of aliens for *war crimes* committed abroad is limited in terms of jurisdiction and applicable Danish criminal law."[206] It noted a number of serious problems with the existing definitions and jurisdictional provisions under Danish law:

> "According to international law, a State has the right to punish the crime of genocide, crimes against humanity and violations of the Hague Conventions, in pursuance of the principle of universal jurisdiction. For these crimes, however, there is no obligation to prosecute. Article 8, Section 6, of the Penal Code establishes jurisdiction for these crimes, depending on three conditions: *primo*, another State must have requested the extradition of the person in question; *secundo*, extradition must have been denied by the Danish authorities; and *tertio*, the alleged behaviour must be a crime under Danish law. It appears that the decision to assume jurisdiction could be influenced by political considerations, such as relations with other States. However, the Minister of Justice, who has to take the decision whether to prosecute or not, is bound by obligations of international law.
>
> When the Danish Penal Code was drafted, no consideration was given to international humanitarian law. This may cause problems when the legal basis necessary for the prosecution of some types of war crimes must be established. Maximum and minimum penalties, for example, are the same in wartime as in peacetime.
>
> Furthermore, the Code has no provision for a number of war crimes, and as a result these crimes cannot be prosecuted in Denmark."[207]

The International Law Committee recommended:

> "When the legislation is revised it should be made clear that only objective considerations are relevant to the decision whether to prosecute in cases concerning breaches of international humanitarian law.
>
> A study should be carried out on the possibilities for more efficient prosecution of breaches of international humanitarian law.
>
> . . . .
>
> Article 9 of the Military Penal Code should be rephrased so that actions contrary to international humanitarian law performed by subordinates obeying an order incur penal responsibility."[208]

A commission established by the Minister of Defence Ordinance for the Armed Forces of 21 May 1999 is responsible for reviewing the Military Penal Code and the Military Administration of Justice Act. It began work in June 1999, but it had not yet completed its work by 1 June 2001.

(2) Prosecution for war crimes. In November 1994, the Danish High Court (*Ostre Landsrets*) in

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[206] *Implementation of international humanitarian law by Denmark: Report by the International Law Committee of the Danish Red Cross,* 320 Int'l Rev. Red Cross 583 (1997), Recommendations, § 2 (emphasis in original).

[207] *Ibid. See also* Danish Red Cross Society, *Brief/Minute on the international jurisdiction of Danish courts of law,* 23 January 2001 (stating that a number of war crimes in Article 85 (4) of Protocol I were not crimes under Danish law) (not published, English translation by Amnesty International).

[208] *Ibid.*, Final Recommendations, § 2 (Prosecution of war crimes).

Copenhagen, acting on the basis of universal jurisdiction over grave breaches of the Third and Fourth Geneva Conventions, conferred by Article 8 (5) of the Penal Code, convicted Refik Sari after a jury trial of 14 out of 25 charges of assault and aggravated assault under Articles 245 and 246 of the Penal Code, in 1993 of detainees in a detention camp in Bosnia and Herzegovina and sentenced him to eight years' imprisonment.[209] The conviction was affirmed by the Supreme court on appeal. In rejecting the challenge to Danish jurisdiction made on the ground that the offences could not be characterized as grave breaches of the Third and Fourth Geneva Conventions, the Supreme Court stated:

> "Taking account of the fact that the large number of offences - of which several are very grave - were committed in quite uniform circumstances, the Supreme Court find[s] that all counts related to the Conventions shall be considered as a whole. This approach, which is considered to conform most appropriately to the objectives of the Conventions as to 'grave breaches' have been met in the case of all counts of the indictment. Consequently, the Court cannot find for the claim for acquittal of the accused on the grounds of non-applicability of Danish criminal jurisdiction."[210]

Apparently, there was no demand for extradition by Bosnia and Herzegovina.

• ***Dominica:*** It appears that the courts of Dominica have been able to exercise universal jurisdiction over grave breaches of the Geneva Conventions abroad since 1959.

Although Dominica is not known to have a Geneva Conventions Act, the United Kingdom's Geneva Conventions Act 1957 applied to the West Indies Federation under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below), at least before 1 January 1970. Dominica became independent on 3 November 1978. A schedule of transitional provisions stated that existing laws were to continue in effect from the commencement of the Constitution and, as far as is known, the 1959 Order in Council has not been repealed either before or after independence.[211]

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[209] *Public Prosecutor v. N.N.*, High Court (*Ostre Landsrets*), 3d Div., Judgment, 25 November 1994. An unofficial translation by the Legal Service of the Ministry of Foreign Affairs describes this case as *Director of Public Prosecutions v. T.*, as does the source quoted, and states that the sentence was passed by the Eastern High Court, Third Division on 22 November 1994. Presumably, the later date in the first citation may indicate that the judgment may not have been entered until three days later.

[210] *Public Prosecutor v. T.*, Supreme Court (*Hojesteret*), Judgment, 15 August 1995, *Ugeskrift for Retsvaesen* 838 (1995) (English translation by the Legal Service of the Ministry of Foreign Affairs) (a brief excerpt of the decision is reported at 1 Y.B. Int'l Hum. L. 431 (1998). The Supreme Court did not further explain the nature of the jurisdictional challenge (such as whether the convicted person was claiming that the conflict was non-international or that Denmark could not exercise universal jurisdiction) or its reasons for reaching this conclusion. However, given that courts are normally under an obligation to determine that they have jurisdiction on all necessary grounds, it can be assumed that the court determined that it could exercise universal jurisdiction. For further information about this case, see Second Periodic Report of Denmark to the UN Committee against Torture, 13 June 1995, paras 11-13; *See also* Bukh, *supra*, n. 192, 339; *Denmark: Muslim jailed for Bosnian atrocities*, *The Times*, 23 November 1994.

[211] The Commonwealth of Dominica Constitution Order 1978, Statutory Instruments, No. 1027, Schedule 2(Transitional Provisions)(*obtainable from* http://www.georgetown.edu/pdba/Constitutions/Dominica/sch2.html), Section 2. That section provides in relevant part:

> "1. The existing laws shall, as from the commencement of the Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order.
>
> ....
>
> For the purposes of this paragraph. the expression "existing law" means any Act, Ordinance, law, rule,

Dominica is a party to the Geneva Conventions and Protocol I and II. It has ratified the Rome Statute, but as of 1 September 2001 it had not yet enacted implementing legislation.

• ***Dominican Republic:*** Under a bill now being considered in Congress, if it is enacted in law, national courts would be able to exercise universal jurisdiction over certain conduct amounting to war crimes, but only when the conduct was either a crime under the law of the Dominican Republic or the place where it occurred and only in the rare, but occasionally important, case where the suspect acquired Dominican nationality after the crime was committed.

Article 14 (Offences committed outside the territory of the Republic) of the proposed new Penal Code of the Dominican Republic provides:

> "Criminal law shall apply to all acts deemed to be crimes under Dominican legislation when they are committed by a national outside the territory of the Republic. It shall also apply to offences committed by Dominicans outside the territory of the Republic if such acts are punishable under the legislation of the country where they have been committed. This article applies even when the offender has acquired Dominican nationality after committing the alleged act."[212]

Decisions whether to prosecute under Article 14 are not taken by an independent prosecutor, but by a political official, the Attorney General.[213]

The Dominican Republic is a party to the Geneva Conventions and Protocols I and II. It has not signed the Rome Statute and as of 1 September 2001 it had not yet ratified it. It is not known if the

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> regulation, order or other instrument made in pursuance of or continued in force by or under the former Constitution and having effect as part of the law of Dominica or of any part thereof immediately before the commencement of the constitution ."

[212] Penal Code of the Dominican Republic, Art. 14. English translations of the proposed Penal Code are by Amnesty International. The original text of Article 14 in Spanish reads:
"La ley penal se aplicará a todo hecho que la legislación dominicana califica crimen cometido por un nacional fuera del territorio de la República. También se aplicará a los delitos cometidos por dominicanos fuera del territorio de la República si estos hechos son sancionados por la legislación del país donde éstos han sido cometidos. El presente artículo tiene aplicación aún en el caso en que el infractor haya adquirido la nacionalidad dominicana posteriormente al hecho que se le imputa."
The original text of the proposed Penal Code is *obtainable from* http://www.reforma-justicia.gov.do/NCpd/editorial.htm
The Penal Code of Procedure in force (Law No. 5005 of 28 June 1911 G.O. 2208) in its Article 5 provides for the active personality principle with no reference to the situation of a person that acquires the nationality after the commission of the crime. For the current Penal Code: http://www.suprema.gov.do/codigos/WelcomeC.htm

[213] Penal Code, Art. 16. It provides:
"In the circumstances specified in the two previous articles, prosecution of the offences shall be undertaken at the instigation of the Attorney General and must be preceded by the institution of proceedings by the victim or his successors or presentation of an official complaint by the victim or his successors or presentation of an official complaint by the authority of the country where the offence was committed."
The original Spanish text reads: *"En los casos previstos en los dos artículos anteriores, la persecución de las infracciones se ejercerá a requerimiento del ministerio público, y debe ser precedida de una querella de la víctima o de sus causahabientes o denuncia oficial por parte de la autoridad del país donde la infracción se ha cometido."*

Dominican Republic has defined war crimes as crimes under national law, so prosecutions under Article 14 may have to be for ordinary crimes such as murder, abduction, assault and rape. In addition, prosecutions pursuant to Article 14 are prohibited if the person was convicted abroad for the same acts and served the sentence or the case is subject to a statute of limitations.

• ***East Timor:*** Although East Timor is currently subject to a UN transitional administration, it is expected to become independent in 2002, and its courts have universal jurisdiction over war crimes, both in international and non-international armed conflict.[214]

(1) Regulations. Section 2 in Section 2 (Jurisdiction) of United Nations Transitional Administration in East Timor (UNTAET) Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences provides for universal jurisdiction over a number of crimes under international law, regardless when they occurred, but, with respect to ordinary crimes, only for the limited period between 1 January 1999 and 25 October 1999. That provision states:

> "2.1 With regard to the serious criminal offences listed under Section 10.1 (a) [genocide], (b) [war crimes], (c) [crimes against humanity] and (f) [torture] of UNTAET Regulation 2000/11, as specified in Sections 4 to 7 of the present regulation, the panels shall have universal jurisdiction.
> 2.2 For purposes of the present regulation, 'universal jurisdiction' means jurisdiction irrespective of whether;
> (a) the serious criminal offence at issue was committed within the territory of East Timor;
> (b) the serious criminal offence was committed by an East Timorese citizen; or
> (c) the victim of the serious criminal offence was an East Timorese citizen."
> 2.3 With regard to the serious criminal offences listed under Section 10.1 (d) [murder under the Penal Code] to (e) [sexual offences under the Penal Code] of UNTAET Regulation No. 2000/11 as specified in Sections 8 to 9 of the present regulation, the panels established within the District Court in Dili shall have exclusive jurisdiction only insofar as the offence was committed in the period between 1 January 1999 and 25 October 1999.
> 2.4 The panels shall have jurisdiction in respect of crimes committed in East Timor prior to 25 October 1999 only insofar as the law on which the serious criminal offence is based is consistent with Section 3.1 of UNTAET Regulation No. 1999/1 or any other UNTAET Regulation.
> 2.5 In accordance with Section 7.3 of UNTAET Regulation No. 2000/11, the panels established by the present regulation shall have jurisdiction (*ratione loci*) throughout the entire territory of East Timor."[215]

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[214] Under Article 6 of the 5 May 1999 Agreement between the Republic of Indonesia and the Portuguese Republic on the question of East Timor, it was agreed that,

> "If the Secretary-General determines, on the basis of the result of the popular consultation and in accordance with this Agreement, that the proposed constitutional framework for special autonomy is not acceptable to the East Timorese people, the Government of Indonesia shall take the constitutional steps necessary to terminate its links with East Timor thus restoring under Indonesian law the status East Timor held prior to 17 July 1976, and the Governments of Indonesia and Portugal and the Secretary-General shall agree on arrangements for a peaceful and orderly transfer of authority in East Timor to the United Nations. The Secretary-General shall, subject to the appropriate legislative mandate, initiate the procedure enabling East Timor to begin a process of transition towards independence."

U.N. Doc. A/53/951, S/1999/513 (1999), Annex I, Art. 6. Autonomy was rejected and a Constituent Assembly elected on 30 August 2001 has a mandate pursuant to UNTAET Regulation 2001/2 a Constitution within 90 days for an independent East Timor.

[215] Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, U.N. Doc. UNTAET/REG/2000/15, 6 June 2000. Regulation No. 2000/11, Section 10.1 provides:

Section 6, which defines war crimes, reproduces the definitions in Article 8 of the Rome Statute.

(2) Jurisprudence. The Special Panel for Serious Crimes of the Dili District Court has stated that "[w]ar crimes . . . deserve universal jurisdiction due [to] international customary laws and (more recently) international laws".[216]

• ***Ecuador:*** Article 18 of the Ecuadoran Code of Criminal Procedure (*Código de Procedimiento Penal*) of 2000 provides two bases for exercising universal jurisdiction over war crimes. That article provides:

> The following are subject to the criminal jurisdiction of Ecuador:
> . . . .
> 6) Ecuadoreans or foreigners who commit offences against International Law or offences envisioned in International Conventions or Treaties which are in effect at the time, as long as they have not been prosecuted in another State; and
> 7) Nationals or foreigners who are covered in certain other circumstances as indicated by the Penal Code.[217]

The provisions in the Penal Code provide two possible bases for Ecuadoran courts to exercise

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"The District Court in Dili shall have exclusive jurisdiction over the following serious criminal offences:
(a) Genocide
(b) War crimes
(c) Crimes against humanity
(d) Murder
(e) Sexual offences
(f) Torture"

[216] *Prosecutor v. Kasa,* Judgement, Case No. 11/CG/2000, Dili District Court, Special Panel for Serious Crimes, 9 May 2001. The court declined to exercise extraterritorial jurisdiction in that case, but on the ground that it did not have jurisdiction under Regulation No. 2000/15 over the ordinary crime of rape allegedly committed by an East Timorese in West Timor at the time it occurred.

[217] Code of Criminal Procedure 2000, Section I (Jurisdiction and competence) (Chapter I), Art. 18 (Scope of criminal jurisdiction), Law No. 000. RO/ Sup 360, 13 January 2000 (English translation by Amnesty International). The original Spanish text reads:

> *"Están sujetos a la jurisdicción penal del Ecuador: . . . 6) Los ecuatorianos o extranjeros que cometan delitos contra el Derecho Internacional o previstos en Convenios o Tratados Internacionales vigentes, siempre que no hayan sido juzgados en otro Estado; y, 7) Los nacionales o extranjeros que se hallen comprendidos en algunos de los demás casos señalados en el Código Penal."*

*Código de Procedimiento Penal 200, Ley No. 000. RO/Sup 360 de 13 de Enero del 2000, Art. 18 Ambito de la jurisdicción penal.*Obtainable from http://www.cajpe.org.pe/RIJ/bases/legisla/ecuador/coprpe.HTMl

The previous Code of Penal Procedure of 1983 provided in Art.3 (6) that those engaging in piracy, traffic in persons, the slave trade or white slave trade, the destruction or damaging of submarine cables and other offences against international law, shall be subject to Ecuadorian law provided they have not been tried in another State.
Original Spanish text reads:

> *"Están sujetos a la competencia de los órganos de jurisdicción penal del Ecuador:*
> *6.- Los ecuatorianos o extranjeros que cometan delitos de piratería, comercio de personas, trata de esclavos o trata de blancas, destrucción o deterioro de cables submarinos, y los demás delitos contra el Derecho Internacional, siempre que no hayan sido juzgados en otro Estado; y.*
> *7.- Los nacionales o extranjeros que se hallen comprendidos en alguno de los demás casos del Art. 5 del Código Penal."*

custodial universal jurisdiction over certain war crimes.[218]

The government has explained that " Moreover, Ecuadorian jurisdiction will apply to Ecuadorians and aliens who outside the territory of Ecuador commit any of the offences cited in article 5, paragraph 4 of the Penal Code, i.e. offences against the State; counterfeiting State stamps or making use of forged stamps; counterfeiting currency or bank notes that are legal tender, stamp bearing securities or Government bonds; offences committed by public officials in the service of the State abusing their authority or neglecting the duties inherent in their station; breaches of international law; and any other offence for which special legal provisions or international conventions dictate that Ecuadorian law shall prevail."[219]

Ecuador is a party to the Geneva Conventions and Protocol I. It has signed, but not yet ratified Hague Convention IV. Ecuador has signed the Rome Statute and is expected to ratify it in 2001. Ecuador has not defined war crimes as crimes under national law, so prosecutions may have to be for ordinary crimes under national law such as murder, abduction, assault or rape.

• ***Egypt:*** It is possible that Egyptian courts may be able to exercise universal jurisdiction over conduct amounting to grave breaches of the Geneva Conventions and of Protocol I and, possibly, other war crimes, but the matter is not entirely free from doubt.

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[218] First, Article 5 (5a) of the Penal Code provides that national courts have universal jurisdiction over crimes under international law. It provides:

"Any Ecuadorean or foreigner who commits any of the following offences outside of national territory shall be punished in accordance with Ecuadorean law: . . .

5a. offences against international law;

. . . .

Foreigners who commit any of the offences described above shall be prosecuted and punished in accordance with Ecuadorean law only if they are apprehended in Ecuador or if they have been extradited to Ecuador." (*"Será reprimido conforme a la ley ecuatoriana el nacional o extranjero que cometa fuera del territorio nacional alguna de estas infracciones: . . .*

5a. Los atentados contra el Derecho Internacional; . . . .

Los extranjeros que incurran en alguna de las infracciones detalladas anteriormente, serán juzgados y reprimidos conforme a las leyes ecuatorianas, siempre que sean aprehendidos en el Ecuador, o que se obtenga su extradición." Código Penal, Art. 5.)

Second, Article 5 (6a) provides national courts with jurisdiction over other crimes for which it has been determined by special laws or treaties that Ecuadoran law should apply. That provision states in relevant part:

"Any Ecuadorean or foreigner who commits any of the following offences outside of national territory shall be punished in accordance with Ecuadorean law: . . .

6a. any other offence for which it has been determined by special laws or international conventions that Ecuadorean law should apply.

Foreigners who commit any of the offences described above shall be prosecuted and punished in accordance with Ecuadorean law only if they are apprehended in Ecuador or if they have been extradited to Ecuador." (*"Será reprimido conforme a la ley ecuatoriana el nacional o extranjero que cometa fuera del territorio nacional alguna de estas infracciones: . . .*

6a. Cualquiera otra infracción para la que disposiciones especiales de la ley o convenciones internacionales establezcan el imperio de la ley ecuatoriana.

Los extranjeros que incurran en alguna de las infracciones detalladas anteriormente, serán juzgados y reprimidos conforme a las leyes ecuatorianas, siempre que sean aprehendidos en el Ecuador, o que se obtenga su extradición." Código Penal, Art. 5). (English translation by Amnesty International.) Spanish original obtainable from: http://www.unifr.ch/derechopenal/ljecuador/epecuidx.htm

[219] Initial report of Ecuador to the Committee against Torture, U.N. Doc. CAT/C/7/Add.13 (1991), Art. 5.

Article 151 of the Constitution provides that treaties "shall have the force of law after their conclusion, ratification and publication according to the established procedure".[220] The government has declared that the provisions of international treaties, including their jurisdictional provisions, are directly enforceable by Egyptian courts. In Egypt's third periodic report to the Committee against Torture, it states:

> "The provisions of articles 6 to 9 [of the Convention against Torture] are deemed to be directly enforceable .... Hence, following Egypt's accession to the Convention, they constitute legislative principles which are directly enforceable in Egypt and binding on all the authorities to which they apply."[221]

There appears to be no definitive jurisprudence on this particular point, but two distinguished Egyptian criminal law experts have disagreed with the government's interpretation of the enforceability of international criminal law by Egyptian courts. Adel Maged, the Chief Prosecutor of the Egyptian Court of Cassation, has stated that Egypt cannot directly enforce international criminal law without implementing legislation:

> "It is true that the provisions of international treaties, that Egypt has signed and ratified (according to article 151 of the Egyptian Constitution), are directly applicable in the Egyptian legal system. However, to enforce international criminal law, international humanitarian law and human rights norms in the Egyptian legal system we still need an enabling legislation. The Egyptian courts cannot adjudicate international crimes unless they have the criminal provisions that penalize such conduct."[222]

He also noted that there was no national law or jurisprudence providing for universal jurisdiction, but did not say that the jurisdictional provisions of treaties and customary international law - as opposed to the substantive norms embodied in those treaties or customary international law - could not be directly enforced by Egyptian courts when the conduct abroad was defined as a crime (such as murder, abduction, assault or rape) under Egyptian law.[223] Another expert, Walid Abelgawad,
has argued that, in the past, although Egypt was in principle a monist state, when Egypt ratified treaties requiring states parties to investigate and prosecute crimes, it had enacted legislation defining the crimes and punishments in national law rather than relying on courts to exercise jurisdiction over such conduct

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[220] Constitution of the Arab Republic of Egypt of 11 September 1971, as amended by the referendum of 22 May 1980, Art. 151 (English translation in Peter B. Heller, *Egypt: 1983-1991, in* Albert P. Blaustein & Gisbert H. Flanz, eds, *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publicatison, Inc.) (booklet issued October 1991)).

[221] Third periodic report of Egypt to the Committee against Torture, U.N. Doc. CAT/C/34/Add.11 (1999), para. 82. The government has stated that universal jurisdiction provision of treaties were incorporated into national law. In response to a question by the Chair of the Committee against Torture during an examination of this report whether universal jurisdiction over torture was part of Egyptian law, including the principle of *aud dedere aut judicare,* the Egyptian delegation stated: "Egypt fully respected the provisions on universal jurisdiction of all international instruments to which it was a party, since those instruments were incorporated directly into national law." Burns, Chairman, summary records of the 382nd meeting of the Committee against Torture, U.N. Doc. CAT/C/SR.382 (19XX), para. 12; Egyptian delegation, summary records of the 382nd meeting of the Committee against Torture, U.N. Doc. CAT/C/SR.382 (19XX). Para. 15.

[222] Letter to Judy Dacruz, International Justice Project Volunteer Assistant, 1 May 2001, from Adel Maged, Chief Prosecutor of the Egyptian Court of Cassation.

[223] *Ibid.* He declared that "we do not have any provision in our legislation or in our courts[']decisions that deal with the universal jurisdiction principle".

directly under international law.[224] He also indicated that it was more likely for an Egyptian court to apply directly international criminal law reducing or eliminating criminal penalties than to try someone for a crime under international law directly that was not defined as a crime under Egyptian law.[225]

It appears that war crimes have not been defined as crimes under the Penal Code, but instead the Penal Code provides that it is an aggravating factor in the determination of an appropriate punishment that the commission of homicide and certain crimes of violence took place during armed conflict.[226] Walid Abdelwagad concluded that the universal jurisdiction provisions of the Geneva Conventions could not be directly applied because the Egypt had not defined grave breaches as crimes in national law.[227]

There are a number of other obstacles to implementing universal jurisdiction in Egypt.[228] Statutes of limitation would apply to all crimes except for torture.[229] Reportedly, under Article 4 of the Penal Code, the principle of *ne bis in idem* would prevent a retrial in Egypt if a person had been tried for the same conduct abroad, even if the previous trial had been a sham.[230] It is not clear whether an Egyptian court would recognize an amnesty given by another state as a bar to a trial in Egypt.[231] According to one expert, retrospective application of Egyptian criminal law to conduct that was a crime according to general principles of law is not possible in view of Article 5 of the Penal Code.[232]

In the light of the differing views of the government and commentators on the ability of Egyptian courts to enforce international criminal law directly in national courts, a definitive answer to the question of direct enforceability of international criminal law in Egypt may have to await a judicial determination in a particular case.

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[224] Walid Abelgawad, *Rapport national sur l'Egypte*, unpublished paper, 11, submitted to the *Etude comparée des critères de compétence juridictionnelle en matière de crimes internationaux*, Paris, 2 to 3 July 2001.

[225] *Ibid.*, 11-12 (citing a decision by the High Constitutional Court indicating that the legislature had the duty under such treaties to enact legislation to permit national prosecution).

[226] Penal Code, Arts 251*bis* and 317. Both were added by Law No. 30 of 1940 to implement the 1929 Geneva Convention of 1929 for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, ratified by Egypt in 1933. The Chief Prosecutor noted that the Military Code defines some war crimes as crimes under national law, but it has not been possible to locate these provisions. Letter of 1 May 2001. He stated that Egypt has a "few provisions in the Penal Code and the Military Penal Code that address[] some acts proscribed by the Geneva Conventions (e.g. crimes against prisoners of war)".

[227] *Ibid.*, 12. He noted that a bill to provide that certain crimes under international law would be crimes under national had been abandoned, suggesting that such a law was necessary to permit prosecutions for such crimes in Egyptian courts. *Ibid.*, 17 n. 47.

[228] Adel Maged letter of 1 May 2001, He stated:
"Moreover, there are many legal and practical obstacles to implement the universal jurisdiction principle, such as statutes of limitations for the crimes concerned (as provided in the Egyptian Penal Code), immunities for heads of state or other officials (as provided in the Egyptian Constitution), double-criminality, ne bis in idem (as provided in the Egyptian Criminal Procedure Code and in some rulings of the Egyptian Constitutional Court)."

[229] Adelwagad, *supra, n.225*, 20-21.

[230] *See ibid.*, 21.

[231] *Ibid.*, 21-22 (noting the division of opinion on this point).

[232] *Ibid.*, 22.

Egypt is a party to the Geneva Conventions and Protocols I and II. Egypt has signed the Rome Statute, but it had not yet ratified it as of 1 September 2001.

• ***El Salvador:*** El Salvador courts may exercise universal jurisdiction over war crimes. The relevant legislative provision is reinforced by Article 144 of the Constitution, which provides:

> "The international treaties formalized [*celebrados*] by El Salvador with other states or international organisms, constitute laws of the Republic once they enter into effect, in conformity with the dispositions of the same treaty and of this Constitution.
> The law shall not modify or repeal that agreed in a treaty in effect for El Salvador. In case of conflict between the treaty and the law, the treaty shall prevail."[233]

The Constitution in Article 246 provides the primacy of the Constitution over all other laws. Since treaties are laws they are consequently placed under the Constitution.[234] It has not been possible to locate jurisprudence on that matter.

Article 10 of the 1998 Penal Code (*Código Penal*) of El Salvador provides courts with universal jurisdiction over crimes in national criminal law that affect "property internationally protected by specific agreements or rules of international law or seriously undermine universally recognized human rights".[235] This article does not require that the suspect be in El Salvador. This provision replaces Article 9 of the former 1973 Penal Code which was more narrowly worded and provided that priority was to be given to the territorial state if it had sought extradition before criminal proceedings had begun against the accused.[236] The government has explained the rationale for universal jurisdiction over persons responsible

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[233] The Constitution of the Republic of El Salvador, 15 December 1983, as amended up to and including Decree No. 748 of 10 July 1996, Art. 144 (English translation in *Republic of El Salvador, in* Gisbert H. Flanz, ed., *Constitutions of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. August 1998) (Release 98-5 Reka Koerner trans.). *See also ibid.*, Arts 145-149.

[234] Spanish original reads: *"Art. 246.- Los principios, derechos y obligaciones establecidos por esta Constitución no pueden ser alterados por las leyes que regulen su ejercicio.*
La Constitución prevalecerá sobre todas las leyes y reglamentos. El interés público tiene primacía sobre el interés privado."
Obtainable from http://www.asamblea.gob.sv/constitucion/1983.htm

[235] Article 10 of the current Penal Code provides:
"Criminal legislation shall also apply to offences committed by anyone whosoever in a place not subject to Salvadoran jurisdiction, provided that they affect property internationally protected by specific agreements or rules of international law or seriously undermine universally recognized human rights." (English translation in El Salvador's initial report to the Committee against Torture, U.N. Doc. CAT/C/37/Add.4, 12 October 1999, para. 152).
The original Spanish text reads: *"También se aplicará la ley penal a los delitos cometidos por cualquier persona en un lugar no sometido a la jurisdicción salvadoreña, siempre que ellos afectaren bienes protegidos internacionalmente por pactos específicos o normas del derecho internacional o impliquen una grave afectación a los derechos humanos reconocidos universalmente."*

[236] Article 9 of the former Penal Code provided:
"Salvadorean law shall also apply to offences committed abroad which, under international agreements, treaties and conventions, are considered to have an international dimension and, as such, subject to the jurisdiction of the Salvadorean courts; but preference shall be given to the claim of the State in whose territory the offence has been committed to exercise jurisdiction as long as it does so before criminal

for human rights violations:

> "It therefore considers it permissible to seek this type of criminal within the national territory, thereby avoiding the difficulties which would ensue were El Salvador to become a country of asylum for criminals from other countries, and to prosecute offences against internationally recognized human rights, as occur in cases of torture when they are committed elsewhere."[237]

El Salvador is a party to the Geneva Conventions, Protocols I and II and the 1907 Hague Convention IV. It has not signed or ratified the Rome Statute. Article 362 of the former Penal Code provides that war crimes during an international or non-international armed conflict are punishable by five to 20 years' imprisonment and Article 363 provides that civilians, in relation to armed conflict, who mistreat prisoners of war, hostages, the wounded or the civilian population may be sentenced to five to 20 years' imprisonment.[238] According to Article 99 of the Penal Code statutes of limitation do not apply to war crimes:

> "Offences shall not be time-barred in the following cases: torture,acts of terrorism, kidnapping, genocide, violations of the laws and customs of war, enforced disappearance of persons, political,

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proceedings have been started against the accused." *"Se aplicará también la ley salvadoreña a los delitos cometidos en el extranjero que de acuerdo a pactos, tratados o convenciones internacionales, se consideren delitos de trascendencia internacional y que deban ser juzgados por la ley salvadoreña; pero se dará preferencia a la pretensión del Estado en cuyo territorio se hubieren cometido, si reclamare el juzgamiento antes que se inicie el ejercicio de la acción penal en contra del imputado.*

En los casos señalados en este artículo y en el anterior se aplicará la ley vigente en el lugar de la comisión del hecho, si sus disposiciones son más favorables al imputado que las de la ley salvadoreña." Códigos Penal y Procesal Penal (Con sus Ultimas Reformas, Octubre 1993) Capitulo I: Aplicacion de la Ley Penal en el Espacio, Art. 9 (Extraterritorialidad, Principio de Universalidad. (English translation by Amnesty International).

[237] Initial report of El Salvador to the Committee against Torture, U.N. Doc. CAT/C/37/Add.4, 12 October 1999, para. 151.

[238] Penal Code, Art. 362 (Violation of the Laws or Customs of War)("Anyone who, during an international or civil war, violates the international laws or customs of war or in any way inflicts mental or bodily harm on others, or causes the civilian population to be deported in order to carry out forced labour in occupied territory, or causes the ill-treatment of prisoners of war, the death of hostages, the looting of private or public property, the unnecessary destruction of cities or villages or unjustified devastation for military purposes, shall be liable to imprisonment for a period of five to twenty years.") (English translation by Amnesty International).

The original text in Spanish reads:

"El que dura[nt]e una guerra internacional o civil, violare las leyes internacionales o costumbres de guerra o de cualquier manera ocasionare daños psiquicos o corporales, deportación para trabajos forzados de la población civil en terrotorio ocupado, maltrato de prisioneros de guerra, muerte de rehenes, saqueo de la propiedad privada o pública, destrucción innecesaria de ciudades o pueblos o devastación no justificada por necesidades militares, será sancionado con prisión de cinco a veinte años."

Código Penal, Art. 362 (Violacion de las leyes o costumbres de guerra).

Penal Code, Art. 363 (Violation of the Duty to Behave Humanely) ("Any civilian who is not subject to military jurisdiction and who fails to behave humanely towards prisoners or hostages of war or those wounded in war, or towards those interned in hospitals or places set aside for the wounded, and anyone who commits an inhumane act against the civilian population before, during or after military actioin, shall be liable to imprisonment for a period of five to twenty years."). The original text in Spanish reads:

"El civil no sujeto a la jurisdicción militar, que violare los deberes de humanidad con los prisioneros o rehenes de guerra o heridos a consecuencia de la misma, o con los que estuvieren en los hospitales o lugares destinados a heridos y el que cometiere acto inhumano contra la población civil, antes, durante o después de acciones de guerra, será sancionado con prisión de cinco a veinte años." Art. 363 (Violacion de los deberes de humanidad). (English translation by Amnesty International).

ideological, racial, sexual or religious persecution, provided that the acts in question were committed after the entry into force of this Code."[239]

• ***Equatorial Guinea:*** Equatorial Guinea recognizes the principle of universal jurisdiction in national law, however, it is not clear whether in practice courts could exercise such jurisdiction over war crimes.

Article17 of the *Ley Organica del Poder Judicial* (Organic Law of the Judicial Power) provides that national courts have jurisdiction over foreigners who commit crimes outside the national territory when this is provided for by law.[240] It is not known if the Penal Code or other national law expressly provides for universal jurisdiction. It is probable that the term "law" means national and not international law but it has not been possible to confirm that point.

Equatorial Guinea is a party to the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. It is not known if Equatorial Guinea has defined war crimes as crimes under national law.

• ***Estonia:*** Estonian courts can exercise universal jurisdiction over certain conduct amounting to war crimes under several provisions of the current 1992 Criminal Code, which are reinforced by the Constitution.

Article 123 of the Constitution provides that "[i]f Estonian laws or other acts contradict foreign treaties ratified by the *Riigikogu,* the provisions of the foreign treaty shall be applied."[241]

Section 5 (Validity of the present code in respect of acts committed outside the territory of the Republic of Estonia) of the current 1992 Criminal Code provides:

"(1) A citizen of the Republic of Estonia, a citizen of a foreign country or a stateless person can be prosecuted under the present code for the act committed outside of Estonia:

1) if under an international treaty there has been presented a request to prosecute the offender and the act is punishable as a criminal offence in the place where it was committed or no criminal law of any country is in force in that place;

. . . .

(2) This code is in force in respect of acts committed outside the reach of the present code that are

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[239] Spanish text reads: "No prescribe la pena en los casos siguientes: tortura, actos de terrorismo, secuestro, genocidio, violación de las leyes o costumbres de guerra, desaparición forzada de personas, persecución política, ideológica, racial, por sexo o religión, siempre que se tratare de hechos cuyo inicio de ejecución fuese con posterioridad a la vigencia del presente Código." (English translation in CAT/C/37/Add.4 p.29)

[240] Organic Law of the Judicial Power, Art. 17 (English translation by Amnesty International). That article states: "The Judges and Courts of Equatorial Guinea shall try Guineans or foreigners who have committed any of the following crimes outside the national territory: . . . 3. Any other crimes, as provided for by law." The original text in Spanish reads: *"Serán juzgados por - los Jueces y Tribunales ecuatoguineaos, los guineanos o extranjeros que - fuera del territorio de la Nación hubieren cometido alguno de los delitos siguientes: . . . 3. Cualesquiera otros delitos, - cuando así se disponga por Ley." Ley Orgánica del Poder Judicial, Número 10/1984, de fecha - 20 de Junio.* Paragraph 1 deals with national security and Paragraph 2 addresses crimes committed abroad by government officials.

[241] Constitution of the Republic of Estonia, 3 July 1992, Art. 123 (English translation in Jefri Jay Ruchti, *Estonia, in* Albert P. Blaustein & Gisbert H. Flanz, eds, *Constitutions of the Countries of the World* (Dobbs Ferry,New York: Oceana Publications, Inc. March 1994) (Release 94-2).

offences under the present code and the act is punishable as a criminal offence according to criminal law of the place it was committed or no criminal law of any country is in force in that place:

1) if the offender was a citizen of the Republic of Estonia or became a citizen of the Republic of Estonia after committing that act, or

2) if the offender was a citizen of a foreign country or a stateless person and detained in Estonia and shall not be extradited to any other country.

3) Regardless of the law of the place where the act was committed, this code is in force in respect of acts which are punishable as criminal offences under an international treaty concluded by the Republic of Estonia even if the act is committed outside the borders of the Republic of Estonia."[242]

Decisions to investigate or prosecute are taken by a prosecutor, not by a political official.

A recently adopted new Penal Code, which will replace the current Penal Code when it enters into effect on 1 March 2002, will continue to provide for universal jurisdiction over war crimes.

Section 8 (Validity of the penal law in respect of acts directed against internationally protected legal benefit) of the new Penal Code will provide:

"Irrespective of the law of the place an act was committed Estonian penal law is in force in respect of the act committed outside Estonian territory if the punishability of the act derives from the international treaty binding for Estonia."[243]

Estonia is a party to the Geneva Conventions and to Protocols I and II. It has signed the Rome Statute but it had not yet ratified it as of 1 September 2001. Numerous war crimes are defined as crimes under the current Criminal Code and that Code does not differentiate between international and non-international armed conflict.[244] The new Penal Code will provide that a broader range of war crimes are crimes under Estonian law and will continue to apply in both international and non-international armed conflict.[245] There is no express limitation of the scope of these crimes to conduct during an international armed conflict, so it is possible that they may apply to non-international armed conflict, although it has not been possible to obtain any definitive commentary on this point. Estonia is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and Section 53 (5) of the current Penal Code provides that statutes of limitation do not apply to war crimes and crimes

[242] Estonian Criminal Code of 1992, § 5 (English translation of Section 5 provided by the Legal Department of the Ministry of Foreign Affairs).

[243] Penal Code, effective 1 March 2002, § 8.

