TABLE OF CONTENTS
Chapter Five

UNIVERSAL JURISDICTION

The duty of states to enact and enforce legislation - Chapter Five

Crimes against humanity are subject to universal jurisdiction. This principle has been recognized under international law since the Judgment of the International Military Tribunal of Nuremberg, which declared that any state could have established courts with jurisdiction over the crimes in the Nuremberg Charter (see Chapter Two, Section III.A above) regardless where they had been committed. The principles articulated in the Nuremberg Charter and Judgment were recognized as international law principles by the UN General Assembly in 1946.[1] Moreover, there is growing support for the view that states may not harbour persons suspected of crimes against humanity, but instead that they *must* either exercise jurisdiction over persons in their territory suspected of crimes against humanity, no matter where such crimes took place, or extradite those persons to states able and willing to do so or surrender them to an international criminal court with jurisdiction over the crimes and the suspects. To the extent that this rule may not yet be fully recognized as customary international law with respect to crimes against humanity, Amnesty International believes that general principles of law, logic and morality dictate that states should implement the rule.

I. DEFINITION

Crimes against humanity are inhumane acts that attack, not just the individual, but, by their very nature, humanity itself. As the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (Yugoslavia Tribunal) declared in the *Erdemovi_* case in 1996, crimes against humanity

> "are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and or dignity. They are inhumane acts that by their very extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity."[2]

[1] In that resolution, adopted on 11 December 1946, the General Assembly "*Affirms* the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal". U.N. G.A. Res. 95 (I) (1946).

[2] *Prosecutor v. Erdemovi_*, Sentencing Judgment, Case No. IT-96-22-T (Trial Chamber I, 29 November 1996), para. 28.

Attempts to list individual crimes against humanity were made at the end of the First World War and have been listed in numerous international instruments since Nuremberg.[3] However, the most widely accepted definition of these crimes today is found in Article 7 of the Rome Statute, which defines the jurisdiction of the Court over most of these crimes. They include the following acts, when committed on a widespread or systematic basis: murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape and other crimes of sexual violence, persecution, enforced disappearance, the crime of apartheid and other inhumane acts.[4] It was

[3] For the history of the evolution of the concept and definition of crimes against humanity since the 19th century, see Amnesty International, *The international criminal court: Making the right choices - Part I: Defining the crimes and permissible defences and initiating a prosecution*, January 1997 (AI Index: IOR 40/01/97), Section IV; M. Cherif Bassiouni, *Crimes against Humanity in International Law* 1-87 (The Hague: Kluwer Law International 2d ed. 1999); Rodney Dixon, Christopher K. Hall & Machteld Boot, *Article 7: Crimes against Humanity*, in Otto Triffterer, ed., *The Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden, Germany: Nomos Verlagsgesellschaft 1999).

[4] Article 7 defines the International Criminal Court's jurisdiction over crimes against humanity as follows:

"(1) For the purpose of this Statute, "crime against humanity"means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

(2) For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

generally accepted by the drafters of the Rome Statute that the list of crimes in Article 7 reflected customary law, although the list was not necessarily complete.[5]

Two treaties have been adopted with universal jurisdiction provisions regarding particular crimes against humanity, one for the crime against humanity of *apartheid* and the other for torture, which in certain circumstances amounts to a crime against humanity.

Two articles of the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* (*Apartheid* Convention), read together, recognize universal jurisdiction over this crime against humanity. Article IV requires states parties to take measures to suppress, prosecute, try and punish "in accordance with their jurisdiction" persons responsible for *apartheid*:

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion of other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement, of a woman made forcibly pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that the deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

(3) For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above."

[5] Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Armed Conflicts: A Positivist View*, 93 Am. J. Int'l L. 302, 310 (2000) (stating with respect to crimes against humanity that by "[a]pplying modern positivism and criteria, one may conclude that sufficient practice and *opinio juris* are present for customary law to emerge.").

