UNIVERSAL JURISDICTION

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I. INTRODUCTION

"The jurisdiction to try crimes under international law is universal"

Attorney General of the State of Israel v. Eichmann, 36 Int'l L. Rep. 5, 26 (Dist. Ct. Jerusalem 12 December 1961)

On the eve of the second annual discussion in the United Nations (UN) General Assembly's Sixth (Legal) Committee of universal jurisdiction, Amnesty International is publishing this report to assist governments in preparing to discuss this essential tool to bring to justice persons responsible for genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances. The only documents available to governments are the General Assembly resolutions calling for the first and second annual discussions, daily summaries of the first annual discussion, 44 state reports submitted to the UN Secretary-General on the subject and an analytical summary of the state reports. This paper supplements this material by providing further information about universal jurisdiction legislation and jurisprudence in the 44 states omitted from that summary, as well as correcting some of the errors in the reports.[1] In addition, this paper brings to the attention of governments information about universal jurisdiction legislation and jurisprudence in many of the other 148 UN member states that have failed to submit reports, developments in intergovernmental organizations and some of the many other reliable sources of information about universal jurisdiction.

Background concerning the establishment of the annual discussion.

In 2009 a request for inclusion of a General Assembly agenda item on the issue – originally entitled as "the abuse of universal jurisdiction" - was presented by Tanzania on behalf of the African Group and was granted. The original draft resolution circulated by Rwanda contained, from Amnesty International perspective, several damaging preambular paragraphs, in particular those relating to the issue of immunity of state officials.

Background concerning the second annual discussion.

On December 16, 2009 the UN General Assembly adopted without vote a resolution on "The scope and application of the principle of universal jurisdiction"

[1] In the light of the decision not to publish the 44 state reports until September 2010, it has not been possible to analyze each of these reports in any detail for this paper.

(A/RES/64/117). In that resolution the General Assembly requested the Secretary-General to invite member states to submit, before 30 April 2010, information and observations on the scope and application of universal jurisdiction, including information on the relevant applicable international treaties, their domestic legal rules and judicial practice, and to prepare and submit to the General Assembly, at its 2010 session, a report based on such information and observations.

Resolution 64/117 also decided that the Sixth Committee would continue the consideration of the scope and application of universal jurisdiction, without prejudice to the consideration of related issues in other forums of the UN – as for example, discussions now taking place at the International Law Commission (ILC) on the obligation to extradite or prosecute (*aut dedere aut judicare*).[2]

The Report of the Secretary-General prepared on the basis of comments and observations of Governments (Secretary-General's analytical report) contains a summary of the replies by states to that invitation.[3] Only 44 out of the 192 UN member states have submitted reports.[4] Nevertheless, the Secretary-General's analytical report provides a valuable introduction to some of the information available with regard to the topic. The analytical report and the state reports provide a useful supplement to the information published by Amnesty International nearly a decade ago in a global memorandum on state legislation and practice on universal jurisdiction.

However, some state reports do not seem to contain all the relevant information at national level. In addition, the Secretary-General did not seek information to assist states in preparing for the discussion from sources other than those listed in the 2009 resolution. By doing so, the Secretary-General missed an important

[2] At its fifty-sixth session, in 2004, the International Law Commission, on the basis of the recommendation of a Working Group on the long-term programme of work, began a study of the topic (See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 362). Since that date, the Special Rapporteur on the topic, Mr. Zdzislaw Galicki, has submitted four reports U.N. Doc. A/CN.4/571, U.N. Doc. A/CN.4/585 and Corr. 1, U.N. Doc. A/CN.4/603, and U.N. Doc. A/CN.4/L.774). In 2009, the International Law Commission established a working group under the Chairmanship of Mr. Alain Pellet to assist the Special Rapporteur.

[3] Report of the Secretary-General prepared on the basis of comments and observations of Governments on the scope and application of the principle of universal jurisdiction, U.N. Doc. A/65/181, of 29 July 2010.

[4] The Secretary-General's analytical report summarizes responses from the following states: Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, the Plurinational State of Bolivia, Bulgaria, Cameroon, Chile, China, Costa Rica, Cuba, Cyprus, the Czech Republic, Denmark, El Salvador, Estonia, Ethiopia, Finland, France, Germany, Iraq, Israel, Italy, Kenya, Kuwait, Lebanon, Malaysia, Malta, Mauritius, the Netherlands, New Zealand, Norway, Peru, Portugal, the Republic of Korea, Rwanda, Slovenia, South Africa, Sweden, Switzerland, Tunisia and the United States of America.

opportunity to provide states with a wealth of information concerning universal jurisdiction available that has not been included in the analytical report. Such information is of fundamental value for the purposes of a well-founded discussion at the Sixth Committee on the scope and application of universal jurisdiction.

In this paper Amnesty International provides some additional information to that provided in the Secretary-General's analytical report concerning 44 state reports, as well as information on legislation and practice in some states which have not submitted reports to the Secretary-General. In particular, the organization brings to the attention of states information compiled and analyzed in its September 2001 722-page global study of state practice concerning universal jurisdiction in approximately 125 states,[5] its review of universal civil jurisdiction,[6] a study of state

[5] Amnesty International: *Universal Jurisdiction: the duty of states to enact and implement legislation* (IOR 53/003/2001 to IOR 53/018/2001), September 2001. It is published in 17 parts:

Introduction, AI Index: IOR 53/002/2001 (http://www.amnesty.org/en/library/info/IOR53/002/2001/en);

Chapter One - Definitions, AI Index: IOR 53/003/2001 (http://www.amnesty.org/en/library/info/IOR53/003/2001/en);

Chapter Two – The evolution of the practice of universal jurisdiction, AI Index: IOR 53/004/2001 (http://www.amnesty.org/en/library/info/IOR53/004/2001/en)

Chapter Three - War crimes: The legal basis for universal jurisdiction. AI Index: IOR 53/005/2001 (http://www.amnesty.org/en/library/info/IOR53/005/2001/en);

Chapter Four A - War crimes: Algeria to Hungary, AI Index: IOR 53/006/2001 (http://www.amnesty.org/en/library/info/IOR53/006/2001/en);

Chapter Four B - India to Zimbabwe, AI Index: IOR 53/007/2001 (http://www.amnesty.org/en/library/info/IOR53/007/2001/en);

Chapter Five - Crimes against humanity: The legal basis for universal jurisdiction, AI Index: IOR 53/008/2001 (http://www.amnesty.org/en/library/info/IOR53/008/2001/en);

Chapter Six - Crimes against humanity: State practice - A country by country analysis, AI Index: IOR 53/009/2001 (http://www.amnesty.org/en/library/info/IOR53/009/2001/en);

Chapter Seven - Genocide: The legal basis for universal jurisdiction, AI Index: IOR 53/010/2001 (http://www.amnesty.org/en/library/info/IOR53/010/2001/en);

Chapter Eight - Genocide: State practice at the national level, AI Index: 53/011/2001 (http://www.amnesty.org/en/library/info/IOR53/011/2001/en);

Chapter Nine - Torture: The legal basis for universal jurisdiction, AI Index: IOR 53/012/2001 (http://www.amnesty.org/en/library/info/IOR53/012/2001/en);

practice concerning *aut dedere aut judicare* published in February 2009[7] and its recent steps to update the September 2001 global study in its *No safe haven* series on universal jurisdiction in each of the 192 UN member states.[8] In addition,

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Chapter Ten - Torture: State practice at the national level: Country by country review, AI Index: IOR 53/013/2001(http://www.amnesty.org/en/library/info/IOR53/013/2001/en);

Chapter Eleven - Extrajudicial executions, AI Index: IOR 53/014/2001 (http://www.amnesty.org/en/library/info/IOR53/014/2001/en);

Chapter Twelve - "Disappearances", AI Index: IOR 53/015/2001 (http://www.amnesty.org/en/library/info/IOR53/015/2001/en);

Chapter Thirteen - Other crimes, AI Index: IOR 53/016/2001 (http://www.amnesty.org/en/library/info/IOR53/016/2001/en);

Chapter Fourteen - Overcoming obstacles to implementing universal jurisdiction, AI Index: IOR 53/017/2001 (http://www.amnesty.org/en/library/info/IOR53/017/2001/en); and

Chapter Fifteen - Recommendations, bibliography and appendix (ratifications chart), AI Index: IOR 53/018/2001 (http://www.amnesty.org/en/library/info/IOR53/018/2001/en).

[6] Amnesty International, *Universal jurisdiction: the scope of civil universal jurisdiction*, AI Index: IOR 53/008/2007, 1 July 2007 (http://www.amnesty.org/en/library/info/IOR53/008/2007) (noting legislative provisions in 25 countries with universal civil jurisdiction, including: Argentina, Austria, Belgium, Bolivia, China, Colombia, Costa Rica, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, Myanmar, the Netherlands, Panama, Poland, Portugal, Romania, Senegal, Spain, Sweden, United States and Venezuela).

[7] Amnesty International, Amnesty International, *International Law Commission: The obligation to extradite or prosecute (aut dedere aut judicare)*, AI Index: IOR 40/001/2009, 3 February 2009 (http://www.amnesty.org/en/library/info/IOR40/001/2009/en). Also available in Spanish at: http://www.amnistiainternacional.org/Publicacion.php?Id=119.

[8] Six papers have been published so far: ***Bulgaria*** (http://www.amnesty.org/en/library/info/EUR15/001/2009/en); ***Germany*** (http://www.amnesty.org/en/library/info/EUR23/003/2008/en); (https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/ALEMANIA%20LA%20LUCHA%20CONTRA%20LA%20IMPUNIDAD%20A%20TRAVES%20DE%20LA%20JURISDICCION%20UNIVERSAL?CMD=VEROBJ&MLKOB=27141201313) (Spanish); ***Solomon Islands*** (http://www.amnesty.org/en/library/info/ASA43/002/2009/en); ***Spain*** (http://www.amnesty.org/es/library/info/EUR41/017/2008/es) (Spanish only); ***Sweden*** (http://www.amnesty.org/en/library/info/EUR42/001/2009/en); ***Venezuela*** (http://www.amnesty.org/en/library/info/AMR53/006/2009/en); (http://www.amnesty.org/es/library/info/AMR53/006/2009/es) (Spanish).

Amnesty International notes some of the extensive information available from intergovernmental organizations, international criminal courts and other international organizations that is not discussed in the Secretary-General's analytical report.

II. TWO RELATED BUT DISTINCT RULES: UNIVERSAL JURISDICTION AND THE OBLIGATION TO EXTRADITE OR PROSECUTE (*AUT DEDERE AUT JUDICARE)*

As a number of state reports have correctly stressed, universal jurisdiction should not be confused with the obligation to extradite or prosecute (*aut dedere aut judicare*). They are two important related, but conceptually distinct, rules of international law.

Universal jurisdiction is the *ability* of the court of any state to investigate and try persons for crimes committed outside its territory which are not linked to the state by the nationality of the suspect or the victims or by harm to the state's own national interests. Sometimes this rule is called permissive universal jurisdiction. This rule is now part of customary international law, although it is also reflected in treaties, national legislation and jurisprudence concerning crimes under international law, ordinary crimes of international concern and ordinary crimes under national law. When a national court is exercising jurisdiction over conduct amounting to crimes under international law or ordinary crimes of international concern committed abroad, as opposed to conduct simply amounting to ordinary crimes, the court is really acting as an agent of the international community enforcing international law.

Under the related extradite or prosecute *(aut dedere aut judicare*) rule, a state may not shield a person suspected of certain categories of crimes. Instead, it is *required* either to exercise jurisdiction (which would necessarily include universal jurisdiction in certain cases) over a person suspected of certain categories of crimes or to extradite the person to a state able and willing to do so or to surrender the person to an international criminal court with jurisdiction over the suspect and the crime.

For example, in its report dated 17 May 2010, **Finland** explained that in a recent case, "[i]t was found that the person concerned could not be extradited under the law of Finland, and therefore he was charged in Finland, on the basis of universal jurisdiction".[9]

[9] Verbal note submitted by Finland on 17 May 2010, page 3, available at

Another example, not included in the report of 26 April 2010 submitted by **Switzerland**, is the criminal investigation opened in that state against former Rwanda Minister of Environment, Gaspard Ruhumuriza. Such an investigation was the consequence of the decision not to grant his extradition request to Rwanda, under charges of alleged genocide committed in 1994.[10] Although Switzerland exercised jurisdiction based on the obligation to extradite or prosecute (*aut dedere aut judicare*), the jurisdictional base under which the jurisdiction is exercised is universal, since the suspected perpetrator, a foreigner, allegedly committed crimes under international law in Rwanda against Rwandese victims.

Therefore, although the obligation to extradite or prosecute does not amount *per se* to universal jurisdiction, as a number of states have stated in their reports, whenever a foreigner present in the state is suspected of committing a crime abroad against another foreigner, the *aut dedere aut judicare* rule necessarily requires the exercise of universal jurisdiction.

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http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Finland.pdf.

[10] *Département fédéral de justice et police, Office fédéral de la justice, Communiqués, OFJ, 30.06.2009*, www.bj.admin.ch/bj/fr/home/dokumentation/medieninformationen/2009/2009-06-30.html.

III. THE WIDESPREAD ACCEPTANCE OF UNIVERSAL JURISDICTION AND THE OBLIGATION TO EXTRADITE OR PROSECUTE

Since the total number of states which provided comments with regard to relevant treaties containing either universal jurisdiction or the obligation to extradite or prosecute (*aut dedere aut judicare)* has been particularly low, government representatives preparing for the discussion in the Sixth Committee might not be fully aware how widespread the acceptance by states have been regarding treaties containing such rules (see Table 3 at p.36-39 of the Secretary General's analytical report) and in legislation providing for universal jurisdiction. In addition, as explained below in Section IV, a number of the of the 44 states which submitted reports appear to have failed to mention that they have authorized their national courts to exercise universal jurisdiction over one or more of the following categories of crimes: ordinary crimes, such as murder, rape, assault and abduction; crimes under national law of international concern, such as hostage-taking or terrorist bombings; or crimes under international law such as war crimes, crimes against humanity, genocide and torture.

As Amnesty International documented in February 2009, all UN member states have ratified treaties with *aut dedere aut judicare* obligations to exercise jurisdiction over foreigners suspected of committing certain crimes abroad against other foreigners.[11] A recent review of ratifications of some of these treaties indicates how widespread is such acceptance:

- 194 states have ratified the Geneva Conventions of 12 August 1949, which provide for universal jurisdiction with regard to those war crimes in international armed conflict defined as grave breaches. [12]

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[11] *International Law Commission: The obligation to extradite or prosecute (*aut dedere aut judicare*)*, *supra*, note 7, pp. 74-98.

[12] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), art.49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), art.50; Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), art.129; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva

- 107 states are party to the International Convention on the Suppression and Punishment of the Crime of *Apartheid* (*Apartheid* Convention) (1973), which provides for universal jurisdiction for conduct amounting to *apartheid*. [13]

- 170 states ratified the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), which provides for universal jurisdiction over grave breaches of that protocol.[14]

- 167 states are party to the International Convention against the Taking of Hostages (Hostage Taking Convention) (1979), providing for the obligation to extradite or prosecute.[15]

- 160 states parties to the United Nations Convention on the Law of the Sea (Law of the Sea Convention) (1982), which provides for universal jurisdiction for piracy.[16]

- 147 states are party to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (Convention against Torture) (1984), which provides for universal jurisdiction, if the state decides not to extradite the person concerned to another state. [17]

- 164 states have ratified the International Convention for the Suppression of Terrorist Bombings (Terrorist Bombing Convention) (1997), which provides for the obligation to extradite or prosecute.[18]

- 146 states have ratified the United Nations Convention against Corruption (Corruption Convention) (2003), which provides for the obligation to extradite or prosecute.[19]

Convention), art.146.