[244] Estonian Criminal Code, § 61.2 (Violence against population in the area of hostilities); § 61.3 (Breach of the legal regime of treatment of prisoners of war); § 61.4 (Use of prohibited means or methods of warfare or giving a command for their use).

[245] Estonian Penal Code, entry into effect 1 March 2002, § 93 (Manufacturing and distribution of prohibited weapons); § 95 (Military activities against the civilian population); § 96 (Illegal use of means of warfare against the civilian population); § 97 (Attack against the civilian population); § 98 (Unlawful treatment of prisoners of war and interned civilians); § 99 (Attack against prisoners of war and interned civilians); § 100 (Failure to provide assistance to sick or wounded or to shipwrecked); § 101 (Attacking a combatant unable to fight); § 102 (Attack against a protected person); § 103 (Use of prohibited weapons); § 104 (Damaging environment as a method of warfare); § 105 (Misuse of distinctive emblems and badges of international protection); § 106 (Attacking a non-military object); § 107 (Attack directed against objects of cultural heritage); § 108 (Destruction and appropriation of property in the area of military activities and in occupied territory); and § 109 (Marauding). *See also* § 94 (Punishment for the offences not prescribed in this division [Division 4 - §§ 94-109]).

against humanity. This prohibition will be continued in the new Penal Code and will also be applicable to offences that are subject to life imprisonment (crimes against humanity and genocide).[246] The new Penal Code will provide for command and superior responsibility for war crimes and exclude superior orders as a defence.[247]

• ***Ethiopia:*** Ethiopian courts have been able to exercise universal jurisdiction over war crimes in three situations since 1957: when the crime is a crime under customary international law, when it is a crime codified in national law and it is a crime specified in a treaty to which Ethiopia is a party. The relevant legislative provisions are reinforced by Article 9 (4) of the Constitution, which provides that "[a]ll international agreements ratified by Ethiopia are an integral part of the law of the land."[248]

Article 17 of the Ethiopian Penal Code of 1957 provides in part that

"[a]ny 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 and subject to the general conditions mentioned hereinafter (Art. 19 and 20 (2)) unless he has been prosecuted in the foreign country.
(2) Nothing in this article shall affect the provisions of articles 14 and 15 (2).[249]

In addition, paragraph 2 of Article 18 (Other offences committed in a foreign country) provides a more limited form of universal jurisdiction over serious offences. It states:

"(2) In the case of all other offences [not committed against or by an Ethiopian national] committed in a foreign country by a foreign national, the offender shall, save as otherwise expressly provided, failing extradition, be prosecuted and tried only if the offence is punishable under Ethiopian law with death or with rigorous imprisonment for not less than ten years." [250]

The universal jurisdiction in Articles 17 and 18 is classified as "subsidiary" jurisdiction in the Penal Code and is subject to a number of conditions under Article 19 (Conditions for subsidiary application) and under

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[246] Estonian Penal Code, entry into effect 1 March 2002, § 81 (2).

[247] *Ibid.*, § 88 (Punishment for the offences prescribed in this chapter [Chapter 8 - Offences (Crimes) against the humanity and international security). The first paragraph of this section defines the principle of command and superior responsibility in more detail than in the current Criminal Code and the second paragraph excludes superior orders as a defence:
"(1) In addition to the direct perpetrator of the offence prescribed in this chapter, the representative of state power or military authority who has given a command for committing an offence or under whose consent the offences has been committed or who has not prevented committing the offence although it has been in his or her power, shall be punished.
(2) Commitment of a crime prescribed in this chapter under a command of the representative of state power or military authority does not exclude punishment of the perpetrator of the crime."

[248] Constitution of the Federal Democratic Republic of Ethiopia, 21 August 1995, Art. 9 (4) (official English translation in *Ethiopia - Booklet 2, in* Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. January 1997) (Release 97-1).

[249] Ethiopian Penal Code of 1957, Art. 17.

[250] Ethiopian Penal Code of 1957, Art. 18 (2).

Article 20 (Effect of foreign sentences). Article 19 states:

"(1) In the application of this Code it shall be presumed:
(a) that the complaint or denunciation by the victim or his dependants was lodged when it is a condition for prosecution and trial under the law of the place of commission of the offence or under Ethiopian law;
(b) that the offender is within the territory of the Empire and has not been extradited, or that extradition was obtained by reason of the offence committed;
(c) that the offence was not legally pardoned in the country of commission and that prosecution is not barred either under the law of the country where the offence was committed under Ethiopian law.
(2) Prosecution shall be instituted by the Attorney General after consultation with the Minister of Justice.
(3) The punishment to be imposed under this Code shall not be more severe than the heaviest penalty prescribed by the law of the country of commission where such country is recognized by Ethiopia."[251]

Article 20 provides:

"(1) In all cases where Ethiopian courts have a subsidiary jurisdiction only (Art. 15 (1) [active personality jurisdiction over members of the Ethiopian armed forces], 17 and 18), the offender cannot be tried and sentenced in Ethiopia if he was regularly discharged or acquitted for the same act in a foreign country.
(2) If the offender was tried and sentenced in a foreign country but did not undergo his punishment, or served only part of it in the said country, the punishment, or the remaining part thereof, may if it is not barred by limitation, be enforced according to the forms prescribed by this Code. The provisions of Art. 12 (3) shall apply mutatis mutandis to this Article."[252]

The leading commentator on the Ethiopian Penal Code has explained the broad reach of Articles 17 and 18 (2). After noting that some took the view that states could not exercise universal jurisdiction over persons present in the state where a person suspected of ordinary crimes took refuge, he stated:

"This view, however, is contrary to the exigencies of international co-operation in the struggle against criminality and has, therefore, not been taken in Ethiopia. In connection with Art. 17, reference was made to the principle of universal jurisdiction. Art. 18 goes further in that direction; it is based on the idea that the principle of universal jurisdiction should apply not only in the case of international offences which endanger the whole community of nations, but also in the case of any offence of extreme seriousness committed in violation of any national law. Consequently, a person having committed in any country an offence of the utmost gravity and having taken refuge in another country, should be tried by the courts of the country of refuge, if he cannot be tried at the place of commission. This extensive conception of the principle of universal jurisdiction, though it is not unanimously admitted, has been included in the Ethiopian Code not only for reasons pertaining to international co-operation, but also because of the right of the country of refuge to protect itself. For, if a person should commit several offences of robbery in a foreign country and then take refuge in Ethiopia without having been tried for such offences in the said country, it might be dangerous to leave him at large in Ethiopia, where he might resume his criminal activity. He may, therefore, be tried by an Ethiopian court even though the country of commission has not expressly delegated its

[251] Ethiopian Penal Code, Art. 19.

[252] Ethiopian Penal Code, Art. 20.

jurisdiction to Ethiopia."[253]

Ethiopia is a party to Hague Convention IV, the Geneva Conventions and Protocols I and II. It has not signed or ratified the Rome Statute. Offences against the law of nations are defined in Articles 282 to 295 of the Penal Code to include a wide range of war crimes under customary and treaty law.[254] In addition, the Federal Courts Proclamation No. 25 of 1996 gives Federal Courts jurisdiction over criminal offences against the law of nations.[255] There are some limits on who can be subject to universal jurisdiction.[256]

• ***Federal Republic of Yugoslavia:*** Courts in the former Yugoslavia had been able to exercise universal jurisdiction since 1929 (see Chapter Two, Section II.A). Today, national courts may exercise universal jurisdiction over many war crimes. This legislative grant of jurisdiction is reinforced by Article 16 of the Constitution, which provides:

> "The Federal Republic of Yugoslavia fulfills in good faith the obligations contained in international treaties to which it is a contracting party.
>
> International treaties which have been ratified and promulgated in conformity with the present Constitution and generally accepted rules of international law shall be a constituent part of the internal legal order."[257]

Article 107 (2) of the 1976 Criminal Code of Yugoslavia provides for custodial universal jurisdiction over any crime punishable by at least five years' imprisonment:

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[253] Philippe Graven, *An Introduction to Ethiopian Penal Law (1-84 Penal Code)* 49 (Oxford: Oxford University Press 1965).

[254] These include: war crimes against the civilian population "in violation of the rules of public international law and of international conventions" (Article 282); war crimes against wounded, sick or shipwrecked persons (Article 283); war crimes against prisoners and interned persons (Article 284); pillage, piracy and looting (Article 285); certain ancillary crimes (Article 286); dereliction of duty towards the enemy (Article 287); illegal means of combat (Article 288); breach of an armistice or treaty (Article 289); certain guerrilla activities (Article 290); ill-treatment of wounded, sick and prisoners (Article 291); denial of justice (Article 292); hostile acts against international humanitarian organizations (Article 293); abuses of international emblems and insignia (Article 294); and hostile acts against the bearer of a flag of truce (Article 295).

[255] Federal Courts Proclamation No. 25/1996, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, No. 13, 15 February 1996. It states:

"Federal Courts shall have jurisdiction over the following criminal cases:

....

3) offences against the law of nations;

4) offences involving foreign nationals; . . ."

[256] Articles 19 and 20 (2) contain *general principles* for exercising criminal jurisdiction in Ethiopia, such as the principle of *ne bis in idem*, immunities for certain individuals and exclusion of jurisdiction over members of the Ethiopian armed forces. However, Article 17 (2) refers to *special principles* which override these general principles. Under these special principles, an Ethiopian enjoying immunity who is accused of committing a crime under international law in another country may be tried under Article 14 and a member of the Ethiopian armed forces who commits such a crime in another country may be tried pursuant to Article 15 (2). Both types of suspects may be tried again in Ethiopia despite the general principle of *ne bis in idem* applicable in other cases. Graven, *supra*, n. 254, 46-47.

[257] Constitution of the Federal Republic of Yugoslavia, 27 April 1992, as amended to 6 July 2000, Art. 16 (English translation in Gisbert H. Flanz, *Federal Republic of Yugoslavia, in* Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc.) (Release 2000-7, November 2000)).

"Yugoslav criminal law applies to a foreigner who commits a criminal act abroad against a foreign country or a another foreigner, for which this law provides imprisonment for a term of five years or a heavier penalty, provided the perpetrator is found on the territory of the [Federal Republic of Yugoslavia] and is not extradited to a foreign country. Unless it is stipulated otherwise in this law, in such a case the court may not impose a heavier punishment than the one provided by the law of the country in which the criminal act has been committed."[258]

The Criminal Code prohibits a number of war crimes.[259] There are several conditions which must be satisfied before a court may exercise jurisdiction under Article 107 (2). Article 108 (2) provides that a prosecution may not be instituted if the suspect has served a sentence abroad for the crime or has been acquitted or pardoned, if the prosecution is barred by a statute of limitations and if, the territorial state requires the consent of the victim and the victim has not consented.[260] According to Article 108 (3), a prosecution under Article 107 may be commenced only if the act is punishable in the territorial state, unless the relevant federal or local prosecutor authorizes a prosecution for a crime under the law of the Federal Republic of Yugoslavia.[261] Even if the crime is not punishable under the law of the territorial state, it may be prosecuted pursuant to Article 108 (4) if the Federal Public Prosecutor authorizes it if the act at the time it was committed was considered a criminal act under general legal principles accepted by the international community at the time it was committed.[262]

The Federal Republic of Yugoslavia is a party to the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. Article 100 of the

[258] Criminal Code of Yugoslavia, adopted 28 September 1976, effective 1 July 1977, Art. 107 (2). The English translation is *obtainable from* http://pbosnia.kentlaw.edu/resources/legal/bosnia/criminalcode_fry.htm.

[259] Criminal Code of Yugoslavia, Art. 142 (War crime against the civilian population), Art. 143 (War crime against the wounded and sick), Art. 144 (War crime against prisoners of war), Art. 145 (Organizing a group and instigating the commission of genocide and war crimes), Art. 146 (Unlawful killing or wounding of the enemy), Art. 147 (Marauding), Art. 148 (Making use of forbidden means of warfare), Art. 149 (Violating the protection granted to bearers of flags of truce) and Art. 150 (Cruel treatment of the wounded, sick and prisoners of war).

[260] Article 108 (2) provides:
"In cases referred to in articles 106 and 107 of this law, [prosecution] shall not be instituted if:
(1) the offender has completely served the sentence to which he has been sentenced abroad;
(2) the offender has been acquitted by a legally effective foreign judgement, or if his punishment has been barred by lapse of time, amnestied or pardoned abroad;
(3) by foreign law the criminal act may only be prosecuted upon request by the damaged party and such request has not been filed."

[261] The English translation of Article 108 (3) is not entirely clear. It reads:
"In cases referred to in articles 106 and 107 of this law, prosecution shall be instituted only if the act committed is also punishable [under the law of the country of commission?]. If in cases referred to in articles 106 and 107, paragraph 1 of this law, such criminal act is not punishable under the law of the country of commission, prosecution may be instituted only upon the approval on the part of the Federal Public Prosecutor for criminal acts defined in the federal criminal code, that is to say upon the approval on the part of the public prosecutor of a republic or autonomous province for criminal acts defined in the criminal codes of the republic or autonomous province."

[262] Article 108 (4), which appears to overlap with Article 108 (3), to some extent, provides:
"It is only after the approval on the part of the Federal Public Prosecutor that prosecution may be instituted in the [Federal Republic of Yugoslavia] in cases referred to in Article 107, paragraph 2 of this law, regardless of the law of the country in which the criminal act has been committed, if at the time of the commission the act in question was considered a criminal act in accordance with the general legal principles recognized by the international legal community."

Criminal Code provides that statutes of limitation for war crimes are excluded, and the Federal Republic of Yugoslavia is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[263]

• ***Fiji:*** The courts of Fiji have been able to exercise universal jurisdiction over grave breaches of the Geneva Conventions abroad since 1959.

Although Fiji does not have a Geneva Conventions Act, the United Kingdom's Geneva Conventions Act 1957 applies to the state under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below), which is listed in the 1985 Revision of Subsidiary Legislation. Fiji is a party to the Geneva Conventions, but it has not ratified either Protocol I or II. It has ratified the Rome Statute, but as of 1 September 2001 it had not yet enacted any implementing legislation.

• ***Finland:*** Finnish courts may exercise universal jurisdiction over certain war crimes under three provisions.

Finland appears to follow a dualist approach to conventional and customary international law obligations. The Constitution requires that Parliament accept and bring into force international legislative obligations and the President to do so with respect to other obligations. However, treaty obligations which restrict the scope of the application of criminal law appear to apply directly. Section 15 (Treaties and international custom binding on Finland) of Chapter 1 (Scope of application of the criminal law of Finland). It states:

> "If an international treaty binding on Finland or another statute or regulation that is internationally binding on Finland in some event restricts the scope of application of the criminal law of Finland, such a restriction shall apply as agreed. The provisions in this chapter notwithstanding, the restrictions on the scope of application of Finnish law based on generally recognised rules of international law shall also apply."[264]

The first legislative provision, Section 7 (International offence) of Chapter 1 (Scope of application of the criminal law of Finland) of the Finnish Penal Code provides:

> "Finnish law shall apply to an offence committed outside of Finland where the punishability of the act, regardless of the law of the place of commission, is based on an international agreement binding on Finland or on another statute or regulation binding on Finland (*international offence*). Further provisions on the application of this section shall be issued by Decree".[265]

Section 7 applies to anyone, whether a citizen of Finland or not. Its broad wording would suggest that punishable acts based on common Article 3 and Protocol II, as well as grave breaches of the Geneva

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[263] Criminal Code, Art. 100 ("A criminal prosecution and the execution of sentence are not subject to the statute of limitations for criminal acts referred to in articles 141 to 145 of this law, as well as for other criminal acts which pursuant to international agreements are not subject to the statute of limitations.").

[264] Finnish Penal Code, Ch. 1, § 15. The English translations of the Penal Code cited in this memorandum are from an unofficial translation prepared by persons in the Ministry of Justice and used by the government in Finland's response of 15 July 1999 to a questionnaire by the Committee against Torture. Another English translation is *obtainable from* http://wings.buffalo.edu/law/bclc/finnish.htm.

[265] *Ibid.*, Ch. 1, Sec. 7.

Conventions and Protocol I, would be included.[266] Apparently, it would also apply to acts which are punishable under the Rome Statute as war crimes, although this is not expressly stated. This interpretation is supported by the broad definition of war crime under the Penal Code (see below). A decree has been issued defining certain war crimes as international offences.[267]

Second, paragraphs 1 and 3 of Section 6 (Offence committed by a Finn) of Chapter 1 provide that Finnish law applies to persons resident in Finland at the time of offence or at the beginning of the trial and to persons found in Finland who are citizens or permanent residents of Nordic countries. They provide:

> "(1) Finnish law shall apply to an offence committed outside of Finland by a Finnish citizen. If the offence was committed in territory not belonging to any State, it is a precondition for punishability that, under Finnish law, the act may be punishable by imprisonment for more than six months."
> (2) A person who at the time of the offence was, or at the beginning of the trial is, a Finnish citizen is deemed to be a Finnish citizen.
> (3) The following are deemed equivalent to a Finnish citizen:
> (1) a person who at the time of the offence was, or at the beginning of the trial is, permanently resident in Finland, and
> (2) a person who is caught in Finland and who at the beginning of the trial is a citizen of Denmark, Iceland, Norway or Sweden or at that time is permanently resident in one of those countries."[268]

Third, Section 8 (Other offence committed outside of Finland) of this chapter states that Finnish law applies to offences carrying a penalty of more than six months if the territorial state has requested prosecution or requested extradition and it was refused. It reads:

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[266] This interpretation is supported by the application of the law prior to 1996 to common Article 3 and Protocol II. Section 3 (1) of Chapter 1 of the Finnish Penal Code of 1889, as amended in 1975, provided that the jurisdiction of Finnish courts was normally based upon the territorial, protective and representational principles (where double criminality is present). However, Section 3 (2) of Chapter 1 of the Penal Code provided that notwithstanding this provision

> "an alien may be sentenced according to the law of Finland even when the offence committed by him is not punishable according to the law of the place of the act if this offence is:
> 1. a war crime . . .".

Chapter 13 (2) of the Penal Code gave courts jurisdiction over any person who has committed certain specific war crimes "or in another manner breaches the provisions of an international treaty dealing with the waging of war and binding on Finland". The broad wording indicates that courts would have had jurisdiction over violations of common Article 3 and Protocol II.

[267] Decree on the application of Chapter 1, section 7 of the Penal Code (627/1996). Section 1 provides: "For the purposes of Chapter 1, section 7 of the Penal Code, the following offences shall be considered international crimes: . . .2) Such war crime, violation of human rights in a state of emergency, serious war crime which must be considered a grave breach of the Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Relative to the Treatment of Prisoners of War, and Relative to the Protection of Civilian Persons in time of War (FTS/ 8/1955), as well as the Protocol Additional to the Geneva Conventions, relating to the protection of victims of non-international armed conflicts (FTS 82/1980))." (English translation *obtainable from* http://www.icrc.org/ihl-nat/ihl-nat). The English translation is not free from ambiguity and it appears that it was intended to cover each of the following: any war crime, any violation of human rights in a state of emergency, any serious war crime or other punishable act that amounts to a grave breach of the Geneva Conventions and some violations of Protocol II. However, it is not clear why grave breaches of Protocol I were not expressly included, although they would be war crimes.

[268] Finnish Penal Code, Ch. 1, Sec. 6 (1), (3).

"Finnish law shall apply to an offence committed outside of Finland which, under Finnish law, may be punishable by imprisonment for more than six months, if the State in whose territory the offence was committed has requested that charges be brought in a Finnish court or that the offender be extradited because of the offence, the extradition request has not been granted."[269]

Finland is a party to Hague Convention IV, the Geneva Conventions and Protocols I and II. It has ratified the Rome Statute and enacted implementing legislation on 28 December 2000.[270] Finland has provided in its Penal Code that certain war crimes are crimes under national law.[271] The definition of war crime in Section 1 of Chapter 11 appears to include any violation of an international humanitarian law treaty or customary international law, including all or most of the crimes in the Rome Statute.[272]

There are a number of restrictions on the scope of universal jurisdiction. A ten-year statute of limitations applies to war crimes and a twenty-year statute of limitations for aggravated war crimes.[273] The Prosecutor-General must approve the filing of criminal charges in certain cases.[274] Charges may not be brought if there has been a final judgment abroad, except when the crime is an international offence within the scope of Section 7.[275] Contrary to the rule of international law in the Nuremberg Charter and other international instruments, superior orders are a defence to war crimes, crimes against humanity,

[269] Finnish Penal Code, Ch. 1, Sec. 8.

[270] The Act to implement and apply the Rome Statute of the International Criminal Court (Nr. 1284/2000) (An unofficial English translation by Prof. Ari-Matti Nuutila of the University of Turku, Finland is *obtainable from* http://iccnow.org).

[271] Penal Code of Finland, Law 39/1889, Ch. 11 (War crimes and offences against humanity) (Law 578/1995), Sec. 1(War crime); Sec. 2 (Aggravated war crime); Sec. 3 (Petty war crime). However, petty war crimes carry a maximum penalty of at most six months, so they would not fall within the scope of section 8 of Chapter 1. Two other provisions criminalize conduct during armed conflict which amounts to war crimes: Penal Code, Ch. 11, § 4 (Violation of human rights in a state of emergency) (Law 578/1995) and § 5 (Aggravated violation of human rights in a state of emergency). Finland no longer has a military penal code or military code of procedure. Military disciplinary offences were incorporated into the Penal Code in Chapter 45 (Military offences) in 1981.

[272] Penal Code, Ch. 11, Sec. 1("A person who in an act of war . . . (3) otherwise violates the provisions of an international agreement on warfare binding on Finland or the generally acknowledged and established rules and customs of war under public international law shall be sentenced for a war crime to imprisonment for at least four months and at most six years.").

[273] Penal Code, Ch. 8 (Statute of limitations), Sec. 1 (Law 138/1973) (paragraph 1 provides that "[a] sentence shall not be passed if charges have not been brought (1) within twenty years, if the most severe penalty provided for the offence is fixed-term imprisonment for over eight years, (2) within ten years, if the most severe penalty is imprisonment for more than two years and at most eight years[.]"). The maximum penalty for petty war crimes is four months, for war crimes and violations of human rights in a state of emergency it is six years and it is 12 years for aggravated war crimes and aggravated violations of human rights in a state of emergency.

[274] The general rule is that "[a] criminal case shall not be investigated in Finland without a prosecution order by the Prosecutor-General, where (1) the offence was committed abroad . . ." Penal Code, Ch. 1, Sec. 12 (Prosecution order by the Prosecutor-General), Law 205/1997, para. 1. "However, the order by the Prosecutor-General shall not be required, if (1) the offence was committed by . . . a foreigner permanently resident in Finland . . . [or] (2) the offence was committed in Denmark, Iceland, Norway or Sweden and the competent public prosecutor of the place of commission has requested that the offence be tried in a Finnish court." *Ibid.*, para. 2.

[275] Penal Code, Ch. 1, Sec. 13 (Foreign judgment), para. 2 (3). Section 13 (Foreign judgment) (2) (Law 814/1998) (3) of Chapter 1 provides that the Prosecutor-General may institute a prosecution in Finland for "an international offence referred to in section 7" even if there has been a foreign judgment for the same act, but Section 13 (3) requires that any sentence served be taken into account.

genocide and torture, in certain circumstances.[276] However, this defence should not be considered applicable in the light of Section 15 of Chapter 1, which provides that international law restrictions prevail over Finnish criminal law.

Although there is no requirement of dual criminality with respect to prosecutions under Section 7, Section 11 imposes such a requirement with respect to Section 6 (apart from certain limited exceptions) and to Section 8 of Chapter 1.[277] There are no express provisions in the Penal Code concerning recognition of official immunities of foreigner officials. Therefore, pursuant to Section 15 of Chapter 1 of the Penal Code, official immunities of foreign officials are recognized only to the extent that such immunities must be recognized under international law.

• ***France:*** French courts may exercise universal jurisdiction over war crimes, but only in two situations. First, they may do so if the crimes were committed by a person who subsequently became a French national and, second, if they were committed in the former Yugoslavia since 1991 or in Rwanda in 1994 or in neighboring countries in that year, if by Rwandans.

(1) Constitutional and legislative provisions. Relevant legislative provisions are reinforced by the Constitution.

Constitution. The Preamble of the current French Constitution of 1958 refers to the Constitution of 1946, which declares that "[t]he French Republic, faithful to its traditions, conforms to the rules of international public law."[278] Article 55 of the French Constitution of 1958 provides that "[t]reaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws, subject, for each agreement or treaty, to its application by the other party."[279] However, as

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[276] *Ibid.*, Ch. 3 (Vindication and mitigation) (Law 621/1967), § 10a (1). It provides:
"A subordinate soldier shall be sentenced to punishment for an act that he/she has committed in accordance with the order of a superior officer only if he/she has clearly understood that by obeying the order he/she would be breaking the law or his/her duty or service. If, however, the act has occurred under circumstances in which the subordinate could not have disobeyed the order, he/she may remain unpunished."

[277] *Ibid.*, Ch. 1, § 11. Paragraph 1 states:
"If the offence has been committed in the territory of a foreign State, the application of Finnish law may be based on sections 5 [passive personality], 6 and 8 only if the offence is punishable also under the law of the place of commission and a sentence could have been passed for it by a court of that foreign State. In this event, a sanction that is more severe than what is provided by the law of the place of commission shall not be imposed in Finland."
Paragraph 2 of Section 11 provides that, "[e]ven if the offence is not punishable under the law of the place of commission, Finnish law shall apply to it if it has been committed by a Finnish citizen or a person referred to in Section 6 (3) (1) [a person who at the time of the offence was, or at the beginning of the trial is, permanently resident in Finland] and the penalty for it has been laid down in [listing several specific sections covering sexual abuse of children].

[278] The original French text of the Preamble of the 1946 Constitution reads: *"La République française, fidèle à ses traditions, se conforme aux règles du droit public international."*

[279] The original French text of Article 55 reads:
"Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois sous réserve, pour chaque accord ou traité, de son application par l'autre partie."
(English translation in Vlad G. Spitzer, *France,* in Albert P. Blaustein & Gisbert H. Flanz, eds, *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. June 1998).

explained below, French courts have not treated these constitutional provisions as authorizing them, in the absence of legislation, to implement the jurisdictional provisions of international humanitarian law or other international treaties or customary international law.

Article 689 and related articles of the Penal Code. Article 55 of the Constitution is implemented in part by Article 689 of the Criminal Procedure Code (*Code de procédure pénal*), which provides:

> "The authors of and accomplices in offences committed outside the territory of the Republic may be prosecuted and tried in French courts when, pursuant to the provisions of the Criminal Code, Book 1, or of another legislative instrument, French law is applicable or when an international convention gives French courts jurisdiction to deal with the matter."[280]

Article 689 is followed by Article 689-1, which introduces a series of articles providing that French courts can exercise universal jurisdiction over persons found in France who are responsible for one of the violations listed in these articles. Article 689-1 states:

> "Pursuant to the international conventions referred to below, any person who renders himself guilty outside the territory of the Republic of any of the offences enumerated in those articles may, if in France, be prosecuted and tried by French courts. This article shall apply to attempts to commit any of those offences whenever such attempts are punishable[.]"[281]

The articles that follow, 689-2 to 689-7, provide jurisdiction over persons in the circumstances identified in Article 689-1 who violated certain specific treaties, none of which is an international humanitarian law treaty. As explained below, French courts have held that Article 689 and subsequent articles do not provide for universal jurisdiction over war crimes.

Universal jurisdiction over war crimes in the former Yugoslavia and Rwanda. However, French courts may exercise universal jurisdiction over war crimes if they were committed in the former Yugoslavia since 1991 or in Rwanda in 1994 or in neighboring countries in that year, if by Rwandans, but not by nationals of France or other countries.

French Law 95-1 of 2 January 1995, which implements Security Council Resolution 827 establishing the Yugoslavia Tribunal, gives French courts jurisdiction over persons who commit such crimes, as well

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[280] Code of Criminal Procedure, as amended by the Act of 16 December 1992, Art. 689 (English translation in the second periodic report of France to the Committee against Torture, U.N. Doc. CAT/C/17/Add.18, 8 October 1997, para. 54. The original French text of Article 689 provides:

> *"Les auteurs ou complices d'infractions commises hors du territoire de la République peuvent être poursuivis et jugé par les juridictions françaises soit lorsque, conformément aux dispositions du livre 1er du Code pénal ou d'un autre texte législatif, la loi française est applicable, soit lorsqu'une convention internationale donne compétence aux juridictions françaises pour connaître d l'infraction."*

Code de procédure pénale, art. 689.

[281] Code of Criminal Procedure, as amended by the Act of 16 December 1992, entered into force on 1 March 1994, Art. 689-1 (English translation in the second periodic report of France, *supra, n.281*, para. 56. The original French text of Article 689-1 provides:

> *"En application des conventions internationales visées aux articles suivants, peut être poursuivie et jugée par les juridicitions françaises, si elle se trouve en France, toute personne qui s'est rendue coupable hors du territoire de la République de l'une des infractions énumerées par ces articles. Les dispositions du présent article sont applicables à la tentative de ces infractions, chaque fois que celle-ci est punissable."*

as war crimes during international armed conflict, in the former Yugoslavia since 1991, if they are found in France.[282] Similarly, under Law 96-432 of 22 May 1996, French courts can exercise universal jurisdiction over violations of Article 4 of the Rwanda Statute, which includes violations of common Article 3 of the Geneva Conventions and of Protocol II committed in Rwanda. It stated that

> "according to articles 1 and 2 of the above-mentioned act of 22 May 1996, the offenders or the accomplices of the acts that constitute, under articles 2 to 4 of the Statute of the International Tribunal, grave transgressions against the Conventions of Geneva of 12 August 1949, violations of the laws or customs of war, genocide or crimes against humanity, can, when they are found in France, be prosecuted and judged by the French jurisdictions, while applying French law[.]"[283]

However, it did not find that the provisions of these treaties was too general a character to create rules of extraterritorial jurisdiction. That law, which implements Security Council Resolution 955 establishing the Rwanda Tribunal, provides such courts with jurisdiction over violations of common Article 3 and Protocol II committed in Rwanda during 1994.[284]

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[282] Article 2 of that law provides French courts with universal jurisdiction over grave breaches of the Geneva Conventions, violations of the laws and customs of war, genocide and crimes against humanity, as defined in Articles 2 to 5 of the Yugoslavia Statute, committed in the former Yugoslavia:

"Les auteurs ou complices des infractions mentionnées à l'article 1er peuvent être poursuivis et jugés par les juridictions françaises, en application de la loi française, s'ils sont trouvés en France. Ces dispositions sont applicables à la tentative de ces infractions, chaque fois que celle-ci est punissable. . ."

Loi n. 95-1 du 2 janvier 1995.

[283] *Munyeshyaka, Jugement, Cour de cassation, Chambre criminelle, No. 96-82.491 PF*, 6 January 1998, *Bulletin des Arrêts de la Cour de Cassation, N°1, Chambre Criminelle, janvier 1998, reprinted in* 102 *Revue générale de Droit international public* 825 (1998/3); English translation by Louise Wesseling Plug in 1Y.B. Int'l Hum. L. 598, 599 (1998). The original French text reads:

"Attendu que, selon les articles 1er et 2 de la loi du 22 mai 1996 précité, les auteurs ou complices des actes qui constituent, au sens des articles 2 à 4 du statut du tribunal international, des infractions graves aux Conventions de Genève du 12 août 1949, des violations des lois ou coutumes de guerre, un génocide ou des crimes contre l'humanité, peuvent, s'ils sont trouvés en France, être poursuivis et jugés par les juridictions françaises, en application de la loi française[.]"

Although the accused was not charged with war crimes, the court expressly stated that French courts could exercise universal jurisdiction over all the crimes within the Rwanda Tribunal's jurisdiction (for further information about this case see Chapter Ten, Section II).

[284] Article 1 of the 1996 law on cooperation with the Rwanda Tribunal provides in part:

"Pour l'application de la résolution 955 du Conseil de sécurité des Nations unies du 8 novembre 1994 instituant un tribunal international en vue de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda, ainsi que les citoyens présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins, entre le 1er janvier et le 31 décembre 1994, la France participe à la répression des infractions et coopère avec cette juridiction dans les conditions fixées par la présente loi.

Les dispositions qui suivent sont applicable à toute personne poursuivie à raison des actes qui constituent, au sens des articles 2 à 4 du statut du tribunal international, des infractions graves à l'article 3 commun aux conventions de Genève du 12 août 1949 et au protocole additionnel II auxdites conventions en date du 8 juin 1977, un génocide ou des crimes contre l'humanité."

Article 2 of this law provides:

"Les articles 2 à 16 de la loi n. 95-1 du 2 janvier 1995 portant adaptation de la législation française aux dispositions d la résolution 827 du Conseil de sécurité des Nations unies instituant un tribunal international en vue de juger les personnes présumées responsables de violations graves du droit

Universal jurisdiction over persons who subsequently become French nationals. In addition to the above legislative provisions, Article 113-6 of the Penal Code (*Code pénal*), which permits French courts to try persons for crimes under French law committed abroad if the person subsequently becomes a French national. That article provides:

> "French criminal law is applicable to any felony (*crime*) committed by a French national outside the territory of the Republic.
>
> It is applicable to misdemeanours (*délits*) committed by French nationals outside of territory of the Republic if the conduct is punishable by the legislation of the country where it has been committed.
>
> This present article applies even though the accused acquired French nationality subsequent to the conduct imputed to him or her."[285]

France is a party to Hague Convention IV, the Geneva Conventions and Protocols I and II. It has ratified the Rome Statute and is now preparing implementing legislation. Military courts have jurisdiction over war crimes in an outdated law adopted during the Second World War, shortly after the liberation of Paris.[286] Although the *Code de justice militaire* (Code of Military Justice) has been repeatedly amended, it does not expressly include grave breaches of the Geneva Conventions or of Protocol I or other violations of these treaties or of Protocol II.[287] France has a statute of limitations of 10 years for crimes,

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international humanitaire commises sur le territoire de l'ex-Yugoslavie despuis 1991 sont applicables aux personnes visées à l'article 1er."
Loi n. 96-432 du 22 mai 1996, arts. 1 et 2.

[285] Penal Code, Art. 113-6 (English translation in *The French Penal Code of 1994 as amended of January 1, 1999* (Littleton, Colorado: Fred B. Rothman & Co. 1999) (Edward A. Tomlinson trans.)). The original French text reads:

> *"La loi pénale française est applicable à tout crime commis par un Français hors du territoire de la République.*
>
> *Elle est applicable aux délits commis par des Français hors du territoire de la République si les faits sont punis par la législation du pays où ils ont été commis.*
>
> *Il est fait application du présent article lors même que le prévenu aurait acquis la nationalité française postérieurement au fait qui lui est imputé."*

Code pénal, art. 113-6 (Paris: Dalloz 1997/1998).

[286] *Ordonnance du 28 août 1944 relative à la répression des crimes de guerre.*

[287] The following persons are subject to the Code of Military Justice: prisoners of war (Art. 63), minors who are 18 when they are nationals of an occupied state or an enemy state at the time of the crimes (Arts 64 & 69) and enemy nationals or persons acting in the interests of the enemy in a territory under the authority of France or in a zone of military operations acting against a stateless person or a refugee residing in either area when such persons have committed crimes not justified by the laws and customs of war (Art. 70). The original text in French of Article 70 reads:

> *"Sont de la compétence des juridictions des forces armées les crimes et délits commis depuis l'ouverture des hostilités par les nationaux ennemis ou par tous agents au service de l'administration ou des intérêts enemis, sur le territoire de la République ou sur un territoire soumis à l'autorité de la France ou dans toute zone d'opérations de guerre, soit à l'encontre d'un national ou d'un protégé français, d'un militaire servant ou ayant servi sous le drapeau français, d'un apatride ou réfugié résidant sur un des territoires visés ci-dessus, soit au préjudice des biens de toutes les personnes physiques visées ci-dessus et de toutes les personnes morales françaises, lorsque ces infractions, même accomplies à l'occasion ou sous le prétexte du temps de guerre, ne sont pas justifiées par les lois et coutumes de la guerre. Est réputée commise sur le territoire de la République toute infractioni don't un acte caractérisant un de ses éléments constitutifs a été accompli en France."*

Code de justice militaire, Loi n° 82-621 du 21 juillet 1982 Journal Officiel du 22 juillet 1982 rectificatif JORF 3

which includes war crimes.[288]

(2) Investigations and court decisions. Courts have interpreted French legislation restrictively.

Javor. On its face, Article 689 of the Criminal Procedure Code would appear to be self-executing and to authorize French courts to exercise universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I. Indeed, in 1994, a French investigating judge (*juge d'instruction*) in the *Javor* case held that French courts could exercise universal jurisdiction under the Geneva Conventions over a person suspected of responsibility for grave breaches of those Conventions against Bosnian nationals who was later found in France.[289] However, many observers were surprised when this ruling was reversed by the *Cour d'appel* (Court of Appeal). The court held that the provisions of the Geneva Conventions were too general to create criminal jurisdictional and that no French law had implemented

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août 1982 en vigueur le 1er mai 1983, art. 70.