> "(a) To adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crimes of *apartheid* and similar segregationist policies or their manifestations and to punish persons guilty of that crime.
> (b) To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or some other State or are stateless persons."[6]

The term "in accordance with their jurisdiction" should not, as indicated by Article V, be given a narrow reading as applying only to jurisdiction under existing national law, but should be read as in accordance with their jurisdiction under international law, which includes universal jurisdiction. Article V provides that persons suspected of *apartheid* may be tried by a court of a state party which has acquired jurisdiction over a suspect:

[6] International Convention on the Suppression and Punishment of the Crime of *Apartheid*, *adopted by* U.N. G.A. Res. 3068 (XXVIII) of 30 November 1973, 28 U.N. G.A.O.R. Supp. (No. 30) at 75, U.N. Doc. A/9030 (1973), Art. IV. For background on the *Apartheid* Convention, see Roger S. Clark, *The Crime of Apartheid, in* M. Cherif Bassiouni, ed., 1 *International Criminal Law* 299 (Dobbs Ferry, New York: Transnational Publishers Inc. 1986), and Roger S. Clark, *Apartheid, in* M. Cherif Bassiouni, ed., 1 *International Criminal Law* 643 (Ardsley, New York: Transnational Publishers, Inc. 2nd ed. 1999). For a sceptical, but outdated, view, see H. Booysen, *Convention on the Crime of Apartheid*, 2 So. Afr. Y. B. Int'l L. 56 (1976).

> "Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those State Parties which shall have accepted its jurisdiction."[7]

The second treaty providing for universal jurisdiction over a crime against humanity, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), imposes an *aut dedere aut judicare* obligation on states parties with regard to any person found in territory under their jurisdiction suspected of torture in all cases, not just when the torture amounts to a crime against humanity (see Chapter Nine).[8]

As explained below in this section, not only does each state have the *right* to exercise universal jurisdiction over crimes against humanity, but also it is increasingly recognized that each state has a *duty* either do so or to extradite persons suspected of such crimes able and willing to exercise jurisdiction.

II. THE *ABILITY* OF ANY STATE TO EXERCISE UNIVERSAL JURISDICTION OVER CRIMES AGAINST HUMANITY

The prohibition of crimes against humanity and the norms which regulate them form part of *jus cogens.*[9] As such, they are peremptory norms of general international law which, as recognized in Article 53 of the Vienna Convention of the Law of Treaties (1969), cannot be modified or revoked by treaty (see discussion in Chapter Three, Section I.B).

[7] *Apartheid* Convention, Art. V. According to Clark, "The plain meaning of these two articles combined is that universal jurisdiction is overwhelmingly supported by the preparatory work of the Convention." Roger S., *Offences of International Concern: Multilateral Treaty Practice in the Forty Years Since Nuremberg,* 57 Nordic J. Int'l L. 49, 53 (1988).

[8] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. G.A. Res. 39/46, 39 U.N. G.A.O.R. Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).

[9] *Scholarly authority: Restatement (Third) of the Foreign Relations Law of the United States* § 702 comment n (prohibition of genocide is *jus cogens*); M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes, 59 Law & Contemp. Prob. 63, 68 (1996); Ian Brownlie, *Principles of Public International Law* 515 (Oxford: Oxford University Press 5th ed. 1998).

Cases: In re *Pinochet,* 93 Am. J. Int'l L. 700, 703 (1999) ("[W]e find that before being codified in a treaty or statute, the prohibition on crimes against humanity was part of customary international law and of international *jus cogens*, and this norm imposes itself imperatively and *erga omnes* on our domestic legal order.")

It is also recognized that the prohibition of crimes against humanity is an obligation *erga omnes* of all states, which is a duty all states owe to the international community as a whole to ensure justice is respected (see discussion in Section III.A of this chapter).[10] The legal obligation *erga omnes* with respect to the prohibition of crimes against humanity provides added - but not essential - support for the view that any state may fulfill that obligation by exercising universal jurisdiction over persons suspected of committing such crimes when other states are unable or unwilling to take effective steps to repress these crimes.[11] Of course, states may exercise universal jurisdiction over ordinary crimes under national law that do not contrary to *jus cogens* prohibitions or involve *erga omnes* obligations.

The weight of scholarship, jurisprudence of international criminal courts and intergovernmental organization political bodies and experts demonstrates that international criminal law permits any state to exercise universal jurisdiction over crimes against humanity.[12]

[10] *Restatement (Third) of the Foreign Relations Law of the United States* § 702 comment o (violations of certain rights falling within the concept of crimes against humanity (slavery and slave trade, murder as state policy, torture, prolonged arbitrary detention, systematic racial discrimination, systematic religious discrimination and gender discrimination) "are violations of obligations to all other states").