[13] *Apartheid* Convention, arts IV (b) and V.

[14] Protocol I, art. 85 (1).

[15] Hostage Taking Convention, arts 5 (2), 6 (1) and 8 (1).

[16] Law of the Sea Convention, art. 105.

[17] Convention against Torture, arts. 5 (2), 6 (1) and 7 (1).

[18] Terrorist Bombing Convention, arts. 6 (4) and 7 (1) and (2).

[19] Corruption Convention, art. 42 (4).

- 19 states are party to the International Convention for the Protection of All Persons from Enforced Disappearance (Disappearances Convention) (2006), which provides for universal jurisdiction, unless the state extradites to another state or surrenders the person to an international criminal court whose jurisdiction it has recognized.[20]

Bearing in mind that every treaty in force is binding upon the parties to it and must be performed by them in good faith, states are obliged to exercise universal jurisdiction in those cases so provided by treaties to which they are party – without states invoking the provisions of its internal law as justification for its failure to perform a treaty.[21]

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[20] Disappearances Convention, arts. 9 (2), 10 (1) and 11 (1).

[21] Vienna Convention on the Law of the Treaties, arts. 27 and 28 (reflecting customary international law).

IV. ADDITIONAL INFORMATION CONCERNING UNIVERSAL JURISDICTION IN THE 44 STATES THAT SUBMITTED REPORTS

Some of the 44 state reports do not include all the relevant information on national legislation on universal jurisdiction. These omissions might mislead states preparing for the discussion into thinking that universal jurisdiction was no as extensive as it is. Even when specific legislation is mentioned, it is not usually cited in an easily accessible form, including with links, where they exist. Many of the 44 states that submitted reports have authorized their national courts to exercise universal jurisdiction over ordinary crimes, crimes under national law of international concern or crimes under international law. As noted below, some of the reporting states have provided their courts with universal jurisdiction over civil claims, either in civil proceedings or in criminal proceedings.

Legislation in the reporting states as of September 2001 providing for universal jurisdiction omitted from the Secretary-General's analytical report

As of September 2001, almost a decade ago, Amnesty International documented reporting states that have provided such jurisdiction in certain instances, either expressly in legislation or in national jurisprudence, over particular crimes not mentioned in the Secretary-General's analytical report. What is not immediately apparent, either from that analytical report or the state reports themselves, is that a significant number of the reporting states have provided for universal jurisdiction over ordinary crimes. At least 15 of the reporting states (Austria, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Cuba, Czech Republic, Denmark, Estonia, Ethiopia, Germany, Italy, Lebanon,[22] Portugal and Slovenia) have provided

[22] The statement in the Lebanon report that it had not adopted universal jurisdiction is not correct. Lebanese courts have been able to exercise universal jurisdiction over ordinary crimes for more than half a century. Article 23 of Section IV (*De la compétence universelle*) (Universal jurisdiction) of the *Code pénal*(Penal Code) provides that Lebanese law applies to every foreigner found in Lebanese territory who has committed abroad a crime in the cases not covered by the articles granting protective or active personality jurisdiction. It states:

"Lebanese law shall apply to any foreign national in Lebanese territory who, as perpetrator, instigator or accomplice, has committed, in a foreign country, a crime or offence other than those referred to in articles 19 [crimes against national security], 20 [crimes by Lebanese nationals] and 21 [crimes by Lebanese officials, including diplomats and consuls] and in respect of whom no application for

their courts with universal jurisdiction over ordinary crimes.[23]

Universal jurisdiction legislation in the reporting states in the past decade

In the past decade since the Amnesty International global study of universal jurisdiction was published, a number of the 44 reporting states adopted legislation maintaining or expanding the scope of existing universal jurisdiction or enacting new universal jurisdiction which has been omitted from the Report.

In its report to the Secretary-General, **Cuba** did not refer to its Penal Code, which provides for universal jurisdiction with regard to a number of crimes, as crimes against humanity (as long as the alleged perpetrator is physically present in Cuban territory and the person is not extradited to another state).[24]

The newly adopted Code of Military and Police Justice of **Peru** provides for universal jurisdiction with regard to war crimes, whether committed in international or non-

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extradition has been applied for or granted."

Penal Code of 1956, as amended to 1999, Art. 23. Article 23 is part of Section IV of the Penal Code entitled: *"De la compétence universelle"* (Concerning universal jurisdiction). The introduction to the 1956 Penal Code indicates that Article 23 dates back to the original Penal Code, which was promulgated on 27 October 1943, and made effective under Article 771 on 1 October 1944 (*see Lois integrées modifiant, complétant, abrogeant, remplaçant our adjoutant des articles du Decret-legislatif 340/ni du 1er mars 1943).* The original French text of the article reads:

"La loi libanaise s'applique à tout étranger se trouvant sur le territoire libanais qui a commis à l' étranger, soit comme auteur, soit comme instigateur our complice, un crime ou un délit non visé aux articles 19, 20 et 21, si son extradition n'a pas été requise ou accordée."

Code pénal (Beyrouth: Editions Librairies Antoine 1956), art.23. The Arabic version originally translated the term *"tout étranger se trouvant"*as "any foreigner *muqim*[residing]"; when the Penal Code was amended in 1983, the more accurate translation in Arabic of "any foreigner *wujida*[being found]" was used. As far as Amnesty International is aware, Article 23 of the Penal Code is still in force.

[23] As of September 2001, at least 45 states had provided for universal jurisdiction over ordinary crimes. The Amnesty International 2001 global study did not document the numerous states that had provided for universal jurisdiction over ordinary crimes of international concern, such as piracy and hostage taking, or for the crime under international law of aggression.

[24] *Código Penal de Cuba, Ley No.62, de 29 de Diciembre de 1987 (Artículo 5(3) ("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".*).

international armed conflicts.[25]

Although the report by **Slovenia** appears to be very detailed, in its report to the International Law Commission, Slovenia provided a more expansive explanation of the obligation to extradite or prosecute, stating:

> "The principle *aut dedere aut judicare* applies to all crimes proscribed in the Penal Code of Slovenia, including crimes which derive from international humanitarian law and international treaties referred to above (see paras. 13-15): genocide; crimes against the civilian population; crimes against the wounded and sick; war crimes against prisoners of war; war crimes of use of unlawful weapons; unlawful slaughtering and wounding of the enemy; maltreatment of the sick and wounded and of prisoners of war; abuse of international symbols; trafficking in persons; international terrorism; endangering persons under international protection; taking of hostages; unlawful manufacture and trade with narcotic drugs; enabling opportunity for consumption of narcotic drugs and others".[26]

Switzerland, which in its report to the Secretary-General dated 26 April 2010 stated that a reform of the Penal Code was under way, finally enacted such an amendment on 18 June 2010. The amendment to the Penal Code provides the duty to try a suspect before national courts in those cases of crimes committed abroad – regardless of the nationality of the alleged perpetrator or the victim - when the suspect is found in Switzerland and is neither extradited to another state nor surrendered to an international criminal court whose jurisdiction Switzerland has recognized.[27]

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[25] *Decreto legislativo 1094,* 1 September 2010, art. 78 *("Jurisdicción universal. Con respecto a los delitos contemplados en el presente Título, este Código rige incluso cuando éstos hayan sido cometidos en el extranjero o no tengan vinculación con el territorio nacional"*).

[26] U.N. Doc. A/CN.4/579/Add.1, 30 April 2007.

[27] *Code Pénal (Loi fédérale portant modification de lois fédérales en vue de la mise en oeuvre du Statut de Rome de la Cour pénale internationale, 18 juin 2010 (http://www.admin.ch/ch/f/ff/2010/3889.pdf) (« Art. 264m (nouveau), Quiconque commet à l'étranger un des actes visés aux titres 12bis et 12ter ou à l'art. 264k est punissable s'il se trouve en Suisse et qu'il n'est pas extradé ni remis à un tribunal pénal international dont la compétence est reconnue par la Suisse. Lorsque l'auteur n'est pas de nationalité suisse et que l'acte n'a pas été commis contre un ressortissant suisse, les autorités peuvent suspendre la poursuite pénale ou y renoncer, sous réserve de la conservation des preuves:*

a. si une autorité étrangère ou un tribunal pénal international dont la compétence est reconnue par la Suisse poursuit l'infraction et que l'auteur est extradé ou remis à ce tribunal, ou

b. si l'auteur ne se trouve plus en Suisse et qu'il n'est pas probable qu'il y retourne.

L'art. 7, al. 4 et 5, est applicable, à moins que l'acquittement, la remise de peine ou la

The **United States of America** (USA) recently enacted three laws providing for universal jurisdiction over crimes under international law. The Child Soldiers Accountability Act of 2008 provides for universal jurisdiction over foreigners present in the USA suspected of the recruitment or use of child soldiers abroad. [28]

The Genocide Accountability Act of 2007 expands the jurisdictional bases of the US law criminalizing genocide (the Proxmire Act), to allow prosecution of any person suspected of genocide abroad who is found in the USA.[29] Similarly, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 provides for universal jurisdiction over persons engaged in trafficking in persons.[30]

Legislation permitting national courts to exercise universal jurisdiction over civil claims based on universal jurisdiction in either civil or criminal proceedings

One of the most glaring gaps in the Secretary-General's analytical report and the state reports is the failure to discuss civil claims based on universal jurisdiction. The USA mentioned its legislation, some of which is more than two centuries old, authorizing its courts to exercise universal jurisdiction over civil claims by an alien based upon a tort under international law, but did not provide any information about the numerous decisions based on that legislation awarding civil damages to victims of crimes under international law committed abroad. Other states did not provide any detailed information in their reports about legislation permitting their courts to award civil compensation in civil or criminal proceedings. Among the reporting states that have such legislation, which is not mentioned in the report, are: Austria, Belgium, Bolivia, Bulgaria, China, Colombia, Costa Rica, Finland, France, Germany, Italy, the Netherlands, Portugal, Spain, Sweden and Venezuela.[31] This list is certainly incomplete.

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prescription de la peine à l'étranger n'aient eu pour but de protéger indûment l'auteur de toute peine.»)

[28] Pub. Law 110–340, 110th Cong., 18 U.S.C. 1 note (http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ340.110.pdf).

[29] S. 888 [110th]: Genocide Accountability Act of 2007, 18 U.S.C. Sec. 1091 (Section 1091 of title 18, United States Code).

[30] Pub. L. 110-457 (http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ457.110.pdf).

[31] Amnesty International, *Universal jurisdiction: the scope of civil universal jurisdiction*, *supra*, note 6.

V. NATIONAL LEGISLATION IN STATES THAT HAVE NOT YET SUBMITTED REPORTS

In view of the low number of states which reported to the Secretary-General, government representatives may not have an accurate picture as they prepare for the discussion in the Sixth Committee of how many states around the world have provided their courts with universal jurisdiction in either criminal or in civil proceedings.

Universal jurisdiction legislation as of September 2001 omitted from the Secretary-General's report in the states that did not submit reports

As of September 2001, almost a decade ago, Amnesty International documented non-reporting states that have provided their courts with such jurisdiction in certain instances, either in legislation or in national jurisprudence (although in some instances, as explained in that study, prosecutions for certain crimes under international law could proceed only to the extent that the conduct was defined as an ordinary crime under national law), as including the following:

- Ordinary crimes (Algeria, Burundi, Cameroon, Colombia, Croatia, Democratic Republic of the Congo, Ecuador, Georgia, Hungary, Jordan, Kazakhstan, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lithuania, Macedonia [The former Yugoslav Republic of], Moldova, Monaco, Mongolia, Paraguay, Romania, Russian Federation, Slovak Republic, Syrian Arab Republic, Tajikistan, Turkey, Turkmenistan, Ukraine, Uzbekistan, Vietnam, Yemen);[32]
- Certain war crimes (Antigua and Barbuda, Bahamas, Barbados, Belize, Bosnia and Herzegovina, Botswana, Brazil, Canada, Côte d'Ivoire, Croatia, Democratic Republic of the Congo, Dominica, Ecuador, Fiji, Gambia, Ghana, Greece, Grenada, Guyana, Guatemala, Honduras, Hungary, India, Iran, Ireland, Jamaica, Japan, Kiribati, Lao People's Democratic Republic, Latvia, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia [The former Yugoslav Republic of], Moldova, Monaco, Mongolia, Nicaragua, Nigeria, Panama, Papua New Guinea, Paraguay, Philippines, Poland, Romania, Russian Federation, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Samoa, San Marino, Seychelles, Sierra Leone,

[32] As noted above in footnote 5, at least 45 states in 2001 had provided their courts with universal jurisdiction over ordinary crimes under national law. The study did not examine in any detail legislation providing for universal jurisdiction over crimes under national law of international concern such as piracy and hostage taking, or over the crime under international law of aggression.

Singapore, Slovak Republic, Solomon Islands, Swaziland, Tajikistan, Tanzania [United Republic of], Timor-Leste, Trinidad and Tobago, Turkmenistan, Tuvalu, Uganda, Ukraine, United Kingdom, Uruguay, Uzbekistan, Vanuatu, Vietnam and Zimbabwe);

- All or some several crimes against humanity (Algeria [*apartheid*], Bosnia and Herzegovina, Croatia [*apartheid*], Ecuador, Georgia, Ghana [slave trade, trafficking in women and *apartheid*], Hungary, Iraq [slavery, trafficking in human beings], Kyrgyzstan [*apartheid*], Lao People's Democratic Republic [*apartheid*], Latvia [*apartheid*], Liberia [*apartheid*], Lithuania, Macedonia [former Yugoslav Republic of], Monaco [sexual slavery and other forms of sexual violence], Mongolia [*apartheid*], Nicaragua [slave trade and trafficking in women and children], Panama [*apartheid* and enforced disappearance], Paraguay [enforced disappearance], Philippines, Poland, Romania [*apartheid*], Russian Federation [*apartheid*], Tajikistan, Timor-Leste, Ukraine, Uruguay [enforced disappearance], Uzbekistan [*apartheid*], Vanuatu [slave trading and trafficking in persons] and Vietnam [*apartheid*]);
- Genocide (Bosnia and Herzegovina, Brazil, Canada, Colombia, Croatia, Ecuador, Georgia, Honduras, Hungary, Ghana, Kyrgyzstan, Latvia, Lithuania, Luxembourg, Macedonia [former Yugoslav Republic of], Mexico, Nicaragua, Panama, Poland, Romania, Russian Federation, Slovak Republic, Tajikistan, Timor-Leste); and
- Torture (Algeria, Brazil, Canada, Colombia, Croatia, Ecuador, Georgia, Greece, Guatemala, Honduras, Hungary, Iceland, Ireland, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia [former Yugoslav Republic of], Mexico, Monaco, Mongolia, Panama, Paraguay, Poland, Romania, Russian Federation, Slovak Republic, Sri Lanka, Tajikstan, Timor-Leste, Turkey, Turkmenistan, Ukraine, United Kingdom, Uruguay, Uzbekistan).