Several offences against military discipline which constitute war crimes are expressly listed as crimes in the Code of Military justice, including pillaging (Art. 427), robbing wounded, sick, shipwrecked and the dead (Art. 428) and misuse of Red Cross insignia in violation of the laws and customs of war (Art. 439), following a general provision which states that these offences are without prejudice to criminal prosecution for conduct amounting to *crimes* (felonies) and *délits* (misdemeanours), in particular those which are contrary to the laws and customs of war and international conventions (Art. 383). The original text in French of Article 383 reads:

> *"Sans préjudice de la répression pénale des faits qui constituent des crimes ou délits de droit commun, et notamment de ceux qui sonts contraires aux lois et coutumes de la guerre et aux conventions internationales, sont punies conformément aux dispositions du présent livre les infractions d'ordre militaire ci-après."*

Code de justice militaire, Loi n° 82-621 du 21 juillet 1982 Journal Officiel du 22 juillet 1982 rectificatif JORF 3 août 1982 en vigueur le 1er mai 1983, art. 383. However, Article 383 seems to simply provide that these offences can also be punished under some other provision.

[288] *Code de procédure pénale (Paris: Litec 9e ed. 1996/1997), art. 7 (L. n. 92-1336, 16 déc. 1992, art. 7 ; L. n. 93-913, 19 juill. 1993).*

[289] In re *Javor, N. Parquet 94 052 2002/7, Ordonnance, Tribunal de grande instance, Paris,* 6 May 1994 (Getti, J.). However, the following year another judge in the same court came to the opposite conclusion. *Dupaquier et Gatari contre Zigiranyirazo et Hahimana, N. Parquet 943252005/6, Ordonnance d'incompetence, Tribunal de Grande instance, 23 février 1995* (Hervé Stephan, J.). That judge concluded that the *aut dedere aut judicare* provisions concerning grave breaches of the Geneva Conventions created only an obligation on states parties to enact these provisions into law and that they were too general to be applied by French courts and did not exclude the possibility that states parties need only adopt other categories of extraterritorial jurisdiction, rather than universal jurisdiction:

> "These articles only create an obligation on the contracting parties to translate into national law the rules they define; Whereas it must first be noted that the wording of the aforementioned articles is conceived in a general manner, unlike some of the texts mentioned; that in particular there is no mention, if only expressly to exclude them, of the usual criteria relating, for example, to the place where the acts were committed, to the nationality of the victims or of the perpetrators, or to their place of refuge after the event." (English translation by Amnesty International)

The original French text reads:

> *"[C]es articles ne créent qu'une obligation à la charge des parties contractantes de traduire en droit interne les règles qu'ils définissent; Attendu qu'il doit être tout d'abord relevé que la rédaction des articles précités est conçues de manière générale, contrairement d'ailleurs à d'autres textes évoqué; qu'en particulier n'y figurent pas, ne serait-ce que pour les exclure expressément, les critères habituellement retenus relatifs, par example, au lieu de commission des faits, à la nationalité des victimes ou des auteurs, ou à leur lieu de refuge ou de résidence postérieurments aux faits."*

As indicated above in Chapter Three, Part II, there appears to be no basis for this interpretation in the drafting history.

these provisions.[290] This decision was affirmed by the *Cour de cassation* (Court of Cassation).[291] The *Cour de cassation* gave the same two reasons for its decision on this point as the *Cour d'appel*. First, France had not enacted any legislation implementing the *aut dedere aut judicare* obligation in the Geneva Convention. Second, the conventions could have no direct effect in the French legal system because "their provisions have too general a character to be able directly to create rules on extraterritorial jurisdiction in criminal matters."[292] This decision has been severely criticized by leading French legal scholars. For example, Brigitte Stern has argued that Article 689 contemplated the Geneva Conventions and she also suggested that French courts might have relied upon customary international law.[293]

Munyeshyaka. However, the *Cour de cassation* reached a different conclusion with respect to violations of international humanitarian law committed in non-international armed conflict in Rwanda. On 6 January 1998, it held in the *Wenceslas Munyeshyaka* case that, pursuant to French Law 96-432 of 22 May 1996, French courts could exercise universal jurisdiction over violations of Article 4 of the Rwanda Statute, which includes violations of common Article 3 of the Geneva Conventions and of Protocol II committed in Rwanda. It stated that

> "according to articles 1 and 2 of the above-mentioned act of 22 May 1996, the offenders or the accomplices of the acts that constitute, under articles 2 to 4 of the Statute of the International Tribunal, grave transgressions against the Conventions of Geneva of 12 August 1949, violations of the laws or customs of war, genocide or crimes against humanity, can, when they are found in France, be prosecuted and judged by the French jurisdictions, while applying French law[.]"[294]

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[290] In re *Javor, Dossier N. A 94/ 02071, Arrêt, Cour d'appel, Paris*, 24 November 1994 (stating that *"[c]es dispositions revêtent un caractère trop général pour créer directement des règles de compétence en matière pénale"* and that *"aucun texte portant adaptation de la législation française aux dispositions . . . des Conventions de Genève n'est intervenu"*).

[291] *Javor, Arrêt, no. 132, Cour de cassation, chambre criminelle, 26 mars 1996, 1996 Bulletin des Arrrêts de la Cour de Cassation, Chambre Criminelle, nos. 1-6, 379.*

[292] In re *Javor*, (The court stated *"qu'en l'absence d'effet direct des dispositions des quatre Conventions de Genève, relatives à la recherche et à la poursuite des auteurs d'infractions graves, l'article 689 du Code de procédure pénale ne saurait recevoir application"*.) (English translation in Brigitte Stern, In re *Javor*, 93 Am. J. Int'l L. 525, 527, n. 14 (1999)).

[293] Stern, In re *Javor, supra, n. 293*, 528-529; _____, *La compétence universelle en France: le cas des crimes commis en ex-Yougoslavie et au Rwanda*, 40 Ger. Y.B. Int'l L. 280, 293-294, 296-299 (1997). *See also* Claude Lombois, *De la compassion territoriale*, Rev. Sc. Crim., Apr. - Jun. 1995, 399; Michel Massé, *Ex-Yugoslavie, Rwanda: Une compétence "virtuelle" des juridictions françaises?* 1997 Rev. Sc. Crim. (n.s.) 893.

[294] *Munyeshyaka, Jugement, Cour de cassation, Chambre criminelle, No. 96-82.491 PF*, 6 January 1998, *Bulletin des Arrêts de la Cour de Cassation, N°1, Chambre Criminelle, janvier 1998, reprinted in* 102 *Revue générale de Droit international public* 825 (1998/3) (a corrected version of the decision reportedly was issued on 10 February 1998); English translation by Louise Wesseling Plug in 1 Y.B. Int'l Hum. L. 598, 599 (1998). The original French text reads:

> *"Attendu que, selon les articles 1er et 2 de la loi du 22 mai 1996 précité, les auteurs ou complices des actes qui constituent, au sens des articles 2 à 4 du statut du tribunal international, des infractions graves aux Conventions de Genève du 12 août 1949, des violations des lois ou coutumes de guerre, un génocide ou des crimes contre l'humanité, peuvent, s'ils sont trouvés en France, être poursuivis et jugés par les juridictions françaises, en application de la loi française[.]"*

Although the accused was not charged with war crimes, the court expressly stated that French courts could exercise universal jurisdiction over all the crimes within the Rwanda Tribunal's jurisdiction (for further information about this case see Chapter Ten, Section II).

However, it did not find that the provisions of these treaties was too general a character to create rules of extraterritorial jurisdiction. That law, which implements Security Council Resolution 955 establishing the Rwanda Tribunal, provides such courts with jurisdiction over violations of common Article 3 and Protocol II committed in Rwanda during 1994 (for the text, see discussion above under legislation). Presumably, the earlier French Law 95-1 of 2 January 1995, which implements Security Council Resolution 827 establishing the Yugoslavia Tribunal, similarly gives French courts jurisdiction over persons who commit such crimes, as well as war crimes during international armed conflict, in the former Yugoslavia since 1991, if they are found in France (for the text, see discussion above).

Restrictions on the scope of French legislation. In addition to the limited geographic and temporal scope of legislation concerning war crimes, the outdated definitions of conduct falling within the jurisdiction of military tribunals as war crimes and the ten-year statute of limitations, French courts have further restricted the scope of war crimes.

French courts have imposed a strict custodial jurisdiction limitation on the exercise of universal jurisdiction which makes it almost impossible for prosecutors or investigating judges to investigate crimes abroad unless, as in the *Munyeshaka* case, the suspect was living openly in the country and readily identifiable. As noted above, Articles 689-1 and 689-2 to 689-7, as well as the 1995 and 1996 laws concerning the former Yugoslavia and Rwanda, require that the suspect be found in France. In the *Javor* case, Judge Getti had interpreted this requirement broadly, permitting all the activities of the preliminary inquiry (*actes d'instruction*) to be conducted with a view to identifying the suspect and determining the appropriate charges so that the suspect could either be arrested if in France or extradition requested. The *Cour d'appel* and *Cour de cassation* held that no jurisdiction existed even for such preliminary steps unless it could be proved that the suspect was in France.

The interpretation by the *Cour d'appel* and *Cour de cassation* is problematic for at least three reasons. First, it prevents France from implementing the provisions of the Geneva Conventions, which expressly authorize states parties to request other states to extradite persons suspected of grave breaches, even if they have no link to the requesting state, thus limiting the effectiveness of France as an agent of the international community able to act when other states parties fail to fulfill their responsibilities under international law to bring such persons to justice. Second, it prevents France from fulfilling effectively its duty to cooperate with other states in tracing and arresting persons suspected of war crimes, particularly with respect to persons suspected of crimes within the jurisdiction of the Yugoslavia and Rwanda Tribunals and the future International Criminal Court. Third, it makes it impossible for victims to invoke the resources of the prosecutor or investigating magistrate to locate a suspect believed to be in France. Since victims are often in exile with limited resources, they will not have the same ability to locate such suspects or to do so in a way which will not alert them and lead to their flight. The requirement that the suspect be found in France is in marked contrast to the use of trials *in absentia* based on territorial and passive personality jurisdiction, such as in the *Astiz* case.[295]

It has been argued that another problem with French law concerning universal jurisdiction concerning war crimes is that it is limited to universal jurisdiction over such crimes as defined in French, rather than international, law. The wording of paragraph 2 of Article 1 of the 1995 law concerning the former Yugoslavia and of paragraph 2 of Article 1 of the 1996 law concerning Rwanda appears to require prosecution for war crimes as defined in the Statutes of the two Tribunals. However, a leading commentator on French law concerning universal jurisdiction has stated that, in effect, the definitions used

[295] *Astiz, Arrêt, N°1893/89, Cour d'assises de Paris, 16 mars 1990.* See also *Astiz, Arrêt, N°1 893.89, Cour d'appel de Paris, 2ème Chambre d'accusation, 20 Octobre 1989.*

by courts in prosecutions pursuant to these two provisions will be more restrictive definitions under French law.[296]

Unfortunately, France reportedly does not intend to give its courts universal jurisdiction over any of the war crimes within the jurisdiction of the International Criminal Court when it enacts implementing legislation or to modify the restrictive custodial jurisdiction limitations on extraterritorial jurisdiction, although it apparently is likely to repeal the statute of limitations for war crimes.[297] Unless this current intention is changed, French legislation providing for universal jurisdiction over war crimes will continue to be limited to war crimes in the former Yugoslavia since 1991 and in Rwanda in 1994, and war crimes in 1994 committed by Rwandan citizens in neighbouring countries, except for torture (see Chapter Ten, Section II), although it does provide for passive personality jurisdiction over war crimes.

• ***Gambia:*** The courts of Gambia have been able to exercise universal jurisdiction over grave breaches of the Geneva Conventions committed abroad since 1959.

The United Kingdom's Geneva Conventions Act 1957 (except for Section 4 and Section 8 (2)) applied to the Gambia prior to independence under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below). Gambia became independent on 18 February 1965. On 1 September 1959, the Gambia adopted legislation providing that Section 4 (1) of the Geneva Conventions Act 1957 would apply to the Gambia as of that date.[298] As far as is known, neither the 1959 Order in Council nor the 1959 Act have been repealed since that date.

Gambia is a party to the Geneva Conventions and Protocol I and II. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. It has not been possible to determine if national law expressly provides that statutes of limitations do not apply to grave breaches, but Gambia is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

• ***Georgia:*** Georgian courts may exercise universal jurisdiction over conduct amounting to war crimes in three situations, based on legislative provisions whose origins can be traced back to Russian universal jurisdiction legislation of 1903 (see Chapter Two, Section II.A). The relevant legislative provisions are reinforced by Article 6 (2) of the Constitution, which reads:

> "The legislation of Georgia conforms with universally recognized principles and norms of international law, international treaties or agreements of Georgia which are not against the Constitution of Georgia have superior legal force in relation to internal normative acts."[299]

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[296] Stern, *La compétence universelle, supra, n.294,* 298.

[297] Statement by a senior official of the Ministry of Justice at a conference organized by the International Law Society in Berlin, 21-22 October 2000.

[298] Laws of the Gambia, Chapter 24:01, Geneva Conventions - An Act to enable effect to be given to certain International Conventions done at Geneva on the 12th day of August, 1949, and for purposes connected therewith, 1 September 1959, Preamble, para. 3.

[299] The Constitution of Georgia, adopted 24 August 1995, Art. 6 (2) (English translation in Gisbert H. Flanz, *Georgia - Booklet 2, in* Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. August 1996) (Release 96-5 Kevin Jones trans.)). The comma appears to be a typographical error for either a semi-colon or a full stop.

This constitutional provision is supplemented by Article 6 (International Treaty in Legislation of Georgia) of the Law on International Treaties of Georgia, which provides:

> "1. An international treaty of Georgia is an integral part of the legislation of Georgia.
> 2. An international treaty of Georgia, unless it is contrary to the Constitution of Georgia, shall have preferential legal force with respect to municipal normative acts.
> 3. The provisions of officially published international treaties of Georgia establishing rights and duties of a specific character and not requiring the adoption of municipal clarifying normative acts shall operate in Georgia directly."[300]

It has not been possible to locate any jurisprudence or commentary on Article 6 (2) of the Constitution or Article 6 of the Law on International Treaties that would indicate whether either provision would be independent bases for exercising universal jurisdiction over crimes abroad.

The first legislative provision, paragraph 1 of Article 5 (Criminal responsibility for a crime committed overseas) of the Criminal Code of Georgia provides universal jurisdiction over aliens permanently resident in Georgia who commits acts abroad which are crimes under the Code, as well as crimes under the law of the territorial state. That provision states:

> "A citizen of Georgia as well as a person permanently resident in Georgia but not possessing citizenship who commits abroad such an action considered by this Code which is deemed a crime according to the legislation of the state where it is committed will be liable for criminal responsibility according to this Code, if they have not been condemned in another state."[301]

Second, Article 5 (2) permits national courts to exercise universal jurisdiction over aliens permanently resident in Georgia who commit acts abroad which are crimes under the Code and under international undertakings, even if not crimes under the law of the territorial state. It reads:

> "A citizen of Georgia as well as a person permanently resident in Georgia but not possessing citizenship who commits abroad such an action considered by this Code which is not deemed a crime according to the legislation of the state where it is committed will be liable for criminal responsibility according to this Code, if this is a serious or particularly serious crime directed against the interests of Georgia or if criminal responsibility for this crime is considered according to Georgia's international undertakings."[302]

Third, Article 5 (3) provides universal jurisdiction over foreigners and stateless persons not permanently resident in Georgia who have committed a serious crime within the meaning of Georgia's international undertakings. That provision states:

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[300] Law on International Treaties of Georgia, adopted 16 October 1997, Art. 6 (English translation in 4 *Sudebnik* 398, 392 (1999)).

[301] Criminal Code of Georgia, 22 July 1999, Art. 5 (1) (English translations of Code by Amnesty International). Previously such jurisdiction appears to have been provided in Article 6 of the Code. Initial report of Georgia to the Committee against Torture, U.N. Doc. CAT/C/28/Add.1, 17 June 1996), para. 75. The second periodic report to the Committee against Torture, submitted on 15 November 1999, covering the period from 1996 to July 1999, does not mention the new Criminal Code or suggest that there has been any change in the scope and conditions of universal jurisdiction.

[302] Criminal Code of Georgia, Art. 5 (2). Previously, such jurisdiction appears to have been provided in Article 6 of the Code. Initial report of Georgia, *supra, n. 302*, para. 76.

"The citizen of a foreign country who has committed a crime abroad as well as a person not holding citizenship who do not live permanently in Georgia will be liable to criminal responsibility according to this Code, if this is a serious or particularly serious crime directed against the interests of Georgia or if criminal responsibility for this crime is considered according to Georgia's international undertakings, if indeed they have not been condemned in another state."[303]

Georgia is a party to the Geneva Conventions and Protocol I and II. It has signed the Rome Statute, but as of 1 September 2001, it had not yet ratified it. Certain war crimes in international and non-international armed conflict are made crimes under the Criminal Code in Chapter XLVII (Crimes against the Peace and Security of Mankind and International Humanitarian Law) in the Fourteenth Section of the Code (Crimes against Humanity).[304] Georgia is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and the Criminal Code provides that statutes of limitation are not applicable to war crimes.[305]

• ***Germany:*** There are two provisions in the *Strafgesetzbuch* (StGB), German Penal Code of 1871, as amended, which permit courts to exercise universal jurisdiction over conduct amounting to war crimes. Their origins can be traced back to proposals made in the Weimar Republic in 1927 (see Chapter Two, Section II.A).[306]

These legislative provisions are reinforced by Article 25 of the Constitution, which provides that international law has priority over legislation: "The general rules of international law shall be an integral part of federal law. They shall override laws and directly establish rights and obligations for the inhabitants of the federal territory."[307] German legal commentary indicates, however, that the principle of legality in Article 103 (2) of the Constitution is interpreted to prohibit a national court from trying a person for a crime under international law unless the conduct is a crime under national law at the time it occurred.[308] Thus, to the extent that the conduct is prohibited only as an ordinary crime, such as

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[303] Criminal Code of Georgia, Art. 5 (3). Previously, such jurisdiction appears to have been provided in the Code, although it is not clear whether it was in Article 6 or some other article. Initial report of Georgia, *supra, n.302*, para. 76.

[304] Criminal Code of Georgia, Art. 411 (The deliberate transgression of the norms of international humanitarian law at a time of armed conflict); Art. 412 (The deliberate transgression of the norms of international humanitarian justice at a time of inter-state or intra-state armed conflict by the creation of a danger to health or by physical maiming").

[305] Criminal Code of Georgia, Art. 71 (Freeing from criminal responsibility because of the passage of the term of a statute of limitation); Art. 76 (Freeing from serving punishment because of lapse of time from the guilty verdict). Both provisions state that a statute of limitation will not apply in a case involving Georgia's international undertakings.

[306] Parts of the analysis of German legislation and jurisprudence in this memorandum draw upon two unpublished papers: Luc Reydams, *Germany*, a draft chapter of his book, *Universal Jurisdiction in International Law* (Oxford: Oxford University Press 2001) (forthcoming), and Robert Roth & Yvan Jeanneret, *Rapport sur le droit allemand, 22 juin 2001*, unpublished draft manuscript submitted for discussion at the *Etude comparée des critères de compétence juridictionnelle en matière de crimes internationaux (crimes contre l'humanité, génocide, torture, crimes de guerre, terrorisme)*, Paris, 2 to 3 July 2001.

[307] The Basic Law of the Federal Republic of Germany, 23 May 1949, as amended to June 1993, together with the text of the 40th amendment of 20 December 1993 (Official English translation in Gisbert H. Flanz, *Germany, in* Albert P. Blaustein & Gisbert H. Flanz, eds, *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. August 1994) (Release 94-6).

[308] Roth & Jeanneret, *supra, n.307*, 3 to 4 (*citing* H. Tröndle & T. Fischer, *Strafgesetzbuch und*

murder, rather than as a crime under international law, it will be subject to the limitations applicable to ordinary crimes under national law, which in many cases are wholly inappropriate to crimes of this gravity.

(1) Legislation. First, paragraph 9 of Section 6 (Conduct outside Germany affecting internationally protected interests) of the German Penal Code permits courts to exercise universal jurisdiction (*Weltrechtsprinzip*) over conduct amounting to war crimes. It provides that

> "[r]egardless of the law of the place of commission, the German criminal law is also applicable to the following acts committed outside of Germany: . . . (9) Acts which, on the basis of an international treaty binding on the Federal Republic of Germany, are to be prosecuted even in cases when such acts have been committed abroad."[309]

In a prosecution pursuant to this paragraph, the suspect would be charged with an ordinary crime under international law, such as murder or rape, not directly with the crime under international law, such as grave breaches of the Geneva Conventions or Protocol I.[310] The problems with relying on ordinary crimes under German law to prosecute war crimes under international law have led to calls to incorporate war crimes in the Penal Code as part of the implementing legislation for the Rome Statute (see below in this entry).[311] There is no express requirement that the suspect be in Germany at the time an investigation is opened.[312]

In addition to Section 6 (9) of the Penal Code, Section 7 (2) provides for universal jurisdiction in two situations. First, German criminal law applies to persons who were foreigners at the time of the crime

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Nebengesetze (Munich 49th ed. 1999) § 6 N.9.; H. H. Jescheck & T. Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil* 164 (Berlin 5th ed. 1996); Christiane Nill-Theobald, *"Defences" bei Kriegsverbrechen am Beispiel Deutschlands und der USA* (Freiburg im B. 1998) [37ss.BverfG *in* NStZ 2001, 241]).

[309] German Penal Code of 15 May 1871 (*Strafgesetzbuch vom 15. Mai 1871*) (StGB), § 6 (9). Published in *Bundesgesetzblatt* 1160 (1987).

[310] A leading commentator on German legislation concerning crimes under international law has stated that "in recent years the clause dealing with Germany's international obligations [Section 6 (9)] has always been understood as embodying the Geneva Conventions and the Additional Protocols." Horst Fischer, *Some Aspects of German State Practice Concerning IHL*, 1 Y. B. Int'l L. 380, 382 (1998). However, since war crimes and crimes against humanity are not, as such, defined as crimes under national law, if German courts exercise universal jurisdiction over such crimes,

> "the German Penal Code applies in full, including its definitions of crimes, rules about attempt, participation, justification and mitigating circumstances. German law and not international law forms the basis for a judgement, as is made clear by the introductory sentence of sections 3-7 stating that 'German law applies'. The current prosecution of the penal code in question, be it murder, taking of hostages or damage to property."

Ibid., 383.

[311] Some of these problems are described in Fischer, *supra, n.311*,387-389.

[312] As explained in Chapter Three, Section II.B.2, the Geneva Conventions envisage states parties requesting the extradition of person suspected of grave breaches of the Conventions whenever the requesting state can make out a *prima facie* case; they do not require that the suspect have been in the requesting state's territory or jurisdiction at any time prior to the request. Similarly, Article 5 (3) of the Convention against Torture envisages states parties being able to exercise any form of jurisdiction under their national legislation, without requiring the suspect's presence before initiating an investigation. It could be argued that the phrase, "Acts which, on the basis of an international treaty binding on the Federal Republic of Germany, are to be prosecuted even in cases when such acts have been committed abroad", includes situations when the treaty has permissive language as well as when it contains obligatory language, but it has not been possible to locate any definitive jurisprudence on this question.

but subsequently acquired German citizenship and, second, it applies to foreigners arrested in Germany for acts punishable in the territorial state, if the suspect is not extradited:

> "(2) The German criminal law is likewise applicable to crimes committed abroad if such conduct is punishable by the law of the place where it occurred, or if no criminal law enforcement existed at the place where the crime was committed, and if the perpetrator:
> 1. was a German at the time of the crime or acquired German citizenship thereafter, or
> 2. was a foreigner at the time of the crime, was apprehended within Germany and, although the extradition statute would permit extradition for the type of offense involved, was not extradited either because a request for extradition was never made, or was refused, or because extradition is not feasible."[313]

There is no statute of limitations for murder, but statutes of limitations for ordinary crimes under national law would apply to other conduct amounting to war crimes or crimes under international law, except for genocide.[314] German law incorporates international law with respect to official immunities.[315] However, it also extends immunity to representatives of states visiting Germany on an official invitation. This provision reportedly was enacted for the visit of Ernest Honecker, the head of the East German Communist Party, in 1987, but was not designed to address the question of crimes under international law generally. The current failure to define war crimes as crimes under national law means that prosecutions for conduct amounting to war crimes will be subject to principles of criminal responsibility, defences and other restrictions that are not applicable to crimes under international law. This result has been criticized.[316] The *ne bis in idem* principle incorporated in Article 103 (3) of the Constitution does not preclude a prosecution in Germany for a crime that has been the subject of a foreign judgment.[317]

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[313] Penal Code, § 7 (2). English text in *Federal Penal Code of the Republic of Germany* (Fred R. Rothman 1987). The government has explained that

> "[u]nder section 7 (2), item 2 of the Penal Code, German criminal law is applicable to foreigners living in Germany for an act punishable by the law of the place where it occurred if the offender was not extradited either because a request for extradition was never made, or was refused, or because extradition is not feasible 'although the Extradition Act (*Auslieferungsgesetz*) would permit extradition for the type of offence involved'."

Initial report of Germany to the Committee against Torture, U.N. Doc. CAT/C/12/Add.117 March 1992, para. 58.

German authority is split on whether the legal norm in the territorial state must be identical. Reydams, *supra, n.307.*

Some scholars argue that this section is not based on universal jurisdiction (*Universalitätsprinzip*), but rather on the principle of vicarious (representational) jurisdiction (*stellvertretende Strafrechtspflege*). *See, for example,* Christoph J.M. Safferling, *Public Prosecutor v. Djajić*, 92 Am. J. Int'l L. 528, 530 (1998). However, as indicated in Chapter One, Section II.E.3, representational jurisdiction should be seen as simply one form of universal jurisdiction, that is, jurisdiction over conduct abroad not linked to the forum state by the nationality of the accused or victim or by harm to the forum state's own interests. Moreover, it is difficult to see how Germany would be "representing" the interests of the territorial state if it refused a request to extradite and prosecuted the suspect for a crime under international law based on the ordinary crime under the German Penal Code.

[314] Penal Code, § 78 (2) (no statute of limitations for murder or genocide). Other statutes of limitations are addressed in paragraphs 1, 3 and 4 of Section 78 and other provisions related to statutes of limitations are found in Sections 78a, 78b, 78c, 79, 79a and 79b. German scholarly authority is split on whether a prosecution pursuant to Section 7 (2) could proceed if it were otherwise barred by a statute of limitations in the territorial state. Reydams, *supra, n.307.*

[315] German Judicature Act (GVG), *Gerichtverfassungsgesetz*, § 20 (2).

[316] *See* Roth & Jeanneret, *supra, n.307,* 6 (*citing* C. Nill-Theobald, *supra*, n.309).

[317] Article 51 (3) of the *Strafgesetzbuch* (StGB), Penal Code, provides that "if the convicted person has been

In contrast to the normal rule under the German concept of legality in Section 152 of the *Strafprozeßordnung* (StPO), Code of Criminal Procedure, which provides for mandatory prosecution (*Legalitätsprinzip*) whenever there is a sufficient factual basis, Section 153 of this code provides that the Public Prosecutor may exercise discretion not to prosecute (*Opportunitätsprinzip*) a case based on extraterritorial jurisdiction, subject to approval by the Chief Public Prosecutor of the *Bundesgerichtshof* (BGH), Federal Supreme Court, in three situations where other interests are determined to outweigh the public interest in a prosecution, so that decisions could be made - or be perceived to be made - on the basis of political, rather than legal considerations.[318] The proposed legislation for implementing the Rome Statute would modify this discretion (see below).

Germany is a party to Hague Convention IV, the Geneva Conventions and Protocols I and II. It has ratified the Rome Statute, but as of 1 September 2001 it had not yet enacted implementing legislation.

Proposed implementing legislation for the Rome Statute. A draft bill to implement the Statute is now being considered by the government that would define war crimes, crimes against humanity and genocide as crimes under German law in a special new Code of Crimes under International Law.[319] It would also provide for universal jurisdiction and abolish the severely criticized judicially created requirement of a link to Germany (see discussion below).[320] It would also modify the scope of the

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punished abroad for the same offence, the new sentence will be offset against the foreign sentence if it has been served."

[318] *Strafprozeßordnung* (StPO), Code of Criminal Procedure, Section 153c (1). That provision states in part:
"The prosecution may refrain from prosecuting a criminal offence:
1. which has been committed outside the territorial application of this statute or which has been committed by a participant in a criminal offence in this territory which was perpetrated outside the territorial application of this statute,
2. which a foreigner has committed within Germany on a foreign ship or aircraft,
3. if a punishment has already been executed abroad against the accused for the offence and if the punishment to be expected in Germany would be negligible after credit is given for the punishment imposed abroad or if the accused has been finally and conclusively acquitted outside Germany for the offence."
English translation in the initial report of Germany to the Committee against Torture, *supra*, n.314, para. 66.

[319] For background on the proposed code, see Claus Kreß, *Vom Nutzen eines deutschen Völkerstrafgesetzbuchs* (Baden-Baden 2000).

[320] Rome Statute of the International Criminal Court of 17 July 1998 Act [*Gesetz zum Römischen Statut des Internationalen Strafgerichtshofes vom 17. Juli 1998*]. Published in II *Bundesgesetzblatt* 1393 (2000). The implementing legislation for the Rome Statute is likely to define war crimes and other crimes within the International Criminal Court's jurisdiction as crimes under German criminal law. The Federal Ministry of Justice asked an expert group to assist its legislative work on the draft implementing legislation. On 2 May 2001, this expert group presented the report of its proceedings, with the *Entwurf Völkerstrafgesetzbuch* (EGVStB), Draft of a law for the introduction of a people's penal code, and a commentary on the draft legislation, to the Federal Minister of Justice (English translations cited in this memorandum are by Amnesty International). Federal Ministry of Justice, Press Release of 2 May 2001 (*Bundesministeriumder Justiz, Mitteilungen, Berlin, am 2. Mai 2001, Expertenarbeitsgruppe übergibt Entwurf eines Völkerstrafgesetzbuchs, international abgestimmte Strafgesetze gegen Schreibtischtäter und Folterknechte*). The Ministry of Justice will prepare a draft bill for the Parliament, based on the expert group's draft, which was sent to other ministries and the justice departments of the Lander, as well as to certain non-governmental organizations, for comment. The original German texts of the report and the press release are *obtainable from* http://www.bmj.bund/de.

Article 1 (Range of application - Principles of international law), § 1 of the draft legislation prepared by the expert group would eliminate the judicially created requirement of a link to Germany. It states: "This law is valid for all crimes listed even if the crime was committed abroad and has no relevance to Germany." The original German text reads:

discretion of the public prosecutor to decline to prosecute in universal jurisdiction cases when the suspect is being prosecuted by an international criminal court, the state of the suspect's nationality or the territorial state.[321] However, the proposed reform would not require the Public Prosecutor to demonstrate, before

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"Artikel 1(Erster Teil Allgemeine Regelungen), § 1(Anwendungsbereich - Weltrechtsprinzip). Dieses Gesetz gilt für alle in ihm bezeichneten Verbrechen, auch wenn die Tat im Ausland begangen wurde und keinen Bezug zum Inland aufweist."

The commentary on this provision explains:

"The crimes dealt with in the VstGB, which are throughout directed against the vital interests of the international community and are therefore not confined by frontiers are therefore subject to the principles of international law. Because of the special nature of these offences, there is no inadmissible interference in the sovereignty of other states in the trial of foreign countries or foreign nationals. Therefore the existence of special 'references to Germany' (settlement Lagodny/Nill-Theobald.JR 2000,205 206.: Eser in the fiftieth anniversary edition BGH page 26ff) does not apply to foreign states when applying the German penal code. Since the Federal Court has to date represented a divergent view of § 6 StGB in their interpretation (compare BGHSt 45 64 66; recent open verdict of the BGH of the 21.02.2001.3StR372/00) it is made explicitly clear by the wording of § 1 that there is no need for special reference to Germany for offences according to the VStGB. It is, however, to be noted that the validity of the ability to prosecute regarding foreign states is limited in specific ways according to the VStGB Article 3 no.2 EGVStGB § 153ff StPO."

The original text in German reads:

"Die im VStGB geregelten Straftaten richten sich durchweg gegen die vitalen Interessen der Völkergemeinschaft, haben folglich grenzüberschreitenden Charakter und unterliegen deshalb dem Weltrechtsprinzip. Wegen der besonderen Stoßrichtung dieser Delikte liegt in der Aburteilung von Auslandstaten auch ausländischer Staatsangehöriger keine unzulässige Einmischung in die Souveränität anderer Staaten. Für die Anwendbarkeit des deutschen Strafrechts auch auf Auslandstaten bedarf es deshalb nicht des Bestehens eines speziellen "Inlandsbezugs" (vgl. Lagodny/Nill-Theobald, JR 2000, 205, 206; Eser, in: Festgabe 50 Jahre BGH, S. 26ff., jeweils m.w.N.). Da der Bundesgerichtshof bisher bei der Auslegung von § 6 StGB insoweit eine abweichende Auffassung vertreten hat (vgl. BGHSt 45, 64, 66; neuerdings offener Urteil des BGH vom 21.02.2001, 3 StR 372/00) ist durch die Formulierung von § 1 ausdrücklich klargestellt, dass es jedenfalls für die Taten nach dem VStGB eines besonderen Inlandsbezugs nicht bedarf. Es ist allerdings zu beachten, dass die Geltung der Anklagepflicht in Bezug auf Auslandstaten nach dem VStGB durch den in Artikel 3 Nr. 2 EGVStGB vorgesehenen § 153f StPO in spezifischer Weise eingeschränkt ist."

See, generally, Horst Fischer, *Untersuchung und Strafverfolgung von Verletzungen des Rechtes des bewaffneten Konfliktes: Nationale Gesetze und Verfahren, internationale Zusammenarbeit auf militärischer und rechtlicher Ebene, in* Horst Fischer and Sascha Rolf Lüder (eds.), *Völkerrechtliche Verbrechen vor dem Jugoslawien-Tribunal, nationalen Gerichten und dem Internationalen Strafgerichtshof* 193 (1999); Horst Fischer, and Sascha Rolf Lüder, *La répression des violations du droit international humanitaire dans la legislation nationale allemande, in* C. Pellandini, ed., *Répression nationale des violations du droit international humanitaire (systèmes Romano-Germaniques)* 227 (1998).

[321] Article 3 (Change in the procedure of the trial), § 1 of the draft adds a new section 153f to the *Strafprozeßordnung* (StPO), Code of Criminal Procedure. It reads:

"The public prosecution can~refrain from the prosecution of a crime which according to ' '7 to 15 of the Code of Crimes under International Law is liable, in cases of ' 153c section~ 1 No. 1 and 2 , if the accused is not in Germany and his stay there is not expected. This only applies~if in the cases of '153c section 1 the accused is German ,the crime comes before an international court of law ,or a state in which the crime was committed ,or where the relations of the injured party reside.

(2.)The public prosecution is to refrain from pursuing a crime which is liable according to §§ 7 to 15 of the Code of Crimes under International Law in cases of §§ 153c section 1 No. 1and 2 if:

1. If there is no criminal suspicion against a German
2. No criminal act has been committed against a German
3.No suspect criminal is or is expected to be in Germany and
4.The crime is prosecuted in an international court of law or by a state where the crime was committed , or

declining to prosecute, that the territorial state or the state of the suspect's nationality would ensure a fair trial without the possibility of the death penalty or that these states would not conduct sham proceedings.

Criminal investigations and jurisprudence. Most criminal cases are prosecuted in regional courts of the *Länder* (states), but pursuant to Federal criminal procedure. Most crimes fall within the jurisdiction of the *Landesgerichte*, State District Courts. Judgments of the State District Courts can be reviewed by the *Oberlandesgerichte* (Higher Regional Courts, sometimes translated as the State Supreme Courts or State Courts of Appeals). However, some crimes, such as genocide pursuant to Section 120 (8) of the German Judicature Act (GVG), can be tried in the *Oberlandesgerichte*. Appeals from these courts go to the *Bundesgerichtshof* (BGH), Federal Supreme Court (sometimes translated as the Federal High Court, Federal Court of Appeals or the Federal Court of Justice). A further challenge on constitutional grounds in the *Bundesverfassungsgericht* (BverfG), Federal Constitutional Court, is also possible in certain circumstances.

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whose national is suspected of the crime ,or has been injured by the crime.
The same holds good when a foreigner accused of a crime committed abroad resides in Germany, but the requirements according to clause 1 No. 2 and 4 are complied with and the transfer to an international court or the extradition to a prosecuting state are admissible and intended."

The original German text reads:

"(1) Die Staatsanwaltschaft kann von der Verfolgung einer Tat, die nach §§ 7 bis 15 des Völkerstrafgesetzbuches strafbar ist, in den Fällen des § 153c Abs. 1 Nr. 1 und 2 absehen, wenn sich der Beschuldigte nicht im Inland aufhält und ein solcher Aufenthalt auch nicht zu erwarten ist. Ist in den Fällen des § 153c Abs.1 Nr.1 der Beschuldigte Deutscher, so gilt dies jedoch nur dann, wenn die Tat vor einem internationalen Gerichtshof oder durch einen Staat, auf dessen Gebiet die Tat begangen oder dessen Angehöriger durch die Tat verletzt wurde, verfolgt wird.
(2) Die Staatsanwaltschaft soll von der Verfolgung einer Tat, die nach §§ 7 bis 15 des Völkerstrafgesetzbuches strafbar ist, in den Fällen des § 153c Abs. 1 Nr. 1 und 2 absehen,wenn.
1. kein Tatverdacht gegen einen Deutschen besteht,
2. die Tat nicht gegen einen Deutschen begangen wurde,
3. kein Tatverdächtiger sich im Inland aufhält und ein solcher Aufenthalt auch nicht zu erwarten ist, und
4. die Tat vor einem internationalen Gerichtshof oder durch einen Staat, auf dessen Gebiet die Tat begangen wurde, dessen Angehöriger der Tat verdächtig ist oder dessen Angehöriger durch die Tat verletzt wurde, verfolgt wird.
Dasselbe gilt, wenn sich ein wegen einer im Ausland begangenen Tat beschuldigter Ausländer im Inland aufhält, aber die Voraussetzungen nach Satz 1 Nr. 2 und 4 erfüllt sind und die Überstellung an einen internationalen Gerichtshof oder die Auslieferung an den verfolgenden Staat zulässig und beabsichtigt ist." The expert group explained:

"Forcrimes that are liable under VStGB the wide latitude in judgement of the public prosecution is curtailed by special decree in § 153f StPO. §153c paragraph1 no1 and 2 grant immunity of prosecution to foreign states and crimes by foreigners on foreign ships in Germany. According to article 3 no1 all crimes that are punishable through VStGB~ are exempted by application of § 153c paragraph 1 no1 and 2 of the StPO. The substitution by special regulation of numbers 1 and 2 does not exclude the possibility of exemption of prosecution or curtailment of proceedings in the criminal proceedings or after § 28 IStGHG(see above under A.IVas special directive in relation to IStGH)."