[11] As the Belgian *juge d'instruction* (investigating magistrate) in the *Pinochet* case stated:

> "The struggle against impunity of persons responsible for crimes under international law is, therefore, a responsibility of all states. National authorities have, at least, the right to take such measures as are necessary for the prosecution and punishment of crimes against humanity.
>
> . . . .
>
> [W]e find that, as a matter of customary law, or even more strongly as a matter of *jus cogens*, universal jurisdiction over crimes against humanity exists, authorizing national judicial authorities to prosecute and punish the perpetrators in all circumstances."

English translation in *In re Pinochet*, 93 Am. J. Int'l L. 700, 702, 703 (1999).

[12] C.J.R. Dugard, Opinion, *Bouterse* Case, 7 July 2000, para. 4.6.2 ("That crimes against humanity, which form part of the corpus of customary international law, are crimes that may be tried in accordance with the principle of universality is accepted by judicial decisions, the International Law Commission and the writing of jurists.").

Most scholars and other authorities which have addressed the question have concluded that any state may exercise universal jurisdiction over crimes against humanity.[13] In July 2000, the

[13] Bassiouni, *Crimes against Humanity*, *supra*, n. 1, 237-240 (review of the authorities demonstrates that crimes against humanity are subject to universal jurisdiction); Brownlie, *supra*, n. 9, 308; Cassel, Douglass, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court,* 35 New Eng. L. Rev. 421, 426-427 (2001) ("Customary international law permits states to exercise universal jurisdiction over . . . crimes against humanity . . ."); Lori Fisler Damrosch, *Enforcing International Law Through No-Forcible Measures*, 269 Recueil des Cours 9, 218 (1997) ("Crimes against humanity assuredly entail universal jurisdiction . . . ."); Eric David, *Principes de Droit des Conflits Armés* 633-634, 701-702 (Bruxelles: Editions Bruylant 2d ed.1999) (*"L'obligation de répression des crimes de guerre prend la forme, comme pour bien d'autres infractions internationales, de l'alternative* aut dedere aut judicare *ou* aut prosequi. *Elle oblige tout Etat à rechercher les auteurs de crimes de guerre ou de crimes contre l'humanité et, soit à les poursuivre pénalement pour ces faits quels que soient la nationalité des auteurs, celles des victimes et le lieu où les faits ont été commis, soit à extrader les auteurs, selon le droit de l'Etat requis, vers tout Etat qui les réclame aux fins de poursuites. L'Etat doit donc exercer une compétence pénale dite universelle à l'égard de l'auteur d'un crime de guerre ou d'un crime contre l'humanité, ou à défaut, il doit l'extrader dans les conditions prévues par sa législation vers un Etat intéressé."*); Nguyen Quoc Dinh, Patrick Daillier & Alain Pellet, *Droit international public* 632-633 (Paris: Librairie Générale de Droit et de Jurisprudence 5th ed. 1994) (citing examples); Yoram Dinstein, *International Criminal Law*, 20 Israel L. Rev. 206, 211-112 (1985) ("Insofar as crimes against humanity are concerned, universal jurisdiction over offenders is accorded to all States."); John R. Dugard, Opinion, *Bouterse* Case, 7 July 2000, par. 4.6.3 ("There is therefore no room for doubt that under customary international law the Netherlands is permitted to exercise jurisdiction over a crime against humanity with which it is not linked by territoriality or nationality when the suspect is present in its territory."); J.E.S. Fawcett, *The* Eichmann *Case*, 38 Brit. Y.B. Int'l L. 181, 204 (1962) ("It is believed that State practice since 1919 vindicates this claim of jurisdiction and that even if it be said that practice was not yet crystallized into a firm rule of international law, it demonstrates at least that there is no contrary rule of international law *prohibiting* the exercise of jurisdiction by the Israeli courts over the crimes against humanity committed by *Eichmann*."); Bernard Graefrath, *Universal Criminal Jurisdiction and an International Criminal Court*, 1 Eur. J. Int'l L. 67, 68 (1990); Christopher Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 Law & Contemp. Prob. 153, 165, 168 ("Every state may prosecute violations of modern fundamental norms of international law, particularly those relating to war crimes and crimes against humanity"), 169 (1996); Menno T. Kamminga, *Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, Committee on International Human Rights Law and Practice, International Law Association, London Conference 2000, 5 (*Final ILA Report*) (stating that "it is widely considered that the exercise of such jurisdiction [over crimes against humanity] is permitted under international law"); F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 113-1 *Recueil des Cours* 9, 95 and n. 18 ("It is, therefore, likely that Israel was entitled to exercise international jurisdiction in the *Case of Eichmann* which arose from a unique case of such an attack."); Peter Malanczuk, *Akehurst's Modern Introduction to International Law* 113 (London and New York: Routledge 7th ed.1997) (crimes against humanity "are a violation of international law, directly punishable under international law itself (and thus universal crimes), and they may be dealt with by national courts or by international tribunals"); Theodor Meron, *International Criminalization of Internal Atrocities*, 89 Am. J. Int'l L. 554, 569 (1995) ("It is now widely accepted that crimes against humanity . . . are subject to universal jurisdiction."); Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 Tex. L. Rev. 785, 814 (1988); Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law,*