For example, the **Russian Federation**, in its detailed report in 2008 to the International Law Commission on the obligation to extradite or prosecute,[33] reported that it is a party to a number of international treaties which contain the principle of universal jurisdiction, including the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973 and also "[t]he Convention on the Law of the Sea, article 105 of which establishes universal criminal jurisdiction with regard to piracy".[34] According to that report the Russian criminal law consists of the Criminal Code of the Russian Federation. Pursuant to Article 12 (3), of the Code,

"foreign nationals and stateless persons not permanently residing in the

[33] U.N. Doc. A/CN.4/599, 30 May 2008.

[34] U.N. Doc. A/CN.4/599, 30 May 2008, paras. 35-36

> Russian Federation who have committed a crime outside the Russian Federation shall be subject to criminal prosecution under the present Code in cases where the crime is directed against the interests of the Russian Federation or a Russian national or a stateless person permanently residing in the Russian Federation, and in cases provided for by the international treaties to which the Russian Federation is a party, if they have not been convicted in a foreign State and are being tried in the territory of the Russian Federation".[35]

Recent legislation in non-reporting states providing for universal jurisdiction

A number of non-reporting states, including Argentina, Burkina Faso, Canada, , Colombia, Ecuador, Ireland, Mauritius, Mexico, Namibia, Panama, Philippines, Senegal, Serbia, Spain, Trinidad and Tobago, Uganda, United Kingdom and Uruguay, have maintained universal jurisdiction provisions during legislative reform, strengthened existing legislation or enacted new legislation providing their courts with universal jurisdiction over war crimes, all or some several crimes against humanity, genocide and torture.

In 2007 **Argentina** enacted Law 26.200, implementing the Rome Statute and making genocide, crimes against humanity and war crimes criminal under national law and providing for universal jurisdiction when so stipulated in a convention to which Argentina is a party to.[36] The Law 26.200 also includes a provision on the obligation to extradite or prosecute (*aut dedere aut judicare*).[37] In addition, the Argentine Constitution has provided since 1853 that *delicta juris gentium* (*delitos contra el derecho de gentes*) will be investigated and prosecuted once a law on that is passed by Congress.[38]

In December 2009, **Burkina Faso** enacted legislation implementing the Rome Statute of the International Criminal Court into domestic law, making genocide, crimes against humanity and war crimes criminal under national law. Article 15 provides for universal jurisdiction over persons suspected of committing such

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[35] *Ibid.*

[36] *Ley 26.200*, enacted 13 December 2006, Official Gazette, 9 January 2007, art. 3 (d) (*"Esta Ley se aplica… d) En los casos previstos en convenios internacionales de los que la República Argentina es parte"*).

[37] *Ibid.*, art. 4 (*"Aut dedere aut iudicare. Cuando se encuentre en territorio de la República Argentina o en lugares sometidos a su jurisdicción una persona sospechada de haber cometido un crimen definido en la presente ley y no se procediera a su extradición o entrega a la Corte Penal Internacional, la República Argentina tomará todas las medidas necesarias para ejercer su jurisdicción respecto de dicho delito."*).

[38] Const., art. 118 (*"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"*).

crimes.[39]

The Crimes against Humanity and War Crimes Act of **Canada**, enacted in 2000, provides for universal jurisdiction with regard to genocide, crimes against humanity and war crimes.[40] In addition, in its report to the International Law Commission, Canada declared:

> "*Universal jurisdiction*. Where crimes are so serious and on such a scale that they can justly be regarded as an attack on the international legal order, the principle of universality provides jurisdiction for offences anywhere in the world. For example, the 1949 Geneva Conventions and the 1977 Additional Protocol provide for mandatory universal jurisdiction over grave breaches and require a party to either bring alleged offenders before its courts or else surrender them to another party for trial. In addition, piracy, serious violations of the laws and customs of war, crimes against humanity and genocide are generally recognized as subject to the universality principle."[41]

The 2000 Penal Code of **Colombia** makes a number of crimes under international law criminal under national law, such as genocide, enforced disappearances and some war crimes. Article 16 (6) provides for the obligation to extradite or prosecute, including universal jurisdiction.[42]

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[39] *Loi No.052-2009 du 3 décembre 2009 portant détermination des compétences et de la procédure de mise en œuvre du statut de Rome relatif à la Cour pénale internationale par les juridictions burkinabè (art. 15, « Les juridictions burkinabé sont compétentes pour connaitre des crimes visés par la présente loi, indépendamment du lieu où ceux ci auront été commis, de la nationalité de leur auteur ou de celle de la victime, lorsque la personne poursuivie est présente sur le territoire national. La condition de présence sur le territoire du Burkina Faso ne s'applique pas aux nationaux. »).*

[40] Crimes against Humanity and War Crimes Act ,Sec. 6. (1) ("Every person who, either before or after the coming into force of this section, commits outside Canada (a) genocide, (b) a crime against humanity, or (c) a war crime, is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8.") (http://www.international.gc.ca/court-cour/war-crimes-guerres.aspx?lang=eng).

[41] International Law Commission, Comments and information received from Governments, U.N. Doc. A/CN.4/612, 26 March 2009.

[42] *Código Penal de Colombia ("Artículo 16. Extraterritorialidad. La ley penal colombiana se aplicará: (6) 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 (3) años;

The Criminal Procedural Code of **Ecuador** of 2000 provides for universal jurisdiction with regard to crimes defined in treaties or conventions to which Ecuador is a party, provided that the suspect has not been tried abroad before.[43]

In 2006, **Ireland** enacted legislation with a view to implementing its complementarity obligations under the Rome Statute that provided its courts with universal jurisdiction over grave breaches of the Geneva Conventions and of Protocol I.[44]

The **Mauritius** Geneva Conventions Act of 1970, as amended in 2003, provides for universal jurisdiction for grave breaches to Geneva Conventions of 1949 and Protocol I.[45]

The Federal Penal Code of **Mexico** provides that crimes set out in treaties binding on Mexico shall be punished in accordance with the Penal Code, even though the crime concerned is not defined in the Code.[46] Since Mexico reported to the International Law Commission that the Geneva Conventions of 1949, Protocol I, the Apartheid Convention, the Genocide Convention and the Convention against Torture provide for the obligation to extradite or prosecute, it may be inferred that these crimes are subject to the jurisdiction of Mexico even though not committed in Mexico or by Mexican nationals or over victims of national origin, and even if not

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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 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.").

[43]*Artículo 18. "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."*

[44] International Criminal Court Act 2006, Sec. 12 (2) (http://www.irishstatutebook.ie/2006/en/act/pub/0030/index.html).

[45] Geneva Conventions Act, RL 3/37 – 24 December 1970 (as amended by the Geneva Conventions (Amendment) Act 2003) ("3. Breaches of the Conventions and Protocol I (1) Any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the Conventions or of Protocol I shall commit an offence… (3) This section applies to persons regardless of their nationality or citizenship.").

[46] *Código Penal Federal, as amended on 28 June 2007 (Official Gazette), artículo 6 ("Cuando se cometa un delito no previsto en este Código, pero sí en una ley especial o en un tratado internacional de observancia obligatoria en México, se aplicarán éstos, tomando en cuenta las disposiciones del Libro Primero del presente Código y, en su caso, las conducentes del Libro Segundo").*

defined in Penal Code.[47]

Namibia Geneva Conventions Act of 2003 provides that "any person who, in Namibia 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 offence". The Act makes clear that that "section applies to all persons, irrespective of their nationality or citizenship".[48]

The 2007 Penal Code of **Panama** provides for universal jurisdiction regarding 'crimes against humanity', which according to Title XV definitions also covers genocide, crimes against humanity and war crimes.[49]

The Philippines enacted legislation, signed by the President on 11 December 2009, defining war crimes, genocide and crimes against humanity as crimes under national law and providing its courts with universal jurisdiction over these crimes.[50]

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[47] International Law Commission, Comments and information received from governments, the obligation to extradite or prosecute (*aut dedere aut judicare*), U.N. Doc. A/CN.4/579/Add.1, 30 April 2007, para.7.

[48] Geneva Conventions Act, 2003, Act No. 15 of 2003, secs. 2 (1) and 3.

[49] *Código Penal de Panamá, Ley No.14 de 18 de Mayo de 2007 Artículo 19 and Título XV ("Es aplicable la ley penal panameña, aunque se hayan cometido en el exterior, a los delitos contra la Humanidad, contra la Personalidad Jurídica del Estado, contra la Salud Pública, contra la Economía Nacional y contra la Administración Pública, así como a los delitos de desaparición forzada de personas, trata de personas, y falsedad de documentos de crédito público panameño, de documentos, sellos y timbres oficiales, de la moneda panameña y demás monedas de curso legal en el país, siempre que, en este último caso, se hayan introducido o pretendido introducir al territorio nacional").*

[50] Act defining and penalizing crimes against international humanitarian law, genocide and other crimes against humanity, organizing jurisdiction, designating special courts, and for related purposes, approved by the President, 11 December 2009 (http://www.lawphil.net/statutes/repacts/ra2009/ra_9851_2009.html). Section 17 of that act provides:

"Jurisdiction. The State shall exercise jurisdiction over persons, whether military or civilian, suspected or accused of a crime defined in this Act, regardless of where the crime is committed, provided, any one of the following conditions is met:

(a) The accused is a Filipino citizen;

(b) The accused, regardless of citizenship or residence, is present in the Philippines; or

(c) The accused has committed the said crime against a Filipino citizen.

In the interest of justice, the relevant Philippine authorities may dispense with the investigation or prosecution of a crime punishable under this Act if another court or international tribunal is already conducting the investigation or undertaking the prosecution of such crime. Instead, the authorities may surrender or extradite suspected or accused persons in the Philippines to the appropriate international

The Penal Code and Criminal Procedural Code of **Senegal**, as amended in 2007, provides for universal jurisdiction for genocide, crimes against humanity, war crimes, among other crimes, as long as the alleged perpetrator is under Senegalese jurisdiction, or one of the victims is in Senegal soil or the government is granted the extradition of the alleged responsible.[51]

In its report to the International law Commission in 2007 **Serbia** explained how its criminal legislation applies with regard to universal jurisdiction. It stated:

> "Similarly, the criminal legislation of Serbia is further applicable to a foreigner who commits against a foreign country or another foreigner abroad an offence punishable under the criminal law of the country where it was committed by an imprisonment of not less than five years or by a harsher sentence (universal principle). In addition, the requirements for the application of this principle include that the foreigner is found in its territory but is not extradited, and that the offence is also punishable under the laws of the country where it has been committed. As regards the requirement that the offence concerned is also considered as an offence under a foreign law, there is one exception: the offence is to be considered as such under the principles of law recognized by the international community."

The report then concludes:

> "In view of the foregoing, the criminal legislation of Serbia and the universal principle will be applied only if no foreign country has requested the extradition of a foreigner or if the extradition request has been refused.[52]

For many years the legislation of **Spain** has permitted the exercise of universal jurisdiction over crimes under international law, such as genocide, torture and piracy and, later, through judicial interpretation, war crimes and crimes against humanity.[53] Although that legislation on universal jurisdiction has recently been

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court, if any, or to another State pursuant to the applicable extradition laws and treaties.

No criminal proceedings shall be initiated against foreign nationals suspected or accused of having committed crimes defined in this Act if they have been tried by a competent court outside the Philippines in respect of the same offense and acquitted, or having been convicted, already served their sentence."

[51] *La Loi 2007- 02, modifiant le Code pénal de la République du Sénégal, et de la Loi 2007- 05, 12 février 2007, modifiant le Code de Procédure pénale de la République du Sénégal*.

[52] International Law Commission, U.N. Doc., A/CN.4/579/Add.2, paras.44-45.

[53] *Ley Orgánica del Poder Judicial, artículo 23(4) ("Igualmente, será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la Ley española, como alguno de los siguientes delitos:*

1. Genocidio y lesa humanidad.

amended from one which permitted the exercise of jurisdiction without the physical presence of the suspect under Spanish soil to one which now requires such physical presence – at what stage of the proceeding is still unclear -, it still covers fundamental human rights violations. The Act also provides that that provision does not abrogate what may be provided for in treaties to which Spain is party (e.g., Geneva Conventions of 1949, etc.).

The Act No. 4 of 2006 of **Trinidad and Tobago** not only makes crimes covered by the Rome Statute criminal under national law but also provides for universal jurisdiction for genocide and war crimes.[54]

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2. Terrorismo.

3. Piratería y apoderamiento ilícito de aeronaves.

4. Delitos relativos a la prostitución y corrupción de menores e incapaces.

5. Tráfico ilegal de drogas psicotrópicas, tóxicas y estupefacientes.

6. Tráfico ilegal o inmigración clandestina de personas, sean o no trabajadores.

7. Los relativos a la mutilación genital femenina, siempre que los responsables se encuentren en España.

8. Cualquier otro que, según los tratados y convenios internacionales, en particular los Convenios de derecho internacional humanitario y de protección de los derechos humanos, deba ser perseguido en España.

Sin perjuicio de lo que pudieran disponer los tratados y convenios internacionales suscritos por España, para que puedan conocer los Tribunales españoles de los anteriores delitos deberá quedar acreditado que sus presuntos responsables se encuentran en España o que existen víctimas de nacionalidad española, o constatarse algún vínculo de conexión relevante con España y, en todo caso, que en otro país competente o en el seno de un Tribunal internacional no se ha iniciado procedimiento que suponga una investigación y una persecución efectiva, en su caso, de tales hechos punibles".).

[54] Act to provide for the prevention and punishment of genocide, crimes against humanity and war crimes, to give effect to the Rome Statute of the International Criminal Court, article 8 (1) ("Proceedings may be brought for an offence… *(c)* against section 9, 11 or 19 regardless of—

(i) the nationality or citizenship of the person accused;

(ii) whether or not any act forming part of the offence occurred in Trinidad and Tobago; or

(iii) whether or not the person accused was in Trinidad and Tobago at the time that the act constituting the offence occurred or at the time a decision was made to charge that person with an offence".

The International Criminal Court Act of **Uganda** of 25 June 2010 makes genocide, crimes against humanity, war crimes and some ordinary crimes criminal under national law. It includes a provision on universal jurisdiction for all crimes set out in its text.[55]

The **United Kingdom** has supplemented its existing legislation providing for universal jurisdiction over grave breaches of the Geneva Conventions and of Protocol I and over torture with universal jurisdiction over United Kingdom residents who are suspected of genocide, crimes against humanity and war crimes.[56]

Uruguay enacted a Law implementing the Rome Statute in 2006, *Ley 18.026 de Cooperación con la Corte Penal Internacional en materia de lucha contra el genocidio, los crímenes de guerra y de lesa humanidad,* making genocide, crimes against humanity, war crimes, torture, enforced disappearances and extrajudicial executions criminal under national law and providing for the obligation to extradite or prosecute (*aut dedere aut judicare*), including cases based on universal jurisdiction.[57]

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[55] Uganda International Criminal Court Act, 25 June 2010. Sec. 18 (Jurisdiction) ("For the purposes of jurisdiction where an alleged offence against sections 7 to 16 was committed outside the territory of Uganda, proceedings may be brought against a person, if… d) the person is, after the commission of the offence, present in Uganda.").

[56] International Criminal Court Act 2001 (http://www.icrc.org/ihl-nat.nsf/WebLAW!OpenView&Start=1&Count=300&Expand=176.12.1#176.12.1); International Criminal Court Act (Scotland) (http://www.icrc.org/ihl-nat.nsf/6fa4d35e5e3025394125673e00508143/7ae9e83642648037c1256aea004a08dd!OpenDocument). Section 51 of the International Criminal Court Act 2001 provides:

"51 Genocide, crimes against humanity and war crimes

(1) It is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime.