The original German text reads:

"Für Taten, die nach dem VStGB strafbar sind, wird der weite Ermessenspielraum der Staatsanwaltschaft, den § 153c Abs. 1 Nr. 1 und 2 StPO für das Absehen von der Verfolgung bei Auslandstaten und bei Taten von Ausländern auf ausländischen Schiffen im Inland einräumt, durch eine besondere Ermessensstrukturierung in § 153 f StPO beschränkt. Durch Artikel 3 Nr. 1 werden deshalb Taten, die nach dem VStGB strafbar sind, vom Anwendungsbereich des § 153c Abs. 1 Nr. 1 und 2 StPO ausgenommen. Die Ersetzung der Nummern 1 und 2 durch eine Sonderregelung schließt aber sonstige Möglichkeiten des Absehens von der Verfolgung oder der Verfahrenseinstellung nach der Strafprozessordnung oder etwa nach § 28 IStGHG (s. oben unter A.IV) als Sondervorschrift im Verhältnis zum IStGH nicht aus."

There have been several criminal investigations and prosecutions in Germany based on universal jurisdiction of persons suspected of war crimes abroad.

Djaji•. In the *Djaji•* case, the accused was convicted on 23 May 1997 by the *Bayerisches Oberlandesgericht* (Bay OLG), Bavarian Higher Regional Court, at Munich, of committing grave breaches of the Fourth Geneva Convention and Protocol I in Bosnia and Herzegovina , although he was acquitted on charges of genocide and attempted genocide, and sentenced to five years in prison.[322] He had been charged with murder under Section 211 of the Penal Code, genocide under Section 220a, unlawful deprivation of liberty under Section 239, violations of Article 3 (common Article 3) of the Fourth Geneva Convention and, based on Articles 146 and 147 of that treaty, grave breaches. The court held that it had jurisdiction over genocide under Section 6 (1) of the Penal Code (see Chapter Eight, Section II). The court held that the conflict was international and reportedly based its jurisdiction over conduct amounting to grave breaches, including murder and unlawful deprivation of liberty, on Section 6 (9) of the Penal Code, rather than 7 (2) (2).[323]

It has not been possible to locate and translate the entire decision, but an authoritative account of its reasoning on universal jurisdiction describes how it balanced the competing *aut dedere aut judicare* rule incorporated in the Geneva Conventions with the principle of noninterference in the internal affairs of states:

> "It concluded that public international law, far from barring prosecution, corroborated and supported the conclusion that the arguments in favour of prosecuting war criminals in Germany prevail over the limiting principle of noninterference. It considered prosecution as one measure among many others implemented by the international community - be they political, military or humanitarian in nature - aimed at limiting and eventually terminating the policy of expansion and oppression, as well as deportations and other human rights violations, on the territory of the former Yugoslavia. In view of all these efforts by the international community, national prosecution could not possibly infringe international law. The court concluded that it would be 'intolerable' under these circumstances if war criminals could live in liberty in Germany. Moreover, the aim of the prosecution was seen as international in nature. The international community is attempting to deter crimes against civilians during armed conflict."[324]

The court also found that prosecution in this case serve Germany's interest in not being seen as a haven for international criminals:

> "Considerations of international law are important, but one should not overlook the fact that the prosecution of a foreigner for crimes committed abroad serves also an interest of the State of residence, viz. not to become a refuge for offenders who have committed crimes against under customary and conventional international law. Not to prosecute would undermine the trust of the German citizens in the national and international legal order (*Rechtsbewährungsprinzip*).

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[322] *Public Prosecutor v. Djaji•*, Judgment, No. 20/96 (Higher Regional Court of Bavaria 23 May 1997) [*Bayerisches Oberlandesgericht, Urteil vom 23. Mai 1997 - 3 StR 20/96*]. *See* Christoph Safferling, *Public Prosecutor v. Djaji•*, 92 Am. J. Int'l L. 528 (1998). A comment on the case by Kai Ambos is in *Neue Zeitschrift für Strafrecht* (NStZ) 138 (1998) and an abstract of this case in English is *obtainable from* http://www.icrc.org/ihl-nat/ihl-nat.

[323] Fischer, *supra, n.311,* 384-385. However, there are varying accounts of whether the court also relied on Section 7 (2) (2) as a basis for jurisdiction.

[324] Safferling, *supra,n.314,* 531-532 (summarizing judgment).

Furthermore, since the ICTY and the competent territorial State do not wish to take over the proceedings, Germany has an interest not to be perceived by the international community as a haven for international criminals."[325]

For the court's discussion of the judicially created link to Germany, see below in this entry.

Jorgi•. On 26 September 1997, Nikolai Jorgi• was convicted of 30 counts of murder in Bosnia and Herzegovina amounting to grave breaches of the Fourth Geneva Convention and 11 counts of genocide by the *Oberlandesgericht Düsseldorf* (OLG Düsseldorf), Higher Regional Court at Düsseldorf and sentenced to life imprisonment.[326] He had been charged with murder, genocide, unlawful deprivation of liberty, bodily injury, robbery and receiving stolen goods, under Sections 211, 220a, 223, 223a, 239, 249, 250 and 255 of the Penal Code and of violations of Article 3 (common Article 3) of the Fourth Geneva Convention and, based on Articles 146 and 147, of grave breaches of that treaty. The court reportedly stated that it had jurisdiction over the ordinary crimes amounting to grave breaches pursuant to Article 6 (9) of the Penal Code and over genocide under Article 6 (1).[327] As in the *Djaji•* case, the court held that the conflict was international. For the discussion of the judicially created requirement of a link, see discussion below in this entry. The conviction was upheld on appeal by the *Bundesgerichtshof* (BGH), Federal Supreme Court.[328] For its discussion of the judicially created link, see discussion in this entry below. A constitutional challenge was rejected by the *Bundesverfassungsgericht* (BvergG), German Constitutional Court, in 2001.

Sokolovi•. On 29 November 1999, the *Oberlandesgericht Düsseldorf* (OLG Düsseldorf), Higher Regional Court at Düsseldorf, convicted the accused inflicting physical injuries on Muslim civilians in five cases in May 1992 in Bosnia and Herzegovina and unlawfully detaining Muslim civilians in 56 cases, conduct amounting to grave breaches of the Fourth Geneva Convention, and genocide and abetting genocide in these cases and sentenced him to nine years in prison.[329] He had been a resident of Germany for twenty years and received a pension from the German government. On 21 February 2001, the *Bundesgerichtshof* (BGH), Federal Supreme Court, confirmed the judgment.[330] For the question of any link, see discussion of this case in this entry below.

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[325] *Djaji•* case, *ibid.*

[326] *Jorgi•* case, Judgment, Higher Regional Court at Düsseldorf, 6 September 1997 [*Oberlandesgericht Düsseldorf, Urteil vom 6. September 1997*] (abstract in English *obtainable from* http://www.icrc.org/ihl-nat). A comment on this case by Kai Ambos is published in *Neue Zeitschrift für Strafrecht* (NStZ) 404, Heft 8 (1999).

[327] *Ibid.*

[328] *Jorgi•* case, Judgment, Federal Supreme Court, 30 April 1999 [*Bundesgerichtshof, Urteil vom 30. April 1999 - 3 StR 215/98*].

[329] The description of this case is based on the account in the press release describing the decision by the Federal Supreme Court affirming the judgment (see following footnote).

[330] *Sokolovi•* case, Judgment, Federal Supreme Court, 21 February 2001 [*Bundesgerichtshof, Urteil vom 21. Februar 2001 - 3 StR 372/00*]. The case is summarized in: *In addition to the prosecution of genocide, German courts also competent for the prosecution of other atrocities committed during "ethnic cleansing" in Bosnia-Herzegovina*, Press release, No. 11/2001, Federal Supreme Court, Karlsruhe, 21 February 2001 (English translation by Amnesty International) (*Deutsche Gerichte neben der Verfolgung von Völkermord auch für die Verfolgung anderer Greueltaten während der "ethnischen Säuberungen" in Bosnien-Herzegwina zuständig, Mitteilung der Pressestelle, Nr. 11/2001). See also* Helmut Kerscher, *BGH stärkt Verfolgung von Kriegsverbrechern, Die Süddeutsche Zeitung*, 22 February 2001 (*obtainable from:* http://www.suddeutche.de).

Kuslji•. On 15 December 1999, two weeks after the conviction of Maksim Sokolovi•, the *BayObLG* convicted Kjuradj Kuslji•, the former police commander of Vrbnica, 40 kilometers south of Banja Luka in Bosnia and Herzegovina, of genocide and six murders constituting grave breaches of the Fourth Geneva Convention. He had lived in Germany before the war in the former Yugoslavia. He was sentenced to life imprisonment. On 21 February 2001, the *Bundesgerichtshof* (BGH), Federal Supreme Court, confirmed the judgment.[331] For the discussion of any judicially created link, see below.

The severely criticized judicially created requirement of a link to Germany. No link to Germany is expressly required in Section 6 (9) or Section 7 (2), but several courts have stated in cases involving universal jurisdiction over war crimes and other crimes under international law, as well as ordinary crimes of international concern, that some link to Germany, such as residence, is required.

The first of the series of cases creating the requirement of a link to Germany was the *Tadi•* case. The Federal Supreme Court on 13 February 1994 held that a link between the crime of genocide and Germany was required to ensure that the principle of non-intervention in other states' internal affairs was not infringed. It found such a link in the case because the person suspected of crimes in Bosnia and Herzegovina had lived in Germany for several months, was arrested there, the alleged acts were closely connected with other crimes the prosecution of which was compulsory under international law and the international community, including Germany, had adopted political, military and humanitarian measures in the former Yugoslavia:

> "German penal law applies by virtue of § 6(1) to genocide committed abroad independently from the law of the territorial State (so-called universality principle). Prerequisites, however, are that international law does not forbid this and that there is a legitimate link (*ein legitimierender Anknüpfungspunkt*) in the concrete case; only then is the application of German penal law to extraterritorial conduct by foreigners justified. Absent such a link the forum State violates the non-interference principle which requires States to respect the sovereignty of other States . . . .
> The fact that the accused resides voluntarily since several months in Germany, that he has established here his center of interests (*Lebensmittelpunkt*), and that he was arrested here constitute(s) a link. Whether such a connection with the forum State is always sufficient must not be decided because there are further legal and political considerations in this case which carry so much weight that Germany's exercise of universal jurisdiction seems not merely justified but even required."[332]

In the 1976 *Dost* case, which involved the exercise of universal jurisdiction pursuant to Section 6 (5) of the Penal Code over an ordinary crime of international concern, drug trafficking, the *Bundesgerichtshof* (BGH), Federal Supreme Court, stated that there was no consensus concerning the extent of restrictions in international law on the application of by a national legislature of its criminal sanctions and that it was "inclined to accept the proposition that any extension of State criminal jurisdiction to offences committed abroad by aliens requires the presence of some factor, connecting the case to the forum, which constitutes a justifiable basis for the exercise of jurisdiction".[333] However, it also stated that there were "no clear criteria under international law for determining the weight to be given to such factors

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[331] BGH 3 StR 244/00 - Bechluss v. 21. Februar 01.

[332] *Tadi•* case, Decision, Federal Supreme Court, 13 February 1994 [*BGH-Ermittlungsrichter, Beschluß vom 13. Februar 1994, 1 BGs 100/94*] (abstract of this case in English *obtainable from* http://www.icrc.org/ihl-nat). The English translation is based on the translation in Reydams, *supra*, n. 307. A note on this decision by Dietrich Oehler is in NStZ 485 (1994).

[333] *Dost* case, 74 Int'l L. Rep.166, 168 (1976). *See also* BGH, NJW 507 (1977).

and the extent to which they may affect the national legislature's competence to establish such norms".[334] Apart from this restrictive interpretation of international law, the court found that international law permitted the exercise of universal jurisdiction independent of an extradition request or double criminality and that there was no requirement under international law that the exercise of universal jurisdiction be based on a treaty.[335]

In the *Djaji•* case, the *Bayerisches Oberlandesgericht* (BayOLG), Bavarian Higher Regional Court, at Munich held in May 1997 that there was a sufficient link to overcome the principle of non-intervention in the internal affairs of states because the accused was living in Germany and because the forum state was not acting in its own interests, but was in representing the entire community of states. The court held that Germany could exercise universal jurisdiction as long as it did not violate the principle of non-interference in the internal affairs of states and that this principle required the existence of sufficient links.[336] In this case, it found sufficient links because the accused had freely become a German resident and because

> "Germany, together with other States, has participated in a UN sanctioned operation aimed at alleviating the consequences of violations of humanitarian law. This indirect interaction between breaches of humanitarian law on the one hand and protection of victims on the other establishes a link for the prosecution before German courts. Germany, by doing so, does not act out of self-interest. Rather, it stands up for the interests of the world community as expressed in the UN resolutions on the conflict in Yugoslavia."[337]

The court also found that prosecution in this case serve Germany's interest in not being seen as a haven for international criminals (see passage quoted above in this entry).

In the *S.B. and D.B.* case, the *Bundesgerichtshof* (BGH), Federal Supreme Court, held in December 1998 that the presence alone of the person making a complaint was an insufficient link, although this statement has not been repeated in other cases. The court stated:

> "Without a meaningful point of contact respect for the sovereignty of other States (non-interference principle) can hardly be assured and the municipal criminal justice system would be

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[334] *Ibid.*

[335] On the first point, the court stated that the legislature could under international law provide in Section 6 (5) for universal jurisdiction over drug trafficking without requiring an extradition request or double criminality:

> "The legislator could have chosen to adopt the vicarious enforcement of criminal law (*stellvertretende Strafrechtspflege*), under which the liability of an offender to prosecution under German law is dependant upon the existence of corresponding provisions under the *lex loci* and the fact that the offender has not been extradited although his extradition would have been admissible in the circumstances (cf. § 7(2)(2)). Contrary to the submissions contained in the grounds of appeal, however, this was not the only legally valid path which the legislature could have followed."

Ibid. As to the second point, the court explained that Germany could exercise universal jurisdiction over crimes independently of a treaty: "There is in fact no general rule of international law prohibiting the application of the principle of universality of law in the absence of special provision by international convention." *Ibid.*, 169. *See also* BGH, NJW 2168, 2170 (1987).

[336] *Djaji•*, No. 20/96, Judgment, Higher Regional Court of Bavaria, 23 May 1997 (reported in Safferling, *supra, n.314)* [*Bayerisches Oberlansdesgericht, Urteil vom 23. Mai 1997 - 3 StR 20/96*] (abstract of this case in English *obtainable from* http://www.icrc.org/ihl-nat). The English translation is based on a translation in Reydams, *supra, n. 307)*

[337] *Djaji•* case, *ibid.*

overloaded with the 'world wide' prosecution of offences.

The only link with Germany is the plaintiff's presence. Even if he were the victim of any of the alleged crimes – which is doubtful – there would not be a sufficient connection. The presence of a crime victim is not an appropriate basis for German jurisdiction because it usually is a matter of pure coincidence with no relation to the offence and offender. If it were an adequate criterion this would lead to an endless and internationally questionable extension of national jurisdiction. German courts would have to deal with cases for which it is manifest from the start that there are very few chances to properly investigate and try them.

It is quite another thing when the offender is present in Germany; in that case there is an internationally undisputed linking point for the exercise of jurisdiction."[338]

The Higher Regional Court at Düsseldorf held on 26 September 1997 that the judicially created link was satisfied in the *Jorgi•* case because the accused lived in Germany from 1969 to 1992, he was registered at his house in Bochum at the time of his arrest and his wife and daughter lived in Germany at that time, so his permanent place of residence was Germany, and he was arrested in Germany.[339] In 1999, the Federal Supreme Court affirmed on this point, stating that any prosecution based on Section 6 under the universality principle required an additional link to Germany.[340]

However, the judicially created requirement of a link has been criticized.[341] Possibly in reaction to this criticism, courts have started to retreat from the requirement of a link. For example, in December 2000, the *Bundesverfassungsgericht* (Constitutional Court) in the *Jorgi•* case noting the criticism of the judicially created link, in particular by Kai Ambos, decided to leave open the question whether it was required. The Constitutional Court stated:

"The question whether, like the appealed decisions state, that another link is necessary because of the [principle of] non-interference, does not have to be answered here. . . . Because the claim that in this case the Federal Supreme Court's assertion of jurisdiction was *ultra vires* is unfounded, the

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[338] *Bundesgerichtshof, Beschluß vom 11. Dezember 1998 - 2 Ars 499/98, reprinted in* 5 *Neue Zeitschrift für Strafrecht* 236 (1999). The English translation is based on the translation in Reydams, *supra*, n.307.

[339] *Jorgi•* case, Judgment, Higher Regional Court at Düsseldorf, 6 September 1997 [*Oberlandesgericht Düsseldorf, Urteil vom 6. September 1997*](abstract in English *obtainable from* http://www.icrc.org/ihl-nat).

[340] *Jorgi• case, Federal Supreme Court, 3d Strafsenat, 30 April 1999 [Bundesgerichtshof, Urteil vom 30. April 1999* - 3 StR 215/98].

[341] For critical comments on the judicially created requirement of a link, see Kai Ambos, *Aktuelle Probleme der deutschen Verfolgung von "Kriegsverbrechen" in Bosnien-Herzegowina*, 20 *Neue Zeitschrift für Strafrecht* 226 (1999); _____, [comment on *Djaji•* case] *Neue Zeitschrift für Strafrecht* 138 (NStZ) (1998); Stefan van Heeck, *Der aktuelle Fall: Die Anwendung deutschen Strafrechts auf Balkankriegsverbrechen, Humanitäres Völkerrecht-Informationsschriften* 27, 27 (2000); Claus Kreß, *Völkerstrafrecht in Deutschland, Neue Zeitschrift für Strafrecht* 617 (2000); Otto Lagodny & Christiane Nill-Theobald, *Urteilsanmerkung, Juristische Rundschau* 205 (2000); Sascha Rolf Lüder, *Eröffnung der deutschen Gerichtsbarkeit für den Völkermord im Kosovo?*, 53 *Neue Juristische Wochenschrift* 269 (2000); Sascha Rolf Lüder & Gregor Schotten, *A Guide to State Practice Concerning International Humanitarian Law: Germany*, 2 Y. B. Int'l Hum. L. 362 (1999); Reinhard Merkel, *Universale Jurisdiktion bei völkerrechtlichen Verbrechen: Zugleich ein Beitrag zur Kritik des § StGB, in* Klaus Lüderssen, ed., *Aufgeklärte Kriminalpolitik oder Kampf gegen das Böse? Band III* 238 (Baden-Baden: Makrodelinquenz 1998); Gerhard Werle, *Völkerstrafrecht und geltendes deutsches Strafrecht*, 55 *Juristenzeitung* 755 (2000); _____, *Urteilsanmerkung, Juristenzeitung* 1181 (1999); Steffen Wirth & Jan C. Harder, *Die Anspassung des deutschen Rechts an das Römische Statut des Internationalen Strafgerichtshofs aus Sicht deutscher Nichtregierungsorganisationen, Zeitschrift für Rechtspolitik* 144 (2000).

question can be left open."[342]

Similarly, in the *Kuslji•* case, the Federal Supreme Court on revision in a decision issued on 21 February 2001 upholding the conviction and the sentence left the question whether a link is required open.[343] The trial court, the *Bayerisches Oberlandesgericht* (BayOLG), Bavarian Higher Regional Court, had held on 15 December 1999 that the accused was guilty of genocide and murder as a grave breach of the Fourth Geneva Convention; the Supreme Court amended the conviction to abetting genocide, but let the murder conviction stand.

On the same day that the Supreme Court issued its decision in the *Kuslji•* case, 21 February 2001, it held in the *Sokolovi•* case that although there would have been insufficient links in this case under the judicially created link requirement, the fact that Germany was a party to the Fourth Geneva Convention was a sufficient link when the accused had been convicted of murder as a grave breach of that Convention. According to a translation of the press summary of the Supreme Court's decision,

> "According to the principle of universal jurisdiction in Section 6 (9) of the Criminal Code, this obligation [to search for and bring to justice persons suspected of grave breaches] applies to the Federal Republic of Germany for the prosecution of criminal acts that foreigners have committed on foreigners abroad if the requirements of the 4th Geneva Convention are otherwise fulfilled. The Higher Regional Court accepted this free from legal error and in particular regarded the severe physical mistreatment of five Muslim men by the defendant as serious violations of the Convention, as it is covered by the notion of torture, but at least meets the requirements of inhuman treatment. The Supreme Court has left open the other legal question, as to whether in the case of a duty of prosecution of the Federal Republic of Germany based on a national treaty it further depends on an additional 'domestic connection' in the person of the defendant or on the criminal acts. The Higher Regional Court regarded such additional points of contact legitimizing the exercise of German criminal jurisdiction still to be necessary; it saw them free from legal error in the many years' residence of the defendant in the Federal Republic of Germany and the circumstance that even before his arrest he had registered as unemployed in Germany in 1996 and was drawing a pension."

The trial court, the *Oberlandesgericht Düsseldorf,* had convicted the accused on 29 November 1999. Reportedly, it stated that it had jurisdiction over over the accused pursuant to Section 6 (9) and that the case satisfied the requirement of a link to Germany because the accused was a resident of Germany and had been a resident for twenty years and received a pension from the government.

• ***Ghana:*** Ghanaian courts can exercise universal jurisdiction over grave breaches and other violations of the Geneva Conventions and of Protocol I and, possibly, other war crimes identified in treaties Ghana has signed. Article 56 (4) (n) of the Courts Act, 1993 states:

> "Any person (whether a citizen of Ghana or not) is liable to be tried and punished in Ghana for the respective offence if he does an act which if done within the jurisdiction of the courts of Ghana would have constituted any of the following offences -
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> . . . .

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[342] *Jorgi•* case, Judgment, *Bundesverfassungsgerichtshof* (BverfG), Constitutional Court, 2 BvR 1290/99 *vom* 12.12.2000, Absatz Nr. (1-49 (*obtainable from* http://www.bverfg.de). The English translation is based on translation in Reydams, *supra, n.307.*

[343] *Kuslji•* case, Federal Supreme Court, Judgment of 21 February 2001 [*Bundesgerichtshof, Urteil vom 21. Februar 2001* - 3 StR 244/00].

(n) any other offence which is authorised or required by a convention or treaty to which the Republic is a signatory to be prosecuted and punished in Ghana."[344]

Ghana is a party to the Geneva Conventions and Protocol I, which require states parties to prosecute or extradite persons suspected of responsibility for grave breaches of those treaties and require states parties to take other steps to suppress other violations. This obligation can be satisfied by prosecutions. Other violations would include violations of common Article 3. Ghana is a party to Protocol II and to the Rome Statute, but as of 1 September 2001 had not yet enacted any implementing legislation.[345] However, it is expected that drafting implementing legislation will include universal jurisdiction over war crimes and other crimes within the Court's jurisdiction. Pending the enactment of such legislation, and in the absence of provisions providing that grave breaches and other war crimes are crimes under national law, it would appear that Article 56 (4) (n) would permit Ghanaian courts to exercise universal jurisdiction over conduct amounting to grave breaches of the Geneva Conventions and Protocol I which also is a crime under national law, such as murder and manslaughter.[346] It is not known if Ghana expressly provides that statutes of limitation do not apply to war crimes, but it is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

• ***Greece:*** Greek courts may exercise universal jurisdiction over grave breaches of the Geneva Conventions and, possibly, over other war crimes, pursuant to national law dating to 1950 and the Constitution. Article 28 (1) of the Greek Constitution provides:

"The generally acknowledged rules of international law, as well as international conventions as of the time they are sanctioned by law and become operative according to the conditions therein shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law. The enforcement of the rules of international law and of international conventions to aliens does always depend on the condition of reciprocity."[347]

The government has stated that, pursuant to this article, treaties ratified by Greece "formed an integral part of domestic law" and "took precedence over any domestic legislation which might be contrary to it."[348]

Paragraph k of Article 8 (Offenses Abroad Always Punishable by Greek Law) of the Greek Penal

[344] Ghanaian Courts Act, 1993, Act 459, Art. 56 (4) (n).

[345] Although the Rome Statute does not expressly *authorize* states parties to exercise universal jurisdiction over crimes within the Court's jurisdiction, the states parties recognize in the Preamble that it is "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".

[346] The provisions prohibiting murder and manslaughter are found in the Ghanaian Criminal Code, 1960, Act 29, Arts 46 *et seq*.

[347] Constitution of Greece, Art. 28 (1) (English translation in Gisbert H. Flanz, *Greece, in* Albert P. Blaustein & Gisbert H. Flanz, eds, *Constitutions of the Countries of the* World (Dobbs Ferry, New York: Oceana Publications, Inc. December 1988) (Louis Pagonis trans.). For interpretation of this provision, see Emmanuel Roucounas, *Grèce, in* Pierre-Marie Eisemann, ed., *L'Intégration du droit international et communautaire dans l'ordre juridique national* 287 (The Hague/London/Boston: Kluwer Law International 1996). In two recent decisions, courts held that Article 14 (7) of the International Covenant on Civil and Political Rights prevailed over contrary provisions in Article 8 of the Penal Code. Judgment 1574/1999 of the Court of Appeal of Athens; Judgment 286/1999 of the Court of Appeal of Piraeus.

[348] Summary records of examination by the Committee against Torture of the second periodic report of Greece, U.N. Doc. CAT/C/SR. 182 (1994), para. 8.

Code provides that

> "Regardless of the law of the place of commission, Greek criminal law is applicable to Greeks and aliens for the following offences committed abroad: . . . (k) Any other offence to which Greek criminal law shall be made applicable by express provision or international agreement signed and ratified by the Greek state."[349]

Greece has ratified the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but as of 1 September 2001 had not yet ratified it. It appears that grave breaches of the Geneva Conventions are not expressly defined as crimes under national law, but some war crimes are defined as crimes under the Greek Military Penal Code, although it has not been possible to determine if civilian courts can exercise jurisdiction over these crimes or if military courts can exercise universal jurisdiction over crimes in the Military Penal Code.[350] Therefore, it is possible that war crimes committed abroad might have to be prosecuted as ordinary crimes, such as murder, abduction, assault or rape. Article 9 (2) of the Greek Penal Code expressly provides that certain bars to prosecution for conduct abroad, such as prior conviction or acquittal in a foreign court, foreign statutes of limitation and foreign pardons, do not apply to prosecutions pursuant to Article 8.[351] Defences and principles of criminal responsibility under the Penal Code are not fully consistent with international law with regard to war crimes.[352]

• ***Grenada:*** It appears that the courts of Grenada have been able to exercise universal jurisdiction over grave breaches of the Geneva Conventions abroad since 1959.

Although Grenada is not known to have a Geneva Conventions Act, the United Kingdom's Geneva Conventions Act 1957 applied to the West Indies Federation under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below), at least before 1 January 1970. Grenada became independent on 7 February 1974. As far as is known, the 1959 Order in Council has not been repealed either before or after independence.

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[349] Penal Code of 1950, Statute 1492 of 17/17, August 1950, Art. 8 (k) (English translation in *The Greek Penal Code* (South Hackensack, N.J.: Fred B. Rothman & Co. and London: Sweet & Maxwell Limited 1973)).

[350] Military Criminal Code, Law 2287/1995, Government Gazette A 20/1-2-1995, in force 1 August 1995 (unofficial translation by Dr. Maria Gavouneli, Hellenic Institute of International and Foreign Law, 1 Y. B. Int'l Hum. L. 535 (1998), Art. 156 (Insults, threats or violence against a prisoner of war), Art. 156 (Outrages against a prisoner of war), Art. 159 (Coercion of a prisoner of war into providing information), Art. 161 (Violence against non-combatants).

[351] The first paragraph of Article 9 (Offences abroad Not Punishable by Greek Law) precludes prosecution for acts committed abroad in certain circumstances, but the second paragraph expressly provides that these exclusions do not apply to prosecutions pursuant to Article 8:

"1. No criminal prosecution shall ensue for an offence committed abroad:
a) If the accused has been tried abroad and found not guilty, or found guilty and given full punishment;
b) If under the applicable foreign law prosecution for the offense is barred by lapse of time, or if execution of punishment is barred by lapse of time, or if punishment is remitted;
c) If under the applicable foreign law a complaint from a private person is required for prosecution, and that has not been submitted or has been waived.
2. These provisions are not applicable to offences under Article 8."

Ibid., Art. 9.

[352] Superior orders are a defence in certain circumstances. Penal Code, Art. 21. There is no principle of command or superior responsibility in the Penal Code.

Grenada is a party to the Geneva Conventions and Protocol I and II. It has not signed the Rome Statute and as of 1 September 2001, it had not yet ratified it.

• ***Guatemala:*** Guatemalan courts may exercise universal jurisdiction over war crimes.

The relevant legislative provision is reinforced by Article 46 (Pre-eminence of International Law) of the Constitution, which provides that "[t]he general principle is established that in the field of human rights treaties and agreements approved and ratified by Guatemala have precedence over municipal law."[353] The government has stated that treaties, apparently including their jurisdictional provisions, can be applied directly by national courts.[354] This constitutional provision is supplemented by Article 16 of the Criminal Procedure Code (*Código Procesal Penal*) of 1996 which provides that courts and other authorities responsible for trials must fulfill the obligations imposed on them by international treaties in the matter of respect for human rights.[355]

Article 5 (5) (e) of the Guatemalan Penal Code (*Código Penal*) provides that Guatemalan criminal law applies to

> "[a]ny offence which, by virtue of a treaty or convention, is punishable in Guatemala, even if the offence is not committed in Guatemalan territory[.]".[356]

Guatemala has ratified Hague Convention IV, the Geneva Conventions and Protocols I and II. It has also expressly provided in Article 378 (Offences against the duties of humanity) of the Penal Code that

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[353] Constitution of the Republic of Guatemala, 31 May 1985, Art. 46 (English translation in *Guatemala - Booklet 3, in* Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. January 1997) (Release 97-1 Reka Koerner trans.).

[354] The government has stated that under Article 46 of the Constitution treaties ratified by Guatemala take precedence over internal law and can be invoked directly in national courts, subject to prior approval by the Congress and President making them part of domestic law. It informed the Committee against Torture that

> "According to article 46 of the Constitution, treaties and conventions accepted and ratified by Guatemala, in matters of human rights, take precedence over internal law. Consequently, the provisions of the Convention [against Torture] can be applied directly, subject to prior approval by the Congress of the Republic and the Executive Branch, through the appropriate decree or order, making them part of Guatemala's domestic law (political Constitution of the Republic of Guatemala, arts. 46, 171 and 183)."

Initial report of Guatemala to the Committee against Torture, U.N. Doc. CAT/C/12/Add.5 (1994), para. 14.

[355] *Article 16 of the Code of Penal Procedure: "Respect for Human Rights. The courts and other authorities involved in criminal proceedings must carry out the duties imposed on them by the Constitution and international treaties concerning respect for human rights."* (English translation by Amnesty International). *Código Procesal Penal, Art. 16 (Respeto a los derechos humanos) ("Los tribunales y demás autoridades que intervengan en los procesos deberán cumplir los deberes que les impone la Constitución y los tratados internacionales sobre respeto a los derechos humanos.").* (published 5 June 1996, in force 18 June 1996). *Spanish original obtainable from:* http://www.minugua.guate.net/derhum/CDROM/Normativa/Leyes%20Guate/Codigo%20procesal%20penal.htm.

[356] *Código Penal. Art. 5 (5) (Extraterritorialidad de la ley): "Este Código también se aplicará: ...5.-Por delito que, por tratado o convención, deba sancionarse en Guatemala, aun cuando no hubiere sido cometido en su territorio..."* (English translation by Amnesty International). Article 10 (a) of Supreme Court Order No. 8-94 and Article 11 of Supreme Court Order 9-94 state which courts in Guatemala have jurisdiction over extraterritorial crimes. These orders are considered to be binding only on the members of the Supreme Court. (Spanish original available from http://www.unifr.ch/derechopenal/ljguate/cpguateidx.htm)

a broad range of war crimes are crimes under national law.[357]

• ***Guyana:*** The courts of Guyana have been able to exercise universal jurisdiction over grave breaches of the Geneva Conventions committed abroad since 1959.

The United Kingdom's Geneva Conventions Act 1957 applied to British Guiana under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below), at least before 1 January 1970. Guyana became independent on 26 May 1966. On 3 March 1962, it enacted the Geneva Conventions (Supplementary Provisions) Act, which provided for appeals by prisoners of war.[358] As far as is known, neither the 1959 Order in Council nor the 1962 Act have been repealed.

Guyana is a party to the Geneva Conventions and Protocol I and II. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it.

• ***Honduras:*** Honduran courts may exercise custodial universal jurisdiction over war crimes.

The relevant legislative provision is supplemented by Articles 15, 16 and 18 of the Constitution. Article 15 states in part that Honduras supports the principles and practices of international law, that promote the solidarity and self-determination of peoples, non-intervention and the strengthening of universal peace and harmony." [359] Article 16 reads in part: "International treaties entered into by Honduras with other States form part of the domestic law as soon as they enter into force."[360] Article 18 provides that "[I]n case of conflict between the treaty or convention, and the law, the former shall prevail."[361] It has not been possible to locate any jurisprudence or commentary on Articles 15, 16 and 18 of the Constitution that would indicate whether any of these provisions would be independent bases for exercising universal jurisdiction over crimes abroad.

Article 5 (5) of the Penal Code (*Código Penal*) states that national courts have custodial universal jurisdiction over crimes committed outside the country when it is permitted by international treaties or when the crime is in grave violation of universally recognised human rights. . That article reads:

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[357] *Código Penal, Art. 378 (Delitos contra los deberes de la humanidad). Quien violare o infringiere deberes humanitarios, leyes o convenios con respecto a prisioneros rehenes de guerra, heridos durante acciones bélicas, o que cometiere cualquier acto inhumano contra población civil, o contra hospitales o lugares destinados a heridos será sancionado con prisión de veinte a treinta días."* (Article 378 states:

"Anyone who infringes or breaches their humanitarian duties or the laws or conventions regarding prisoners of hostages of war, or those wounded in war, or who commits any inhumane act against the civilian population or against hospitals or places set aside for the wounded, shall be liable to imprisonment for a period of twenty to thirty years.") (English translation by Amnesty International)

[358] Laws of Guyana (Rev. ed. 1973), Cap. 15:04, An Act to supplement the applied Act entitled the Geneva Conventions Act, 1957, so as to enable full effect to be given in relation to Guyana to certain International Conventions done at Geneva on the twelfth day of August, nineteen hundred and forty-nine.

[359] Constitution of the Republic of Honduras of 1982, Decree No. 131 of 11 January 1982, Art. 15 (English translation published by the General Secretariat of the Organization of American States and reprinted in Gisbert H. Flanz, *Honduras, in* Albert P. Blaustein & Gisbert H. Flanz, eds, *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. December 1982).

[360] *Ibid.*, Art. 16.

[361] *Ibid.*, Art. 18.

"The Honduran courts shall also be competent to try offences committed abroad in the following cases as long as the accused are present in Honduras:

. . . .

(5) If, in accordance with international conventions to which Honduras is a party], the offence lies within the purview of Honduran law for reasons other than those mentioned in the preceding paragraphs [dealing with other forms of extraterritorial jurisdiction], or is in grave violation of universally recognized human rights. Preference shall nevertheless be given to the jurisdiction of the State in whose territory the criminal act was committed as long as it claims jurisdiction before criminal proceedings are initiated in the relevant Honduran court."[362]

A draft bill introduced in July 2000 would renumber and modify this provision, if adopted, sometime in 2002. Under Article 21 of this proposal, the first paragraph would state that Honduran law would apply to crimes committed on Honduran territory, except in cases permitted by international agreements entered into by Honduras.[363] In addition, under the fourth paragraph of this article, Honduran law would apply

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[362]Article 5 (5) of the Penal Code (Decree No. 144-83 published in La Gaceta Nr.24.264 12 March 1984. Amended by Decree Nr. 191-96 27 November 1996) *"Los tribunales hondureños conocerán, asimismo, de los delitos cometidos en el extranjero cuando el imputado se halle en Honduras y concurra alguna de las situaciones siguientes:*
(...)
5) Cuando de conformidad con los convenios internacionales de que Honduras forme parte, el delito se encuentre sometido a la ley penal hondureña por razones distintas de las mencionadas en los numerales precedentes o lesione gravemente los derechos humanos universalmente reconocidos. Se dará preferencia, sin embargo, a la pretensión del Estado en cuyo territorio se haya cometido el hecho punible con tal que la haga valer antes de que se ejercite en el juzgado hondureño competente la respectiva acción penal."
(English translation by Amnesty International).