International Law Association endorsed the conclusion of its Committee on Human Rights Law and Practice that "[g]ross human rights offences in respect of which states are *entitled* under international customary law to exercise universal jurisdiction include . . . crimes against humanity [as defined in Article 7 of the Rome Statute]".[14]

supra, p. 143 (Oxford: Clarendon Press 1997) ("[c]rimes against humanity today are subject to universal jurisdiction."); *Restatement (Third) of the Foreign Relations Law of the United States* (1987), § 404; Nigel Rodley, *Treatment of Prisoners under International Law* 125 (Oxford: Clarendon Press 2d ed. 1999) (crimes against humanity "are amenable to any international penal jurisdiction and, while no treaty requires the exercise of universal jurisdiction over perpetrators, it may be assumed that such jurisdiction is permitted"); Malcolm N. Shaw, *International Law*, 473 (4th ed. 1997); Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 63 Law & Contemp. Probs (2000) (forthcoming) (23 October 2000 draft, 20) ("It is now widely accepted that crimes against humanity are subject to universal jurisdiction."); Georg Schwarzenberger, *The Eichmann Judgment: An Essay in Censorial Jurisprudence*, 15 Curr. Leg. Probs 248, 256 (1962) (stating with respect to Eichmann's crimes, which included crimes against humanity, "It would, be hard to point to evidence of a rule of international law prohibiting the assumption of criminal jurisdiction against an accused actually present in the territory of a sovereign State for crimes he is accused of having committed against foreign nationals abroad."); Simma & Paulus, *supra*, n. 5, 314 ("[A]s evidenced by national trials, the establishment of universal jurisdiction for . . . crimes against humanity, even if committed against aliens abroad seems almost universally to be considered permissible.").

[14] International Law Association, Res. 9/2000, adopted at the 69th Conference, London, 25-29 July 2000. For the text of this resolution, see Introduction, footnote 6.

Although two British scholars as recently as 1996 considered that "no general rule of positive international law can as yet be asserted which gives to states the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy", they conceded that there were "clear indications pointing to the gradual evolution of a significant principle of international law to that effect".[15] That principle included both universal jurisdiction and "the recognition of the supremacy of the law of humanity over the law of the sovereign state when enacted or applied in violation of elementary human rights in a manner which may justly be held to shock the conscience of mankind".[16]

The UN General Assembly has adopted two treaties concerning particular crimes against humanity, the Convention on the Suppression and Punishment of the Crime of *Apartheid* (*Apartheid* Convention) in 1973 and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) in 1984 (see Chapter Fourteen, Section I and Chapter Ten, Section II) providing for universal jurisdiction.[17]

[15] Robert Jennings & Arthur Watts, 1 *Oppenheim's International Law* 998 (London and New York: Longman 9th ed. 1992) (paperback edition). A somewhat less conservative view was expressed by another British scholar in 1992 who accepted that there was universal jurisdiction over crimes against humanity "committed immediately before, or during, war", but did not go so far as to say that such jurisdiction existed over crimes against humanity not linked to armed conflict. Rosalyn Higgins, *Problems and Processes: International Law and How We Use it* 61-62 (Oxford: Oxford University Press 1992). However, it is now generally accepted that the nexus to armed conflict was simply a *jurisdictional* requirement of the Nuremberg and Tokyo Charters, not a part of *substantive* definition of the crime under international law. The same is true with respect to crimes against humanity in the Yugoslav Statute. The absence of a nexus to armed conflict is documented in Amnesty International, *The international criminal court: Making the right choices - Part I: Defining the crimes and permissible offences and initiating a prosecution*, January 1997 (AI Index: IOR 40/01/97), Sec. IV.K; Virginia Morris & Michael P. Scharf, 1 *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* 81-84 (Irvington-on-Hudson, New York: Transnational Publishers, Inc. 1995). *See also* Herman von Hebel & Darryl Robinson, *Crimes within the Jurisdiction of the Court* in Roy S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute -Issues - Negotiations - Results* 92-93 (The Hague/London/Boston: Kluwer Law International 1999).