(2) This section applies to acts committed:

(a) in England or Wales, or

(b) outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction."

[57] Law 18.026 at Official Gazette on October 4, 2006, Article 4(2) *("Cuando se encontrare en territorio de la República o en lugares sometidos a su jurisdicción, una persona sospechada haber cometido un crimen de los tipificados en los Títulos I a IV de la Parte II de la presente ley, el Estado uruguayo está obligado a tomar las medidas necesarias para ejercer su jurisdicción respecto de dicho crimen o delito, si no recibiera solicitud de entrega a la Corte Penal Internacional o pedidos de extradición, debiendo proceder a su enjuiciamiento como si el crimen delito se hubiese cometido en territorio de la República,*

Legislation permitting national courts to exercise universal jurisdiction over civil claims based on universal jurisdiction in either civil or criminal proceedings

As noted above, one of the most significant gaps in the Secretary-General's analytical report is the failure to discuss civil claims based on universal jurisdiction. A number of the states that failed to submit reports have such legislation, which, therefore, is not mentioned in the report, including: Argentina, Denmark, Greece, Ireland, Luxembourg, Myanmar, Panama, Poland, Portugal, Romania, Senegal and Venezuela.[58] This list is certainly incomplete since many civil law countries permit civil claims to be made in criminal proceedings and few of them limit the geographic jurisdiction of such claims.

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independientemente del lugar de su comisión, la nacionalidad sospechado o de las víctimas. La sospecha referida en la primera parte de este párrafo debe estar basada en la existencia de la semiplena prueba".).

[58]*Amnesty International: Universal jurisdiction: The scope of civil universal jurisdiction*, *supra*, note 6. See also Ireland's Criminal Justice Act 1993, Sec. 6 (permitting civil claims to be made in criminal proceedings, with no geographic restriction).

VI. NATIONAL INVESTIGATIONS AND PROSECUTIONS BASED ON UNIVERSAL JURISDICTION

The information provided by states concerning their investigations and prosecutions based on universal jurisdiction is often incomplete and could mislead states preparing for the discussion in the Sixth Committee into thinking that there have been only a few investigations and prosecutions of crimes under international law based on universal jurisdiction. Even when specific investigations and prosecutions are mentioned, copies of court decisions or decisions by prosecutors or political officials whether to prosecute are not attached and citations are often inadequate to permit readers to find the original texts. In addition, states with special immigration, police and prosecutor units with responsibilities to deal with crimes under international law often do not mention them or their numerous investigations and prosecutions based on universal jurisdiction.

Since the Second World War, there have been investigations or prosecutions of crimes under international law based on universal jurisdiction in the courts of at least 17 reporting and non-reporting states, both sitting at home and abroad (Argentina, Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Israel, Netherlands, Norway, Spain, Sweden, Switzerland, United Kingdom and the United States). That list omits states that have exercise universal jurisdiction over crimes under national law of international concern, such as South Africa in a hijacking case, and Kenya and Seychelles, which have exercised such jurisdiction recently over piracy. In addition, there are states, such as Paraguay, without passive personality jurisdiction provisions or provisions that are not applicable in a particular case, such as Sweden, that have relied upon universal jurisdiction legislations. The examples of investigations and prosecutions, as well as court decisions discussing universal jurisdiction, that follow are illustrative only, but they give a somewhat more comprehensive picture of investigations and prosecutions of crimes under international law based on universal jurisdiction that the Secretary-General's analytical report and the 44 state reports.

Argentina

In Argentina a criminal complaint was filed in 2005 against Jiang Zemin, former president of China, and Luo Gang, a Chinese official, who were both in Buenos Aires at that time, under charges of torture and genocide. Jurisdiction to investigate was based on a constitutional provision dating back to 1853. An appeal is pending challenging the failure of the federal prosecutor to investigate the case thoroughly. During the course of proceedings, the jurisdiction of Argentina to investigate alleged

crimes under international law committed in China against Falun Gong members was undisputed.[59]

In September 2010, a Federal Appeals Chamber decided to confirm the commencement of an investigation for crimes under international law committed in Spain over Spanish nationals from 1939 to 1975.[60]

Australia

There have been a number of investigations and prosecutions in Australia based on universal jurisdiction, none of which are mentioned in its report. Over 1,000 trials of former Axis nationals for war crimes and crimes against humanity were conducted under legislation enacted in 1945 providing for universal jurisdiction between 1945 and 1951, when Australia stopped prosecuting war crimes committed during the Second World War, a significant number of which were based on universal jurisdiction.[61] When, as a result of public pressure, Australia decided to resume such prosecutions in 1988, the legislation was extensively amended to address some of its procedural defects, such as the provision for trials of civilians in military courts, but it was limited to a restricted group of war crimes committed only in Europe during the Second World War.[62] A special unit 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.[63] The special unit was later disbanded and, as a result, Australia was unprepared to assist in criminal investigations of Konstantin Kalejs, suspected of war crimes in Latvia during the Second World War.

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[59] *Juzgado Nacional en lo Criminal y Correccional Federal Nº 9, Secretaría 17, causa Nº 17.885/2005, caratulada: "LUO GAN s/ imposición de torturas (art. 144 ter inciso 1° del Código Penal) y genocidio.*

[60] *Causa n° 29.275 "NN s/ desestimación de denuncia y archivo" Juzg. Fed. n° 1; Secret. n° 1, Expte. n° 4.591/2010.*

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

[62] War Crimes Act, 1945 (as amended by the War Crimes Amendment Act, 1988).

[63] *Polyukhovich v. Commonwealth of Australia*, (1991) 172 CLR 501, F.C. 91/026 (Australian High Court 14 August 1991) (obtainable from http://www.austlii.edu.au/au/cases/cth/high_ct/172clr501.html) (dismissal for lack 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 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*, The Hague, Kluwer Law International, 1997, pp. 123, 131-134.

There have been a number of requests for investigations or investigations based on universal jurisdiction of persons suspected of war crimes or crimes against humanity, none of which led to a prosecution in Australia. For example, police conducted an investigation of allegations that Guy Campos, a national of Timor-Leste, was responsible for war crimes, crimes against humanity and torture in Timor-Leste, but he was permitted to leave Australia while the criminal investigation was still going on.[64]

Austria

The Austria report did not mention any of the investigations and prosecutions in its courts based on universal jurisdiction. The first universal jurisdiction trial in Austria took place a century and a half after this form of jurisdiction was introduced in 1803 and it resulted in a conviction for an ordinary crime which was upheld in 1958.[65] There have been two other trials based on universal jurisdiction. One trial in 1959 involved the ordinary crime of manslaughter.[66] The other trial, which began in 1994, was the second criminal proceeding for a crime under international law committed after the end of the Second World War (a Bosnian Muslim had appeared in a Danish court on 18 February 1994 on charges of murder amounting to grave breaches of the Geneva Conventions of 1949); it led to an acquittal in 1995 on charges of genocide.[67] However, several subsequent attempts to initiate prosecutions in Austria for crimes based on crimes under international law have failed, not because of legal obstacles, but because of lack of political will or,

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[64] **Julian Drape, 'Anger as alleged war criminal 'flees' , 14** September 2009 (http://news.smh.com.au/breaking-news-national/anger-as-alleged-war-criminal-flees-20090914-fnyn.html).

[65] *Public Prosecutor v. Milan T.*, Judgment, *Oberste Gerichtschof*, 29 May 1958, reprinted in *Oberste Gerichtshof, Serie Strafsachen XXIX*, No. 32, edited version in English published in 28 Int'l L. Rep. 341 (1963).

[66] *Hungarian Deserter (Austria) Case*, Judgment, Supreme Court, 30 December 1959, 28 Int'l L. Rep.343 (describing the ruling of the lower court). The Supreme Court affirmed the lower court decision. *Ibid.*, p. 345.

[67] On an interlocutory appeal, the Supreme Court held that the lower court had jurisdiction over genocide. Judgment of the *Oberster Gerichstshof*, 13 July 1994. The *Landesgericht, Salzburg* (District Court of Salzburg) issued an indictment on 27 July 1994 for genocide and murder. The accused was acquitted after a trial of all charges on the ground of insufficient evidence. *Republic of Austria v. Cvjetković*, *Landesgericht, Salzburg*, 31 May 1995. For further information about this case, see Axel Marschik, "The Politics of Prosecution: European National Approaches to War Crimes", *in* Timothy L.H. McCormack & Gerry J. Simpson, eds, *The Law of War Crimes*, 65, 79-81 (1997), and Steve Pagani, Austrian court clears Bosnian Serb of war crimes, Reuters, 31 May 1995..

possibly, political interference.[68]

Canada

Dessiré Munyaneza was tried and found guilty in Canada in 2009 of seven counts of genocide, crimes against humanity and war crimes committed in the prefecture of Butare, Rwanda between April 1 and July 31, 1994, and he was sentenced to life in prison.[69] On November 6, 2009, the Royal Canadian Mounted Police made its second arrest under the *Crimes Against Humanity and War Crimes Act*. Rwandan Jacques Mungwarere was charged with one count of genocide in the area of Kibuye, Rwanda and he is now awaiting trial.[70] In addition, there are many other cases involving persons from many other countries where the War Crimes Program has opened investigations over the past decade.[71]

Chile

In Chile, the Supreme Court, in the *Villa Grimaldi* case, where the immunity of former President Augusto Pinochet was set aside in order to permit an investigation to proceed, concluded that, although the prosecution of crimes against humanity should in principle be the responsibility of the state in whose territory the crimes were committed, all states are also permitted to investigate and prosecute when the investigation in the territorial state was not efficient nor effective.[72]

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[68] For example, an attempt to initiate a prosecution of Izzat Ibrahim al-Duri, a senior Iraqi official, then visiting Austria, for genocide, war crimes and torture failed. AP Worldstream, Green Party official files criminal complaint against ailing Iraqi official, 16 August 1999; *Pilz zeigt Husseins Viz an, Der Standard*, 17 August 1999*; Grüne zeigen Saddam husseins Stellvertreter an, Der Standard,* 17 August 1999; *Husseins Vize hat Österreich verlassen, Der Standard,* 19 August 1999. Similarly, an attempt to initiate a prosecution of Chechen President Ramzan Kadyrov during an expected visit to Austria, for torture and other human rights violations failed after a Ministry of Justice spokesperson is reported to have said – incorrectly – that Austrian courts "probably had no competence" in cases where "Chechens torture Chechens in Chechnya." and a senior Austrian prosecutor, Werner Peischl, reportedly claimed that "we cannot arrest a president just because a lawyer wants us to." Nikolaus von Twickel, 'Austria Investigated Chechen Leader', St. Petersburg Times, 13 February 2009.

[69] *R. c. Munyaneza*, No. 500-73-002500-052, 29 May 2009.

[70] Ministry of Justice website (http://www.justice.gc.ca/warcrimes-crimesdeguerre/successes-realisations-eng.asp#jacques).

[71] See Program on Crimes against Humanity and War Crimes, Tenth Annual Report, 2006-2007 (http://www.cbsa-asfc.gc.ca/security-securite/wc-cg/wc-cg2007-eng.html).

[72] Supreme Court of Chile, Rol N° 2707-2006, 3 October 2006 (*"La falta de investigación adecuada de los delitos de lesa humanidad es de competencia preferente del Estado en que sucedieron los hechos, pero de competencia subsidiaria, sino conjunta, de cualquier Estado ante el hecho que tal investigación*

Three years later, in 2009, the Supreme Court recalled, in a case where Edgardo Benjamín Cevallos Jones and Ramón Cáceres Jorquera were sentenced to imprisonment for torturing 17 persons between 1973 and 1975, that all states are obliged to search for persons alleged to have committed crimes against humanity.[73]

Denmark

The report by Denmark mentions only two investigations, one of which led to a prosecution. However, the Special International Crimes Office has, since it was established in 2002, opened investigations based on universal jurisdiction in 219 cases in approximately 30 different countries in Europe, Africa, the Americas and Asia; a legislative reform in 2009 led to the opening of investigations into 27 new cases in 2010.[74]

France

The information in the report by France about specific investigations and prosecutions is incomplete, only a few specific citations to court decisions are provided and it is now out of date.

For example, the discussion of the conviction of Ely Ould Dah for torture in Mauritania, pursuant to Articles 689-1, 689-2 and 693 of the Criminal Procedure Code providing French courts with universal jurisdiction over this crime, does not mention that he fled home before trial or discuss what steps, if any, France has taken to extradite him from Mauritania and to enforce the civil award of reparations.

On 24 September 2010, the *Cour d'assises de Meurthe et Moselle* increased on appeal the sentence imposed on 15 December 2008 by the *Cour d'assises du Bas-Rhin* on Khaled Ben Saïd to 12 years' imprisonment for having ordered the torture of Mme Gharbi in October 1996 in a police station in Jendouba, Tunisia.[75]

Wenceslas Munyeshyaka was accused of genocide, crimes against humanity and torture under universal jurisdiction according to Article 1 and 2 of the Law N. 96-

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no sea eficiente y efectiva.").

[73] Supreme Court of Chile, Rol N° 8113-08, 29 September 2009 (*"Que tratándose como se ha visto, de delitos de lesa humanidad, cada Estado miembro de la comunidad internacional tiene la obligación de juzgar y castigar a sus autores, precisamente porque han lesionado valores que la humanidad no duda en calificar como esenciales y constitutivos de la persona."*).

[74] *Statsadvokaten* website (http://www.sico.ankl.dk/page34.aspx). See also Brigitte Vestberg, Prosecuting and Investigating International Crimes in Denmark, 6 April 2006 (http://www2.icc-cpi.int/NR/rdonlyres/9C4449DE-B59B-40E2-BF72-062764FFCBEB/0/Vestberg_paper.pdf).

[75] FIDH, *Affaire Ben Said: Condamnation en appel d'un diplomate tortionnaire tunisien*, 25 September 2010 (http://www.fidh.org/Condamnation-en-appel-d-un-diplomate-tortionnaire).

432 of 22 May 1996, adapting the French legislation to the provisions of resolution 955 of the United Nations Security Council, establishing the International Criminal Tribunal for Rwanda. More than 14 years later, even after assurances to the International Criminal Tribunal for Rwanda, he has not been tried. The European Court of Human Rights found that the delay in bringing him to trial on these charges violated the right of victims to access to justice.[76]

On 19 July 2006, the Ministry of Justice, agreed to a request by the International Criminal Tribunal for Rwanda to try Wenceslas Munyeshyaka, as well as Laurent Bucyibaruta and Dominique Ntawukuriryayo, in France, on the basis of universal jurisdiction.[77] None of them, however, have ever been brought to trial.

Finland

The report by Finland was submitted before the Eastern Uusimaa District Court in Finland convicted François Bazaramba on 11 June 2010 for genocide in Rwanda during 1994 and sentenced him to life imprisonment.[78] His appeal is pending.

Germany

The report submitted by Germany does not mention the extensive landmark jurisprudence of its courts exercising universal jurisdiction over both ordinary crimes and crimes under international law.