Before the reform to the Penal Code of 1996 the article stated as follows:
"The Honduran courts shall also be competent to try offences committed abroad in the following cases as long as the accused are present in Honduras:

. . . .

(5) When, in accordance with international conventions or the principles of international law, the offence lies within the purview of Honduran law for reasons other than those mentioned in the preceding provisions [dealing with other forms of extraterritorial jurisdiction], preference shall nevertheless be given to the right of the State where the punishable act was committed to proceed with appropriate legal action against the person responsible before instituting proceedings in whichever Honduran court is competent to hear the case."

" Los Tribunales hondureños conocerán, asimismo, de los delitos cometidos en el extranjero, siempre que los imputados se hallaren en Honduras, en los siguientes casos: . . . 5.Cuando de conformidad con las convenciones internacionales, o los principios del Derecho Internacional, el delito cayese bajo el imperio de la Ley hondureña por razón distinta de las mencionadas en las disposiciones precedentes, se dará preferencia, empero, a la pretensión del Estado en cuyo territorio se hubiere cometido e hecho punible, con tal que la haga valer, antes de incoarse en el tribunal hondureño competente, la respectiva acción penal contra el imputado." Código Penal, Artículo 5. (English translation by Amnesty International).

Article 5 also provides: "In cases covered by this article, the law in force in the place where the offence was committed shall be applied if it favours the accused." *("En los casos contemplados en este Artículo se aplicará la Ley vigente en el lugar de la comisión del delito, si fuere más benigna.")* (English translation by Amnesty International).

[363] Draft Penal Code of Honduras (First Draft), June 2000, Bk. One (General Part), Chap. III (Realization and Application of the Criminal Law), Art. 21 (Application of the Criminal Law), para. 1. The first paragraph (Principle of Territoriality) states in relevant part: "Honduran criminal law shall be applied to crimes and misdemeanours committed on Honduran territory, except in cases permitted by international agreements which the country has approved and ratified or under international regulations or treaties which have been accepted."). The original

to foreigners present in Honduras who had committed violations of international humanitarian law.[364]

Honduras has ratified the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but it had not yet ratified it as of 1 September 2001.

Articles 318-321 of the Penal Code provide for crimes against international law (*Delitos contra el derecho de gentes*). Piracy and genocide are included but not war crimes. The draft bill would define certain war crimes as crimes under national law.[365]

• ***Hungary:*** Hungarian courts have been able to exercise universal jurisdiction over ordinary crimes committed abroad since 1878 (see Chapter Two, Section II.A). Today, two legislative provisions permit Hungarian courts to exercise universal jurisdiction over war crimes committed abroad, and it is possible that they may also do so directly, based on the incorporation of international law under the Constitution.

Section 4 (1) (a) (formerly, Section 5 (a) of the 1961 Hungarian Criminal Code) of Act IV of 1978 on the Criminal Code permits national courts to exercise universal jurisdiction over conduct which is a crime both under Hungarian law and the law of the place where it was committed. Section 4 (1) (c) (formerly, Section 5 (b) of the 1961 Code) authorizes national courts to exercise universal jurisdiction over certain crimes against humanity (which are defined to include war crimes), regardless whether it is a crime under the law of the place where it occurred, but the decision whether to prosecute in such cases must be made by the Attorney General, a political official. Article 4 in its entirety reads:

"(1) Hungarian law shall also apply to acts committed by non-Hungarian citizens abroad, if they are
a) criminal acts in accordance with Hungarian law and are also punishable in accordance with the law of the place of perpetration,
b) it is a criminal act against the state (ChapterX), excluding espionage against allied armed forces (Section 148), regardless of whether it is punishable in accordance with the law of the place of country where committed,
c) crimes against humanity (Chapter XI) or any other crime, the prosecution of which is prescribed

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Spanish text reads: *"Pincipio de territorialidad: La ley penal de Honduras se aplicará por los delitos y faltas cometidos en el territorio de Honduras, salvo las excepciones dispuestas en convenios internacionales aprobados y ratificados por el país, o en reglas y tratados internacionales aceptados." Proyecto Código Penal de Hondureño (Primer Borrador), Junio 2000, Libro Primero (Parte General), Capítulo III (Realización y Aplicación de la Ley Penal), Artículo 21 (Aplicación de la Ley Penal).*
Obtainable from http://www.congresociel.gob.hn/C/p/borrador.htm

[364] *Ibid.*, Art. 21, para. 4. The fourth paragraph states in relevant part: "The Principle of Universality: Honduran criminal law shall be applied to Hondurans or foreigners present in the country who have committed any of the following offences outside of national territory: Crimes against international humanitarian law.... In the cases above, Honduran criminal law shall be applied as long as the person who is criminally liable has not been acquitted or given an amnesty or has not served a sentence abroad or been sentenced by an International Court". The original Spanish text reads: *"Principio de Universalidad: La ley penal de Honduras se aplicará a los hondureños o extranjeros que se encuentren en el país, que hayan cometido fuera del territorio nacional alguno de los siguientes delitos: Delitos contra el derecho Internacional Humanitario.... En los casos anteriores, la ley penal de Honduras se aplicará siempre que el penalmente responsable no haya sido absuelto, amnistiado o haya cumplido condena en el extranjero, o haya sido condenado por Tribunal International." Ibid.*

[365] Draft Penal Code of Honduras (First Draft), June 2000, Bk. One (General Part), Title XVII (Crimes against International Humanitarian Law), Chapter II (Attacks on persons protected by International Humanitarian Law) Art.455-458.

by an international treaty.
(2) Espionage (Section 148) against allied armed forces by a non-Hungarian citizen in a foreign country shall be punishable according to Hungarian penal law, provided that such offence is also punishable by the law of the country where committed.
(3) In the cases described in Subsections (1)-(2) the indictment shall be ordered by the Attorney General."[366]

In addition to these two provisions, Article 7 (1) of the Hungarian Constitution states that "[t]he legal system of the Republic of Hungary accepts the universally recognised rules and regulations of international law, and harmonises the internal laws and statutes of the country with the obligations assumed under international law."[367] In 1993, the Constitutional Court held that this provision means that these rules form part of Hungarian law without any further transformation.[368] In addition, it may also mean that the rules concerning jurisdiction over crimes under international law can be enforced directly by national courts, although there seems to be no jurisprudence on this specific point.[369]

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[366] Act IV of 1978 on the Criminal Code, Sec. 4 (English translations of Act IV are *obtainable from* http://www.era.int/domains/corp.PDF). The text of Section 4 is essentially the same with respect to war crimes as Section 5 of the 1961 Code. *See* Criminal Code of the Hungarian People's Republic, Act V of 1961, Sec. 5 (English translation in *Criminal Code of the Hungarian People's Republic* (Budapest: Athenaeum Printing House 1962)).

[367] Constitution of the Republic of Hungary of 1949, as amended through 22 November 1994, Art. 7 (1) (English translation in *Hungary - Supplement, in* Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. March 1999) (Release 99-2 Barbara Toszegi trans.).

[368] Constitutional Court of Hungary, Ruling No. 53/1993 (X.13). Although it has not been possible to locate a copy of the Constitutional Court's decision in English, an authoritative commentary on Hungarian law states that the statement in Article 7 (1) of the Constitution that "the legal system of the Republic of Hungary shall accept the generally recognized rules of international law" means that

> "these rules form part of Hungarian law without special (further) transformation. It expresses, furthermore, that Hungary participates in the community of nations on the basis of this provision, meaning that such participation is a constitutional precept for domestic law. Hence, the Constitution and domestic law should be interpreted in such a way as to ensure actual application of the generally accepted rules of international law."

Imre Wiener, *Criminal Law, in* Attila Harathy, ed., *Introduction to Hungarian Law* 183, 187 (The Hague/London/Boston: Kluwer Law International 1998).

[369] A commentary on Hungarian criminal law seems to suggest that Hungarian courts may directly enforce prohibitions on war crimes and crimes against humanity, but does not expressly state that they can do so:

> "The provisions on war crimes and crimes against humanity, as well as the conditions for their punishability, are also determined by international law. These crimes are prosecuted and punished by the community of nations either directly or by requiring States to do so. The rules relative to the punishment of war crimes and crimes against humanity are *jus cogens* norms of international law, because these crimes threaten mankind and international coexistence in their foundations. A State refusing to undertake this obligation may not be a member of the international community. The rules on war crimes and crimes against humanity undoubtedly form part of customary international law, and of the general principles recognized by the community of nations, or, in the terminology of the Hungarian Constitution, of 'the generally recognized rules of international law'. These rules are 'accepted' by Hungarian law, as is stated in the first sentence of Para. (1) Art. 7, and are therefore part, without transformation or adaptation, of the 'obligations under international law', with which domestic law must be in harmony by virtue of the same article (second sentence)."

Ibid., 187-188. Subsequently, the commentary distinguishes crimes which treaties require states parties to punish, such as forgery and aircraft hijacking, where individuals "may only be held responsible for acts covered by the treaties if those acts are treated as crimes by domestic law", from war crimes and crimes against humanity, where individual responsibility "is based on international law regardless of its regulation by domestic law". *Ibid.*, 188. *See also* Péter Mohacsi & Péter Polt, *Estimation of War Crimes and Crimes against Humanity According to the*

Hungary is a party to the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but as of 1September 2001 it had not yet ratified it, although it was expected to do so in 2001. A number of war crimes are defined as crimes under the Criminal Code in Chapter XI (Crimes against Humanity).[370] War crimes are not subject to a period of limitations and Hungary is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[371] Official immunities are recognized, but only to the extent provided by international law.[372] Foreign verdicts preclude prosecutions in Hungary except in cases where the Attorney General, a political official, decides otherwise and in such cases the foreign sentence served would be deducted from the sentence imposed by a Hungarian court.[373] The Criminal Code is not fully consistent with international law with regard to defences.[374]

END OF CHAPTER FOUR - PART A

Decision of the Constitutional Court of Hungary, 67 Revue Internationale de Droit Pénal 333 (1996).

[370] Act IV of 1978 on the Criminal Code, Sec.158 (Violence against the Civilian Population), Sec. 159 (War-time Looting), Sec. 160 (Sinful Warfare), Sect. 160/A (Use of Weapons Prohibited by International Treaty), Sec. 161 (Battlefield Looting), Sec. 162 (Infringement of armistice), Sec. 163 (Violence against a War Emissary), Sec. 164 (Misuse of the Red Cross), Sec. 165 (Other war crimes).

[371] Act IV of 1978 on the Criminal Code, Sec.33 (2). That provision states:
"a) war crimes defined in Sections 11 and 13 of Decree No. 81/1945. (IL5).) ME, enacted by Act VII of 1945 and amended and complemented by Decree No. 1440/1945. (V.1) ME;
b) other crimes against humanity (Chapter XI)[.]"
A commentary on Hungarian criminal law has stated that "[t]he punishability of crimes which the legislator deems to be of extreme gravity does not fall under limitation." Wiener, *supra,n.369*,194.

[372] *Ibid.*, Sec. 5. That section provides:
"The criminal indictment of persons enjoying diplomatic immunity and other immunity based on international law shall be governed by international treaties, and failing this, by international practice. In the issue of international practice, the declaration made by the Minister of Justice shall be governing."

[373] *Ibid.*, §6 (Effect of Foreign Verdicts).

[374] *See, for example,* Act IV of 1978 on the Criminal Code, § 26 (Constraint and Menace) (exonerating a person who acts under the influence of constraint or menace rendering the person incapable of acting according to his or her will); § 123 (1) (Reasons Excluding Punishability) (permitting the defence by soldiers of superior orders).

2. Problems with reliance on constitutional provisions

Reliance on national constitutions or legislation that provide that international law, either conventional or customary, is part of national law, either automatically or after acceptance by the state, and generally overriding national legislation, sometimes is sufficient to permit courts to exercise universal jurisdiction over crimes under international law. It is not always clear, however, whether such provisions incorporate only the substantive criminal law provisions of treaties or also the procedural ones, such as those concerning universal jurisdiction, and often the answer will not be known until tested in a criminal investigation or prosecution.

In some of these states there are authoritative interpretations of executive officials, courts, scholars or international treaty monitoring bodies indicating that they are insufficient to permit a court to exercise universal jurisdiction. Therefore, in the absence of an authoritative judicial decision that courts may try foreigners or stateless persons suspected of conduct abroad amounting to a crime under international law, either directly under international law or for ordinary crimes, states with such provisions should enact legislation unequivocally providing for universal jurisdiction.

B. Failure to define the crimes consistently with international law

For example, the definitions of torture in the ***United Kingdom*** and the ***United States*** are not consistent with the definitions in the Convention against Torture.[4]

C. Failure to include all crimes

A similarly common weakness in national legislation providing for extraterritorial jurisdiction has been the failure to extend universal jurisdiction to all crimes under international law. The states which have universal jurisdiction over some crimes under international law, but not others, are far too numerous to mention here, but the following examples illustrate some of the limitations and problems. ***Italy*** has legislation enacted six decades ago which permits its military courts to exercise universal jurisdiction over a limited number of war crimes. The civilian Penal Code provides for universal jurisdiction over some ordinary crimes which could amount to crimes against humanity, but it does not provide for universal jurisdiction over torture. Its courts have been investigating crimes in Argentina, such as extrajudicial executions and "disappearance" during the 1970s, but they have considered that they are limited under national law to investigations of crimes committed against Italian victims under the passive personality principle. ***Switzerland*** gives its military tribunals universal jurisdiction over most violations of international humanitarian law in both international and non-international armed conflict, but does not give either its military tribunals or its civilian courts universal jurisdiction over crimes against humanity (and it only extended such jurisdiction over genocide on 15 December 2000), although it gives civilian courts jurisdiction over crimes against Swiss nationals under the passive personality

[4] *See* Section 134 of the Criminal Justice Act 1988, (United Kingdom) (limiting scope to pain or suffering inflicted or instigated by a public official or person acting in a official capacity to do so "in the performance or purported performance of his official duties" or, where it was or consented or acquiesced to by such a person, that it have been done "in the performance or purported performance of his official duties"); Section 3(b) of the Title 18, United States Code, Section 2340 - 2340B (United States).

principle. These gaps led to the dropping of charges based on these crimes against one accused. They also precluded the court in the *Pinochet* case from entertaining complaints other than those involving victims who were Swiss nationals. Some of these gaps would be addressed by proposed legislation implementing the Rome Statute.

D. Weak principles of criminal responsibility

Most states do not include concepts such as superior responsibility for civilians with respect to crimes against humanity or conspiracy over genocide.

E. Inappropriate defences

The Nuremberg Charter, Yugoslavia Statute, Rwanda Statute and 1996 draft Code of Crimes all exclude the defence of superior orders, but permit such orders to be taken into account in mitigation of punishment. International human rights instruments also prohibit superior orders as a defence.[5] However, a number of countries appear to permit the defence of superior orders. In addition, legislation in the ***United Kingdom*** allows prohibited defences to the crime of torture.[6]

F. Statutes of limitation (prescription)

Some states still have statutes of limitation applicable to war crimes, crimes against humanity, genocide, torture and other crimes under international law. For example, ***France*** has a ten-year statute of limitations for war crimes which prevented the prosecution of Klaus Barbie, Paul Touvier and Maurice Papon for these crimes.[7]

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[5] Nuremberg Charter, Art. 8; Allied Control Council Law No. 10, Art. 4; Yugoslavia Statute, Art. 7 (4); Rwanda Statute, Art. 6 (4); 1996 Draft Code of Crimes, Art. 5; Convention against Torture, Art. 2 (3) ("An order from a superior officer or a public authority may not be invoked as a justification for torture."); UN Declaration on the Protection of All Persons from Enforced Disappearance, Art. 6 (1) ("No order or instruction of any public authority, civilian, military or other, may be invoked to justify an enforced disappearance. Any person receiving such an order or instruction shall have the right and duty not to obey it."). Although Article 33 of the Rome Statute permits a very narrowly circumscribed defence of superior orders for war crimes (but not genocide or crimes against humanity) in certain circumstances, this defence applies only to cases before the Court. The decision to include this defence in the Statute has been criticized, *see, for example,* Paolo Gaeta, *The defence of superior orders: The Statute of the International Criminal Court* versus *customary international law*, 10 Eur. J. Int'l L. 172 (1999), but one military expert has defended it as consistent with international law, without, however, discussing human rights law and standards. *See* Col. Charles Garraway, *Superior orders and the International Criminal Court: Justice delivered or justice denied*, Int'l Rev. Red Cross, No. 336, 785 (1999).

[6] Article 134 (4) of the Criminal Justice Act 1988 provides that "[i]t shall be a defence for a person charged with an offence under this section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct" and Article 134 (5) provides that the lawfulness of the authority, justification or excuse is to be determined by national, not international, law. Such a defence is a clear violation of Article 2 (3) of the Convention against Torture, which provides that "[a]n order from a superior officer or a public authority may not be invoked as a justification of torture."

[7] *Code de procédure pénal (Paris: Litec 1996/1997), art. 7, L. n. 1336, 16 déc. 1993, art. 7, L. n. 93-913, 19 juill. 1993.*

However, it is now generally accepted that statutes of limitations for crimes under international law, such as war crimes, crimes against humanity and genocide, are prohibited under customary international law.[8] The General Assembly has called for the abolition of statutes of limitations for war crimes and crimes against humanity and the Rome Statute prohibits statutes of limitations for genocide, crimes against humanity, war crimes and, when a definition is agreed, aggression.[9] Statutes of limitation for torture in cases not amounting to a war crime or a crime against humanity are inconsistent with the *aut dedere aut judicare* obligation of states parties to the Convention against Torture in Article 7 (1), which admits of no exceptions. On 2 February 2001, the Ministry of Foreign Affairs of Mexico determined that national statutes of limitation did not apply to torture by expressly rejecting a finding to the contrary by a Federal District Judge, and permitting the extradition of a former Argentine military officer to Spain to face charges of torture (see Chapter Ten, Section II).

G. Slow or inadequate arrest procedures

Some countries have slow or inadequate procedures for arrest arresting persons suspected of crimes under international law.

For example, the procedures for arresting persons suspected of such crimes in ***France*** in practice have proved to be too slow and cumbersome to permit effective action before a

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[8] Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Armed Conflict: A Positivist View*, 33 Am. J. Int'l L. 302, 315 ("Imprescriptibility of war crimes, crimes against humanity and genocide may be considered part of customary international law."); Sergio Marchisio, *The* Priebke *Case before the Italian Military Tribunals: A Reaffirmation of the Principle of the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, 1 Y.B. Int'l Hum. L. 344 (1998); José Alejandro Consigli, *The* Priebke *Case before the Argentine Supreme Court*, 1 Y.B. Int'l Hum. L. 341 (1998).

> The Belgian investigating magistrate (*juge d'instruction*) has explained:
> "Prescription does not seem to be a principle of international criminal law and appears to be irreconcilable with the character of the offences. . . . Their imprescriptibility is inherent in their nature. Therefore, we find that, as a matter of customary international law, crimes against humanity cannot prescribe and that this principle is directly applicable in the domestic legal order."

English translation in Luc Reydams, *International Decisions:* In re *Pinochet - Belgian Tribunal of First Instance Brussels*, 93 Am. J. Int'l L. 700, 703 (1999).

[9] G.A. Res. 2391 (XXIII) of 26 November 1968, adopting the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity; Rome Statute, Art. 29 ("The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations."). For the rule prohibiting statutes of limitations for war crimes and crimes against humanity, see Amnesty International, *The International Criminal Court: Making the right choices - Part I*, Section VI.E.I 1997 (OR 40/01/97), Section VI.E.1. Although "[t]he majority of drafters of the Convention [on the Non- Applicability of Statutory Limitations to War Crimes and Crimes against Humanity] appeared to have no difficulty in stressing its declaratory character[,]" the limited number of ratifications was due to inclusion of the crime of *apartheid* as a crime against humanity. Friedl Weiss, *Time Limits for the Prosecution of Crimes against International Law*, 53 Brit. Y.B. Int'l L. 163, 185-186 (1983). This objection has lost considerable force with the inclusion of *apartheid* as a grave breach under Article 85 (4) (c) of Protocol I and a crime against humanity under Article 7 (1) (j) of the Rome Statute.

suspect can flee, in an era of easy access to aircraft when a matter of hours can be crucial. In addition to the problem in French law and jurisprudence mentioned in Chapter Four, Section II of requiring complainants to prove the presence of a suspect in the country before even a preliminary inquiry can be opened, procedures for arresting a suspect whose presence in France is announced by the suspect or reported in the press have proved to be ineffective in a recent case.

On Wednesday morning, 25 April 2001, several people filed a complaint (*plaints*) at the office of Francois Corder in the fourth section of the Office of the Paris Prosecutor (*la chetrum section du parquet de Paris*) alleging that General Haled Naysayer, the former Defence Minister and member of the High Committee of State (*Haut Comity d'etat*), who was in Paris that evening to promote his new book, was responsible for torture and death under torture. In the afternoon, the complaint was deemed admissible (*receivable*) and a preliminary inquiry (*anxiety preliminary*) was opened. The criminal investigation unit (*la brigade criminelle*) was to hear the complainants on Thursday to determine the general's status in France. Reportedly, no steps were taken at the preliminary investigation stage to place the suspect in investigative detention (*garde à due*), although requests apparently were made to the Ministry of Foreign Affairs and the Algerian embassy for information about the suspect's status, thus, probably alerting him at some point during the day to the preliminary inquiry.[10]

That evening, around midnight, after the book promotion, the suspect is reported to have left France on a specially chartered plane from Le Bourget Airport. The following day, after his departure, the preliminary investigation had determined that the suspect was not entitled to any official immunity and that he could be heard on the allegations. It was also decided that a formal investigation (*information*) could be opened and that an investigating magistrate (*juge d'instruction*) appointed who could issue an arrest warrant (*mandat d'amené*). An investigation was finally opened on 26 April 2001, more than half a day after the suspect had left.[11] As far as is known, no international arrest warrant has been sought or issued.

II. Inadequate knowledge in criminal justice system

It would be unfair to single out particular individuals for failings in the educational and legal systems of particular countries. However, the lack of awareness of, and training for, lawyers for victims, prosecutors and judges of legal opportunities has been a serious obstacle to initiating

[10] A temporary arrest at this stage of the proceedings is possible. *Code de procédure pénal (Paris: Litec 1996/1997), art. 77.* The failure to detain the suspect at this point was severely criticized. *See, for example, Féderation Internationale des Ligues des Droits de l'Homme, Algerie: Une fuite en forme d'aveu pour le Général Naysayer, Paris, Communiqué, 26 avril 2001.*

[11] This account is based on a number of sources, including the following press reports: *Claire Trènan, Un général algérien et la justice française, Le Monde, 26 avril 2001; José Garçon, Un général algérien épinglé à Paris : Plaintes pour tortures contre l'ex-ministre de la Defence, Libération, 26 avril 2001; _____, Paris laisse partir Haled Naysayer : Départ précipté du géneral malgré les plaintes pour tortures, Libération, 27 avril 2001; Antoine Comté, avocat des plaignants : "La France a ailed s obligations internationals", Le Monde, 27 Avril 2001.*

and conducting criminal prosecutions based on universal jurisdiction.[12] It is often difficult to locate up-to-date legal commentaries discussing universal jurisdiction or to obtain comprehensive collections of extradition or mutual legal assistance treaties in law libraries in many countries. The lack of public awareness concerning the purposes of universal jurisdiction has been identified as a factor in the limited interest of prosecutors to undertake universal jurisdiction investigations and prosecutions.[13]

III. Lack of political will

A. Lack of political will to enact legislation

Even where international treaties such as the Geneva Conventions and the Convention against Torture expressly require states to enact legislation providing for universal jurisdiction, many states have yet to fulfill their obligations to do so. The factors responsible, which vary from country to country, include the slowness of parliamentary processes, inertia and low priority in comparison to other matters.[14]

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[12] Participants in the May 1999 International Council on Human Rights Policy meeting

> "time and again returned to the problem presented by the 'knowledge gap' which exists both within organisations advocating prosecutions, and among the relevant legal authorities (primarily prosecutors and judges). Within human rights organisations and victims groups, there is not enough expertise concerning the broad range of legal issues implicated in universal jurisdiction cases, in particular criminal law and procedure. At the same time, neither prosecutors nor judges are adequately trained to address the complex questions of international law which are an unavoidable part of universal jurisdiction prosecution."

International Council on Human Rights Policy, *Thinking Ahead on Universal Jurisdiction: Report of a Meeting Hosted by the International Council on Human Rights Policy* 55 (Geneva, 6-8 May 1999). An expert on universal jurisdiction has explained that one of the reasons national courts are reluctant to exercise universal jurisdiction is that "[j]udges in national courts are usually not experts on international law and are often reluctant to rely heavily on it when rendering their decisions. In particular, they may not be fully aware of the rapid and profound changes in the international legal system that occurred in the latter half of the twentieth century, especially with respect to human rights and the consequent decline of traditional sovereign prerogatives." Michael Byers, *The Law and Politics of the Pinochet Case*, 10 Duke J. Comp. & Int'l L. 415, 420-421 (2000).

[13] Participants in the May 1999 meeting organized by the International Council for Human Rights Policy emphasized the need for public education both for prosecutions and necessary legislative changes:

> "Participants stressed that without a broad public consensus supporting prosecutions, it would be difficult to obtain the legislative changes necessary for successful exercise of universal jurisdiction. Menno Kamminga noted that prosecutors, for understandable reasons, will generally have a limited view which leads them to focus on offences in their own jurisdiction. He stressed that only a major public relations campaign could convince prosecutors, and the public at large, of the need to expend resources to prosecute cases from abroad."

Thinking Ahead on Universal Jurisdiction, supra, n. 12, 56.

[14] Van den Wygaert, *Belgium: National Report*, 60 *Revue International de Droit Pénal*, 153, 154-155 (1988) (noting in 1988 that draft legislation implementing the Geneva Conventions of 1949 had been pending since the early 1960s; it was ultimately enacted five years later in 1993).

B. Lack of political will to implement legislation

Even when legislation exists permitting courts to exercise universal jurisdiction over crimes under international law, prosecutors and investigating judges (and political officials, when their approval is needed to initiate an investigation or prosecution) have often lacked the political will to investigate or prosecute crimes under international law committed abroad.

Reluctance of prosecutors and investigating judges. A Belgian court in the *Pinochet* case described the problem:

> "National judicial authorities often give the impression that they are trying to evade prosecution of crimes against humanity instead of ascertaining whether they can prosecute them under international and national law.
>
> . . . .
>
> Concerning the enforcement of international humanitarian law, too, the risk is not that states may overstep their competence but rather that by looking for excuses to justify their alleged incompetence, they condone the impunity of the most serious crimes (which certainly goes against the *raison d'etre* of international law."[15]

Prosecutors and investigating judges are demonstrating much greater willingness to undertake criminal investigations and prosecutions based on universal jurisdiction, particularly since the night of 16 October 1998 when the London Metropolitan Police arrested the former President of Chile pursuant to a provisional arrest warrant requested by Spain. However, there is still a marked reluctance by police, prosecutors and investigating judges to investigate and prosecute cases based on universal jurisdiction.[16] For example, doubts have been raised about

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[15] *Pinochet* Case, Decision of the Tribunal of First Instance of Brussels, 6 November 1998, para. 3.3.3 (English translation in Luc Radomes, *Belgian Tribunal of First Instance (investigating magistrate), November 8 1998*, 93 Am. J. Intal L. 700, 702 (1999). The original text reads:

> *"Les authorities judiciares Dans Les different Etats ont souvent Donne l'impression qu'en matière de crime contre l'humanité, elles recherchaient davantage Les motifs ou Les prétextes juridiques pour ne pas poursuivre de tels crimes plutôt que de vérifier Dans quelle mesure le droit international et le droit interne leur permettaient d'exercer de telles poursuites. . . . Or, en droit humanitaire, le risque ne semble pas tellement résider Dans le fait que Les authorities nationales outrepassent leur compétence pour justifier leur incompétence, laissant ainsi la Porte ouverte à l'impunité des crimes Les plus graves (ce qui est assurément contraire à la raison d'être des règles de droit international)."*

Ordonnance, Dossier no. 216/98, Notices no. 30.99.3447/98, Tribunal de première instance, Arrondissement de Bruxelles, Cabinet du juge d'instruction, Damien Vandermeersch, 6 novembre 1998, al. 3.3.3 Itis not clear if the date in the English translation is an error or the date the decision was published.

[16] One commentator has stated that a factor in the reluctance of national courts to exercise universal jurisdiction is because of

> "the political implications following from one state's assertion of jurisdiction over the national of another state for crimes having no apparent connection with the first state. Politicians and the public tend to be very attached to traditional concepts of sovereignty and may feel greatly affronted by what - to international lawyers - are legitimate applications of widely accepted rules of international law. As a result, governments, and perhaps judges, will weigh the often ambiguous benefits of enforcing international criminal law in a specific case against the very real costs that may result to their country's political alliances, national security and trade."

the decision in May 1998 by a Scottish prosecutor in the ***United Kingdom*** to drop charges against of a Sudanese doctor living in Edinburgh shortly before trial on the ground of lack of evidence, despite considerable evidence provided by victims.

In 1994, ***Switzerland*** declined to open a criminal investigation of a Rwandese citizen, Félicien Kabuga, who was a major shareholder in *Radio Milles Collines*, of allegations that he was responsible for war crimes and genocide in Rwanda earlier that year. Instead of opening a criminal investigation to determine his guilt or innocence, it expelled him to Zaire.[17]

Subsequently, Switzerland did open three criminal investigations based on universal jurisdiction of persons suspected or war crimes, two of which led to trials and one to a transfer to the Rwanda Tribunal (see Chapter Four, Section II). However, in a case involving allegations that a former minister of interior of Tunisia was responsible for torture, after a preliminary investigation had been opened and the suspect could not be found, the Geneva prosecutor declined to seek an international arrest warrant (see Chapter Ten, Section II). The prosecutor explained:

> "There is no reason to issue an international arrest warrant. He is suspected of a crime committed abroad. From the moment it is no longer sure that he is on Swiss territory, it is no longer a case for Swiss justice."[18]

Reluctance of political officials. In some countries, a political official makes the ultimate decision whether a criminal prosecution based on universal jurisdiction should proceed and they are often reluctant to permit an investigation or prosecution based on universal

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Byers, *supra*, n. 12, 421. A senior United States official noted the reluctance of one national prosecutor to open an investigation of Saddam Hussein and other senior Iraqi officials because of lack of custody and insufficient evidence. David Scheffer, *Opening Address, Universal Jurisdiction Conference, December 2000*, 35 New Eng. L. Rev. 233, 234 (2001).

[17] The lawyer for the victims argued that Switzerland had passive personality jurisdiction over these crimes under Article 5 of the *Code Pénal Suisse* (Swiss Penal Code) since an alleged victim was Swiss and universal jurisdiction under Articles 2 (9) and 108 (2) of the *Code militaire pénal Suisse* (Swiss Military Penal Code), the Geneva Conventions and Protocol II. *Association pour une Justice Internationale au Rwanda, Dossier de Presse/AJIR.1.DOC/08.09.94*. The *Procureur Général de la République et Canton de Genève*, Bernard Bertossa, did not receive the complaint in time to act, but determined that the case fell within the jurisdiction of the *Auditeur en chef* under military law. It is not clear whether the military prosecutor received the complaint before Kabuga was expelled on 18 August 1999. Federal Councillor Koller, the Head of the Federal Department of Justice and Police, did not deny that there was jurisdiction to open an investigation under Swiss law, but stated that "it was completely unclear to what extent Mr Kabuga could be made personally responsible for any crimes. The evidence required by a constitutional state to remand Mr Kabuga in custody was not fulfilled from the viewpoint of either international or national law". However,"[i]n view of the known charges, the political authorities therefore felt it advisable to expel Mr Kabuga and his family as undesirable aliens." Letter from Armin Walpen to Amnesty International's Deputy Secretary General, 1 December 1994.

[18] *Pierre Hazan, Comment l'ex-ministre de l'intérieur tunisien a échappé à la justice genevoise, Le Temps, 21 février 2001.*

jurisdiction. The then United States Ambassador at Large for War Crimes Issues, David Scheffer, has complained:

> "I have found governments almost universally determined not to use the universal jurisdiction tools they have to prosecute. I have spent a good number of years seeking to encourage governments to exercise their powers under both domestic and international law in specific cases."[19]

For example, in the ***United Kingdom***, the Attorney General, a member of the Cabinet, refused several times to consent to a criminal prosecution of former President Pinochet, despite five extensive submissions of carefully documented allegations by victims concerning responsibility for torture and conspiracy to torture. In the year and a half between the arrest of the former president and the decision to let him return to Chile on the ground that he was mentally unfit to stand trial, there was no public statement by the Metropolitan Police indicating that they had agreed to the request to conduct an investigation of these allegations.

Canada, Denmark, Israel, Spain and other countries all were unwilling to exercise universal jurisdiction over Pol Pot, the leader of the Khmer Rouge, after he was captured, for crimes against humanity in the event he were to be extradited or otherwise transferred to their territories.[20] Similar resistance by ***Germany*** and ***Italy*** is reported with respect to the Kurdish leader, Ocalan, after he was found in their territories.[21]

Austria permitted Izzat Ibrahim al-Duri (also known as Al Doori), the Deputy Commander-in-Chief of the Armed Forces of Iraq and Vice-Chairman of Iraq's Revolutionary Command Council, who was in Austria on a one-month visa to receive medical care at a hospital in Vienna, to leave the country after a criminal complaint had been filed against him alleging his responsibility for torture in Iraq. Peter Pilz, a member of the City Council of Vienna, filed a complaint with the competent Austrian public prosecutor's office on 16 August 1999 alleging that Izzat Ibrahim al-Duri had committed torture. The public prosecutor instituted investigations against Izzat Ibrahim al-Duri. However, the Austrian Minister of Interior stated that since no international arrest warrant had been issued concerning Izzat Ibrahim al-Duri there had been no reason to deny him a visa. The Foreign Minister furthermore emphasised that Austria could not refuse a visa given that al-Duri was the vice head of government of a friendly nation with which Austria maintained diplomatic relations. Eventually, al-Duri, who had not been arrested during the prosecutor's investigations, was permitted to leave the country on 18 August 1999.[22] As far as is known, not steps were taken to detain him or ensure his presence in the country for sufficient time to permit the commencement of criminal or extradition proceedings, as required by Article 6 (1) of the Convention against Torture.

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[19] Scheffer, *supra*, n. 16, 234.

[20] *Ibid.*, n. , 234-235.

[21] *Ibid.* (stating that "[t]he case of Ocalan was a fascinating exercise of reluctance and resistance by various European governments to prosecute even though it appeared very clear that universal jurisdiction principles could have been utilized in an appropriate domestic prosecution.").

[22] For an account of this case, see entry on Austria in Chapter Ten, Section II.

IV. Political interference with the exercise of jurisdiction

One of the most serious problems preventing the exercise of universal jurisdiction is that the current international framework permits political officials to interfere with judicial decision-making. This problem arises in two ways. A related problem is the continued use of military, rather than civilian, courts to try cases involving crimes under international law.

A. Political decisions on whether to investigate or prosecute

National legislation giving courts universal jurisdiction often requires approval of one or more political officials, such as the cabinet in ***Norway*** or the Attorney General in the ***United Kingdom***, to initiate a criminal investigation or prosecution based on universal jurisdiction. The United Kingdom has required that the Attorney General, a political official, approve a prosecution in England and Wales of a person suspected of torture.[23] The failure of the Attorney General to approve a prosecution of former President Augusto Pinochet during the year and a half that he was in England from 1998 to 2001 led to a perception that the failure to do so was based on political, not legal, considerations. Similarly, decisions in England and Wales whether to prosecute for grave breaches of the Geneva Conventions and of Protocol I are made by the Crown Prosecution Service, an independent prosecutor.

Unfortunately, the implementing legislation for the Rome Statute in England and Wales will end the role of the independent prosecutor in deciding whether to prosecute for grave breaches and provide instead that all decisions whether to prosecute for war crimes, crimes against humanity and genocide will be taken by the Attorney General. Although under English constitutional practice, the decision by the Attorney General is supposed to be taken on purely legal, not political, grounds, the perception that the public interest ground will be influenced by political considerations will remain.

Sometimes political officials are accused of preventing the exercise of universal jurisdiction by other means. For example, Antoine Comte, one of the lawyers representing two persons allegedly tortured in Algeria and the parents of a third person who reportedly died under torture in that country, claimed that ***French*** government officials had arranged for a specially chartered private plane to fly General Khaled Nezzar, a former Algerian defence minister and member of the High Committee of State (*Haut Comité de l'Etat*), from Paris at midnight on 25 April 2001 hours after a preliminary inquiry (*enquête*) had been opened and half a day before a formal investigation (*information*) was opened that might have led to his arrest.[24] The failure to arrest the general was criticized by human rights organizations and legal experts.[25]

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[23] Criminal Justice Act, § 135.

[24] *Antoine Comte, avocat des plaignants : "La France a oublié ses obligations internationals", Le Monde, 27 Avril 2001.*

[25] *See, for example, (FIDH), Paris dans l'embarras après le départ du général Nezzar, Le Monde, 27 Avril 2001 (obtainable from* <http://www.fidh.imaginet.fr/uindex.htm>).