[16] *Oppenheim's International Law, supra,* n. 15, 998.

[17] Convention on the Suppression and Punishment of the Crime of *Apartheid*, U.N. G.A. Res. 3068 (XXVIII), 28 U.N. G.A.O.R. Supp. (No. 30), at 75, U.N. Doc. A/9030 (1973), Art. V ("Persons charged with the acts enumerated in article II [the crime against humanity of *apartheid*] of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused . . ."); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. G.A. Res. 39/46, 39 U.N. G.A.O.R. Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).

The Commission of Experts appointed to investigate the human rights situation in the former Yugoslavia concluded in 1994 that universal jurisdiction over crimes against humanity existed under international law.[18] Subsequently, the Trial and Appeals Chambers of the International Criminal Tribunal for the former Yugoslavia have confirmed that international customary law permits any state to exercise universal jurisdiction over crimes against humanity. In the *Tadi_* case, a Trial Chamber stated the crimes within the Tribunal's jurisdiction, which include crimes against humanity,

[18] Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/1994/674 (Annnex), 27 May 1994, para. 42 (stating, in the context of an internal armed conflict, that there was universal jurisdiction over crimes against humanity).

> "are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognized in international law as serious breaches of international humanitarian law, and transcending the interest of any one State. The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community."[19]

These views were confirmed in 1995, when the Security Council urged states to exercise universal jurisdiction over crimes against humanity over which the Rwanda Tribunal had jurisdiction. In Resolution 978, it

> "*[u]rges* states to arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities, persons found within their territory against whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda."[20]

Trial Chamber 1 of the Rwanda Tribunal in 1999 called upon all states to exercise universal jurisdiction over grave violations of international humanitarian law within its jurisdiction, which include war crimes in non-international armed conflict.[21] At almost the same time as the Security

[19] *Prosecutor v. Tadi_*, Decision on the defence motion on jurisdiction, Case No. IT-94-1-T (Trial Chamber 10 August 1995), para. 42. In discussing the principle of universal jurisdiction in the same case, the Appeals Chamber declared: "It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity." *Prosecutor v. Tadi_*, Decision on the defence motion for interlocutory appeal on jurisdiction, Case No. IT-94-1-AR72 (Appeals Chamber 2 October 1995), para. 58.

[20] S.C. Res. 978 (1995) of 27 February 1995. Since the phrase "appropriate national authorities" is not limited to Rwandan authorities, it is clear that the Security Council envisaged prosecution by the courts of other states based on universal jurisdiction.

[21] It stated in the context of approving a request to withdraw an indictment that

> "the Tribunal wishes to emphasize, in line with the General Assembly and the Security Council of the United Nations, that it encourages all State, in application of the principle of universal jurisdiction, to prosecute and judge those responsible for serious crimes such as genocide, crimes against humanity and other grave violations of international humanitarian law . . . ."

Council made its call to states to exercise jurisdiction over crimes committed in Rwanda in Resolution 978, it also called upon all parties to the conflict in the Democratic Republic of the Congo, which has both international and non-international dimensions, to bring those responsible for crimes against humanity to justice.[22]

In 1996, the International Law Commission provided for universal jurisdiction in Articles 8 and 9 of the Draft Code of Crimes against the Peace and Security of Mankind over crimes against humanity as defined in Article 18.

Prosecutor v. Ntuyahaga, Decision on the Prosecutor's Motion to Withdraw the Indictment, Case No. ICTR-98-40-T (Trial Chamber I, 18 March 1999). The Trial Chamber also noted that "the Tribunal does not have exclusive jurisdiction over crimes included in its mandate and that its criminal proceedings are complementary to those of national jurisdictions." *Ibid.*

[22] On 24 February 2000, the Security Council in Resolution 1291 (2000) called on

"all parties to the conflict in the Democratic Republic of the Congo . . . to refrain from or cease any support to, or association with, those suspected of . . . crimes against humanity . . ., and to bring to justice those responsible, and facilitate measures in accordance with international law to ensure accountability for violations of international humanitarian law."