In a 1976 case, *Prosecutor v. Dost*, a Dutch national was convicted by a German court for selling drugs in the Netherlands.[79] The Netherlands did not protest and did not ask for extradition.[80]

Following the arrest of Duško Tadić, a Bosnian Serb, by the German authorities on 13 February 1994 in Munich, a German investigating judge of the Federal High

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[76] *Mutimura c. France*, *Requête n° 46621/99*, Arrêt, 8 juin 2004 (http://www.haguejusticeportal.net/Docs/NLP/France/Munyeshyaka_CEDH_judgement_8-9-2004.pdf).

[77] FIDH, France should arrest Wenceslas Munyeshyaka, Laurent Bucyibaruta and Dominique Ntawukuriryayo immediately!, 6 July 2007 (http://www.fidh.org/IMG/article_PDF/article_a4467.pdf).

[78] 'Bazaramba plans to appeal genocide conviction', (http://www.hs.fi/english/article/Bazaramba+plans+to+appeal+genocide+conviction/1135257543405).

[79] *Prosecutor v. Dost, Bundesgerichshof*, 20 October 1976, vol. 74, Int'l L. Rep., p. 166.

[80] Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford: Oxford University Press, 2003, pp. 147-148.

Court decided to open proceedings against Duško Tadić.[81] He was subsequently transferred to the International Criminal Tribunal for the former Yugoslavia.

On 23 May 1997, the Bavarian Higher Regional Court found Novislav Dijacić guilty of ordinary crimes, amounting to grave breaches of the Fourth Geneva Convention, of aiding murder and one case of attempted murder and sentenced him to five years' imprisonment.[82]

On 26 September 1997, the Higher Regional Court of Düsseldorf (*Oberlandesgericht Düsseldorf*), after finding that it could exercise universal jurisdiction, convicted Nikola Jorgić, a Bosnian Serb, of 11 counts of genocide and ordinary crimes under the Criminal Code.[83] The conviction and sentence were confirmed on appeal by the Federal Court of Justice.[84] The judgment was upheld in 2001 by the Federal Constitutional Court, which rejected a constitutional challenge contending that customary international law and Article VI of the Genocide Convention prohibited the exercise of universal jurisdiction over genocide.[85] On 12 July 2007 the European Court of Human Rights dismissed Jorgić's complaint against the German court decisions.[86]

On 29 November 1999, the Higher Regional Court at Düsseldorf convicted Maksim Sokolović for inflicting physical injuries on Muslim civilians in five cases and unlawfully detaining Muslim civilians in 56 cases. It also held that this conduct qualified as aiding genocide. It sentenced him to nine years' imprisonment.[87] On 21 February 2001 the Federal Court of Justice affirmed the judgment.[88]

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[81] Federal Supreme Court, 13 February 1994, BGH NStZ 14 (1994), 232. For a note on this decision see Dietrich Oehler, *Verfolgung von Völkermord im Ausland*, in: *Neue Zeitschrift für Strafrecht (NStZ)* 1994, 485.

[82] Higher Regional Court of Bavaria, Judgement, 23 May 1997, NJW 1998, 392. For further reading see Kai Ambos, *Neue Zeitschrift für Strafrecht (NStZ)* 1998, 138; Christoph Safferling, Am. J. Int'l L. 92 (1998), 528, and Frank Selbmann, *Der Tatbestand des Genozid im Völkerstrafrech*t, 115.

[83] *Ibid.*, p. 156 *et seq.*

[84] Federal Court of Justice, Judgment, 30 April 1999, BGH NStZ 19 (1999), 396 *et seq*. For a comment on the case see Kai Ambos, *Anmerkung*, in: *Neue Zeitschrift für Strafrecht (NStZ)* 1999, 404.

[85] *Jorgić* case, Judgment, Constitutional Court, 12 December 2000 (as summarized in Reydams, *supra,* note 81). para. 16. [*Bundesverfassungsgericht* (BVerfG), 2 BvR 1290/99 *vom* 12.12.2000, Absatz No. (1-49) (http://www.bverfg.de).

[86] *Jorgić v. Germany*, Judgment, Eur. Ct. Hum. Rts., 12 July 2007, Appl. No. 74613/01.

[87] Higher Regional Court of Düsseldorf, Judgment, 29 November 1999, File No. IV 9/97 2 StE 6/97 (not published). For further reading, see Frank Selbmann, *Der Tatbestand des Genozid im Völkerstrafrecht*, 117 *et. seq.*

[88] Federal Supreme Court, Judgment, 21 February 2001, BGH in: *Neue juristische Wochenschrift (NJW)* 2001, 2728.

On 15 December 1999, the Bavarian Higher Regional Court convicted Kjuradj Kusljić, the former police commander of Vrbnica, which is situated 40 kilometers south of Banja Luka in Bosnia and Herzegovina. The court found Kjuradj Kusljić guilty of genocide and six cases of murder and sentenced him to life imprisonment. On 21 February 2001, the Federal Supreme Court confirmed the sentence, but convicted Kjuradj Kusljić for aiding genocide.[89] Based on the findings of the *Sokolović* judgment, the Court concluded that it had jurisdiction over the six cases of murder since these crimes also constituted grave breaches in the meaning of Article 146 and 147 of the Fourth Geneva Convention.[90]

Two attempts to persuade the Federal Prosecutor to investigate and prosecute pursuant to the Code of Crimes against International Law (2000) various high-level United States officials and former officials failed.[91]

In addition, the Federal Prosecutor failed to open an investigation under the Code of Crimes against International Law (2002) of allegations that the Minister of Interior of Uzbekistan then in a hospital in Germany was responsible for extrajudicial executions and torture. Once he learned of complaints to the Prosecutor, he fled and the Federal Prosecutor declined to pursue an investigation.[92]

John Demjanjuk was extradited by the United States to Germany on 11 May 2009 and he has been on trial in a German court since 30 November 2009 for war crimes committed during the Second World War in occupied territory.[93]

On 29 July 2010, the German Federal Prosecutor filed charges of genocide, murder as well as incitement of genocide and murder against Onesphore Rwabukombe, the former mayor of a town in northern Rwanda, under the Code of Crimes under International Law (2002).[94]

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[89] Federal Court of Justice, Judgment, 21 February 2001, BGH NJW 2001, 2732. See Frank Selbmann, *Der Tatbestand des Genozid im Völkerstrafrecht*, 119 *et. se*q.

[90] BGH in: Neue *Juristische Wochenschrift (NJW)* 2001, 2732, 2733.

[91] See Jan Arno Hesbruegge, 'An Attempt to Have Secretary Rumsfeld and Others Indicted for War Crimes under the German Völkerstrafgesetzbuch', December 2004, ASIL Insights (http://www.asil.org/insight041213.cfm).

[92] See Salvatore Zappalà, 'The German Federal Prosecutor's Decision not to Prosecute a Former Uzbek Minister: Missed Opportunity or Prosecutorial Wisdom?', J Int'l Crim. Just., 2006, 4, pp. 602-622.

[93] Trial Watch (http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profile.html?tx_jbtrial_pi2%5Btab%5D=facts&tx_jbtrial_pi2%5Bprofile%5D=john_demjanjuk_770&cHash=90b97fcaed).

[94] 'Germany charges Rwandan genocide suspect', 19 August 2010 (http://www.rnw.nl/international-

Israel

Israel's report does not mention that its courts have exercised universal jurisdiction in at least two cases involving war crimes, crimes against humanity or conduct amounting to genocide committed during the Second World War, the *Eichmann* case[95] and the *Demjanjuk* case.[96]

Luxembourg

Chilean refugees resident in Luxembourg filed a complaint with the city prosecutor in Luxembourg after the former President of Chile, Augusto Pinochet, was arrested in London on 16 October 1998 alleging that he was responsible for systematic torture and crimes against humanity. The prosecutor supported the claimants and sought to have an investigating judge (*Juge d'instruction*) open a criminal investigation.[97] The investigating judge denied the request on the ground that, although Luxembourg had provided for universal jurisdiction over war crimes, at that time, it had not done so for these two crimes.[98] This decision was affirmed on appeal. However, in 2000, the Penal Code was amended to give Luxembourg courts universal jurisdiction over torture committed abroad (see Section V above).

Netherlands

The one-page report submitted by the Netherlands notes that, in addition to a prosecution for piracy, there have been prosecutions of one person from the Democratic Republic of the Congo, three Afghans and two Rwandan nationals present in that country, but provides no details about those cases.

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justice/article/germany-charges-rwandan-genocide-suspect).

[95] *Attorney General of Israel v. Eichmann*, Judgment, Dist. Ct., Jerusalem, Int'l. L. Rep., vol. 36, p. 5, *aff'd*, Int'l L. Rep., vol. 36, 277 (Israel Sup. Ct. 1962).

[96] Demjanjuk was convicted on 18 April 1988 of crimes against humanity (Sect.1.(a)(2) NNCL), Crimes against the Jewish people (Sect. 1. (a)(1) NNCL) (conduct amounting to genocide against Jews), and crimes against persecuted people (Sect. 2 NNCL) in Poland and sentenced to death on 25 April 1988. On 17 August 1993, the Supreme Court of Israel reversed this judgment and acquitted him on the ground of mistaken identity. He returned to the United States on 22 September 1993. The decisions in this case do not appear to have been translated from Hebrew.

[97] *Réquisitoire du 19 novembre 1998 du parquet du tribunal d'arrondissement de Luxembourg dans l'affaire de la plainte contre Augusto Pinochet, nº 18077/98/CD*, reprinted in *Annales du Droit Luxembourgeois*, 2009, vol. 9, p. 393.

[98] *L'Affaire de la plainte contre Augusto Pinochet, nº 1630/98, Ordonnance du juge d'instruction auprès du Tribunal d'arrondissement de Luxembourg, 16 décembre 1998, reprinted in* 9 *Annales du Droit Luxembourgeois* 402, 404 (1999).

Sebastien Nzapali, a national of the Democratic Republic of the Congo and former colonel in the Lower Zaire Civil Guard, was sentenced on 7 April 2004 by the Rotterdam District Court to 2 and a half years' imprisonment for torture committed in the then Zaire.[99]

Habibullah Jalalzoy, former head of an investigations unit in the Afghan military intelligence of the KHAD (*Khedamat-e Etelea'at-e Dawlati*) from 1979 to 1992, was convicted on 14 October 2005 for war crimes in Afghanistan and sentenced to nine years' imprisonment.[100] On the same date, Heshamuddin Hesam was convicted by the same court for war crimes and sentenced to 12 years' imprisonment.[101] On 29 January 2007, the Dutch Court of Appeals upheld the convictions and the sentences against both Habibullah Jalalzoy and Heshamuddin Hesam.[102] On 9 July 2008, the Dutch Supreme Court upheld the convictions and sentences with regard to both men.[103]

The Hague District Court found Joseph Mpambara, a member of a Rwandese militia allied with the National Republican Movement for Democracy and Development (MRND), guilty of torture in Rwanda in 1994 and sentenced to 20 years'

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[99] LJN-nummer: AO7287 Zaaknr: 10/000050-03 Translation in English, Public Prosecutor's office no. (of the tried case): 10/000050-03, Judgment, 7 April 2004, Rotterdam District Court, three-judge section for criminal cases; Trial Watch (http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profile.html?tx_jbtrial_pi2%5Btab%5D=facts&tx_jbtrial_pi2%5Bprofile%5D=sebastien_nzapali_47&cHash=779c893426).

[100] LJN: AV1489, Rechtbank 's-Gravenhage , 09/751005-04 - English version , The Hague District Court, Three-Judge Section, 14 October 2005 (http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/Habibullah_Jalalzoy_-_Judgment_of_October_14__2005.pdf).

[101] LJN: AV1163, Rechtbank 's-Gravenhage , 09/751004-04, Public prosecutor's office numbers 09/751004-04 (writ of summons I); 09/750006-05 (writ of summons II), Uitspraak, The Hague District Court, Three-Judge Section, 14 October 2005 (http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/Heshamuddin_Hesam_-_Judgment_of_October_14__2005.pdf).

[102] LJN: AZ9366, Gerechtshof 's-Gravenhage , 09-751005-04, Uitspraak, LJN AZ7147, Court of Appeal, The Hague, 2200613205, 29 January 2007 (http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/Habibullah_Jalalzoy_Appeals_Judgment.pdf); LJN: AZ7143, Cause-list number : 22-006131-05, Public Prosecutor's Office number(s) : 09-751004-04 and 09-750006-05, The Hague Court of Appeal, 2200613105, 29 January 2007 (http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/Hesam_verdict_Jan_07.pdf) .

[103] Trial Watch ();_Trial Watch (http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profile.html?tx_jbtrial_pi2%5Btab%5D=legal-procedures&tx_jbtrial_pi2%5Bprofile%5D=heshamuddin_hesam_391&cHash=71388a52e2).

imprisonment on 23 March 2009.[104].

The Netherlands requested the transfer of the *Bagaragaza* case for trial in that country, but it rescinded this request when it determined that it did not have jurisdiction over the crime of genocide at the time of the crime.[105]

New Zealand

The report submitted by New Zealand cites the decision by the Attorney-General, a politically appointed official, to prevent the prosecution of Moshe Ya'alon, a former Israeli general visiting the country, for war crimes, on the ground that the evidence was insufficient to warrant a prosecution, but does not make clear that the District Court had made a judicial finding that there was sufficient evidence to warrant issuing the arrest warrant. Neither political decision nor the court decisions are attached to the report.

Norway

The report by Norway does not mention that it requested the transfer of a case of a Rwandan national from the International Criminal Tribunal for Rwanda accused of genocide in Rwanda in 1994 and that, since it had jurisdiction over the ordinary crime of murder, but not genocide, that court rejected the request.[106] It also does not mention that a criminal investigation is now pending concerning Charles Bandora, a Rwandan national, in June 2010.[107] It is not clear whether Norway will institute a prosecution or extradite him to Rwanda.

Paraguay

In 1999, an investigating Judge in Paraguay opened an investigation of three enforced disappearances of Paraguayan nationals committed in Argentina. Since

[104] Trial Watch (http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profile.html?tx_jbtrial_pi2%5Btab%5D=legal-procedures&tx_jbtrial_pi2%5Bprofile%5D=joseph_mpambara_757&cHash=fc5ff62c0d).

[105] Cedric Ryngaert, 'The Failed Referral of Michel Bagaragaza from the ICTR to the Netherlands' Hague Justice Portal (http://www.haguejusticeportal.net/eCache/DEF/11/116.html).

[106] *Prosecutor v. Bagaragaza*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway – Rule 11 *bis* of the Rules of Procedure and Evidence, Case No. ICTR-2005-86-11 *bis*, Trial Chamber, 19 May 2006, *aff'd*, *Prosecutor v. Bagaragaza*, Decision on Rule 11 *bis* Appeal, Case No. ICTR-05-86-AR11 *bis*, Appeals Chamber, 30 August 2006.

[107] Trial Watch (http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profile.html?tx_jbtrial_pi2[tab]=legal-procedures&tx_jbtrial_pi2[profile]=charles_bandora_905&cHash=a1595e1e2c).

the Paraguay Penal Code does not include a provision on passive personality, the investigating Judge based his decision on universal jurisdiction, as provided in Article 8 of that Code.[108] Argentina did not protest such a decision.