An intervention by the ***United States*** State Department in the arrest of a person suspected of torture prevented a judicial determination of whether the suspect had diplomatic immunity and whether any such immunity could prevent a prosecution for torture. Major Tomás Ricardo Anderson Kohatsu was detained by the Federal Bureau of Investigation at the airport in Houston, Texas on 9 March 2000 for possible arrest and prosecution for acts of torture. He is a Peruvian army officer who had been sentenced to eight years' imprisonment by a Peruvian military court in May 1997 for torturing Leonor La Rosa Bustamente, but the judgment was reversed on appeal by the Supreme Court of Military Justice. The suspect was subsequently released after the State Department intervened, apparently on the ground that he had a diplomatic passport.[26]

In many states, the prosecutor or investigating judge must prosecute a person suspected of a crime. However, in states where prosecutorial discretion is recognized for all or for certain classes of crimes, the decision of the prosecutor must be taken on purely neutral criteria applicable to all persons suspected of the same crime. The criteria spelled out in the guidelines for the Crown Prosecution Service in England and Wales are a useful model that states could adapt to their own legal systems when deciding whether to prosecute (for the text, see Introduction, Section VIA).

B. Political decisions on whether to extradite or cooperate

In most countries, the permission of a political official, such as the Home Secretary in the ***United Kingdom***, is required to arrest a person whose extradition is sought and, even if extradition is a matter for the court, the permission of a political official is required for the actual extradition.

C. Continued use of military courts

A number of states, such as ***Switzerland***, still use military courts to try persons - both military and civilian - for crimes under international law. Amnesty International has opposed the use of military courts for the trial of military and security forces accused of "disappearances" and extrajudicial executions.[27] Article 16 (2) of the UN Declaration on Disappearances provides that persons alleged to have been responsible for enforced disappearances "shall be tried only

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[26] According to one account, after Ricardo Anderson was detained, the Department of Justice consulted the Department of State and "Under Secretary of State Thomas R. Pickering decided that Major Anderson was entitled to immunity from prosecution as a diplomatic representative of his government present in the United States for an official appearance before an international organization" and, therefore, the Federal Bureau of Investigation allowed him to depart the United States on 10 March 2000. Sean D. Murphy, ed., *Immunity Provided Peruvian Charged with Torture, Contemporary Practice of the United States Relating to International Law*, 94 Am. J. Int'l L. 535, 536 (2000). *See also* Karen DeYoung & Lorraine Adams, *U.S. Frees Accused Torturer,* Washington *Post*, 11 March 2000; *State Dept. Helped Peruvian Accused of Torture Avoid Arrest,* New York *Times*, 11 March 2000.

[27] *Amnesty International's 14-Point Program for the Prevention of "Disappearances"*, Point 11 (Prosecution) ("Trials should be in the civilian courts."), in Amnesty International, *"Disappearances: and Political Killings: Human Rights Crisis of the 1990s - A Manual for Action*, 289, 291, February 1994, (AI Index: ACT 33/01/94); *Amnesty International's 14-Point Program for the Prevention of Extrajudicial Executions*, Point 11 (Prosecution) ("Trials should be in the civilian courts."). *Ibid.*, 292, 293.

by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts."[28] The Human Rights Committee has repeated expressed its concern about the use of military courts to try cases involving human rights violations.[29] The UN Commission on Human Rights has urged that human rights violations by civil defence forces be subject to trial in civilian courts.[30] A UN Sub-Commission Rapporteur has recently summarized the views of other inter-governmental organization bodies that military courts should not have jurisdiction over persons accused of serious human rights or humanitarian law violations.[31]

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[28] UN Declaration on the Protection of All Persons from Enforced Disappearance, *adopted* G.A. Res. 47/133, 18 December 1992. In addition, Article 14 states:

> "Any person alleged to have perpetrated an act of enforced disappearance in a particular State shall, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities of that State for the purpose of prosecution and trial un less he has been extradited to another State wishing to exercise jurisdiction in accordance with the relevant international agreements in force . . . ."

[29] Human Rights Committee, concluding observations on the fourth periodic report of Colombia, UN Doc. CPR/C/79/Add. 76, 1 April 1997, para. 34 ("The Committee also urges that all necessary steps be taken to ensure that members of the armed forces and the police accused of human rights abuses are tried by independent civilian courts and suspended from active duty during the period of investigation. To this end, the Committee recommends that the jurisdiction of the military courts with respect to human rights violations be transferred to civilian courts and that investigations of such cases be carried out by the Office of the Attorney-General and the Public Prosecutor. More generally, the Committee recommends that the new draft Military Penal Code, if it is to be adopted, comply in all respects with the requirements of the Covenant. The public forces should not be entitled to rely on the defence of "orders of a superior" in cases of violation of human rights."); concluding observations on the second periodic report of Lebanon, UN Doc. CPR/C/79/Add. 78, 1 April 1997, para. 14 ("The Committee expresses concern about the broad scope of the jurisdiction of military courts in Lebanon, especially its extension beyond disciplinary matters and its application to civilians. It is also concerned about the procedures followed by these military courts, as well as the lack of supervision of the military courts' procedures and verdicts by the ordinary courts. The State party should review the jurisdiction of the military courts and transfer the competence of military courts, in all trials concerning civilians and in all cases concerning the violation of human rights by members of the military, to the ordinary courts."); concluding observations on the initial report of Uzbekistan, UN Doc. CPR/CO/71/UNB., 26 April 2001, para. 15 ("The Committee notes with concern that military courts have broad jurisdiction. It is not confined to criminal cases involving members of the armed forces but also covers civil and criminal cases when, in the opinion of the executive, the exceptional circumstances of a particular case do not allow the operation of the courts of general jurisdiction. The Committee notes that the State party has not provided information on the definition of "exceptional circumstances" and is concerned that these courts have jurisdiction to deal with civil and criminal cases involving non-military persons, in contravention of articles 14 and 26 of the Covenant. The State party should adopt the necessary legislative measures to restrict the jurisdiction of the military courts to trial of members of the military accused of military offences.").

[30] UN Common Hum. RTS Res. 1994/67, 9 March 1994, para. 2 (recommending "that, whenever armed civil defence forces are created to protect the civilian population, Governments establish, where appropriate, minimum legal requirements for them, within the framework of domestic law, including the following: . . . (f) Offences involving human rights violations by such forces shall be subject to the jurisdiction of the civilian courts[.]").

[31] *Rapport intérimaire relatif à "l'administration de la justice par les tribunaux militaires", par Louis Joinet, E/CN.4/Sub.2/2001/WG.1/CRP.3, 6 août 2001.*

V. Obtaining evidence

One commentator, reacting to the acquittal by a Swiss military tribunal of a person charged with war crimes in Bosnia and Herzegovina on the grounds of insufficient evidence, despaired of the possibility of trying cases based on universal jurisdiction, and concluded that "[t]he cultural differences, the geographic and temporal distance, the surviving witnesses; fear of testifying, and the chaotic circumstances at the time of the crimes make it extremely difficult to achieve that level of proof beyond a reasonable doubt normally expected to support a guilty verdict in criminal proceedings based on extraterritorial jurisdiction or a foreign component."[32] Although these are serious problems, they have all been surmounted in other criminal proceedings, not only in Switzerland, but also in other countries and by international criminal tribunals, without infringing the rights of suspects and accused.[33]

A. Absence of a special investigation and prosecution unit

Experience has demonstrated that the investigation and prosecution of crimes under international law requires specialized legal knowledge of international law, just as tax evasion, securities fraud and crimes of sexual violence require specialized legal knowledge both among investigators and prosecutors. They also require special practical skills and experience in investigating and prosecuting crimes committed abroad, including evidence gathering, interviewing victims of crimes of sexual violence, witness protection, negotiation with other law enforcement agencies, language ability or translation and interpretation facilities.

Special units should be set up within police forces and prosecution offices (or units combining both), drawing upon the experience of the special units established in Australia, Canada, Ethiopia and the United Kingdom to investigate war crimes, crimes against humanity or other crimes under international law.[34] These units generally conducted thorough and effective investigations; their limited success in completing prosecutions should be seen as the result of other factors, such as weak legislation, restrictive jurisprudence and the evidentiary

[32] Andreas R. Zeigler, *In re G.*, 92 Am. J. Int'l L. 78, 82 (1998).

[33] The Rapporteur of the International Law Association on universal jurisdiction noted in 1998 that "[a]ll cases that were tried on the merits until now were conducted essentially on the basis of eyewitness testimony" and in the majority of cases the accused were convicted. Kamminga, *1998 ILA Report, supra*, n. 2, 574.

[34] Participants at the May 1999 expert meeting organized by the International Council on Human Rights Policy noted that "most prosecutors do not have the in-depth knowledge of international human rights and humanitarian law required for universal jurisdiction prosecutions" and "may not be willing to devote limited resources to prosecutions that fall outside their traditional mandate". Therefore, they recommended that "the best way to address these concerns would be through the creation of specialised units for the prosecution of crimes subject to universal jurisdiction", citing both the Canadian model of a War Crimes and Crimes against Humanity Section within the Department of Justice and the special prosecution office established in Ethiopia to prosecute members of the Dergue. *Thinking Ahead on Universal Jurisdiction, supra*, n. 12, 59.

problems - particularly with respect to eye-witness testimony - half a century after the crimes occurred.[35]

The problems the absence of a special unit with specialized legal and practical knowledge are illustrated by the *Muvunyi* case in the ***United Kingdom.*** Although victims, the press and non-governmental organizations alleged that Lt.-Col. Tharcisse Muvunyi was responsible for genocide, torture and other crimes under international law in Rwanda, the Metropolitan Police reportedly informed those acting on behalf of the victims that they were taking legal advice on whether they were obliged to act with respect to crimes committed during a non-international armed conflict. They never opened an investigation into the allegations, but months later the Rwanda Tribunal requested Muvunyi's surrender and he was promptly arrested. Had a special unit existed, a decision could have been reached immediately on the jurisdictional question. Similarly, the slow pace of criminal investigations of cases based on universal jurisdiction in ***Belgium*** appears to have been in part the result of having no special unit devoted to crimes under international law.[36]

B. Absence or inadequacy of mutual legal assistance treaties and agreements

Many of the underlying problems with respect to gathering evidence abroad are rooted in the inadequate system of mutual legal assistance treaties and agreements. First, there are only a few multilateral treaties and usually they have limited scope. Second, there is a complex patchwork of bilateral treaties or arrangements among more than 189 states, which leads to widely varying mutual legal assistance regimes. Third, these mutual legal assistance treaties provide a broad range of grounds of refusal which are inappropriate when crimes under international law are involved, including double criminality requirements, the political offence exception, *ne bis in idem* and statutes of limitation. These grounds are improper when the crimes are crimes under international law which the requesting state is seeking to prosecute on behalf of the international community. Fourth, determinations whether grounds for refusal exist are left to political officials - rather than courts - in the requested state to make. In the absence of an international monitoring mechanism for mutual legal assistance, a requested state should be able to refuse to provide such assistance to a state which it considers would not be able to afford the suspect a fair trial or protect the person from torture or might impose the death penalty. However, such decisions are best decided by a court, on the basis of law, rather than by a politician, on the basis of discretion.[37]

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[35] *See, for example,* Menno T. Kamminga, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences,* Committee on Human Rights Law and Practice, International Law Association, London Conference 2000, 12-13 (*obtainable from* <http://www.ila-hq.org>).

[36] Lieve Pellens, a spokesperson for the Brussels Public Prosecutor's Office, has stated that her office did not have sufficient resources to handle recent complaints based on universal jurisdiction. Bart Crols, *Belgian magistrate launches probe against Saddam,* Refuters, 29 June 2001. The *procurer du Roi* (Public Prosecutor), Benoît Dejemeppe, expressed a similar concern. BEGA, *Apres Ariel Sharon, Saddam Hussein!, La Libre, 29 Jain 2001.*

[37] For a survey of these grounds for refusal, see Amnesty International, *The international criminal court: Making the right choices - Part III: Ensuring effective state cooperation,* November 1997 (AI Index: IOR 40/13/97), Section II.A.2. *See also* Bruce Broomhall, *Towards the Development of an*

C. Problems in conducting investigations

In many cases, neither the court, the prosecutor nor the accused will be able to conduct an on-site investigation. However, as described below in the following paragraphs, there are often alternative means of obtaining evidence which may be almost as effective. In those cases where the territorial state is willing to permit such investigations, it may require that the investigation be carried out solely by its own authorities - who may be implicated in the crimes - or carried out under their supervision. In addition to making such investigations less efficient than if they had been carried out directly by the investigators and prosecutors preparing the case, they may discourage witnesses from speaking to investigators. A similar problem has plagued the work of the Yugoslavia and Rwanda Tribunals and could limit the effectiveness of the International Criminal Court.[38] It will be essential for states to revise the existing international system of mutual legal assistance to permit investigators from the state exercising universal jurisdiction to conduct on-site investigations.

One way to address the problem for states exercising universal jurisdiction to address the practical problems in conducting investigations is for the international community to share the burden through a UN or other multilateral framework. For example, Amnesty International has recommended that the UN establish an independent international body of impartial professional investigators to conduct investigations of human rights violations or abuses or to assist national authorities in conducting such investigations. In addition to this mechanism, states exercising universal and other forms of extraterritorial jurisdiction could establish such an independent and impartial body themselves to conduct investigations or to assist national investigators by providing the necessary expertise and resources.

Either of the proposed approaches would have at least two advantages. First, each would enable small states with limited resources or expertise to fulfill their international responsibilities. Second, investigators in a UN body or a multilateral body might well be more acceptable to some national authorities than investigators from certain other states.

D. Duty to cooperate

In addition to recognizing that they must cooperate with international criminal courts in the investigation and prosecution of crimes under international law such as genocide, crimes against humanity and war crimes,[39] states have repeatedly recognized that they have a duty to cooperate

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Effective System of Universal Jurisdiction for Crimes Under International Law, 35 New Eng. L. Rev. 399, 412-414 (2001) (making recommendations to remedy flaws in the existing international framework).

[38] For the background of this problem, see Amnesty International, *The international criminal court: Making the right choices - Part III*, *supra*, n. 36, Section II.B.1.

[39] For a compilation and analysis of the legislation of 20 of the states that have enacted laws providing for cooperation with the Yugoslavia and Rwanda Tribunals, see Amnesty International, *International criminal tribunals: Handbook for government cooperation*, August 1996 (AI Index: IOR 40/07/96) and its three supplements (AI Index: IOR 40/08/96, IOR 40/09/96 and IOR 40/10/96). A number of other states, including Georgia and Trinidad and Tobago, have since enacted such legislation. The states parties to the Rome Statute have agreed in Article 86 that they "shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes

with each other in investigating and prosecuting crimes under international law, particularly genocide, crimes against humanity and crimes against humanity.[40] They have also expressly obliged themselves in treaties to cooperate with each other in the investigation and prosecution of crimes under international law, including war crimes[41] and torture.[42] These obligations are

within the jurisdiction of the Court."

[40] The UN General Assembly has on a number of occasions called upon all states to cooperate with each other in the investigation and prosecution of crimes against humanity (including genocide) and war crimes. *See, for example,* U.N. G.A. Res. 2583 (XXIV) of 15 December 1969 (drawing attention "to the special need for international action in order to ensure the prosecution and punishment of persons guilty of war crimes and crimes against humanity); UN G.A. Res.2712 (XXV) of 15 December 1970, para. 4 ("*calls upon* all States concerned to intensify their cooperation in the collection and exchange of information which will contribute to the detection, arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity"); U.N. G.A. Res. 2840 (XXVI) of 18 December 1971 (declaring that it was "*[f]irmly convinced* of the need for international co-operation in the thorough investigation of war crimes and crimes against humanity . . . and in bringing about the detection, arrest, extradition and punishment of all war criminals and persons guilty of crimes against humanity who have not yet been brought to trial or punished"); U.N. Declaration on the Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, U.N. G.A. Res. 3074 (XXVIII) of 3 December 1973 (listing a broad range of measures of cooperation). Indeed, the General Assembly has affirmed that "refusal by States to co-operate in particular in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law". U.N. G.A. Res. 2840 (XXVI) of 18 December 1971, para. 4. In addition, the states parties to the Rome Statute affirm in the Preamble that "the most serious crimes of international concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation."

[41] In addition to the express obligations in the Geneva Conventions to prosecute or extradite persons suspected of grave breaches of those conventions, Article 88 of Protocol I (Mutual assistance in criminal matters) provides:

> "1. 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.
> 2. Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1 of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.
> 3. The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceeding 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 legal assistance in criminal matters."

Thus, the absolute obligations to prosecute or extradite persons suspected of grave breaches in the Geneva Conventions override any less stringent obligations in Protocol I.

[42] Article 9 of the Convention against Torture provides:

> "1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4 [prohibiting torture, attempted torture, complicity in torture and participation in torture], including the supply

part of a broader, but still emerging and fragmentary system of bilateral and multilateral commitments to cooperate with other states in the investigation and prosecution of ordinary crimes and crimes under national law of international concern.

E. Lack of cooperation in the foreign state

Despite these extensive obligations of states to cooperate with each other, the courts and other authorities in the foreign state may sometimes be unwilling to cooperate for a variety of non-legal reasons, such as a restrictive view of sovereignty, unfamiliarity with international law or state-to-state cooperation, lack of independence or implication in the crimes. Such problems may arise not only in the territorial state, but also in other states where evidence is located, such as states which contributed personnel to a United Nations peace-keeping operation or another multinational operation in the territorial state.

There are a variety of solutions to this problem which have been used by national courts and by the Yugoslavia and Rwanda Tribunals. For example, given the usual scale of the crimes and the number of the victims, alternative sources of evidence are often available for many of the crimes. For example, although the Spanish investigating judge in the *Pinochet* case was not able to obtain cooperation in the Argentine and Chilean cases from the executive authorities in the territorial states, he was able to obtain voluminous evidence from official truth commissions in both states, as well as the testimony of hundreds of victims, information from police and prosecutors in other states conducting investigations of the crimes and information from certain non-governmental organizations. To the extent that executive authorities in the foreign state refuse to cooperate, it may be possible, as in the *Pinochet* case, for the investigators to obtain cooperation from judicial authorities in that state. In addition, persistence by the authorities of the forum state and diplomatic pressure to cooperate by other states may encourage cooperation. Such persistence by the Yugoslavia and Rwanda Tribunals has led to increased cooperation by both territorial states and states where evidence is located. External pressure also led to cooperation by Chile in an investigation in its territory by Federal Bureau of Investigation investigators of the murder in Washington, D.C. of Orlando Letelier and Ronni Moffit.

Similarly, the London Metropolitan Police, which do not have a specialized unit to investigate crimes under international law committed since the Second World War, have relied heavily on experienced non-governmental organizations such as Redress and the Medical Foundation for the Care of Victims of Torture. One or both have helped them to obtain the names and addresses of witnesses willing to testify and to contact witnesses abroad, provided impartial background information on matters ranging from the political context to cultural or language issues, acted as liaison between the authorities and community groups in the territorial state, assisted in obtaining qualified translators and interpreters, identified appropriate experts and obtained expert legal opinions on questions of evidence and international and foreign law. They have also provided moral support and other assistance and other support to victims, witnesses and groups who have provided information. Redress has explained the unfamiliar legal procedures in the United Kingdom to victims and witnesses and kept them informed of

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of all evidence at their disposal necessary for the proceedings.
2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them."

developments in cases.[43] National victims groups in Chile and in Chad have performed similar functions in the *Pinochet* and *Habré* cases.

F. Problems associated with witnesses

There are several types of problems associated with witnesses, both those willing to cooperate and those who are not. These problems include immunities, privileges, perjury and ensuring a fair trial for the accused. However, each of these difficulties can usually be overcome.

Of course, it goes without saying that trials for persons accused of the worst possible crimes must be conducted with the greatest regard for the rights of the accused, not only because the opprobrium associated with the crimes will arouse passions in the press and the public which may make it difficult for the accused to obtain counsel and to be treated consistently with the right to be presumed innocent, but also because the legitimacy and acceptance of any verdict, whether a conviction or an acquittal, depends on the perception as well as the reality of a fair trial before an independent and impartial court. National courts will have to take effective steps, as they have in recent trials based on universal jurisdiction to ensure that the accused, in the same manner as the prosecution and victims, is able to obtain witnesses. The drafters of the Convention against Torture were well aware of this obligation when they decided to reinforce existing guarantees in international instruments, such as in Article 14 (3) (e) of the International Covenant on Civil and Political Rights (ICCPR), "[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him[.]" For example, Article 7 (2) of the Convention against Torture requires that in cases of persons suspected of torture the prosecution

> "shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1."[44]

[43] A Steering Committee appointed by the United Kingdom Home Office to conduct a review of extraterritorial jurisdiction with a view to determining whether jurisdiction should be extended to include serious crimes, such as sex-tourism offences, by United Kingdom nationals overseas recognized the vital role which non-governmental organizations played in obtaining evidence, particularly those organizations which work with victims in the places where crimes occurred. Home Office Review of Extra-Territorial Jurisdiction, Steering Committee Report 28-9 (July 1996).

[44] Convention against Torture, Art. 7 (2). According to the leading commentary on the Convention against Torture,

> "This means that the normal procedures relating to serious offences as well as the normal standards of evidence shall be be applied. It is specifically indicated in the second sentence of paragraph 2 that the standards of evidence shall in no be less stringent than those applicable in the cases referred to in article 5, paragraph 1. The lack of evidence may frequently be a serious obstacle to bringing proceedings in a country other than that in which the torture took place. It may be difficult to call witnesses and collect other evidence, in particular where the State in which the offences were committed is not willing to co-operate in investigating the case. The

amnesty international

UNIVERSAL JURISDICTION:

The duty of states to enact and implement legislation

Chapter Fourteen

(Overcoming obstacles to implementing universal jurisdiction)

"I recommend that the Security Council: . . . Urge Member States to adopt national legislation for the prosecution of individuals responsible for genocide, crimes against humanity and war crimes. Member States should initiate prosecution of persons under their authority or on their territory for grave breaches of international humanitarian law on the basis of the principle of universal jurisdiction and report thereon to the Security Council."

Report of the UN Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, U.N. Doc. S/1999/957, 8 September 1999

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UNIVERSAL JURISDICTION:
The duty to enact and enforce jurisdiction - Chapter Fourteen (Overcoming obstacles to implementing universal jurisdiction)

As discussed below, there are a number of different types of legal, practical and political obstacles to the exercise of universal jurisdiction. Most states still have not enacted any legislation permitting their courts to exercise universal jurisdiction over war crimes, crimes against humanity, genocide, torture, extrajudicial executions or "disappearances". All the universal legislation which does exist could be improved. Where legislation is in place, implementation is often hampered by inadequate knowledge of universal jurisdiction in the legal system, lack of political will or even political interference with the exercise of such jurisdiction.

Courts often face practical and legal problems in obtaining evidence or extradition of suspects. Some countries, contrary to international law, respect amnesties, pardons and similar measures of impunity or immunities of officials. However, as explained below, each of these obstacles can be overcome.

I. Absence of any legislation or inadequate legislation

Although almost two-thirds of all states have national legislation permitting their courts to exercise universal jurisdiction over certain conduct committed abroad amounting to one or more of the following crimes: war crimes, crimes against humanity, genocide, torture, extrajudicial executions or "disappearances". However, few of these states have legislation covering all of these crimes. In every state where such provisions do exist, they fall short in certain respects, thus posing the danger that persons responsible for the worst crimes in the world could travel to or even reside in those states with complete impunity. It is beyond the scope of this paper to do a comprehensive survey of the defects in the legislation providing for universal jurisdiction. The universal jurisdiction database is to maintain and update information on such legislation and Amnesty International hopes to be able to provide detailed recommendations over the coming years to particular countries for strengthening their legislation. What follows in this section are simply some examples of the types of problems with the approaches of states which have attempted to fulfill their responsibilities under international law (in contrast to those which have no legislation at all), but still need to do more to ensure that their legislation does not inadvertently lead to impunity. Recommendations for action are included in Chapter Fifteen, which are based in part on the organization's *14 principles on the effective exercise of universal jurisdiction*, May 1999 (AI Index: OR 53/01/99).

A. Failure to define the crime or the punishment in national law

One of the most common problems in many states, whether they follow a monist or a dualism approach to international law,[1] has been the failure to define crimes under international law as crimes in the national criminal code and to specify the punishments applicable under national law.

1. Problems with three legislative models

These problems are particularly an issue in states which have followed the legislative models which provide national courts with jurisdiction generally over offences defined in treaties or over offences which treaties require states to investigate and punish. They are also a problem in those states with legislation giving courts jurisdiction over crimes under customary international law or defined under general principles of law. However, these problems also apply to legislation expressly providing courts with jurisdiction over specific crimes defined in treaties or customary law.

Many national courts are willing to give direct effect in *civil* litigation to international law. However, since the trials in military courts after the Second World War came to an end, national courts appear now to be less willing to do so in *criminal* cases, even in jurisdictions adhering to a monist view of international law, except to the extent that international law prohibits the national court from acting. Courts are concerned that, without precise definitions in the national criminal code of the crimes and punishments, prosecutions would be inconsistent with the fundamental principle of legality (*nullum crimen, nulla poena sine lege*).[2] To some extent, this is surprising since the International Criminal Tribunal for the former Yugoslavia (Yugoslavia Tribunal) and the International Criminal Tribunal for Rwanda (Rwanda Tribunal) have been able to prosecute effectively on the basis of crimes as defined under customary international law and generally in a manner which has been consistent with due process of law, although with respect to sentencing they take into account the general practice regarding prison sentences in the national courts of the former Yugoslavia and Rwanda.[3] To a great extent, the problems with the three models mentioned above have been avoided in states which have enacted Geneva Conventions Acts, including those which have amended them to include grave breaches of Protocol I and other violations of international humanitarian law. These acts often annex in schedules the texts of the provisions imposing criminal responsibility in these treaties (or the texts of the entire treaty) and specify the punishments to be applied.

[1] See the introduction to Chapter One for the distinction between these two approaches.

[2] Menno T. Kamminga, *The Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, in* International Law Association, *Report of the Sixty-Eighth Conference held at Taipei, Taiwan, Republic of China, 24-30 May 1998*, 563, 569 (London 1998).

[3] Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 24 (1); Statute of the International Criminal Tribunal for Rwanda, Article 23 (1).

In addition, Article 7 (3) requires that

> "[a]ny person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings."[45]

It may be difficult for a national prosecutor in some circumstances to locate witnesses in another state. However, as in all the prosecutions based on universal jurisdiction so far, the prosecutor will be able to rely on victims' groups, either in the territorial state, other states or in the state where the court is located to assist in locating witnesses. It has been claimed that it is too costly to transport witnesses from the territorial state to the state exercising universal jurisdiction, but with the increasing amount of transnational criminal and civil litigation in all types of cases, this is increasingly a cost which must be incurred in the ordinary course of many cases. As Lawrence Collins, Q.C., counsel for the Republic of Chile before the House of Lords in the *Pinochet* case, observed at a panel of the International Law Association on transnational litigation, there has been an "explosion" of such litigation in the last two decades of the 20th century.[46]

Indeed, forum states have been willing to transport witnesses to testify in criminal cases based on universal jurisdiction. For example, Belgium and Switzerland have transported witnesses from Rwanda so that they could testify at trials of persons accused of committing crimes in that country.[47]

As an alternative to transporting witnesses to the forum state, such costs, as well as fears for security, can be minimized by the use of video-conferencing facilities in the territorial state or in a neighbouring state. As in ordinary organized crime cases, witnesses predisposed to cooperate may need protection. In such cases, governments as a matter of course will provide security, relocate witnesses and their families and, if necessary, provide them with new identities. They should do no less in the case of far more serious crimes. Similarly, if witnesses are not willing to cooperate by travelling to the forum state, they can be encouraged to do so by

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> second sentence makes it clear, however, that although the principle of universal jurisdiction has been regarded as an essential element in making the Convention an effective instrument, there has been no intention to have the alleged offenders prosecuted or convicted on the basis of insufficient or inadequate evidence."

J. Herman Burger & Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 138 (Dordrecht/Boston/New York: Martinus Nijhoff Publishers 1988).

[45] Convention against Torture, Art. 7 (3).

[46] Lawrence Collins, Q.C., Partner, Herbert Smith, London, remarks at the panel, "Globalisation of Civil Disputes", 28 July 2000, International Law Association, 69th Conference, London.

[47] Over 70 witnesses are reported to have been flown to Brussels for a trial of four Rwandans accused of war crimes that opened in April 2001. Approximately 60 witnesses, including some flown in from Rwanda, plus experts, testified in the trial of Fulgence Niyonteze in Lausanne in 1999. *Fati Mansour, La Justice militaire confirme la condemnation d'un notable rwandais, Le Temps, 28 avril 2001.*

providing testimony through video-conferencing,[48] or, if necessary, compelled to provide testimony through such facilities, subject to appropriate due process guarantees. It may be difficult to locate experienced and qualified translators and interpreters. Nevertheless, to some extent, expatriates from the territorial state may be able to assist in locating such persons or in doing some of the translation and interpretation themselves, subject to careful revision or monitoring. Courts will need to be sensitive to cultural differences in assessing eye-witness testimony by persons from other societies, but courts trying such cases appear to have made serious efforts to address this issue.[49]

Another way that some of these difficulties can be surmounted, if some of the authorities in the territorial state, such as investigating judges in Chile in the *Pinochet* case, are willing to help or there is access to the territorial state where the government has collapsed, but a peace-keeping force is present in the territorial state, is for the forum state to send the prosecutor or investigating judge to the state. A ***Belgian** juge d'instruction* investigating crimes in Rwanda went on three visits to that country and one to Ghana and Togo. Before the ***Swiss*** trial of Fulgence Niyonteze for war crimes, the court visited Rwanda to interview witnesses unable or unwilling to appear in Switzerland.[50] In some cases, the territorial state may even permit part of the trial to take place in its territory, as in the *Sawoniuk* case where the

[48] Such procedures are expressly authorized for international criminal courts. Article 69 (2) of the Rome Statute provides:

> "The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused."

Article 68 (2) permits the Chambers of the Court, "to protect victims and witnesses or an accused", to "allow the presentation of evidence by electronic or other special means".

Rule 71 *bis* of the Yugoslavia Rules states: "At the request of either party, a Trial Chamber may, in the interests of justice, order that testimony be received via video-conference link." UN Doc. IT/32/Rev.17, *adopted* 17 November 1999. The Yugoslavia Tribunal has authorized the presentation of evidence through video-conferencing facilities. The Trial Chamber has expressly rejected a challenge to the presentation of evidence through video-conferencing facilities, finding that it did not violate the right of the accused in that case to confront the witness against him. *Prosecutor v. Delali*•, Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference, Case No. IT-96-21-T (Trial Chamber, 28 May 1997), para. 14.

[49] See the description of the evaluation of such testimony by a Swiss military court trying a case involving war crimes in Rwanda. *N. [Fulgence Niyonteze], Le Tribunal militaire de cassation, jugement, 27 mai, 14-32.*

[50] Fati Mansour, *Le maire rwandais jugé à Lausanne a bien commis des crimes de guerre, Le Temps,* 16 September 1999; Kamminga, *Final ILA Report*, n. 34, 24, 28; Damien Vandermeersch, *La répression en droit belge des crimes de droit international*, 68 Int' Rev. Pen. L. 1093, 1121-1122 (1997).

judge and jury in a ***United Kingdom*** court sat for several days in Belarus at the sites of massacres during the Second World War.[51]

As described above in this sub-section, in many cases, non-governmental organizations and associations of victims will be able to provide the court with extensive assistance in locating witnesses, encouraging them to testify and providing necessary support.

If an uncooperative witness who is in the forum state asserts an immunity of his or her own state, that national immunity should not be recognized by the forum state in a trial involving crimes under international law (see discussion below of immunities in Chapter Fourteen, Section VIII). In addition, the territorial state can be urged to waive an immunity such as diplomatic immunity in the rare case when the witness is an ambassador accredited to the forum state or a head of state. Most countries recognize some privileges with regard to certain communications and documents, such as the confidentiality of lawyer-client communications concerning past actions and memoranda on legal strategy. However, to the extent that the witness asserts a privilege under his or her national law, the scope of that privilege, when crimes under international law are involved, should be measured in accordance with international standards. States should build on the work which has been done by the Preparatory Commission for the International Criminal Court with respect to privileges and develop international standards to govern privileges.[52] If perjury or other offences against the administration of justice by a witness are discovered while the witness is in the forum state, it will normally be possible for the judicial system to take effective action. If the offence is discovered after the departure of the witness, however, the ability of the forum state to take effective measures will be limited and largely depend on the existence of bilateral or multilateral extradition agreements. States should build on the work which has been done by the Preparatory Commission in drafting rules concerning offences against the administration of justice to improve the existing arrangements among states.[53]

G. Difficulties concerning documentary and physical evidence

There are a number of problems associated with documentary and physical evidence. These include authentication of documents, transport of physical evidence out of the state, excavation of graves, claims of national security and imbalances in power to obtain evidence between the prosecution and defence. Each of these problems can be surmounted in individual cases. However, it would be useful for states to adopt a multilateral treaty open to all states which would facilitate state cooperation with respect to mutual legal assistance in the investigation and prosecution of crimes under international law.

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[51] *See National Decisions: UK: The* Sawoniuk *case*, 2 Y.B. Hum. L. (1999) (forthcoming). Military courts of the United Kingdom had always been able to sit overseas. A Scottish civilian court sat in the Netherlands to conduct the Lockerbie trial, although it was exercising territorial jurisdiction, based on a crime committed on an aircraft over Scotland, and the circumstances are probably unique.

[52] Report of the Preparatory Commission for the International Criminal Court, Addendum: Finalized Draft of the Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/INF/3/Add.1, Rule 73 (Privileged communications and information).

[53] *Ibid.*, Rules 162 to 172 (Offences and misconduct against the Court).

! ***Authentication of documents.*** In most cases where the investigating or prosecuting state and the requested state have a mutual legal assistance treaty or agreement, authentication of a document should pose few problems.

! ***Restrictions on export of items.*** Most states will have legal or regulatory prohibitions or limitations on the export of items such as weapons, military vehicles, bodies and chemicals, all of which could be crucial evidence in a criminal case. However, the experience of the Yugoslavia and Rwanda Tribunals, as well as of national courts in transnational crimes, such as drug trafficking, have shown that these problems can usually be resolved.

! ***Excavation of grave sites and other searches.*** In many states, it will not be possible to conduct excavation of grave sites and forensic examinations of bodies or searches of buildings without local permission. In cases where permission is granted, it may be possible to do so only by using local police or acting under their supervision. Nevertheless, these difficulties should not be overestimated. For example, even when the executive authorities in a state may be uncooperative, judicial authorities may be more willing to cooperate. In addition, alternative methods of investigation may be available, particularly in large-scale crimes. For example, satellite photos may be used to confirm that the site of an alleged massacre was dug up shortly after the event and recovered in a manner consistent with the account of a witness. However, states will need to improve the existing framework of mutual legal assistance with respect to crimes under international law.

! ***National security evidence.*** Given the nature of the crimes, they will often involve matters of military strategy and tactics which will be related to national security. Nevertheless, national courts have been able to devise systems for trying cases involving the most sensitive information related to national security, such as espionage, to protect such information. They have even been able to do so with regard to persons who are suspected of carrying out their crimes in more than one state. Similarly, international courts have been able to do so as well, as in the *Blaskić* case in the Yugoslavia Tribunal, and under Article 72 of the Rome Statute. To the extent that a territorial state (or other state where evidence is located) is cooperative with the forum state, it should be possible to reach an arrangement that fulfils the international duty to bring those responsible for crimes under international law to justice while taking account of legitimate national concerns regarding security; to the extent that the state where the evidence is located is uncooperative, the issue of national security will be no different from dozens of other problems.

! ***Imbalance in powers of prosecution and defence.*** In some cases, the prosecution will have greater resources and influence with authorities in other states than the defence with respect to travel, experts and cooperation, especially in when the evidence is located in another state or in the hands of a transitional government. In other situations, particularly with respect to evidence in the territorial state when the government is sympathetic to the

accused, it may well be more difficult for the prosecution than the defence to locate evidence. The prosecution will not necessarily have the same powers and influence as international prosecutors. Within the limits required by due process, courts may fashion remedies to address the lack of cooperation, such as drawing inferences or dropping certain charges.

VI. Absence or inadequacy of extradition agreements

There are many grounds in extradition agreements and legislation for requested states to refuse extradition.[54] Most of these grounds of refusal, including the prohibition of the extradition of nationals, double criminality requirements, advanced age, the political offence exception, *ne bis in idem*, statutes of limitation and general discretion, are not appropriate grounds when the crimes are crimes under international law which the requesting state is seeking to prosecute on behalf of the international community.[55] Other grounds for refusing extradition are factors which, as a general rule, should be considered by the courts (as opposed to the executive authorities) in the *requesting* - rather than the *requested* - state, such as fitness to stand trial. When these decisions, as in the *Pinochet* case, are left to *political officials* in the *requested state* to decide in secret on the basis of discretion, instead of the *courts* of the *requesting state*, in a fair and open process on the basis of legal criteria, the public perception of the fairness and integrity of the proceedings is undermined. In the absence of an international monitoring mechanism for extradition, a requested state should be able to refuse to extradite a person to a state which it considers would not be able to afford the suspect a fair trial or might impose the death penalty or other cruel, inhuman or degrading punishments. However, such decisions are best decided by a court, on the basis of law, rather than by a politician, on the basis of discretion.