Since the conflict includes a rebellion by certain of the parties against the government and since some of the other parties are foreign states, the Security Council necessarily was calling upon those foreign states to exercise universal jurisdiction over war crimes in a non-international armed conflict. *See also* S.C. Res. 1304 (2000) of 16 June 2000.

The Inter-American Commission on Human Rights has recommended that "the member States of the Organization of American States adopt such legislative and other measures as may be necessary to invoke and exercise universal jurisdiction in respect of individuals in matters of . . . crimes against humanity . . .".[23]The ICRC has stated that "[r]ecent cases before national tribunals indicate that crimes against humanity are to be considered as crimes against international law and against the international community as a whole, and therefore are not restricted to the principle of territorial jurisdiction . . ."[24] National courts, even in states which do not have legislation providing for universal jurisdiction over crimes against humanity, have recognized that under international law the courts of any state may do so.[25]

III. THE *DUTY* TO PROSECUTE OR EXTRADITE PERSONS RESPONSIBLE FOR CRIMES AGAINST HUMANITY

There is some evidence that states not only are *permitted* to exercise universal jurisdiction over persons suspected of crimes against humanity, but also that they are *under an obligation* to exercise universal jurisdiction over persons found in their territory or to extradite persons suspected of committing crimes against humanity under the principle of *aut dedere aut judicare* (extradite or prosecute). There are a number of grounds for this conclusion, including scholarly authority, the scope of *erga omnes* obligations and declarations and other actions by states at the international level.

A. The scope of *erga omnes* obligations

Given that the prohibition of crimes against humanity is *jus cogens* and is an obligation *erga omnes*, it follows that states have limited choices if a person suspected of such crimes is found in their territory. It is logical to assume that if a person are found in the territory or jurisdiction of a state who are suspected of crimes against humanity, the state must either investigate and, if there is sufficient admissible evidence, prosecute the suspect or to cooperate in the detection, arrest, extradition and punishment of persons responsible for these crimes, wherever they have occurred, just as they must

[23] Inter-Amer. Comm'n Hum. Rts Rec. 21, OEA/Ser/L/V/II/.101 Doc. 70, 8 December 1998, *obtainable from* http://www.iachr.org.

[24] International Committee of the Red Cross, *International Criminal Court: State consent regime v. universal jurisdiction* 4 (1998).

[25] *See, for example, Polyukhovich v. Commonwealth of Australia*, (1991) 172 CLR 501, F.C. 91/026, *obtainable from* http://www.austlii.edu.au/au/cases/cth/high_ct/172clr501.html, para. 28 ("[T]here appears to be general agreement that . . . crimes against humanity are now within the category subject to universal jurisdiction[.]") (Toohey, J.) (reviewing jurisprudence and other authorities)

with regard to war crimes. Sheltering them from justice by failing to initiate criminal investigations or failing to extradite them to a state able and willing to exercise jurisdiction would be inconsistent with the *erga omnes* obligation.

B. Scholarly authority

A number of scholars have concluded that states have a duty to extradite or try persons suspected of crimes against humanity.[26]

C. The recognition by states of a duty to bring to justice those responsible for crimes against humanity, without any geographic limits

On 17 July 1998, the international community reaffirmed the fundamental obligations of every state to bring to justice at the national level those responsible for crimes against humanity, genocide and war crimes and to exercise its jurisdiction over those responsible for these crimes. In the Preamble of the Rome Statute, the states parties 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", determined "to put an end to impunity for the perpetrators of these crimes" and recalled "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".[27] Nothing in the Preamble limits the scope of the obligation to exercise jurisdiction to the exercise of territorial jurisdiction.

[26] *See, for example,* Bassiouni, *supra,* n. 1, 500 ("'Crimes against humanity' is a category of international crimes and, as such, a general duty exists to prosecute or extradite."); Brownlie, *supra,* n. 9, 315. *See also* Walter Gary Sharp, Jr., *International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia?,* 7 Duke J. Comp. & Int'l L. 411, 432 (1997) (citing authorities who had reversed their position and had subsequently concluded that there was a duty to prosecute persons suspected of crimes against humanity).