Senegal

In Senegal, more than a decade after African victims filed a complaint in the *Hissène Habré* case alleging that he was responsible for crimes against humanity and torture, and more than four years after the African Union directed Senegal on 2 July 2006 to try him on these charges "on behalf of Africa", he has yet to be put on trial.[109]

South Africa

The report submitted by South Africa does not mention any investigations and prosecutions based on universal jurisdiction. In 1982, Natal Supreme Court in Pietermaritzburg found Mike Hoare, an Irish mercenary, and six other men guilty of hijacking a plane to escape from an aborted coup attempt in the Seychelles, interfering with the safety of its passengers and disrupting procedures at Durban Airport, South Africa.[110] In contrast, in 1999, Mengistu, the former leader of Ethiopia, visited South Africa to receive medical treatment.[111] Despite an attempt to persuade prosecutors to arrest him on the basis of alleged war crimes and crimes

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[108] *"Sumario Criminal en averiguación de hechos punibles contra la seguridad de la convivencia de las personas (desaparición forzada). 26 February 1999. Juzgado de 1° Instancia en lo Criminal de 9° turno. Juez: Pedro Martínez; Secretaría No.17 a cargo de Billordo ("Que, si bien los hechos en sus etapas constitutivas finales podrían haber sucedido en la Argentina, nuestra legislación penal contempla en su artículo 8 numeral 1° inciso 7° la posibilidad de la persecución penal de los ilícitos denunciados aplicando como fundamento el principio de jurisdicción universal...").*

[109] For the most recent decision by the African Union following up this initial request, see Decision On The Hissène Habré Case, Doc. Assembly/AU/9(XVI), Assembly/AU/Dec.272(XIV), 14th Ord. Sess., 31 January – 2 February 2010, Addis Ababa, Ethiopia (http://www.africa-union.org/root/ua/Conferences/2010/Summit/doc/DECISIONS/Assembly%20Dec.268-288_%20Decl.1-3_%20Res%20E.pdf).

[110] BBC, '1982: Seychelles coup leader guilty of hijack' (http://news.bbc.co.uk/onthisday/hi/dates/stories/july/27/newsid_2499000/2499153.stm).

[111] According to a recent report, Mengistu stated that the visit to South Africa had been organised at the "highest level". He informed the Pretoria News that South Africa had assured him that he would not be extradited to Ethiopia. "My trip to South Africa was organised at the highest level by the governments of Zimbabwe and South Africa," he said. He added: "The South African government told me that I should not worry because in the first place there is no extradition agreement between South Africa and Ethiopia, and secondly, South Africa believed in reconciliation rather than recrimination." IRIN, 'South Africa: Mengistu says visit was organised at the "highest level"', Johannesburg, 9 December 1999 (http://www.irinnews.org/Report.aspx?ReportID=11134).

against humanity in Ethiopia, no action was taken.[112] In addition, the Southern Africa Litigation Centre (SALC) has submitted a complaint on 18 March 2008 to the National Prosecution Authority's Priority Crimes Unit urging the unit to initiate investigations with a view to prosecuting senior Zimbabwean police and other officials responsible for crimes against humanity. However, according to information available to Amnesty International, a recent attempt to persuade police and prosecutors to investigate these has failed and this inaction is now the subject of a judicial review in a South African court.[113]

Spain

Although **Spain** did not submit a report to the Secretary-General, it is well known that a number of investigations or prosecutions regarding crimes under international law have been opened on universal jurisdiction basis in that country, starting with the *Pinochet* case. However, a number of cases often misperceived as based on universal jurisdiction are based on other jurisdictional grounds. Until 2009, Spanish Law of the Judiciary did not include a provision allowing cases based on 'passive personality' and that's why some cases – where Spanish citizens were victims of crimes committed abroad, for example, the *Couso*, *Ríos Montt*, and *Manthaussen* cases – were formally opened under the provision on universal jurisdiction contained in the Organic Law of the Judiciary, but were really based on passive personality. Several examples of investigations or prosecutions based on universal jurisdiction in Spain are noted below.

In 2007 the Supreme Court of Spain (*Tribunal Supremo*) found Adolfo Francisco Scilingo, a former Argentine Navy officer, guilty of 30 killings and one arbitrary detention in Argentina over citizens of that country. Adolfo Scilingo is now serving a sentence of 25 years' imprisonment.

In the same year, the Supreme Court overruled a judgment by a first instance court and declared that Spain had jurisdiction to try non-Spaniards alleged to be responsible of smuggling migrants found on the high seas. According to the Supreme Court, Spain may exercise universal jurisdiction over foreigners alleged to be responsible for smuggling migrants, even if found on the high seas, based on provisions contained in the Organic Law of the Judiciary and the 1982 Convention on the Law of the Sea. The Supreme Court also recalled that states are under the duty to enact implementing legislation with regard to crimes under international

[112] Human Rights Watch, Letter (http://www.hrw.org/en/news/1999/11/29/letter-hrw-south-african-minister-foreign-affairs).

[113] Max du Plessis , 'Building up domestic will and capacity in Africa to prosecute serious crimes (speaking notes), International Criminal Court Review Conference, Kampala, Uganda, Panel Discussion on Critical Issues in Africa's Relationship with the International Criminal Court, Monday 31 May 2010; Tichaona Sibanda, 'Zimbabwe torturers face prosecution in South Africa', 17 March 2008 (http://www.swradioafrica.com/news170308/zimtortures170308.htm).

law, including the *aut dedere aut judicare* principle.[114]

In the *Martínez de Perón* case, the National Court of Spain (*Audiencia Nacional*), although it rejected an extradition request made by Argentina against an Argentine citizen who was an alleged perpetrator of imprisonment, enforced disappearances and torture committed in Argentina from 1974 to 1976 over Argentine victims, it also stated the if extradition was not granted, Spain would be obliged to submit the case to its own competent authorities for the purpose of prosecution. In this concrete case, the National Court of Spain found that no investigation could take place in view of the nature of crimes involved: since the crimes were not part of a widespread or systematic practice and, therefore, did not amount to crimes against humanity, so a prosecution was barred by statutory limitations.[115]

Sweden

The report submitted by Sweden does not mention investigations and prosecutions of crimes under international law based on universal jurisdiction or its special war crimes unit. Since the Second World War, there have been at least three public formal completed investigations of individuals concerning crimes under international law committed abroad based on universal jurisdiction. In addition, in one case based on passive personality jurisdiction and another based on active personality jurisdiction, universal jurisdiction provisions were applied.

In 2002, a complaint was filed with the Swedish police against Ariel Sharon regarding the Sabra and Chatila killings in Lebanon, claiming that the acts amounted to a "crime against international law". The prosecutor concluded that Swedish Courts had jurisdiction and that the acts described in the complaint would be sufficient to initiate a criminal investigation. However, he decided to discontinue investigation as he believed that difficulties in gathering evidence and securing extradition of the suspect would prevent a successful prosecution.[116] The superior

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[114] *Tribunal Supremo. Sala de lo Penal, Sección: 1, Nº de Recurso: 2027/2006, Nº de Resolución: 554/2007* of 27 June 2007. ("*No quedaría debidamente perfilado el ámbito de la jurisdicción española sin aludir al llamado principio de la justicia supletoria, también denominado del Derecho penal de representación, el cual opera en caso de inexistencia de solicitud o de no concesión de extradición, al permitir al Estado donde se encuentra el autor, con aplicación de la Ley penal, juzgarlo. El fundamento de este principio no es otro que el de la progresiva armonización de las distintas legislaciones como consecuencia de la estructura semejante de los Tratados internacionales, en cuanto vienen a diseñar unos tipos punibles e imponen normalmente a los Estados la obligación de introducirlos en sus ordenamientos jurídicos. De ahí que la incorporación de tales tipos penales en el Derecho interno permita la aplicación en su caso de la regla "aut dedere aut iudicare", si no se concediere la extradición*").

[115] *Audiencia Nacional, Sala de lo Penal, Sección Segunda, Rollo de Sala 12/2007, Extradición 1/2007, Juzgado Central de Instrucción nº 3*, 28 April 2008.

[116] Prosecutor Thomas Lindstrand, decision on police complaint 0104-K 102-02, September 19, 2002,

prosecutor (*överåklagare*) rejected an appeal of this decision.[117]

In February 2004, a Swedish prosecutor initiated a preliminary investigation directed at the leaders of the separatist movement, the Free Aceh Movement, Gerakan Aceh Merdeka (GAM) in Aceh, Indonesia. The prosecutor found cause to believe that acts amounting to "crimes against international law" (war crimes) had been committed and initiated investigations against three of the GAM leaders. Two of them were arrested in the summer of 2004.[118] However, the court ordered them released on the ground of insufficient evidence and the investigation was discontinued on 22 April 2005.[119] Indonesia cooperated with the prosecutor.

In October 2005, Abdi Qeybdiid, a Somali police chief in Mogadishu, was arrested on suspicion of responsibility for genocide in Somalia and the international prosecutor's office initiated a preliminary investigation into the matter.[120] However, the Gothenburg District Court declined to authorize continued detention on the ground that there was insufficient evidence.[121]

A complaint was filed against Russian Lieutenant-General Vjatjeslav Sucharev when he participated in the international defence exercise "Snowflake", in Sweden in January 2006alleging that he and his military unit were responsible for war crimes and crimes against humanity in Chechnya.[122] However, after informal contacts between the Prosecutor-General and the government, the international prosecutor's office dropped the case and decided not to open an investigation.[123] The prosecutor claimed, without citing any legal argument, that the suspect had immunity on the basis of principles of international law[124] and political officials would be unlikely to

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Dnr C9-1-842-02.

[117] Decision by Superior Prosecutor Björn Ericsson, November 14 2002, Dnr 100 2002/1158.

[118] Prosecutor Thomas Lindstrand, decision K 012-04, July 15, 2004, Dnr C9-691-03.

[119] *Ibid*.

[120] Chief Prosecutor Mats Sällström, decision on complaint K166567-05, November 10, 2005, dnr 409A-497-05.

[121] *Göteborgs Tingsrätt, Mål nr. B 10096-05*, October 10 2005.

[122] *Anmälan om folkrättsbrott enligt 22 kapitlet 6 Brottsbalken*, Swedish Helsinki Comittee for Human Rights, January 23 2006, shc.mediaonweb.org/attachment/000000**2**34.pdf.

[123] Chief Prosecutor Thomas Häggström, decision on complaint 509A06000018, January 26 2006, Dnr 509A-19-06.

[124] The prosecutor contended:

authorize a prosecution.[125]

In one active personality case[126] and one passive personality case,[127] Swedish courts relied in part on universal jurisdiction provisions.

On 1 March 2008, Sweden established the War Crimes Unit in its National Criminal Investigation Department. That unit is reported to have been investigating about a dozen cases involving crimes under international law committed abroad.[128] In April 2010, Swedish police announced that they have arrested a Kosovo Serb suspected

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"According to my opinion strong reasons speak in favor of the Russian official holding immunity from criminal prosecution during the time he is in Sweden in his quality of participant in the joint rehearsal "Snowflake". He has come to Sweden after above-mentioned decision by the Swedish Government. Such immunity rests on generally accepted principles of international law. Immunity is an obstacle to start an investigation and to use any measures of force proscribed in penal law." (translation by Amnesty International).

[125] The prosecutor stated:

"The reported crimes have been committed in civil service of another country. In such a situation the legislator has decided that the issuing of an order of prosecution for the crime is a task for the Government, as proscribed in Ch. 2, Sect. 7a of the Penal Code. It is a matter of difficult assessments of a legal as well as a foreign policy nature. As of now, there is no possibility to obtain a preliminary decision from the Government whether such an order can be expected. An order to prosecute formally only concerns the issue whether to initiate a prosecution and not the decision of whether to open an investigation. This issue is, however, of outmost importance when deciding whether to open an investigation, since an investigation should not be initiated or be continued if there are not conditions at hand for the investigation to lead to a sentence. According to my view, it is not likely that an order of prosecution will be issued. With that premise, no investigation should be initiated." (translation by Amnesty International).

[126] Jackie Arklöv, a Swedish citizen, was charged with war crime in Bosnia and Herzegovina. The District Court of Stockholm agreed with the prosecutor that it had jurisdiction over the accused under both passive personality and universal jurisdiction provisions in the Penal Code. Stockholm District Court, December 18 2006, Case No. B 4084-04, p. 52.

[127] In 2001, a Swedish prosecutor initiated investigations into the the disappearance of Dagmar Hagelin, a Swedish citizen, based on universal jurisdiction provisions in the Penal Code (the provisions based solely on the Swedish nationality of the victim did not apply).[127] Decision by Chief Prosecutor, Tomas Lindstrand, July 5 2001, (K 70494-01). An international arrest warrant was issued and Sweden requested the extradition of the naval officer Alfredo Astiz from Argentina. Decision by Chief Prosecutor, Tomas Lindstrand, November 30 2001, C9-1-405-01. Argentina refused to extradite him on the ground that the Argentine statute of limitations had expired. Decision by Chief Prosecutor Thomas Lindstrand, 30 January, 2002, Dnr C9-1-405-01.

[128] 'Man arrested over Kosovo war crimes', The Local (http://www.thelocal.se/25940/20100407/).

of responsibility for war crimes committed in the village of Cuska near Peja/Pec, Kosovo in May 1999.[129]

Switzerland

In addition to the trial and conviction of a Rwandan national, Fulgence Niyonteze (F.N.), for war crimes against other Rwandans in Rwanda mentioned in the report submitted by Switzerland, there have been a number of investigations opened based on universal jurisdiction.

On April 28, 1948, Ernst Haldiman, a German national, was sentenced to twenty years in prison by a Swiss military court for his participation as a member of an SS commando unit in the Bande massacre in Belgium during the Second World War.[130]

On 11 February 1995, Alfred Musema, was arrested in Switzerland for war crimes in Rwanda and on 8 July 1996 the *Tribunal Militaire de cassation* (Military Tribunal of Cassation) held that it had jurisdiction over the case.[131] However, Switzerland later surrendered him to the International Criminal Tribunal for Rwanda.

Goran Grabe was charged on 28 February 1997 with grave breaches of the Third and Fourth Geneva Conventions and violations of Protocol II in Bosnia and Herzegovina, but, although the military court held that it had jurisdiction, it acquitted him for lack of evidence.[132]

On 23 September 2003, the Canton of Geneva's General Prosecutor declined to act on a complaint that Habib Ammar, a former Tunisian Minister of Interior, was responsible for murder, assault, bodily harm and threats based on a claim that he had diplomatic immunity.[133]

In addition, since Switzerland submitted its report dated 26 April 2010, Swiss authorities have opened a criminal investigation against former Rwanda Minister of Environment, Gaspard Ruhumuriza, regarding allegations that he was responsible

[129] Bojana Barlovac, 'Kosovo Serb War Crimes Suspect Arrested in Sweden', 7 April 2010 (http://www.balkaninsight.com/en/main/news/27150/).

[130] George Duncan's Massacres and Atrocities of World War II (http://members.iinet.net.au/~gduncan/massacres.html).

[131] *In re A.M., Tribunal militaire de cassation*, 8 July 1996.

[132] *In re G,,Tribunal militaire de Division*, Division 1, Lausanne, 18 April 1997, *aff'd in part, rev'd on the scope of damages*, *Tribunal militaire de cassation*, 5 September 1997.