VII. Amnesties and similar national measures of impunity

A number of states have given those responsible for war crimes, crimes against humanity, genocide, torture, extrajudicial executions and enforced disappearances impunity through amnesties, pardons and similar measures. However, national amnesties, pardons and similar national measures of impunity for the worst imaginable crimes not only have no place in an

[54] For a survey of these grounds for refusal, see Amnesty International, *The international criminal court: Making the right choices - Part III*, *supra*, n. 36, Section IV.B.2. *See also* Broomhall, *supra*, n. 36, 414-415 (making recommendations to remedy flaws in the existing legal framework for extradition).

[55] The prohibition against the extradition of nationals (as opposed to foreigners) and the requirement of double criminality are rooted in concerns about the application of foreign national law, which may be different from national law and embody different values. However, this concern is irrelevant when the requesting state is exercising jurisdiction over crimes under international law. National courts have generally rejected claims that advanced age in and of itself is an appropriate ground for not trying a person suspected of crimes under international law. The political offence exception does not apply to crimes under international law. The principle of *ne bis in idem* is limited to a prohibition of a second trial for the same conduct in the same jurisdiction. Statutes of limitation are not permissible for genocide, crimes against humanity, war crimes and certain other crimes under international law. It would defeat the goals of international justice if national authorities could, in their discretion, shield persons in their territory suspected of crimes under international law from international justice.

international system of justice, but also are prohibited under international law.[56] They are also inconsistent with the duty to bring to justice those responsible for such violations recognized in the Preamble to the Rome Statute.[57] They deny the rights of victims to justice.[58] Therefore, as explained in more detail below, such steps cannot prevent the courts of another state or an international criminal court from investigating and prosecuting persons suspected of such crimes. Indeed, for such reasons, Amnesty International has consistently opposed, without exception, amnesties, pardons and similar measures of impunity that prevent the emergence of the truth, a final judicial determination of guilt or innocence and satisfactory reparations to victims and their families.[59]

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[56] See generally Kai Ambos, *Impunity and International Criminal Law: A Case Study on Colombia, Peru, Bolivia, Chile and Argentina*, 18 Hum. Rts L.J. 1, 7 (1997); Douglass Cassel, *La Lucha Contra la Impunidad ante el Sistema Interamericano de Derechos Humanos, in* Martin Abregú & Juan Mendez, eds, *Libro Homenaje a Emilio Mignone* (San José, Costa Rica: Inter-American Institute of Human Rights 2001) (forthcoming); _____, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 L. & Cont. Prob. 191 (1996) [page proofs]; Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2537 (1991); Naomi Roht-Arriaza, *Combating Impunity: Some Thoughts on the Way Forward*, 59 L. & Cont. Prob. 87 (1996) [page proofs]; Naomi Roht-Arriaza, ed., *Impunity and Human Rights in International Law* (Oxford: Oxford University Press 1995); Simma & Paulus, *supra*, n.8, 315. For a minority dissenting view, see Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 Com. Int'l L. J. 507 (1999); _____, *Swapping Amnesty for Peace: Was there a Duty to Prosecute International Crimes in Haiti?*, 31 Tex. Int'l L. J. (1996).

[57] The states parties to the Rome Statute affirm "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation", determine "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes" and recall "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". Rome Statute, Preamble, paras 4 to 6.

[58] See UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34 of 29 November 1985, Principle 4 ("Victims . . . are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered."). *See, also*, Articles 25 and 18 of the Joinet Principles. Article 25 (Restrictions and Other Measures Relating to Amnesty) of those principles provides that "Even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds: (a) The perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations referred to in principle 18[.]" The first paragraph of Principle 18 (Duties of States with Regard to the Administration of Justice) recalls the obligation of states to bring to justice those responsible for such violations: "Impunity arises from a failure by States to meet their obligations to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take steps to prevent any recurrence of such violations." In a similar vein, the Van Boven-Bassiouni Principles spell out the duty to prosecute (Principle 4) and the right of victims to "[j]udicial or administrative sanctions against persons responsible for the violations" (Principle 25 (f)), without any suggestion that an amnesty, pardon or similar measure of impunity would be permissible.

[59] *See, for example, Chile: Legal brief on the incompatibility of Chilean Decree Law N° 2191 of 1978 with international law - A document published jointly by Amnesty International and the International Commission of Jurists*, January 2001 (AI Index: AMR 22/002/01); *Sierra Leone: Ending*

A. Rejection of amnesties at the international level

Amnesties, pardons and similar measures of impunity have been rejected at the international level by the UN Secretary-General, the UN Security Council, the UN General Assembly, UN High Commissioner for Human Rights, the UN Commission on Human Rights, the Yugoslavia Tribunal, the Committee against Torture and the Human Rights Committee. In this regard, they have followed the lead of the 1993 World Conference on Human Rights, which stated that "[s]tates should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law."[60]

1. The rejection of amnesties in Sierra Leone

The most striking example of the rejection of amnesties for crimes under international law at the international level is illustrated by the recent case of Sierra Leone. There, the ***UN Secretary-General*** concluded that "[t]he experience of Sierra Leone has confirmed that such amnesties do not bring about lasting peace and reconciliation." In that situation, a peace agreement in July 1999 had given an amnesty for crimes under international law.[61] Shortly afterwards, on 30 July 1999, the Secretary-General commented on the amnesty provision of the peace agreement:

> "The agreement provides for the pardon of Corporal Foday Sankoh and a complete amnesty for any crimes committed by members of the fighting forces during the conflict

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impunity - an opportunity not to be missed,, July 2000 (AI Index: AFR 51/60/00); *Sierra Leone: Recommendations on the draft Statute of the Special Court*, November 2000 (AI Index: AFR 51/83/00); *Memorandum to the Select Committee on Justice [of South Africa]: Comments and Recommendations by Amnesty International on Promotion of National Unity and Reconciliation Bill*, 13 January 1995; *South Africa: No impunity for perpetrators of human rights abuses*, 29 July 1999 (AI Index: AFR 53/1099); *United Kingdom: The* Pinochet *case - universal jurisdiction and the absence of immunity for crimes against humanity*, January 1999 (AI Index: EUR 45/01/99).

[60] World Conference on Human Rights, Vienna Declaration and Programme of Action, Vienna, 14-25 June 1993, U.N. Doc. A/CONF.157/23, 12 July 1993, para. 60.

[61] Article IX (PARDON AND AMNESTY) provided:

> "1. In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon.
>
> 2. After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.
>
> 3. To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality."

Sierra Leone peace accord, U.N. Doc. S/1999/777.

from March 1991 up until the date of the signing of the agreement .... I instructed my Special Representative to sign the agreement with the explicit proviso that the United Nations holds the understanding that the amnesty and pardon in article IX of the agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law."[62]

The ***UN Security Council*** recalled the Secretary-General's 30 July 1999 statement in August 2000 when it provided for the establishment of an international criminal tribunal for Sierra Leone, thus implicitly approving the action taken by the Secretary-General in disassociating the UN from the amnesty provisions.[63]

The ***UN High Commissioner for Human Rights*** has stated in this context that she is

"particularly concerned ... about the issue of amnesty laws. I stress that certain gross violations of human rights and international humanitarian law should not be subject to amnesties. When the United Nations faced the question of signing the Sierra Leone

[62] Seventh Report of the Secretary-General on the United Nations, Observer Mission in Sierra Leone, U.N. Doc. S/1999/836, 30 July 1999, para. 7. Thus, the Secretary-General implicitly rejected the approach of the UN Model Treaty on Extradition, which requires refusal of extradition if the person whose extradition is sought is immune from prosecution or punishment because of an amnesty, at least to the extent that the Model Treaty applies to crimes under international law. Indeed, as a footnote to Article 3 (e) indicates, states were concerned about the scope of this provision, and it suggests that "[s]ome countries may wish to make this an optional ground for refusal".

In the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, 4 October 2000, para. 22 (footnote referring to Article 6 (5) of Protocol II omitted), the Secretary-General recalled that,

"[w]hile recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law."

In paragraph 24, he stated that

"[i]n the negotiations on the Statute of the Special Court, the Government of Sierra Leone concurred with the position of the United Nations and agreed to the inclusion of an amnesty clause which would read as follows:

'An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 [crimes against humanity, violations of common Article 3 of the Geneva Conventions and of Additional Protocol II and other serious violations of international humanitarian law] of the present Statute shall not be a bar to prosecution.'

With the denial of legal effect to the amnesty granted at Lomé, to the extent of its illegality under international law, the obstacle to the determination of a beginning date of the temporal jurisdiction of the Court within the pre-Lomé period has been removed."

[63] The Security Council recalled that "the Special Representative of the Secretary-General appended to his signature of the Lomé Agreement a statement that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law...". U.N. S.C. Res. 1315 (2000).

Peace Agreement to end atrocities in that country, the UN specified that the amnesty and pardon provisions in Article IX of the agreement would not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law."[64]

The ***UN Commission on Human Rights*** agreed with the approach of the Secretary-General to the amnesty provisions in the Sierra Leone peace agreement and stated that it:

> "[n]otes that the Special Representative of the Secretary-General entered a reservation, attached to his signature of the Lomé Agreement, that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law, and affirms that all persons who commit or authorize serious violations of human rights or international humanitarian law at any time are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice[.]"[65]

2. The rejection of amnesties in other situations

The ***UN General Assembly*** has opposed legislative and other measures of impunity with regard to crimes against humanity and war crimes.[66]

National amnesties and pardons which prevent the emergence of the truth and accountability before the law would be a ground for the International Criminal Court to exercise its concurrent jurisdiction over crimes under Article 17 (2) (a) of the ***Rome Statute.***[67] That article provides that in deciding whether a state is unwilling to exercise jurisdiction, the Court should determine whether "[t]he proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court".

A Trial Chamber of the ***Yugoslavia Tribunal*** in the *Furundzija* case stated:

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[64] Mary Robinson, High Commissioner for Human Rights, *Forward, in The Princeton Principles on Universal Jurisdiction* 17 (Princeton, New Jersey: Program in Law and Public Affairs, Princeton University 2001).

[65] U.N. Doc. E/CN.4/RES/2000/24 of 18 April 2000, para. 2.

[66] Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, GA Res. 3074 (XXVIII) (1973), para. 8 ("States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.").

[67] As Kamminga has observed, "In the terms of Article 17 of the ICC Statute such amnesties [for political killings, torture and forced disappearances] could be an indication of 'unwillingness or inability of the State genuinely to prosecute'; they would therefore not prevent the ICC from declaring a case inadmissible." *Final ILA Report, supra,* n. 34, 15.

> "It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition on torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, . . . would not be accorded international legal recognition."[68]

The ***Human Rights Committee*** has expressed its concern about the incompatibility of amnesties in Argentina, El Salvador, France, Peru and Uruguay with the obligations of states parties under the International Covenant on Civil and Political Rights.[69]

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[68] *Prosecutor v. Furundzija*, Judgment, Case No. IT-95-17/1-T 10 (Trial Chamber 10 December 1998), para. 155.

[69] The Committee has expressed its concern about various national amnesties for grave human rights violations. For example, it noted its "deep concern" over ***Uruguay's*** Expiry Law, adopted in a popular referendum, preventing prosecution of police and military officials and requiring that pending prosecutions be dismissed, and it recommended that the law be amended to permit victims to have an effective remedy for human rights violations. Comments of the Human Rights Committee, Uruguay, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, U.N. Doc. CCPR/C/79/Add.19, 5 May 1993; Views of 19 July, 1994, Hugo Rodriguez, Communication No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988 (Uruguay). *See also* General Comment No. 20, U.N. Doc. No. CCPR/C/21/Rev.1./Add.3, 7 April 1992, para. 4, concerning torture.

In addition to amnesties in Uruguay, it has criticized amnesties in ***Argentina:*** Observations of the Human Rights Committee - Argentina, U.N. Doc. CCPR/C/79/Add.46 (1995), *reprinted in* U.N. Doc. A/50/40 (1995), para. 146 (" [T]he compromises made by the State party with respect to its authoritarian past, especially the Law of Due Obedience and Law of *Punto Final* and the presidential pardon of top military personnel, are inconsistent with the requirements of the Covenant."), para. 153 ("The Committee reiterates its concern that Act 23,521 (Law of Due Obedience) and Act 23,492 (Law of Punto Final) deny effective remedy to victims of human rights violations, in violation of article 2, paragraphs 2 and 3, and article 9, paragraph 5, of the Covenant. The Committee is concerned that amnesties and pardons have impeded investigations into allegations of crimes committed by the armed forces and agents of national security services and have been applied even in cases where there exists significant evidence of such gross human rights violations as unlawful disappearances and detention of persons, including children. The Committee expresses concern that pardons and general amnesties may promote an atmosphere of impunity for perpetrators of human rights violations belonging to the security forces. Respect for human rights may be weakened by impunity for perpetrators of human rights violations."); ***Chile:*** Concluding observations of the Human Rights Committee - Chile, U.N. Doc. CCPR/C/79/Add.104 (1999), para. 7 ("The Amnesty Decree Law, under which persons who committed offences between 11 September 1973 and 10 March 1978 are granted amnesty, prevents the State party from complying with its obligation under article 2, paragraph 3, to ensure an effective remedy to anyone whose rights and freedoms under the Covenant have been violated. The Committee reiterates the view expressed in its General Comment 20, that amnesty laws covering human rights violations are generally incompatible with the duty of the State party to investigate human rights violations, to guarantee freedom from such violations within its jurisdiction and to ensure that similar violations do not occur in the future."); ***El Salvador:*** Human Rights Committee - El Salvador, U.N. Doc. CCPR/C/79/Add.34, 21 September 1994, *reprinted in* U.N. Doc. A/49/40 (1994), para. 215 ("The Committee expresses grave concern over the adoption of the Amnesty Law, which prevents relevant investigation and punishment of perpetrators of past human rights violations and consequently precludes relevant compensation. It also seriously undermines efforts to re-establish respect for human rights in El Salvador and to prevent a recurrence of the massive human rights violations experienced in

The ***Committee against Torture*** has repeatedly criticized amnesties and recommended that they not apply to torture (see discussion below in Chapter Fourteen, Section VII.D).

B. Rejection at the regional level

The ***Inter-American Court of Human Rights*** has found that amnesties in Honduras and Peru for crimes under international law violate the American Convention on Human Rights.[70] In the case of the Peruvian amnesty, the Court stated:

> "In the Court's judgment, the Amnesty Law enacted by Peru precludes the obligation to investigate and prevents access to justice. For these reasons, Peru's argument that

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the past. Furthermore, failure to exclude violators from service in the Government, particularly in the military, the National Police and the judiciary, will seriously undermine the transition to peace and democracy."); ***France:*** Observations of the Human Rights Committee - France, U.N. Doc. CCPR/C/79/Add.80, 4 August 1997, para. 13 ("The Committee is obliged to observe that the Amnesty Acts of November 1988 and January 1990 for New Caledonia are incompatible with the obligation of France to investigate alleged violations of human rights."); ***Haiti:*** Comments by the Human Rights Committee - Haiti, U.N. Doc. CCPR/C/79/Add.49, 3 October 1995, *reprinted in* U.N. Doc. A/50/40 (1995), para. 230 ("The Committee expresses its concern about the effects of the Amnesty Act, agreed upon during the process which led to the return of the elected Government of Haiti. It is concerned that, despite the limitation of its scope to political crimes committed in connection with the coup d'état or during the past regime, the Amnesty Act might impede investigations into allegations of human rights violations, such as summary and extrajudicial executions, disappearances, torture and arbitrary arrests, rape and sexual assault, committed by the armed forces and agents of national security services. In this connection, the Committee wishes to point out that an amnesty in wide terms may promote an atmosphere of impunity for perpetrators of human rights violations and undermine efforts to re-establish respect for human rights in Haiti and to prevent a recurrence of the massive human rights violations experienced in the past."); ***Lebanon:*** Concluding observations of the Human Rights Committee - Lebanaon, U.N. Doc. CCPR/C/79/Add.78, 1 April 1997, para. 12 ("Such a sweeping amnesty may prevent the appropriate investigation and punishment of the perpetrators of past human rights violations, undermine efforts to establish respect for human rights, and constitute an impediment to efforts undertaken to consolidate democracy."); ***Peru:*** Preliminary observations of the Human Rights Committee - Peru, U.N. Doc. CCPR/C/79/Add.67, 25 July 1996, para. 20; Concluding observations by the Human Rights Committee: Peru, U.N. Doc. CCPR/CO/70/PER, 15 November 2000, para. 9 ("The Committee deplores the fact that its recommendations on the 1995 amnesty laws have not been followed and reiterates that these laws are an obstacle to the investigation and punishment of the persons responsible for offences committed in the past, contrary to article 2 of the Covenant. The Committee is deeply concerned about recent information stating that the Government is sponsoring a new general amnesty act as a prerequisite for the holding of elections. The Committee again recommends that the State party should review and repeal the 1995 amnesty laws, which help create an atmosphere of impunity. The Committee urges the State party to refrain from adopting a new amnesty act.").

[70] *Barrios Altos* Case, Inter-Amer. Ct. Hum. Rts, 20 March 2001 (Reparations)(not yet officially reported); *Loayza Tamayo* Case, Inter-Amer. Ct. Hum. Rts (Ser. C), Case No. 42, 27 November 1998 (Reparations), paras 165-171; *Castillo Paez* Case, Inter-Amer. Ct. Hum. Rts (Ser. C), Case No. 43, 27 November 1998 (Reparations), paras 98-108; *Velásquez Rodriquez* Case, Inter-Am. Ct. Hum. Rts (Ser. C), No. 4 (1988) (judgment), para. 174 ("The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry our a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.").

it cannot comply with the duty to investigate the facts that gave rise to the present Case must be rejected."[71]

Similarly, the ***Inter-American Commission on Human Rights*** has found that have found that amnesties in Argentina, Chile, Colombia and Uruguay violate the Convention.[72] For example, in a case involving an amnesty by El Salvador, the Inter-American Commission, after reviewing its decisions on amnesties, stated:

> "The IACHR has repeatedly stated that the application of amnesty laws that prevent access to justice in cases of serious human rights violations renders ineffective the obligation of states parties to respect the rights and freedoms recognized in the Convention and to guarantee their full and free exercise to all persons subject to their jurisdiction, without discrimination of any kind, as established an Article 1(1) of the American Convention. In fact, such laws remove the most effective measure for enforcing human rights, i.e., the prosecution and punishment of the violators."[73]

C. Rejection at the national level

National legislation and courts have interpreted international law the same way. In particular, they have refused to recognize amnesties of foreign courts for crimes under international law. ***Allied Control Council Law No. 10*** provided that national amnesties for crimes against peace, war crimes and crimes against humanity could not bar prosecutions by the national military tribunals established by the Allies.[74] Indeed, the ***House of Lords*** permitted the Magistrate's Court to determine whether the extradition of the former President of Chile could proceed despite a national amnesty and a similar measure of impunity. A ***trial court in Argentina*** held that amnesties for crimes against humanity violated international law as incorporated in

[71] *Loayza Tamayo* Case, *supra*, n. 69, para. 168.

[72] Inter-American Commission on Human Rights has repeatedly found that national amnesties violated human rights, including: ***Argentina:*** Report No. 24/92, 82nd Sess., OEA/ser.L/V/II.82, Doc. 24 (2 October 1992);Report N° 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311 (Argentina), 2 October 1992; ***Chile:*** Report N° 36/96, Case 10.843, 15 October 1996, para. 50; *see also* Report N° 34/96, Cases 11.228, 11.229, 11.231 and 11282, October 15, 1996, para. 50; Report N° 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675 and 11.705, April 7, 1998, para. 42 ; ***Colombia:*** Third Report on the Human Rights Situation in Colombia, OAS Doc. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, 26 February 1999, para. 345; ***El Salvador:*** Report No. 26/92, 82nd Sess., OEA/ser.L/V/II.82, 24 September 1992; Report N° 136/99, Case 10.488 Ignacio Ellacuría S.J. et al., 22 December 1999, para. 200; Report N° 1/99, Case10.480 *Lucio Parada Cea et al.*, January 27 1999, para. 107; Report N° 26/92, case 10.287 (*Las Hojas massacre)*, 24 September 1992, para. 6; ***Uruguay:*** Report No. 29/92, 82nd Sess., OEA/ser.L/V/II.82, Doc. 25 (2 October 1992); Report N° 29, 1992.

[73] Report N° 136/99, Case 10.488, *Ignacio Ellacuría S.J. et al.*, 22 December 1999, para. 200 (footnote omitted).

[74] Article II (5) of Allied Control Council Law No. 10, *supra*, n. 5, provided that no "immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment" for crimes against peace, war crimes or crimes against humanity.

Argentine law.[75] A French investigating judge (*juge d'instruction*) "concluded that Chile's amnesty law had not deprived French courts of their jurisdiction to prosecute crimes committed against French citizens."[76] Another French judge has held that a Mauritanian amnesty which covered acts of torture had no legal effect in France and would not be recognized.[77] Some ***peace agreements*** have ruled out amnesties for violations of crimes under international law.[78]

D. Prohibition for specific crimes

As outlined below, this prohibition applies to war crimes, crimes against humanity, genocide, torture, extrajudicial executions, enforced disappearances and other grave violations of human rights.

War crimes. National amnesties and pardons which prevent the emergence of the truth and accountability for war crimes in international and non-international armed conflict are inconsistent with the duty to bring to justice those responsible for such crimes. Each state party to the Geneva Conventions of 1949 undertakes "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches" of the Conventions.[79] Each state party is also under an obligation to bring such persons to justice in its own courts, to extradite them to another state party willing and able to do so or to transfer them to an international criminal court.[80] These obligations are *absolute* and

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[75] *Simon and Del Cerro* Case, Order of 6 March 2001, Case No. 8686/2000, *Juzgado Nacional en lo Criminal y Correccional Federal No. 4, Buenos Aires.* The order has been appealed to the Supreme Court.

[76] Brigitte Stern, *International Decisions:* In re *Pinochet - Tribunal de grande instance (Paris),* 93 Am. J. Int'l L. 696, 699 (1999) (describing the rationale of the order in the case, which is not publicly available). However, in a recent case, a French court held that allegations of war crimes, including torture, involving a French general in Algeria could not be investigated because they were covered by a French amnesty law of 31 July 1968. *Fanck Johannès, Aussaresses : ouverture d'une enquête pour "apologie de crimes de guerre", Le Monde, 17 mai 2001.* This decision is likely to be appealed.

[77] *Ely Ould Dah, Ordonnance, Tribunal de grande instance de Montpellier, N° du parquet : 99/14445, N° Instruction : 4/99/48, 25 mai 2001, § 4* (for the text of this portion of the decision, see Chapter Ten, Section II).

[78] *See, for example,* General Framework Agreement fo Peace in Bosnia and Herzegovina, 14 December 1995, Annex 7, Art. VI, 35, Int. Leg. Mat. 75, 118 (1996) (Dayton/Paris Peace Agreement) ("Any returning refugee or displaced person charged with a crime, other than a serious violation of international humanitarian law . . . or a common crime unrelated to the conflict, shall upon return enjoy an amnesty.").

[79] First Geneva Convention, Art. 49, para. 1; Second Geneva Convention, Art. 50, para. 1; Third Geneva Convention, Art. 129, para. 1; Fourth Geneva Convention, Art. 146, para. 1.

[80] First Geneva Convention, Art. 49, para. 2; Second Geneva Convention, Art. 50, para. 2; Third Geneva Convention, Art. 129, para. 2; Fourth Geneva Convention, Art. 146, para. 2. The ICRC Commentary makes clear that the drafters of the Geneva Conventions envisaged that states could satisfy their duty to bring to justice those responsible for grave breaches by transferring suspects to an international criminal tribunal: "[T]here is nothing in the paragraph (First Geneva Convention, Art. 49, para. 2) to exclude the handing over of the accused to an international penal tribunal, the competence of which is recognized by the Contracting Parties. On this point the Diplomatic Conference declined expressly to take any decision which might hamper future developments of

no state may excuse another state from fulfilling them.[81] Moreover, states parties are required to repress *all* breaches of the Geneva Conventions, including those taking place in non-international armed conflict, not just grave breaches.[82] This is part of the fundamental undertaking by each state party in common Article 1 of the Geneva Conventions "to respect and to ensure respect for the present Convention in all circumstances". A national amnesty or pardon for breaches of the Conventions or the Protocols which are crimes under international law would violate this undertaking.[83]

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international law". ICRC, I *Commentary on the Geneva Conventions of 12 August 1949* (1952), p. 366.

[81] The common article provides: "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave] breaches". First Geneva Convention, Art. 51; Second Geneva Convention, Art. 52; Third Geneva Convention, Art. 131; Fourth Geneva Convention, Art. 148. The official commentary by the ICRC makes clear that this common provision removes any doubt that the duty to prosecute and punish the authors of grave breaches is "absolute". ICRC, I *Commentary on the Geneva Conventions of 12 August 1949*, 373 (1952).

[82] Under an article common to all four conventions, each state party is obliged to "take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches". First Geneva Convention, Art. 49, para. 3; Second Geneva Convention, Art. 50, para. 3; Third Geneva Convention, Art. 129, para. 3; Fourth Geneva Convention, Art. 146, para. 3. States are expected to enact legislation providing for punishment of such breaches, with appropriate penalties, to be imposed after judicial or administrative proceedings. ICRC, I *Commentary on the Geneva Conventions of 12 August 1949*, 368 (1952).

[83] Article 6 (5) of Protocol II provides that "[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained". However, as Amnesty International has repeatedly pointed out to negotiators of peace agreements, such as the one in Sierra Leone in 1999 (*see* Amnesty International, *Sierra Leone: Ending impunity - an opportunity not to be missed.*, July 2000 (AI Index: AFR 51/60/00)), it is clear that this provision was intended to apply to political crimes, such as treason, or ordinary crimes, but not to serious violations of humanitarian law.

Commentators subsequently have confirmed this interpretation. According to Naomi Roht-Arriaza, "the placement of the article at the end of a section on penal prosecutions and the language on internees and detainees suggests the drafters were primarily interested in reintegrating insurgents into national life". Roht-Arriaza, *Combating Impunity*, *supra*, n. 55, 91. Douglass Cassel has commented that "Article 6 (5) seeks merely to encourage amnesty for combat activities otherwise subject to prosecution as violations of the criminal laws of the states in which they take place. It is not meant to support amnesties for violations of international humanitarian law." Cassel, *Lessons from the Americas*, *supra*, n. 55, 212.

An authoritative interpretation by the ICRC communicated in 1995 to the Prosecutor of the Yugoslavia and Rwanda Tribunals in 1995 and reiterated on 15 April 1997 states:

> "Article 6 (5) of Protocol II is the only and very limited equivalent in the law of non-international armed conflict of what is known in the law of international armed conflict as 'combatant immunity', *i.e.*, the fact that a combatant may not be punished for acts of hostility, including killing enemy combatants, as long as he respected international humanitarian law, and that he has to be repatriated at the end of active hostilities. In non-international armed conflicts, no such principle exists, and those who fight may be punished, under national legislation, for the mere fact of having fought, even if they respected international humanitarian law. The 'travaux préparatoires' of 6 (5) indicate that this provision aims at encouraging amnesty, *i.e.*, a sort of release at the end of hostilities. It does not aim at an amnesty for those having violated international humanitarian law."

Letter from Dr. Toni Pfanner, Head of the Legal Division, ICRC Headquarters, Geneva, to Douglass Cassel, quoted

There is increasing recognition by scholars, intergovernmental organization experts and national courts that states have a duty to prosecute or extradite persons responsible for ***crimes against humanity.***[84]

Genocide. National amnesties and pardons which prevent the emergence of the truth and accountability for genocide are inconsistent with the duty to punish persons who have committed this crime. Every state party to the Genocide Convention undertakes "to prevent and to punish" genocide.[85] Article III of that convention provides that genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide "shall be punishable". Under Article V, states parties undertake to enact the necessary legislation, including effective penalties, for these crimes.[86] Article VI requires states parties to bring those responsible for genocide to justice themselves or to transfer them to an international criminal court.[87] There are no exceptions.

Torture. The Convention against Torture imposes an absolute duty on each state party when a person suspected of torture, attempt to torture, complicity in torture or participation in torture is found in its territory, if it does not extradite the suspect, to "submit the case to its competent authorities for the purpose of prosecution".[88] It does not provide for any exceptions to this absolute duty. The Committee against Torture has criticized amnesties in several countries, including ***Azerbaijan, Croatia, Kyrgyzstan*** and ***Peru,*** and recommended that they not apply

in *Lessons from the Americas, supra*, n. 55, 212.

The Inter-American Commission on Human Rights has also taken the position that Article 6 (5) of Protocol II does not permit amnesties for violations of international humanitarian law. Inter-Amer. Comm'n Hum. Rts, Third Report on the Human Rights Situation in Colombia, OAS Doc. OEA/Ser.L/V/II.102 Doct. 9 rev.1, 26 February 1999, para. 345.

[84] *See, for example,* M. Cherif Bassiouni, *Crimes against Humanity in International Law* 492, 500-501 (Dordrecht: Martinus Nijhoff Publishers 1992); Carla Edelenbos, *Human Rights Violations: A Duty to Prosecute?*, 7 Leiden J. Int'l L. 5, 8 (1994); Orentlicher, *supra*, n. 55, 2585, 2593; Joinet Principles, Arts 25 and 18; Van Boven-Bassiouni Principles, Principles 4 and 25 (f); *Simon and Del Cerro* Case, *supra*, n. 74.

[85] Genocide Convention, Art. I.

[86] *Id.*, Art. V ("The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.").

[87] *Id.*, Art. VI ("Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.").

[88] Convention against Torture, Art. 7 (1). That provision requires every state party "in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 [an act of torture] is found shall in the cases contemplated in article 5 [providing for territorial, active and passive personality and universal jurisdiction], if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution". There are no exceptions.

to torture.[89] Similarly, the Human Rights Committee has criticized the use of amnesties for torture.[90]

Extrajudicial executions. The UN General Assembly stated more than a decade ago that governments had a duty to bring persons suspected of extrajudicial executions to justice.[91] It did not spell out any exceptions.

Enforced disappearance of persons. The UN General Assembly expressly declared in 1992 that no one shall benefit from any amnesty or similar measure of impunity for enforced disappearances.[92] There are no exceptions.

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[89] Conclusions and recommendations of the Committee against Torture concerning the initial report of Azerbaijan, U.N. Doc. A/55/44, 17 November 1999, para. 68 (3) (expressing concern about "[t]he use of amnesty laws that might extend to the crime of torture" and para. 69 (c) (recommending that, "[i]n order to ensure that perpetrators of torture do not enjoy impunity, the State party . . . ensure that amnesty laws exclude torture from their reach"); Conclusions and recommendations concerning the second periodic report of Croatia, U.N. Doc. A/54/44, 17 November 1998, para. (expressing concern that "the Amnesty Act adopted in 1996 is applicable to a number of offences characterized as acts of torture or other cruel, inhuman ordegrading treatment or punishment within the meaning of the Convention"); Conclusions and recommendations of the Committee against Torture concerning the initial report of Kyrgyzstan, U.N. Doc. A/55/44, 18 November 1999, para.74 (e) (expressing concern about "[t]he use of amnesty laws that might extend to torture in some cases") and para. 75 (c) (recommending that, "[i]n order to ensure that the perpetrators of torture and ill-treatment do not enjoy impunity, the State party . . . ensure that amnesty laws exclude torture from their reach"); Conclusions and recommendations of the Committee against Torture concerning the third periodic report of Peru, U.N. Doc. A/55/44, 15 November 1999, para. 59 (g) (expressing concern about "[t]he use of, in particular, the amnesty laws which preclude prosecution of alleged torturers who must, according to articles 4, 5 and 12 of the Convention, be investigated and prosecuted where appropriate") and para. 61 (d) (recommending that "[a]mnesty laws should exclude torture from their reach").

[90] The Human Rights Committee has stated, with regard to torture, that "amnesties are generally incompatible" with the duty of states parties under Articles 2 (3) (guaranteeing the right to a remedy) and Article 7 of the ICCPR (prohibiting torture), but it did not suggest any circumstances when an amnesty prior to a final judgment by a court for a breach of the non-derogable prohibition of torture would be compatible with Article 7. General Comment No. 20, U.N. Doc. No. CCPR/C/21/Rev.1/Add.3, 7 April 1992, para. 4.

[91] Principle 18 of the UN Principles on the Effective Prevention and Punishment of Extra-legal, Arbitrary and Summary Executions provides:"Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed."

[92] Article 18 (1) of the UN Declaration on the Protection of All Persons from Enforced Disappearance, U.N. G.A. Res. 47/133, 18 December 1992, provides that persons who are alleged to have committed forced disappearances "shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction".

Violence against women. The 1994 Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women provides that states have duties to investigate and punish those who are responsible for violence against women.[93] It contains no provisions permitting amnesties or similar measures of impunity.

VIII. Immunities

One obstacle to effective action to end impunity through universal jurisdiction has been the reluctance of states to respect the fundamental principle of international law that no official, no matter how high or how low, is immune with respect to crimes under international law such as war crimes, crimes against humanity, genocide and torture. Traditional immunities for heads of state, government officials and even diplomats were designed to protect officials abroad from civil suits and criminal prosecutions for ordinary crimes. They were not designed to give such officials suspected of crimes under international law immunity with respect to crimes under international law.

Indeed, these traditional rules were developed at a time when states were seen as absolutely sovereign and restrained only by rules of international law to which they gave their express or implied consent and when concepts of a reserved domain of internal affairs exempted from any external scrutiny for what governments did to their own people, even when the conduct today would constitute a war crime, crime against humanity, genocide or torture. However, at the dawn of a new millennium, after the two most costly wars in human history, the world is not the same place it was at the end of the 19th century when the rules of official immunity evolved. It is only in this broader context that the question whether any of the official immunities traditionally recognized in customary and conventional international law has any relevance to persons responsible for crimes that attack the very foundation of international law itself. A simple, mechanistic approach to this question is likely to lead national courts astray.

A careful examination of the value of the interests of states in facilitating the conduct diplomatic relations abroad by heads of state, government officials and diplomats and the imperative need to bring to justice those responsible for crimes against the international community and the fabric of international relations should lead to the conclusion that the requirements of international justice must prevail. As outlined below, the same rule should apply to all officials, whatever their rank, and the rule necessarily applies in national, as well as international, courts.

The Nuremberg Charter and Judgment. The starting point is the fundamental rule of international law that official immunities do not bar individual criminal responsibility for crimes under international law, such as war crimes, crimes against humanity, genocide and torture. Since the adoption of the Nuremberg Charter, based on the precedent of the decision during the First World War to bring the Kaiser of Germany to justice, at a time when he was a serving head of state, it has been settled international law that official immunities do not bar prosecution for crimes under international law. Article 7 of the Nuremberg Charter expressly provided: "The official position of defendants, whether as Heads of State or responsible officials in

[93] Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, OAS Doc. OEA/ser.L.V/II.92, Doc.31 rev.3 (1996), *adopted* 9 June 1994, *entered into force* 1995, Art. 7 (recognizing duties to pursue policies to punish and diligently to investigate and impose penalties for violence against women).

Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment." As Justice Robert Jackson, the United States Prosecutor at Nuremberg and one of the authors of the Charter, explained in his 1945 report to the President on the legal basis for the trial of persons accused of crimes against humanity and war crimes,

"Nor should such a defense be recognised as the obsolete doctrine that a head of State is immune from legal liability. There is more than a suspicion that this idea is a relic of the doctrine of divine right of kings. It is, in any event, inconsistent with the position we take toward our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded. We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still 'under God and the law'".[94]

In its Judgment, the International Military Tribunal at Nuremberg declared: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[95] The Nuremberg Tribunal went beyond the Charter by concluding that state immunities do not apply to crimes under international law:

"It was submitted that . . . where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, [this contention] must be rejected. . . . The principle of international law, which under certain circumstances, protects the representative of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings".[96]

The Nuremberg Tribunal made clear sovereign immunity of the state did not apply when the state authorized acts, such as crimes against humanity, which were "outside its competence under international law":

"[T]he very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of

[94] Justice Robert H. Jackson, "Report to President Truman on the Legal Basis for Trial of War Criminals", 19 Temp. L.Q. 148 . (1946).

[95] Judgment of the International Military Tribunal for the Trial of German Major War Criminals (with the dissenting opinion of the Soviet Member) - Nuremberg 30th September and 1st October 1946, 41 (Cmd. 6964, Misc. No. 12) (London: H.M.SO. 1946).

[96] *Ibid.*, 41-42.

the State if the State in authorizing action moves outside its competence under international law".[97]

The Nuremberg Tribunal found that Karl Doenitz, was "active in waging aggressive war" from 1 to the surrender on 9 May 1945 as head of state of Germany, in part based on his order in that capacity to the Wehrmacht to continue the war in the East and he was convicted of Counts Two and Three of the indictment and sentenced to 10 year's imprisonment.[98]

The Tokyo Charter and Tribunal. Article 6 of the Charter of the International Military Tribunal for the Far East (1946) provided that the official position of the accused was not "sufficient to free such accused from responsibility for any crime with which he is charged". The Tokyo Tribunal reached a similar conclusion to that of the Nuremberg Tribunal when it declared that "[a] person guilty of such inhumanities cannot escape punishment on the plea that he or his government is not bound by any particular convention".[99] Although the Emperor of Japan was not charged with crimes against humanity, war crimes or crimes against peace by the Prosecutor of the Tokyo Tribunal, the decision not to prosecute him was not based on the belief that he was immune under international law as head of state, but was made "by the good grace of General Douglas MacArthur".[100]

The consistent rejection of official immunities since the Second World War. The rejection of official immunities for crimes under international law has been consistent in every international instrument adopted on the subject. Article IV of the Convention for the Prevention and Punishment of the Crime of Genocide (1948); Principle III of the Principles of Law Recognized in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal (1950), Article 3 of the UN Draft Code of Offences against the Peace and Security of Mankind (1954), Article III of the Convention on the Suppression and Punishment of the Crime of *Apartheid* ("individuals . . . and representatives of a State"), Article 7 (2) of the 1993 Statute of the International Tribunal for the former Yugoslavia, Article 6 (2) of the 1994 Statute of the International Criminal Tribunal for Rwanda and Article 7 of the UN Draft Code of Crimes against the Peace and Security of Mankind adopted in 1996, as well as in Article 27 of the Statute for the International Criminal Court, adopted in Rome on 17 July 1998 by a vote of 120 in favour to only seven against, with 21 abstentions).