[27] Rome Statute, Preamble, paras. 4-6.

These declarations in the Preamble of the Rome Statute are simply the latest in a series of affirmations by states that they have a duty to cooperate in bringing to justice persons responsible for crimes against humanity, including through extradition. They mark a shift from focussing on a duty to extradite suspects to territorial states as the method for ensuring that they were brought to justice to a duty to ensure that such persons are brought to justice with extradition as one technique for accomplishing this goal. On 15 February 1946, the General Assembly, noting the call in the Moscow Declaration of 1 November 1943 that those responsible for atrocities in particular countries - as opposed to those responsible for crimes with no particular geographical location - be sent back to those countries for trial, called upon all states to send such persons back to those countries for trial and punishment.[28] On 11 December 1946, the General Assembly affirmed the principles of the Nuremberg Charter and Tribunal.[29] On 31 October 1947, the General Assembly recommended that UN Members "continue with unabated energy to carry out their responsibilities as regards the surrender and trial of war criminals".[30] In 1968, the General Assembly adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Article III of which provides that states parties shall "undertake to adopt all necessary domestic measures, legislative or otherwise, with a view to making possible the extradition, in accordance with international law" of persons responsible for war crimes or crimes against humanity.

More than a quarter century ago, the UN General Assembly declared that "crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment".[31] It stated that all states have extensive obligations to cooperate with

[28] G.A. Res. 3 (I) of 13 February 1946. The reference in the preambular paragraphs to crimes against humanity and crimes against peace, as well as to war crimes, makes it clear that the General Assembly intended its recommendations also to include those responsible for these crimes.

[29] G.A. Res. 95 (I) of 11 December 1946.

[30] G.A. Res. 170 (II) of 31 October 1947. The reference in the preambular paragraphs to earlier resolutions which addressed crimes against humanity and crimes against peace, as well as to war crimes, makes it clear that the General Assembly intended its recommendations also to include those responsible for these crimes.

[31] UN Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity (1973 UN Principles of International Co-operation), adopted by the General Assembly in Resolution 3074 (XXVIII) of 3 December 1973, para. 1. In 1971, the General Assembly had urged all states "to take measures in accordance with international law to put an end to and prevent war crimes and crimes against humanity and to ensure the punishment of all persons guilty of such crimes, including their extradition to those countries where they have committed such crimes." G.A. Res. 2840 (XXVI) of 31 October 1971. The General Assembly also affirmed that "refusal by States to co-operate 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

each other to ensure that those responsible for crimes against humanity wherever these crimes occurred are brought to justice and must not take any measures which would be prejudicial to these obligations.

The resolution that states have the obligation to trace persons suspected of crimes against humanity "wherever they are committed" and the suspects shall be subject to trial . . . as a general rule in the countries where they have committed those crimes".[32] However, it is clear from the wording that the resolution leaves open the possibility of trying them on the basis of extraterritorial jurisdiction elsewhere.

The extensive obligations of states concerning trial and extradition of persons suspected of crimes against humanity include:

> "3. States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose.
> 4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them.
> 5. Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, States shall co-operate on questions of extraditing such persons.
> 6. States shall co-operate with each other in the collection of information and evidence which would help to bring to trial the persons indicated in paragraph 5 above and shall exchange such information.
> 7. In accordance with Article 1 of the Declaration on Territorial Asylum of 14 December 1967, States should not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity.

the United Nations and to generally recognized norms of international law." *Ibid.* Although the focus of this resolution was on extradition of persons taking refuge in other countries, the wording clearly suggests that extradition to territorial states was only one option for bringing persons to justice for such crimes.

[32] *Ibid.*, para. 5.

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."[33]

Although these Principles state that "as a general rule" persons responsible for crimes against humanity should face justice in their own courts, given the obligation "to ensure" that such persons are brought to justice, this general rule clearly does not apply when that country has given the person an amnesty or has otherwise demonstrated an unwillingness or inability to bring the person to justice (See, for example, the principle of complementarity in Article 17 of the Rome Statute permitting the Court to exercise its concurrent jurisdiction over genocide, other crimes against humanity and war crimes when states parties themselves are unable or unwilling to do so).