[133] Letter to Trial Watch dated 23 2003 (http://www.trial-ch.org/fileadmin/user_upload/documents/ammar-proc.pdf).

for conduct amounting to genocide in 1994 (noted above).[134]

United Kingdom

The United Kingdom courts acting pursuant to the Royal Warrant of 1945 exercised universal jurisdiction over former Axis nationals in a number of cases in the immediate aftermath of the Second World War. For example, in the *Almelo* case, a British military court sitting in the Netherlands based its jurisdiction over German defendants accused of killing a Dutch civilian in part on universal jurisdiction.[135] In the *Zyklon B* case, another British military court, sitting in Hamburg, exercised jurisdiction over German industrialists on charges that they knowingly supplied poison gas to kill Allied nationals who were not nationals of Great Britain.[136] In 1947, a British military court at Maymyo convicted two Japanese nationals of offences committed against Chinese and Indian inhabitants of areas occupied by Japan.[137] Another British military court, in Singapore, sentenced Tomono Shimio to death for killing US prisoners of war in Saigon.[138]

In the past two decades, United Kingdom authorities, based on universal jurisdiction, have investigated a large number of cases involving crimes under international law and conducted two trials.

A War Crimes Inquiry Group reviewed over 400 cases pursuant to the War Crimes Act 1991 of alleged war crimes committed during that war in Europe with a view to possible prosecution and a special unit of the Metropolitan Police was established to investigate these cases for the same purpose. On 15 April 1996, a resident, Szymon Serafinowicz, was charged under this legislation with murder in violation of the laws of war and of the common law of three persons in 1941-1942 at a concentration camp in the Byelorussian S.S.R. (now Belarus) where he was serving as a guard. On 17 January 1997, he was found unfit to stand trial.[139] On 1

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[134] *Département fédéral de justice et police, Office fédéral de la justice, Communiqués, OFJ, 30.06.2009*, www.bj.admin.ch/bj/fr/home/dokumentation/medieninformationen/2009/2009-06-30.html

[135] *Sandrock and three others* (*The Almelo Trial*), Judgment, Case No. 3, Brit. Mil. Ct. – Almelo 24-26 November 1945, 1 Law Reports of Trials of War Criminals 26 (London: H.M.S.O. 1949), pp. 35, 42 (1949).

[136] *Tesch and two others* (*The Zyklon B* Case), Judgment, Case No. 9, Brit. Mil. Ct. - Hamburg 1946, 1 *Law Reports of Trials of War Criminals, supra,* note 136, 93, 103 (1949).

[137] *Introduction*, 10 *Law Reports of Trials of War Criminals*, *supra*, note 136, 43.

[138] L.C. Green, *The Maxim* Nullum Crimen Sine Lege *and the Eichmann Trial*, 38 Brit. Y. B. Int'l L. 457, 463 (1962).

[139] Jane L. Garwood, The British Experience, in M. Cherif Bassiouni, 3 International Criminal Law 325-326 (Ardsley, New York: Transnational Publishers, Inc. 2d ed. 1999); Helen Smith, Britain's first war

April1999, Anthony (Andrzej) Sawoniuk was sentenced under the War Crimes Act 1991 to life imprisonment for the murder of two civilians.[140] The Court of Appeal upheld his conviction on 10 February 2000.[141] The House of Lords denied leave to appeal on 20 June 2000.[142]

In 1999, the House of Lords decided that former President Augusto Pinochet Ugarte could be extradited to Spain on charges of torture based on universal jurisdiction. However, a political official, the Home Secretary, refused to permit him to be extradited on the basis of claims that he was unfit to stand trial.

Sarwar Zardad, a leader of an Afghan armed group, was prosecuted by the Attorney General for torture, conspiracy to torture, hostage taking and conspiracy to take hostages. After the first jury trial ended in a mistrial, he was successfully prosecuted again, using additional evidence at the first trial. On 18 July 2005, the second jury found Sarwar Zardad guilty of torture and of hostage taking and on 19 July 2005, he was sentenced to 20 years' imprisonment.[143]

The Metropolitan Police opened an investigation of Tharcisse Muvunyi, a Rwandan national, concerning allegations that he was responsible for crimes under international law in Rwanda. However, before a decision was made whether to prosecute him, he was arrested on 5 February 2000 on a warrant issued by the International Criminal Tribunal for Rwanda and surrendered to that court in October 2000.[144] The Metropolitan Police also investigated allegations that Colonel Karuna Amman was responsible for torture and hostage taking in Sri Lanka, but decided not

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crimes trial collapses, Reuter, 17 January 1997; John Mason, War crime prosecution collapses, Financial Times, 18 January 1997.

[140] For a discussion of this case, see Ian Bryan and Peter Rowe, 'The Role of Evidence in War Crimes Trials: The Common Law and the Yugoslav Tribunal', 2 Y.B. Hum. L. 307 (1999). See also Tim Jones & Alan Hamilton, 'War criminal weeps for an old age in jail', The Times, 2 April 1999; Tim Jones, 'The only trial out of 393 suspects', The Times, 2 April 1999; _____, Spelling error nearly led to killer's escape, The Times, 2 April 1999; _____, 'The outsider driven by a hatred of Jews', The Times, 2 April 1999.

[141] *R. v. Sawoniuk, Court of Appeal* (Criminal Division), [2000] Crim. L. R. 506.

[142] 'War Criminal Refused New Hearing', Financial Times, 20 June 2000.

[143] Trial Watch (http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profile.html?tx_jbtrial_pi2[tab]=legal-procedures&tx_jbtrial_pi2[profile]=faryadi-sarwar_zardad_329&cHash=363550d185).

[144] Country Information and Policy Unit, Immigration and Nationality Directorate of the Home Office, para. 3.39 (http://www.ecoi.net/file_upload/1684_1242818563_rwanda-oct-2001.pdf).

to recommend to the Crown Prosecution Service that he be prosecuted.[145]

Four Rwandans whom a court ruled could not be extradited to Rwanda to face trial for genocide are currently at liberty in the United Kingdom and have not been prosecuted, despite a change in the law to permit courts to do so.[146]

United States

The report submitted by the United States does not mention that, according to the United Nations War Crimes Commission, United States military courts after the Second World War conducted "many" trials involving crimes committed against non-nationals of Allied countries for war crimes and crimes against humanity based on universal jurisdiction.[147] For example, the *List*,[148] *German High Command*,[149] *Hadammar* [150]and *Einstrager*[151] cases all involved universal jurisdiction.

The report also does not note the numerous allegations that foreigners present in the United States have been responsible for torture and extradition abroad, none of whom have been prosecuted for crimes under international law.[152] The report also does not make clear that the practice of the United States is not to prosecute such

[145] Trial Watch (http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profile.html?tx_jbtrial_pi2[tab]=legal-procedures&tx_jbtrial_pi2[profile]=karuna_amman_733&cHash=d1b70046ae).

[146] Christopher Hope, 'Four men accused of taking part in 1994 Rwandan genocide win battle against extradition', Daily Telegraph, 8 April 2009 (http://www.telegraph.co.uk/news/uknews/law-and-order/5125104/Four-men-accused-of-taking-part-in-1994-Rwandan-genocide-win-battle-against-extradition.html).

[147] *Introduction*, 10 *Law Reports of Trials of War Criminals, supra*, note 136, 43-44 (listing some of the cases).

[148] *In re List* (*Hostages* Case), Judgment, Case No. 47, U.S. Mil. Trib. Nuremberg 19 February 1948, 8 *Law Reports of Trials of War Criminals*, *supra,* note 136, p. 92.

[149] *Trial of Wilhelm von Leeb and Thirteen Others (German High Command Case*), Judgment, U.S. Mil. Trib. Nuremberg 28 October 1948, 12 *Law Reports of Trials of War Criminals*, *supra,* note 136, p. 61.

[150] *The Hadamar Trial*, Judgment, Case No. 4, U.S. Mil. Comm'n - Weisbaden, 8-15 October 1945, 9 *Law Reports of Trials of War Criminals*, *supra,* note 136, pp.46, 53.

[151] *In re Eisentrager*, Judgement, Case No. 84, U.S. Mil. Comm'n - Shanghai, 3 October 1946 to 1947, 14 *Law Reports of Trials of War Criminals*, *supra,* note 136, pp. 8, 15.

[152] See, for example, Amnesty International USA, *United States of America: A safe haven for torturers* (2002) (http://www.amnestyusa.org/stoptorture/safehaven.pdf).

persons but to prosecute them for immigration offences and then to deport or extradite them.[153]

Uruguay

In the *Alvarez* case in Uruguay, an investigating judge found former Uruguayan dictator Gregorio Alvarez and former Navy officer Juan Carlos Larcebeau criminally responsible for 37 and 29 killings, respectively, committed in Uruguay in the 1970s. While reaching that decision – former head of state Alvarez was sentenced to 25 years of imprisonment whereas Larcebeau will serve 20 years - , the investigating Judge explained that the widespread practice of certain crimes amount to crimes against humanity and, quoting Professor Cherif Bassiouni, concluded that among the consequences which arise from that category of crimes are the non applicability of statute of limitations, immunities and universal jurisdiction.[154]

The above, incomplete survey demonstrates that, since the Second World War, a significant number of states have investigated hundreds of allegations, a significant number of which resulted in successful prosecutions of persons based on universal jurisdiction for crimes under international law.

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[153] See, for example, BBC 17 September 2010 US jails Guatemalan ex-soldier for hiding massacre role (http://www.bbc.co.uk/news/world-latin-america-11338246).

[154] "Alvarez Armellino, Gregorio C. y Larcebeau Aguirregaray, Juan C. - reiterados delitos de homicidio muy especialmente agravados", sentencia No.157, Montevideo, 21 October 2009 *("Este carácter de ius cogens que posee la prohibición de los crímenes contra la humanidad genera para los Estados obligaciones erga omnes, entre las cuales se destacan la inderogabilidad de las prohibiciones, la responsabilidad penal individual frente al derecho internacional por la comisión de dichos crímenes, la obligatoriedad de su juzgamiento (que se traduce en al fórmula aut dedere aut judicare), la inaplicabilidad de reglas de prescripción, la inoponibilidad de inmunidades personales incluyendo las de los jefes de Estado, la inoponibilidad de la defensa de obediencia debida y el principio de jurisdicción universal"*). An appeal is pending before a higher court.

VII. THE RESPONSIBLE EXERCISE OF UNIVERSAL JURISDICTION

While there is a general understanding that the number of cases based on universal jurisdiction is huge such understanding is basically flawed. A considerable number of cases supposedly based on universal jurisdiction are truly based on the principles known as 'passive personality' (the jurisdictional basis which permits the exercise of jurisdiction over a crime committed outside the territory of the state based solely upon the nationality of the victim) and 'protective principle' (based on harm to a state's own national interests). Below the reader will find some examples.

The *Rwanda* case in **Spain** – where an investigating judge has issued 40 arrest warrants against 40 Rwandese citizens under charges of genocide, crimes against humanity and war crimes – has its origin on the killing of Spanish citizens in that country. The *Ríos Montt* case in Madrid, where arrest warrants have been issued against Guatemalan citizens, is also based on such a principle, as well as the protective principle, since the proceeding has its origin in the attack of the Spanish embassy in Guatemala City by Guatemalan paramilitaries. Likewise, the *Couso* case – where arrest warrants have been issued against three US military officials for their alleged responsibility in killing a journalist – is not truly based on universal jurisdiction, but on the passive personality principle.

In **France**, the arrest warrants issued by an investigating Judge against *Rosa Kabuye* and other Rwandese citizens on their alleged responsibility on the shot down of the plane where former Rwanda and Burundi presidents perished in 1994 is also based on passive personality, since the pilots were French nationals. In its report to the SG Rwanda states that this case amount to an abuse of universal jurisdiction.[155]

In **Italy**, the trial of *Alfonso Podlech*, former military prosecutor in Chile, is also based on passive personality. Podlech, as other defendants, is accused of the enforced disappearance of Omar Roberto Venturelli, an Italian and Chilean national, who disappeared in Temuco, Chile, in 1973, allegedly as part of the so-called 'Operation Condor', a coordinated plan to execute dissidents in Latin America in 1970s. More than 100 arrest warrants have been issued by Italian courts against citizens of Latin American states for their alleged participation in the *Plan Condor*.

In conclusion, state representatives, to have an appropriate picture of the scope and practice of universal jurisdiction, should first dismiss all those cases referred in state's reports to the Secretary General which are truly based in principles other than universal jurisdiction.

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[155] Report by Rwanda of 7 May 2010, page 2 ("The first one is that this principle [universal jurisdiction] has been used to settle political scores. Particularly, Rwanda has been victim of the abuse of this principle. It is worth mentioning in this report the case of this kind of abuse by French and Spain judges against Rwanda").

VIII. THE ABSENCE OF ANY PRIORITY OF TERRITORIAL STATES TO INVESTIGATE AND PROSECUTE CRIMES UNDER INTERNATIONAL LAW

There is no priority under international law for either states where the crimes occurred (territorial states) or the suspect's own state to investigate and prosecute crimes on the basis of universal jurisdiction.[156] Some states indicated in their reports that as a matter of policy territorial states should have priority, but they did not contend that it was a rule of international law.[157]

As Amnesty International has explained before in the unlikely event that more than one state claimed priority to investigate and prosecute a suspect for the same crimes under international law based on the same conduct, the state with custody seeking first to exercise universal jurisdiction or any other extraterritorial principle would normally have a better claim than the territorial state or the suspect's own state to act on behalf of the international community. The presence of the suspect outside the territorial state and the suspect's own state creates a presumption that

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[156] This point was recognized in the Report of the United Nations Fact Finding Mission on the Gaza Conflict (Goldstone Report), which stated:

"The exercise of criminal jurisdiction on the basis of the universality principle concerns especially serious crimes regardless of the place of commission, the nationality of the perpetrator or the nationality of the victim. This form of jurisdiction is concurrent with others based on more traditional principles of territoriality, active and passive nationality, and it is not subsidiary to them."

U.N. Doc. A/HRC/12/48, 25 September 2009, para. 1849.
(http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf).

[157] Permanent Mission of Israel to the United Nations, Information and Observation on the Scope and Application of the Principle of Universal Jurisdiction, 3 May 2010, penultimate paragraph. See also Permanent Mission of Cuba to the United Nations, *Respuesta de la República de Cuba sobre el párrafo 1 de la resolución 64/117* (*"Cuba considera que la aplicación de la jurisdicción universal debe regularse, a fin de evitar abusos, respetar la igualdad soberana de los Estados y resguardar la paz y la seguridad internacionales. En ese contexto, consideramos que la aplicación de la jurisdicción universal debe ser supletoria de la jurisdicción nacional de cada Estado. La declaración de que los tribunales nacionales asumen el procesamiento y juzgamiento del comisor, inhibiría cualquier acción de la jurisdicción universal"*).

the authorities of these states are not acting with due diligence to investigate and prosecute. Failure to transmit an extradition request would be compelling evidence that the territorial state was not serious. Such priority for the forum state with custody of the suspect is subject to the proviso, however, that when it seeks to exercise its sovereignty, its judicial system must not conduct sham proceedings or proceedings designed to shield the suspect from justice. The forum state must be able and willing to investigate and prosecute in accordance with international law and standards for fair trial without the death penalty or other cruel, inhuman or degrading treatment or punishment.

It is often argued that it is preferable to try a person in the territory where the crime occurred. As a general rule in an ideal world, this may often be the best course. However, the reason that national courts exercise universal jurisdiction is because the territorial state is unable or unwilling to do so in a trial which is neither a sham nor unfair. Indeed, it appears that in almost none of the post-Second World War cases where investigations or prosecutions have taken place based on universal jurisdiction has the territorial state fulfilled its responsibilities under international law to investigate and prosecute the suspects. For example, Chile never sought the extradition of former President Augusto Pinochet Ugarte from the United Kingdom when he was arrested there in October 1998. Indeed, Chile could not have done so as the crimes with which he was charged were covered by the Amnesty Law that he himself had issued (Decreto Ley 2.191, published in the Official Gazette on 19 April 1978).