This rule applies to all officials, no matter how high or low, including serving and past heads of state, government ministers and even diplomats.

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[97] *Ibid.*, 42.

[98] *Ibid.*, 110, 131.

[99] B.V.A. Röling and Rüter, 2 *The Tokyo Judgment* 996-1001 (Amsterdam: University Press 1977).

[100] M. Cherif Bassiouni, *Crimes against Humanity*, *supra*, n.84,466; see also the view of B.V.A. Röling that the decision not to prosecute the Emperor was the result of a political, rather than a legal, decision by the American President, contrary to the wishes of Australia and the Soviet Union, in his book with Antonio Cassese, *The Tokyo Trial and Beyond* 40 (Cambridge: Polity Press 1994) (paperback edition).

The applicability of the rule in national courts. It is clear that this rule applies to national courts, as well as to international courts.

First, incorporation in a statute of an international criminal court of a rule does not mean that the rule applies only to that court any more than any of the other principles of criminal responsibility or defences.

Second, nothing in the statutes of , which envisaged states continuing to play a major or primary role in prosecuting such crimes, suggests that those establishing the courts intended to reserve cases of officials for the international criminal courts. The Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, as well as the Rome Statute of the International Criminal Court, all envisage that states would continue to do the bulk of criminal investigations and prosecutions and did not establish separate rules of immunity for national courts to apply.

Third, international instruments have made clear that the rule against recognizing official immunities for crimes under international law applies just as strongly to criminal investigations and prosecutions in national courts as in international courts. For example, Allied Control Council Law No. 10, which governed national courts in Germany, included this rule. It expressly stated:

> The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment."[101]

The International Law Commission included the rule of no official immunity in the 1954 Draft Code of Offences against the Peace and Security of Mankind and in the 1996 Draft Code of Crimes against the Peace and Security of Mankind, both of which were intended to be applied primarily by national courts. Article 3 of the 1954 Draft Code of Offences stated: "The fact that a person acted as Head of State or as responsible government official does not relieve him from responsibility for committing any of the offences defined in this Code".[102] Article 7 of the 1996 Draft Code of Crimes provides: "The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment."[103]

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[101] Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and Crimes against Humanity, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January, 1946, 20 December 1945, Art. II (4) (a).

[102] Draft Code of Offences against the Peace and Security of Mankind, *in* Report of the International Law Commission (1954 ILC Report), 28 July 1954, 9 U.N. G.A.O.R. Supp. (No. 9) at 11, U.N. Doc. A/2693 (1954), Art. 3. The International Law Commission expressly stated that pending the establishment of an international criminal court, "a transitional measure might be adopted providing for the application of the code by national courts". 1954 ILC Report, para. 58.

[103] Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on the work of its forty-eighth session 6 May-26 July 1996, 51 U.N. G.A.O.R. Supp. (No. 10), at9, U.N. Doc. A/51/10 (1996).

Eminent international scholars have concluded that the principles of the Nuremberg Charter and Judgment, which include the principle that individuals notwithstanding their official position, even as head of state, are not immune for crimes against humanity, are part of international law.[104] Sir Arthur Watts, KCMG, Q.C., has concluded:

"The idea that individuals who commit international crimes are internationally accountable for them has become an accepted part of international law .... It can no longer be doubted that as a matter of general customary international law a Head of State will personally be liable to be called to account if there is sufficient evidence that he authorized or perpetrated such serious international crimes."[105]

The leading commentators on the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda have stated that "The Nuremberg precedent laid the foundation for the general recognition of the responsibility of government officials for crimes under international law notwithstanding their official position at the time of the criminal conduct."[106] They concluded that "[t]his fundamental principle is a cornerstone of individual responsibility for crimes under international law which by their very nature and magnitude usually require a degree of involvement on the part of high-level government officials."[107]

No basis for different rules of official immunity in national courts. It does not make sense to have different rules of criminal responsibility depending on the happenstance of which court exercises jurisdiction. As noted above, one of the primary reasons for the rule permitting states to exercise universal jurisdiction over crimes under international law is that the absence of international criminal courts for many crimes, coupled with failure or refusal of territorial states to bring their own officials to justice, could lead to impunity if the national courts of other states could not exercise universal jurisdiction.

Which values should prevail?

- the interests of states in facilitating the conduct diplomatic relations abroad by heads of state, government officials and diplomats?

- the imperative need to bring to justice those responsible for crimes against the international community and the fabric of international relations? The UN International Law Commission has explained why the rule that heads of state and public officials may be held criminally

[104] *See* Jennings & Watts, *supra*, 505, para. 148; Claude Lombois, *Droit pénal international* 142, 162 and 506 (Paris: Dalloz 1971); Georg Schwarzenberger, 2 *International Law as Applied by International Courts and Tribunals* 508 (1968); *see also* André Huet & Renée Koering-Joulin, *Droit pénal international* 54-55 (Paris: Thémis 1994).

[105] Arthur Watts, *The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers*, 247-1 Recueil des Cours 9, 82-84 (1994).

[106] Virginia Morris & Michael P. Scharf, 1 *The International Criminal Tribunal for Rwanda* 246 (Irvington-on-Hudson, New York: Transnational Publishers, Inc. 1997).

[107] Morris & Scharf, *supra*, n. 106, 249.

responsible when they commit crimes under international law is an essential part of the international legal system:

" . . . crimes against the peace and security of mankind often require the involvement of persons in positions of governmental authority who are capable of formulating plans or policies involving acts of exceptional gravity and magnitude. These crimes require the power to use or to authorize the use of the essential means of destruction and to mobilize the personnel required for carrying out these crimes. A government official who plans, instigates, authorizes or orders such crimes not only provides the means and the personnel required for carrying out the crime, but also abuses the authority and power entrusted to him. He may, therefore, be considered to be even more culpable than the subordinate who actually commits the criminal act. It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the [Draft Code of Crimes against the Peace and Security of Mankind] to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security."[108]

Justice or convenience? Assuming that a traditional immunity *ratione personae* were to apply to protect officials abroad from national prosecutions for crimes under international law, are national courts powerless? If states remain constrained by traditional rules of immunity, how can they still further the course of international justice? Even under the traditional rules, both the host state and the sending state remain bound by other obligations to the international community.

The duty of the host state. The host state must take certain preventive and repressive steps to further the course of justice. It would be consistent with international law and the imperative need to end impunity for crimes which undermine the international legal order to recognize that host states are under a duty not to facilitate immunity and must, therefore, engage in an in depth inquiry of all officials the sending state proposes to send before accepting the credentials of such officials. In any case where there are reasonable grounds to believe that the official intending to visit or to be received as a diplomat to request the sending state to conduct a prompt, thorough, independent and impartial investigation of the official before the host state accepts the official's credentials. It is axiomatic that acceptance of the presence of foreign officials in the nation's borders is always subject to the consent of the host state. It would undermine the fabric of international law to invite an official to visit when it was known - or there was reason to believe - that the official was likely to be responsible for crimes against the international community itself.

The responsibilities of the host state do not end there. If reasons to believe that the official is responsible for such crimes arise only after the arrival in the host state, then the host state should request the sending state to waive any immunity which may exist and to permit an investigation and - if there is sufficient admissible evidence - a prosecution in the host state, the sending state, a third state or an international criminal court

[108] 1996 Report of the International Law Commission, *supra*, 39.

The duty of the sending state. The sending state, of course, remains under a duty either to waive any official immunity or to investigate and - if there is sufficient admissible evidence - to prosecute the official itself or to permit another state or an international criminal court to do so. Therefore, it is appropriate for the sending state to accede to the above requests. The inconvenience in choice of representation abroad is far out-weighed by the need to ensure justice.

IX. Ineffective international monitoring

One of the weaknesses in the current international system of justice regarding universal jurisdiction is that there is no effective monitoring at the international level of state enforcement of international criminal law. The Yugoslavia and Rwanda Tribunals will, to some extent, monitor investigations and prosecutions by national courts and ask them to defer proceedings if they are unfair or shams. The International Criminal Court will act pursuant to Article 17 of the Rome Statute when states are unable or unwilling genuinely to investigate or prosecute genocide, crimes against humanity and war crimes, but it will not generally monitor performance of states in enforcing international criminal law.

With regard to torture, the Committee against Torture is charged with monitoring the implementation by states parties of the Convention against Torture, including Articles 5, 6 and 7. However, the Committee has not been consistent in this regard and rarely addresses the failure of states to enact legislation providing for universal jurisdiction or to amend ineffective legislation, although it has usually discussed questions related to enforcement.

Perhaps, if the Committee were to ensure that it addressed the question of universal jurisdiction in every examination of a state report and recommended to states in every case when they had no legislation or ineffective legislation that they comply with their obligations under Article 5 and when they failed to enforce such legislation that they comply with their obligations under Articles 6 and 7, states would take their responsibilities under the Convention more seriously. Moreover, states that enacted effective legislation and enforced it are more likely to extend the scope of the legislation to other crimes. It would also be helpful if the UN Special Rapporteur ensured that the annual report to the Commission on Human Rights include information with respect to each country on the extent to which they permit their courts to exercise universal jurisdiction.

amnesty international

UNIVERSAL JURISDICTION:

The duty of states to enact and implement legislation

Chapter Fifteen (Recommendations)

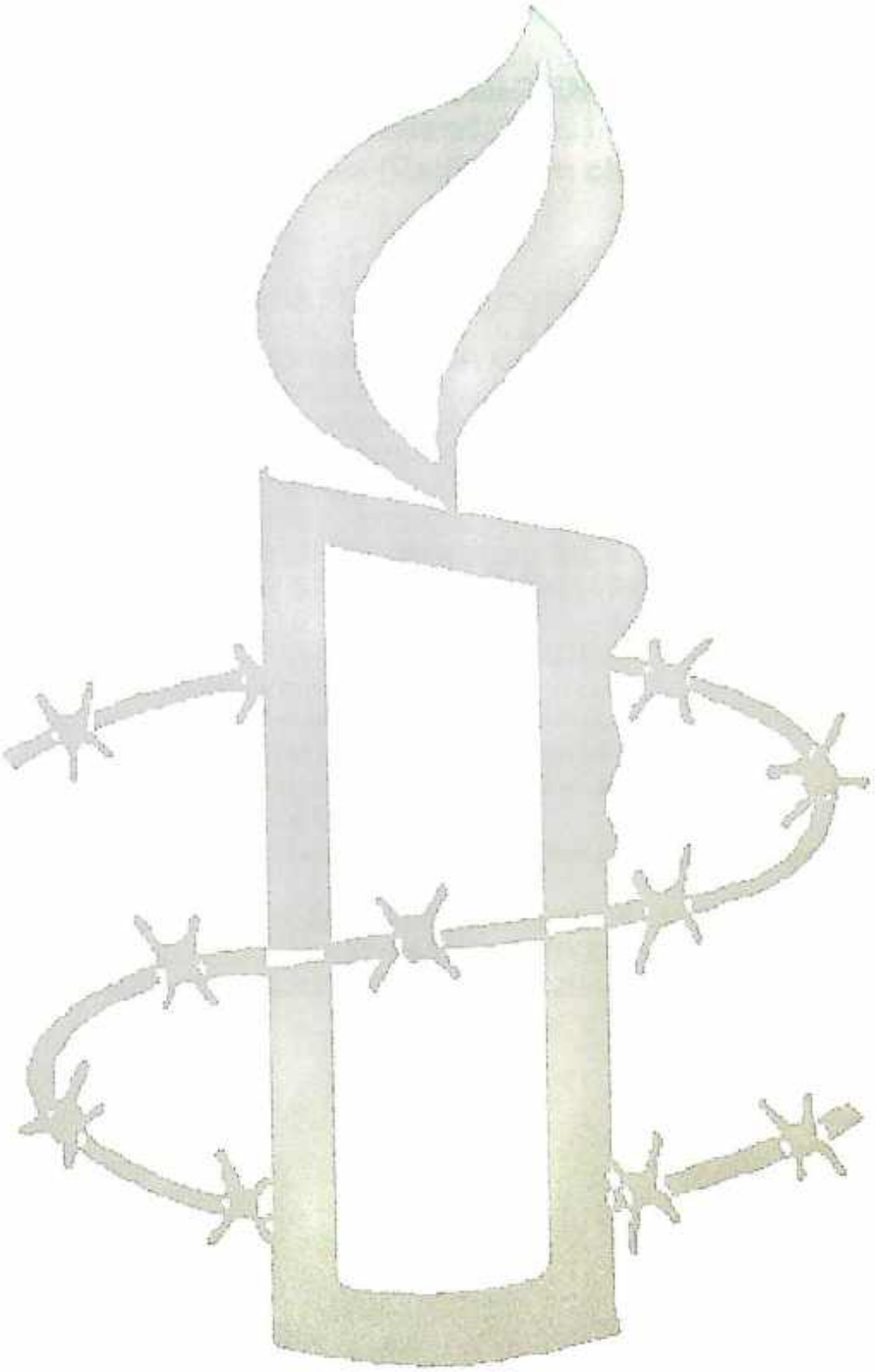
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"Australia's international personality would be incomplete if it were unable to exercise a jurisdiction to try and to punish offenders against the law of nations whose crimes are such that their subjection to universal jurisdiction is conducive to international peace and order. As the material drawn from international agreements and UNGA resolutions acknowledges, international law recognizes a State to have universal jurisdiction to try suspected war criminals. . . ."

***Polyukhovich v. Commonwealth of Australia,* (1991) 172 CLR 501, F.C. 91/026 (Brennan, J.)**

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RECOMMENDED ACTIONS FOR STATES AND INTERGOVERNMENTAL ORGANIZATIONS

STATES SHOULD ADOPT AND IMPLEMENT THE FOLLOWING THREE-POINT PROGRAM:

I. RATIFY TREATIES

• All states should ratify treaties providing for universal jurisdiction over crimes under international law, if they have not yet done so, including:

- *the four Geneva Conventions of 1949, and*
- *Protocol I to the Geneva Conventions, and*
- *the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*

• Members of the Organization of American States, if they have not already done so, should ratify regional treaties providing for universal jurisdiction over crimes under international law, including:

- *the Inter-American Convention to Prevent and Punish Torture and*
- *the Inter-American Convention on Forced Disappearance of Persons.*

• All states, if they have not already done so, should also ratify other treaties designed to combat impunity, such as

- *Protocol II to the Geneva Conventions, and*
- *the Rome Statute of the International Criminal Court, and*

- *the Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes against Humanity, and*
- *the Convention on the Prevention and Punishment of the Crime of Genocide*

II. AMEND OR ENACT LEGISLATION

• All states should review, in cooperation with civil society (including lawyers groups, law faculties and non-governmental organisations), their legislation and practice to determine the extent to which legislation is inadequate, is absent or has not been implemented.

• All states should draft, in consultation with civil society, and enact any necessary legislation, consistent with Amnesty International's 14 Principles on the Effective Exercise of Universal Jurisdiction (AI Index: IOR 53/01/99) (summarised in the introduction to this document). Such legislation should be linked to cooperation with the International Criminal Court and the Yugoslavia and Rwanda Tribunals.

III. IMPLEMENT THE LEGISLATION

• All states should draft, in consultation with civil society, effective training programs on universal jurisdiction for judges, prosecutors, other law enforcement officials and defence lawyers.

• All states should implement the legislation, regulations and training programs.

• All states should establish, in consultation with civil society, national systems for providing redress to victims of the crimes, including restitution, compensation, rehabilitation, satisfaction and non-repetition. In particular, states should consult with national and international organizations which specialise in redress for victims.

• All states should work together to improve existing treaties to facilitate cooperation in extradition and mutual legal assistance in cases involving crimes under international law.

THE UNITED NATIONS SHOULD DO THE FOLLOWING:

THE SECURITY COUNCIL

•should urge Member States to adopt national legislation providing that genocide, crimes against humanity, war crimes and torture are crimes under national law.

•should also urge them to initiate investigations and prosecutions of persons under their authority or on their territory for such crimes on the basis of the principle of universal jurisdiction and report their actions to the Security Council.

THE COMMISSION ON HUMAN RIGHTS

•should urge states to implement the Van Boven/Bassiouni Principles and the Joinet Principles. In particular, states should be urged to establish national systems for providing redress to victims of crimes under international law.

• should urge thematic mechanisms, including any mechanism established concerning impunity, and country mechanisms to monitor and report on the effectiveness of anti-impunity programs of states

THE COMMITTEE AGAINST TORTURE

• should ensure that it regularly monitors the extent to which states parties to the Convention against Torture provide for universal jurisdiction and effective extradition and mutual legal assistance arrangements

• should address the question of universal jurisdiction in every examination of a state report and recommend to states in every case where they have no legislation or ineffective legislation to comply with their obligations under Article 5 and when they fail to enforce such legislation to comply with their obligations under Articles 5, 6 and 7.

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APPENDIX - RATIFICATIONS AND SIGNATURES OF SELECTED INTERNATIONAL TREATIES WITH UNIVERSAL JURISDICTION AND *AUT DEDERE AUT JUDICARE* OBLIGATIONS

KEY TO TREATIES IN CHRONOLOGICAL ORDER

Dark shaded squares indicate states parties; light shaded squares indicate signatories; white squares indicate non-state parties. Where known, ratification (r), accession (a), succession (d) and signature (s) are indicated. The status of each treaty is as of 1 September 2001, except for the 1979 Convention on the Physical Protection of Nuclear Materials and the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, both of which are as of 1 January 2000. Information concerning several states with respect to the 1961 Single Convention on Narcotics Drugs and its 1972 Protocol could not be verified. In any event, only the lists published by the depositaries are definitive.

1. 1929 International Convention for the the Suppression of Counterfeiting Currency (1929 Counterfeiting) (as of 1 April 2001)
2. 1949 Geneva Conventions (1949 Geneva Conventions) (as of 19 April 2001)
3. 1958 Convention on the High Seas (1958 High Seas)
4. 1961 Single Convention on Narcotics Drugs (1961 Narcotics)
5. 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970 Hague Convention)
6. 1971 Convention on Psychotropic Substances (1971 Psychotropic)
7. 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971 Montreal)
8. 1972 Protocol to the Single Convention on Narcotics Drugs (1972 Narcotics)
9. 1973 Convention on the Suppression and Punishment of the Crime of *Apartheid* (1973 *Apartheid*)
10. 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (1973 Diplomats)
11. 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977 Protocol I)
12. 1979 International Convention against the Taking of Hostages (1979 Hostages)
13. 1979 Convention on the Physical Protection of Nuclear Material(1979 Nuclear)
14. 1982 (1982 Law of Sea)
15. 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984 Torture)
16. 1988 Convention for the Suppression of Unlawful Acts against Maritime Navigation (1988 Maritime)
17. 1989 Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989 Mercenaries)
18. 1994 Convention on the Safety of United Nations and Associated Personnel (1994 Peace-keepers)
19. 1999 International Convention for the Suppression of Terrorist Bombings (1999 Terrorist bombing)
20. 2000 International Convention for the Suppression of Financing of Terrorist (2000 Terrorist financing)
21. 2000 Convention on Transnational Crime (2000 Transnational)

Ratifications and signatures of selected international treaties with universal jurisdiction and *aut dedere aut judicare* obligations

Countries	1929 Counterfeit	1949 Geneva	1958 High Seas	1961 Narcotics	1970 Hague	1971 Psychotropic	1971 Montreal	1972 Narcotics	1973 Apartheid	1973 Diplomats	1977 Protocol I	1979 Hostages	1979 Nuclear	1982 Law of Sea	1984 Torture	1988 Maritime	1989 Mercenaries	1994 Peace-keepers	1997 Terrorist bombing	2000 Terrorist financing	2000 Transnational
Afghanistan		r	r	r		a			a					s	r						s
Albania	s	r	a								a				a			a			s
Algeria	a	a		a		a			r	a	a	a		r	r				s	s	s
Andorra		a																			
Angola		a									a			r			s				s
Antigua and Barbuda		d		a		a	a	a	a	a	a	a		r	a						
Argentina		r	s	r	r	r	r	r	r	a	a	a		r	r			r	s	s	s
Armenia		a				a			a	a	a				a						
Australia	a	r	r	r		r	r	r		r	r	a		r	r			r			s
Austria	r	r	r	a		a	r	a		a	r	r		r	r			a	s		s
Azerbaijan		r		a		a			a	a		a			a		a	a			s
Bahamas	d	d		d		a		a	a	a	a	a		r							s
Bahrain		a				a	a		a		a			r	a						
Bangladesh		d		a		a		a	a		a			s	a			r			
Barbados		d		d		a	r	a	a	a	a	a		r			a				
Belarus		r	r	r		r			r	r	r	a		s	r		r	r	s		s
Belgium	r	r	a	r		a	r	r			r	r		r	r			s	s		s
Belize		a									a			r	a						
Benin	a	d		r		a		a	r		a			r	a						s
Bhutan		a					a			a		a		s							
Bolivia		r	s			a			a		a	s		r	r			s			s
Bosnia and Herzegovina		d	d			d			d	d	d	d		d	d						s

Ratifications and signatures of selected international treaties with universal jurisdiction and *aut dedere aut judicare* obligations

Countries	1929 Counterfeit	1949 Geneva	1958 High Seas	1961 Narcotics	1970 Hague	1971 Psychotropic	1971 Montreal	1972 Narcotics	1973 Apartheid	1973 Diplomats	1977 Protocol I	1979 Hostages	1979 Nuclear	1982 Law of Sea	1984 Torture	1988 Maritime	1989 Mercenaries	1994 Peace-keepers	1997 Terrorist bombing	2000 Terrorist financing	2000 Transnational
Botswana		a		a		a	r	a		a	a	a		d	r			a		r	
Brazil	a	r		r	r	r	r	r		a	a	a		r	r			r	s		s
Brunei Darussalam		a		a		a	a	a		a	a	a		r							
Bulgaria	r	r	r	r	r	a	r	a	r	r	r	a		r	r			a		s	s
Burkina Faso	a	d	a	a		a			r		r			s	a						s
Burundi		d		a		a			a	a	a			s	a				s		s
Cambodia		a	a	s				s	a		a			s	a						
Cameroon		d		a		a		a	a	a	a	a		r	a		r				s
Canada		r	s	r	r	a	r	a		r	r	r		s	r			s	s	s	s
Cape Verde		a				a			a		a			r	a						s
Central African Republic		d	a						a		a			s							
Chad		a		r	r	a	r		r		a			s	a						
Chile		r		r	r	r		r		a	r	r		r	r			a			s
China	s	r	s	r		a	s		a	a	a	a		r	r						s
Colombia	r	r	s	a		a		a	a	a	a			s	r						s
Comoros		a				a					a			r	s				s	s	
Congo (Brazzaville)		d					r		a		a			s			s				s
Costa Rica		a	r	r	r	r	r	r	a	a	a			r	r				s	s	s
Côte D'ivoire	a	d		a		a		r			r	a		r	a				s		s
Croatia		d	d	d		d		d	d	d	d			d	d		a				s
Cuba	r	r	s	a		a		a	a	a	a			r	r						s

Ratifications and signatures of selected international treaties with universal jurisdiction and *aut dedere aut judicare* obligations

Countries	1929 Counterfeit	1949 Geneva	1958 High Seas	1961 Narcotics	1970 Hague	1971 Psychotropic	1971 Montreal	1972 Narcotics	1973 Apartheid	1973 Diplomats	1977 Protocol I	1979 Hostages	1979 Nuclear	1982 Law of Sea	1984 Torture	1988 Maritime	1989 Mercenaries	1994 Peace-keepers	1997 Terrorist bombing	2000 Terrorist financing	2000 Transnational
Cyprus	a	a	a	a	a	a	r	r		a	r	a		r	r		a		s	s	s
Czech Republic	d	d	d	d	r	d	d	d	d	d	d	d		r	d			r	s	s	s
Democratic Peoples' Republic of Korea		a								a	a			s							
Democratic Republic of Congo		d		r		a		a	a	a	a	s		r	a		s				
Denmark	r	r	r	r	r	r	r	r		r	r	a		s	r			r	s		s
Djibouti		d		a		a		a			a			r							
Dominica		d		a		a		a			a	a		r							
Dominican Republic		a	r	a		a		a		a	a	s		s	s						s
Ecuador	a	r		a	r	a		r	r	r	r	a			r			a		s	s
Egypt	a	r		r		r	r	r	a	a	r	r		r	a				s	s	s
El Salvador		r		r		a			a	a	r	r		s	a						s
Equatorial Guinea		a									a			r							s
Eritrea		a																			
Estonia	a	a				a	a		a	a	a				a				s	s	s
Ethiopia		r		a		a	a	a	a		a			s	a						s
Fiji	d	d	d	d	r	a	r	a						r				r			
Finland	a	r	r	r	r	r	a	r		r	r	r		r	r			s	s	s	s
France	r	r	s	a	r	r	a	r			a	a			r			s	r	s	s
Gabon	a	d		a	r	a	r	s	a	a	a	s		r	r					s	

Ratifications and signatures of selected international treaties with universal jurisdiction and *aut dedere aut judicare* obligations

Countries	1929 Counterfeit	1949 Geneva	1958 High Seas	1961 Narcotics	1970 Hague	1971 Psychotropic	1971 Montreal	1972 Narcotics	1973 Apartheid	1973 Diplomats	1977 Protocol I	1979 Hostages	1979 Nuclear	1982 Law of Sea	1984 Torture	1988 Maritime	1989 Mercenaries	1994 Peace-keepers	1997 Terrorist bombing	2000 Terrorist financing	2000 Transnational
Gambia		d		a		a			a		a			r	s						s
Georgia	a	a				a					a			a	a		a			s	s
Germany	r	a	r	a	r	r	r	r		r	r	r		a	r		s	r	s	s	s
Ghana	a	a	s	r		r		s	a	a	r	a		r	r						
Greece	r	r		a		r		r		a	r	r		r	r			a	s	s	s
Grenada		d				a					a	a		r							
Guatemala		r	r	r		a		r		r	r	r		r	a						s
Guinea		a		a		a			r		a			r	r			a			
Guinea-Bissau		a		a		a		a			a			r	s						s
Guyana		d				r			a		a			r	r						
Haiti		a	r	r				r	a	a		r		r				s			s
Holy See	a	r	s	r		r		r			r										
Honduras		a		a				a			r	r		r	a			s			s
Hungary	r	r	r	r	r	r	r	a	r	r	r	a		s	r			a	s		s
Iceland		a	s	a		a	a	a		r	r	a		r	r			a	s		s
India	s	r		r		a	r	a	a	a		a		r	s				r	s	
Indonesia	a	a	r	r		a		r						r	r						s
Iran, Islamic Republic of		r	s	r	r	r	a	s	a	a				s							s
Iraq	a	a		r	r	a		a	r	a		s		r							
Ireland	a	r	s	a		a	a	a			r			r	s				s		s
Israel	a	r	r	a	r	a	r	r		a		s			r				s	s	s
Italy	r	r	a	r		a	r	r		r	r	r		r	r		r	r	s	s	s
Jamaica		s	d	a		a	r	a	r	a	a	s		r				a			

Ratifications and signatures of selected international treaties with universal jurisdiction and *aut dedere aut judicare* obligations

Countries	1929 Counterfeit	1949 Geneva	1958 High Seas	1961 Narcotics	1970 Hague	1971 Psychotropic	1971 Montreal	1972 Narcotics	1973 Apartheid	1973 Diplomats	1977 Protocol I	1979 Hostages	1979 Nuclear	1982 Law of Sea	1984 Torture	1988 Maritime	1989 Mercenaries	1994 Peace-keepers	1997 Terrorist bombing	2000 Terrorist financing	2000 Transnational
Japan	s	a	a	r	r	r	a	r		a		r		r	a			a	s		s
Jordan		a		r	r	a	r	r	r	a	r	a		a	a						
Kazakhstan		d		a		a		a		a	d	a			a						s
Kenya	a	a	a	a		a		a	s		a	a		r	a						
Kiribati		d																			
Korea, Republic of		a		r		a		r		a	r	a		r	a			a	s		s
Kuwait	a	a		a		a	a	a	a	a	a	a		r	a						s
Kyrgyzstan		d		a		a			a		d				a						s
Lao People's Democratic Republic		a		a		a	r		a		r			r							
Latvia	a	a	a	a		a	a	a	a	a	a				a						s
Lebanon	a	r	s	r		r		r		a	a	a		r	a			a			
Lesotho		d	d	d		a		a	a		a	r		s						s	s
Liberia		a	s	r		s		s	a	a	a	s		s							
Libyan Arab Jamahiriya		a		a		a		a	a	a	a	a		s	a		a	a			
Liechtenstein		r		r		a	a	r		a	r	a		s	r			r			s
Lithuania		a		a		a					a	a			a			a	s		s
Luxembourg	s	r		r		a	r	r			r	r		r	r			s	s		s
Macedonia, Former Yugoslav Republic of		d		a		a		a	d	d	d	d		d	d				s	s	s
Madagascar		d	a	r		a		r	a		r			s					s		s
Malawi	a	a	a	a		a		a		a	a	a		s	a						s

Ratifications and signatures of selected international treaties with universal jurisdiction and *aut dedere aut judicare* obligations

Countries	1929 Counterfeit	1949 Geneva	1958 High Seas	1961 Narcotics	1970 Hague	1971 Psychotropic	1971 Montreal	1972 Narcotics	1973 Apartheid	1973 Diplomats	1977 Protocol I	1979 Hostages	1979 Nuclear	1982 Law of Sea	1984 Torture	1988 Maritime	1989 Mercenaries	1994 Peace-keepers	1997 Terrorist bombing	2000 Terrorist financing	2000 Transnational
Malaysia	a	a	a	a		a	a	a						r							
Maldives		a				a	a		a	a	a			r			r				
Mali	a	a		a	a	a		a	a		a	a		r	a						
Malta		d				a	a				a			r	a			s		s	s
Marshall Islands				a		a								a							
Mauritania		d				a			a	a	a	a		r			a				
Mauritius	d	d	d	d		a		a			a	r		r	a						s
Mexico	a	r	a	r	r	a	r	a	a	a	a	a		r	r					s	s
Micronesia, Federal States of		a		a		a					a			a							
Moldova, Republic of		a				a		a		a	a				a						s
Monaco	r	r		a		r	a	r			a			r	a			a	s		r
Mongolia		a	a	a	r	a	r	a	r	r	r	a		r							
Morocco	a	a		a		a		s						s	r		s				s
Mozambique		a		a		a			a		a			r	a						s
Myanmar		a		r		a	a							r							
Namibia		d				a			a		a			r	a						s
Nauru														r							
Nepal		a	r				a		a	a		a		r	a			a	s		
Netherlands	r	r	r	r		a	r	a		a	r	r		r	r			s	s	s	s
New Zealand		r	s	r		r	r	r		a	r	r		r	r			r		s	s
Nicaragua		r		r		a		s	a	r	r			r	s						s
Niger	a	d		a	r	a		r	a	a	r			s	a						s

Ratifications and signatures of selected international treaties with universal jurisdiction and *aut dedere aut judicare* obligations

Countries	1929 Counterfeit	1949 Geneva	1958 High Seas	1961 Narcotics	1970 Hague	1971 Psychotropic	1971 Montreal	1972 Narcotics	1973 Apartheid	1973 Diplomats	1977 Protocol I	1979 Hostages	1979 Nuclear	1982 Law of Sea	1984 Torture	1988 Maritime	1989 Mercenaries	1994 Peace-keepers	1997 Terrorist bombing	2000 Terrorist financing	2000 Transnational
Nigeria		d	d	r		a	a		r		a			r	r		s			s	r
Norway	r	r		r	r	a	a	r		r	r	r		r	r			r	r		s
Oman		a		a		a	a		r	a	a	a		r							
Pakistan		r	s	r		a	a	r	a	a		a		r				s			s
Palau		a				a					a			a							
Panama	s	a	s	r	r	a		r	r	a	r	r		r	r			r	r		s
Papua New Guinea		d		d		a	d	a						r							
Paraguay		r		r	r	r		r		r	a			r	r						s
Peru	a	r		r		a	a	r	a	a	r	a			r					s	s
Philippines	a	r		r		a	r	r	r	a		r		r	a			r	s		s
Poland	r	r	r	r	r	r	r	a	r	r	r	a		r	r		s	r	s		s
Portugal	r	r	r	r	r	a	r	a		a	r	r		r	r			r		s	s
Qatar		a				a			r	a	a			s			a				
Romania	r	r	r	a		a	r	a	r	r	r	a		r	a		s	r	s	s	s
Russian Federation	d	r	r	r	r	r	r	a	r	r	r	a		r	r			r	s	s	s
Rwanda		d				r			r	r	a			s							s
St. Kitts and Nevis		d		a		a		a			a	a		r							
St. Lucia		d		d							a										
St. Vincent and the Grenadines		a					a		a	a	a	a		r	a						
Samoa		d									a			r				s			
San Marino	a	a		a		a		a			r									s	s

Ratifications and signatures of selected international treaties with universal jurisdiction and *aut dedere aut judicare* obligations

Countries	1929 Counterfeit	1949 Geneva	1958 High Seas	1961 Narcotics	1970 Hague	1971 Psychotropic	1971 Montreal	1972 Narcotics	1973 Apartheid	1973 Diplomats	1977 Protocol I	1979 Hostages	1979 Nuclear	1982 Law of Sea	1984 Torture	1988 Maritime	1989 Mercenaries	1994 Peace-keepers	1997 Terrorist bombing	2000 Terrorist financing	2000 Transnational
Sao Tome and Principe		a		a		a			a		a			r	s						
Saudi Arabia		a		a		a					a	a		r	a		a				s
Senegal	a	d	a	a		a	a	r	a		r	r		r	r		a	r				s
Seychelles		a		a		a	a	a	a	a	a			r	a		a					s
Sierra Leone		d	d			a					a			r	r			s				
Singapore	d	a		a		a	r	a						r				a				s
Slovakia	d	d	d	d	r	d		d	d	d	s	d		r	d			r	s	s		s
Slovenia		d	d			d	d		d	d	d	d		d	a				s			s
Solomon Islands	d	d	d	d			d				a			r								
Somalia		a		a		a			r					r	a							
South Africa	a	a	a	a	r	a	r	r			a			r	r				s			s
Spain	r	r	a	r	r	a	r	r		a	r	a		r	r			r	r	s		s
Sri Lanka	a	r	s	a		a	a	a	a	a		a		r	a				s	r		s
Sudan		a		a		a		a	r	a		a		r	s				s	s		s
Suriname		d		d		a		a	a		a	r		r			r					
Swaziland		a	a			a					a			s								s
Sweden	a	r		r	r	r	a	r		r	r	r		r	r			r	s			s
Switzerland	r	r	r	r	r	a	r	a		a	r	r		s	r							s
Syrian Arab Republic	r	r		a		a		a	r	a	a											s
Tajikistan		d				a					d				a							s
Tanzania, United Republic of		d				a			a		a			r								s

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Countries	1929 Counterfeit	1949 Geneva	1958 High Seas	1961 Narcotics	1970 Hague	1971 Psychotropic	1971 Montreal	1972 Narcotics	1973 Apartheid	1973 Diplomats	1977 Protocol I	1979 Hostages	1979 Nuclear	1982 Law of Sea	1984 Torture	1988 Maritime	1989 Mercenaries	1994 Peace-keepers	1997 Terrorist bombing	2000 Terrorist financing	2000 Transnational
Thailand	a	a	r	r		a	a	a						s							s
Togo	a	d		a		r		r	a	a	r	r		r	r		a	s	s		s
Tonga		d	d	d		a	a	a						a							
Trinidad and Tobago		a	d	a	r	r		a	r	a		a		r							
Tunisia		a	s	r		a	a	r	a	r	r	a		r	r			r			s
Turkey	a	r		a		r		r		a		a			r				s		s
Turkmenistan		d		a		a	a			a	d	a			a		a	a	r		
Tuvalu		d												s							
Uganda	a	a	a	a	a	a		a	r		a	s		r	a				s		s
Ukraine		r	r	r	r	r	r		r	r	r	a		r	r		r	r		s	s
United Arab Emirates		a				a	a		r		a			s							
United Kingdom	r	r	r	r	r	r	r	r		r	r	r		a	r			r	s	r	s
United States of America	s	r	r	a	r	r	r	r		r		r			r			s	s	s	s
Uruguay		r	s	a		a		a		a	a			r	r		r	r	s		s
Uzbekistan		a				a				a	a	a			a		a	a	r	r	s
Vanuatu		a									a			r							
Venezuela		r	r	r		r	r	r	a		a	a			r				s		s
Viet Nam		a				a			a		r			r							s
Yemen		a				a	r		a	a	r			r	a						s
Yugoslavia, Federal Republic of	r	r	d	d	r	d	d		r	d	r	d		d	d		s				s

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Zambia		a		a		a			a		a			r	a						
Zimbabwe	d	a		d		a	a		a		a			r							s