In addition, the International Law Commission has incorporated the principle of *aut dedere aut judicare* (extradite or prosecute) in Article 9 of the 1996 Draft Code of Crimes. That article states: "Without prejudice to the jurisdiction of an international criminal court, the State Party in territory of which an individual alleged to have committed a crime set out in [Article 18 on crimes against humanity] is found shall extradite or prosecute that individual." [34] The International Law Commission explained that Article 9 established "the general principle that any State in whose territory an individual alleged to have committed [crime against humanity] is present is bound to extradite or prosecute the alleged offender".[35] It added that the "fundamental purpose" of the *aut dedere aut judicare* principle reflected in Article 9 "is to ensure that individuals who are responsible for particularly serious crimes are brought to justice by providing for the effective prosecution and punishment of such individuals by a competent jurisdiction."[36]

Principle 5 of the draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of International Human Rights and Humanitarian Law (Van Boven-Bassiouni Principles) provides that "States shall incorporate within their domestic law appropriate provisions providing for universal jurisdiction over crimes under international law."[37]

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[33] *Ibid.*, paras 3-8.

[34] International Law Commission, Report of the International Law Commission on the Work of its Forty-Eighth Session (1996 ILC Report) , 51 U.N. G.O.A.R. Supp(No. 10) at 9, U.N. Doc. A/51/50 (1996), 1996 Draft Code of Crimes, Art. 9.

[35] 1996 Draft Code of Crimes, Art. 9, Commentary, para. 2.

[36] *Ibid.*

[37] UN Commission on Human Rights Independent Expert on the right to restitution, compensation and

rehabilitation for victims of grave violations of human rights and fundamental freedoms, Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of International Human Rights and Humanitarian Law (Final Draft), 18 January 2000, U.N. Doc. E/CN.4/2000/62, Prin. 5.

The Inter-American Commission on Human Rights, in an important statement on this question on 20 October 2000 has declared that states are under a duty not to grant asylum to persons suspected of crimes against humanity and other crimes under international law who flee to avoid criminal responsibility.[38]

In addition, in 1985, the International Law Association declared that states had a duty to ry or extradite persons suspected of crimes against humanity. International Law Association, Res. No. 7, *Report of the Sixty-First Conference* (London 1985) ("No State may refuse to try or extradite a person accused of . . . a crime against humanity. . . .").

D. The duty not to grant asylum to persons suspected of crimes against humanity

[38] Inter-American Commission on Human Rights, Organization of American States, *Asylum and International Crimes*, 20 October 2000. For the full text of this statement, see Chapter Three, Section I.

States have repeatedly declared at the international level that persons responsible for crimes against humanity may not be given asylum. Article 14 (2) of the 1948 Universal Declaration of Human Rights provides that the right to seek and to enjoy in other countries asylum from persecution "may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations". Article 1 (F) of the 1951 Convention relating to the Status of Refugees provides: "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) He has committed a . . . crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes."[39] In 1967, the General Assembly adopted the Declaration on Territorial Asylum reiterating this principle. Article 1 (2) of that declaration stated: "The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes."[40] As mentioned above, in 1973, the UN General Assembly reaffirmed this principle.[41]

The Inter-American Commission on Human Rights, in an important statement on this question on 20 October 2000 has declared that states are under a duty not to grant asylum to persons suspected of war crimes and other crimes under international law who flee to avoid criminal responsibility.[42]

[39] U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429 (V) of 14 December 1950, adopted on 28 July 1951, Art. 1 (F). The full text of Article 1 (F) reads:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) He has been guilty of acts contrary to the purposes and principles of the United Nations."

For a discussion of the scope of these exclusions, see Guy S. Goodwin-Gill, *The Refugee in International Law* 95-114 (Oxford: Clarendon Press 2nd ed. 1996).

[40] U.N.G.A. Res. 2312, 22 U.N. G.A.O.R. Supp. (No.16) at 81, U.N. Doc. A/67/16/16 (1967) of 14 December 1967, adopting the Declaration on Territorial Asylum.

[41] 1973 UN Principles of International Co-operation, *supra*, n. 31, para. 7.

[42] Inter-American Commission on Human Rights, Organization of American States, *Asylum and International Crimes*, 20 October 2000 (for the text of this statement, see Chapter Three, Section I.B).

As demonstrated in the following chapter, there is ample evidence of state practice at the national level concerning universal jurisdiction over these crimes in the form of legislation, statements of government officials, prosecutions and court judgments.