As with piracy cases and terrorism cases, all states have concurrent universal jurisdiction over the suspects. The same is true with respect to crimes under international law. As the United States Court of Appeals for the Sixth Circuit explained in the *Demjanjuk* case, involving a request for the extradition of a person charged with war crimes and crimes against humanity during the Second World War:

> "This universality principle is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law applicable to such offences."[158]

Therefore, the state which opens a criminal investigation first should have priority, unless it is not able and willing to investigate and prosecute genuinely.

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[158] *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986)

IX. INTERNATIONAL ORGANIZATIONS AND UNIVERSAL JURISDICTION

As a result of the Secretary-General's decision not to seek information from sources other than states, the analytical report fails to bring to the attention of states any of the extensive information available on the subject of universal jurisdiction in international organizations, including the UN General Assembly, the Security Council and its Counter-Terrorism Committee, international courts, the UN Secretariat, commissions of inquiry and the International Committee of the Red Cross.

A. GENERAL ASSEMBLY RESOLUTIONS ON UNIVERSAL JURISDICTION

For nearly four decades the General Assembly has been adopting resolutions which permit states to exercise universal jurisdiction over crimes under international law and gross human rights violations. For example:

The 1973 Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity provides that:

> "War crimes and 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.
>
> 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."[159]

The 1989 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions states:

> "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

[159] Adopted by General Assembly resolution 3074 (XXVIII) of 3 December 1973, paras.1 and 5.

the offence was committed."[160]

The 1992 Declaration on the Protection of all Persons from Enforced Disappearance provides:

> "All States should take any lawful and appropriate action available to them to bring to justice all persons presumed responsible for an act of enforced disappearance, who are found to be within their jurisdiction or under their control."[161]

The 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law also provides:

> "In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.
>
> To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction."[162]

B. THE SECURITY COUNCIL'S CALLS UPON STATES TO EXERCISE UNIVERSAL JURISDICTION

The Security Council has on a number of occasions called upon states to exercise universal jurisdiction over crimes under national law of international concern, such as piracy and, (through its Counter-Terrorism Committee) a broad range of terrorist crimes, included in 16 international treaties and protocols. It has also called upon states to exercise universal jurisdiction over persons suspected of genocide, war crimes and crimes against humanity.

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[160] Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989, Principle 18.

[161] Adopted by General Assembly resolution 47/133 of 18 December 1992. art. 14.

[162] Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, para.4 and 5.

1. PIRACY

With regard to piracy, the Security Council has called upon all states to define piracy as a crime under national law and to prosecute persons suspected of piracy, which necessarily requires the exercise of universal jurisdiction. It stated:

> "Reaffirming that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 ("the Convention"), in particular its articles 100, 101 and 105, sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities,
>
> Commending the efforts of the Republic of Kenya to date to prosecute suspected pirates in its national courts and imprison convicted persons, and encouraging Kenya to continue these efforts, while acknowledging the difficulties Kenya encounters in this regard,
>
> Also commending the efforts to date of other States to prosecute suspected pirates in their national courts,
>
> Noting with concern at the same time that the domestic law of a number of States lacks provisions criminalizing piracy and/or procedural provisions for effective criminal prosecution of suspected pirates,
>
> 2. Calls on all States, including States in the region, to criminalize piracy under their domestic law and favorably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia, consistent with applicable international human rights law;
>
> 4. Requests the Secretary-General to present to the Security Council within 3 months a report on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the CGPCS, the existing practice in establishing international and mixed tribunals, and the time and the resources necessary to achieve and sustain substantive results[.]"[163]

2. OTHER CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN

With respect to terrorist offences, the Security Council's Counter-Terrorism Committee regularly asks states when reporting pursuant to Resolutions 1373 (2001) and 1624 (2005), to provide information about the steps they have taken to

[163] S.C. Res. 1918 (2010), 27 April 2010; See also S.C. 1851 (2008), 16 December 2008.

ratify 16 conventions and their protocols with *aut dedere aut judicare* provisions[164] and to provide in national law for jurisdiction over foreigners suspected of committing crimes abroad listed in those treaties.

3. CRIMES UNDER INTERNATIONAL LAW

On a number of occasions, the Security Council has called upon states to exercise universal jurisdiction over genocide, crimes against humanity and war crimes. In 1995, it urged all states to bring to justice persons suspected of responsibility for such crimes in Rwanda if they were not to be surrendered to the International Criminal Tribunal for Rwanda, which would have necessarily required exercising universal jurisdiction. After determining "that effective measures be taken to bring to justice the persons who are responsible for such crimes", the Security Council urged

> ". . . 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[.]"[165]

In 2000, the Security Council 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 involvement in the crime of genocide, crimes against humanity or war crimes, and to bring to justice those responsible, and facilitate measures in accordance

[164] Convention on Offences and Certain Other Acts Committed On Board Aircraft; Convention for the Suppression of Unlawful Seizure of Aircraft; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; International Convention Against the Taking of Hostages; Convention on the Physical Protection of Nuclear Material; Amendments to the Convention on the Physical Protection of Nuclear Material; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation; Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf; Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf; Convention on the Marking of Plastic Explosives for the Purpose of Detection; International Convention for the Suppression of Terrorist Bombings; International Convention for the Suppression of the Financing of Terrorism; International Convention for the Suppression of Acts of Nuclear Terrorism.

[165] S.C. Res. 978 (1995), 27 February 1995.

with international law to ensure accountability for violations of international humanitarian law[.]"[166]

C. UNIVERSAL JURISDICTION AND INTERNATIONAL CRIMINAL COURTS

The International Criminal Tribunal for the former Yugoslavia in the *Furundzija* case found that torture was subject to universal jurisdiction by any state, as one of the consequences arising out of the peremptory character of the prohibition of that crime under international law. The Trial Chamber stated that:

> "Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes."[167]

In 2004, the International Criminal Tribunals for the former Yugoslavia and Rwanda amended their rules to permit transfer of cases to any state with jurisdiction over genocide, crimes against humanity and war crimes.[168]

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[166] S.C. Res. 1291 (2000), 24 February 2000.

[167],*Prosecutor v. Anto Furundzija*, Judgment, Case No.: IT-95-17/1-T, ICTY Trial Chamber ,10 December 1998, para.156.

[168] .Rule 11 bis, Referral of the Indictment to Another Court. The Rule provides as follows:

"(A) If an indictment has been confirmed, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a Trial Chamber for the purpose of referring a case to the authorities of a State:

(i) in whose territory the crime was committed; or

(ii) in which the accused was arrested; or

(iii) having jurisdiction and being willing and adequately prepared to accept such a case,

The Special Court for Sierra Leone (SCSL), in the *Prosecutor against Augustine Gbao* case stated the following:

"The crimes mentioned in Articles 2-4 of the Statute of the Special Court (crimes against humanity, violations of Article 3 common to the Geneva Conventions and Additional Protocol II, and other serious violations of humanitarian law) are international crimes entailing universal jurisdiction"[169]

D. STUDIES BY THE UN SECRETARIAT AND EXPERT BODIES

As noted above in Section III, the International Law Commission has been conducting a study of the obligation of states to extradite or prosecute persons suspected of certain crimes, a study that will also address the question of universal jurisdiction. The study is still at an early stage and it will be discussed later this year by the Sixth Committee during its review of the work of the International Law Commission. In addition, there have been at least two recent studies by the UN Secretariat which are relevant to the discussion of universal jurisdiction.

In May 2010, the Office of Legal Affairs submitted a survey of state practice concerning the extradite or prosecute obligation to the International Law Commission.[170]

On 1 October 2010, the Office of the High Commissioner for Human Rights published a report on crimes under international law committed in the Democratic Republic of the Congo (DRC) between 1993 and 2003.[171] With regard to the role that states outside the DRC could play in ending impunity in that state using extraterritorial and universal jurisdiction it stated:

"1027. While there are prosecution mechanisms that could be implemented in the DRC to bring action against the many crimes committed, each State still has an immediate role to play in the fight against impunity. Certain States can

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so that those authorities should forthwith refer the case to the appropriate court for trial within that State."

[169] SCSL, Appeals Chamber, 25 May 2004, Prosecutor against Augustine Gbao (case No.SCSL-2004-15-AR72(E)), para.8.

[170] Survey of multilateral conventions which may be of relevance for the Commission's work on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)": Study of the Secretariat, 26 May 2010 (http://untreaty.un.org/ilc/documentation/english/a_cn4_630.pdf).

[171] Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003 (June 2010) (http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf).

also play a crucial role in the success of judicial proceedings, whether they are conducted by jurisdictions in another country or by an international or mixed jurisdiction.

. . .

1029. The exercise of extraterritorial or universal jurisdiction is made obligatory by international law in certain international conventions1730 on the grounds that the most serious crimes under international criminal law, namely war crimes, crimes against humanity, genocide and torture, must not go unpunished. This principle authorises the prosecution of perpetrators of these crimes even if there is no link between the offence and the State which brings proceedings. This form of jurisdiction is based on the nature and gravity of the crimes committed. Thus, a large proportion of the crimes committed between 1993 and 2003 on DRC territory can be prosecuted in accordance with universal jurisdiction.

1031. All States should therefore apply these texts and their own laws, on the basis of either extra-territorial or universal competence, to prosecute those who bear the greatest responsibility for the crimes documented in this report, complying fully with the provisions of international law in effect. They should also cooperate with the implementation of procedures operating outside of their own judicial systems, by responding, for example, to the needs of other national or international jurisdictions carrying out investigations and agreeing to extradite the perpetrators to States that request it."[172]

E. COMMISSIONS OF INQUIRY

The Report of the United Nations Fact Finding Mission on the Gaza Conflict (Goldstone Report) concluded:

"127. In the context of increasing unwillingness on the part of Israel to open criminal investigations that comply with international standards the Mission supports the reliance on universal jurisdiction as an avenue for States to investigate violations of the grave breach provisions of the Geneva Conventions of 1949, prevent impunity and promote international accountability (Chapter XXVIII).

1654. It is the view of the Mission that universal jurisdiction is a potentially efficient tool for enforcing international humanitarian law and international human rights law, preventing impunity and promoting international accountability. In the context of increasing unwillingness on the part of Israel to open criminal investigations that comply with international standards and establish judicial accountability over its military actions in the Occupied Palestinian Territory, and until such a time as clarity is achieved as to whether

[172] *Ibid.*, paras. 1027, 1029 and 1031 (footnotes omitted).

the International Criminal Court will exercise jurisdiction over alleged crimes committed in the Occupied Palestinian Territory, including in Gaza, the Mission supports the reliance on universal jurisdiction as an avenue for States to investigate violations of grave breach provisions of the Geneva Convention of 1949, prevent impunity and promote international accountability.

1975. The Mission recommends that States Parties to the Geneva Conventions of 1949 start criminal investigations in national courts, using universal jurisdiction, where there is sufficient evidence of the commission of grave breaches of the Geneva Conventions of 1949. Where so warranted following investigation, alleged perpetrators should be arrested and prosecuted in accordance with internationally recognised standards of justice." [173]

F. REGIONAL INTERGOVERNMENTAL ORGANIZATIONS

The African Union (AU) and the European Union (EU) have recently sponsored studies of universal jurisdiction. In April 2008, the AU Commission published a study on universal jurisdiction, claiming that this subject "has never been discussed at the level of the United Nations" and asserting, without undertaking a global study on the matter, that "there is no widespread State practice" regarding universal jurisdiction, and that, therefore, a thorough discussion at the UN General Assembly was needed.[174]

However, in November 2008 the AU and European Union Troika (AU-EU Troika) established an ad hoc expert group which published a subsequent, more comprehensive study in April 2009. That expert group concluded that:

- international law did not give states where the crimes were committed priority over investigation and prosecution;
- the majority of AU member states have universal jurisdiction legislation regarding crimes defined in treaties and customary international law which only one has ever tried to use;
- 13 African states have abolished in national law, or have agreed to do so, provisions recognizing claims of immunity by state officials for crimes under international law;

[173] U.N. Doc. A/HRC/12/48, 25 September 2009, paras. 127, 1654 and 1975 (http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf).

[174] Report of the Commission on the Use of the Principle of Universal Jurisdiction by Some Non-African States as Recommended by the Conference of Ministers of Justice/Attorneys General, Executive Council, 13th Ord. Sess. 24 – 28 June 2008, Sharm El-Sheikh, Egypt, EX.CL/411(XIII) (http://internationaljusticeafrica.org/documents/EX.CL%20411(XIII)%20-%20Study%20on%20Universal%20Jurisdiction.doc).

- universal jurisdiction cases involve a broad range of nationalities; and
- some of the cases that have been claimed to be evidence of "abuse" of universal jurisdiction were not even based on universal jurisdiction.[175]

On 28 April 2009, the AU-EU Troika took note of this report and "recalled the necessity to fight impunity in the framework of national and international law".[176] At the same meeting, the AU-EU Troika Ministers underlined the need to produce the budget for the trial in Senegal based on universal jurisdiction of Hissène Habré "as soon as possible".[177]

Although it proclaimed support for "the principle of universal jurisdiction within the context of fighting impunity as well as the need to punish perpetrators of genocide, crimes against humanity and war crimes",[178] the AU Assembly stated that it was concerned about "its ad hoc and arbitrary application, particularly towards African leaders." The AU Assembly decided to refer the issue to the General Assembly "with the view to establishing regulatory provisions for its application." However, the AU when referring the question to the UN General Assembly fully supported universal jurisdiction as a method to end impunity.

G. THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW

In 2005, the International Committee of the Red Cross completed a comprehensive study of state practice around the world concerning customary international law. It concluded that with regard to both international and non-international armed conflict, it was a rule of customary international humanitarian law that "States have the right to vest universal jurisdiction in their national courts over war crimes."[179]

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[175] See AU-EU Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction, Report, annexed to Council Secretariat, The AU-EU Expert Report on the Principle of Universal Jurisdiction, 8672/09, 16 April 2009 (http://register.consilium.europa.eu/pdf/en/09/st08/st08672.en09.pdf).

[176] 12th AFRICA-EU Ministerial Troika meeting, Summary: 28 April 2009, Luxembourg, paras. 38 and 39 (http://www.europa-eu-un.net/articles/en/article_8682_en.htm).

[177] *Ibid.*, para. 40.

[178] The commitment to end impunity for these crimes is reflected in Article 4 (h) of the African Union Constitutive Act (http://www.au2002.gov.za/docs/key_oau/au_act.htm).

[179] Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Geneva: International Committee of the Red Cross and Cambridge: Cambridge University Press, vol. 1, Rule 157 (http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule157).

X. RECOMMENDATIONS

Amnesty International recommends that states participating in the discussion in the Sixth Committee in October 2010 make the following points in support of universal jurisdiction as an essential tool to enforce international justice:

- It is vital that all states uphold their commitment to universal jurisdiction, a long-established rule of international law, and reaffirm the duty of every state to exercise its jurisdiction over those responsible for crimes under international law, including genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances.
- Under the related obligation to extradite or prosecute (*aut dedere aut judicare)* a state is required either to exercise jurisdiction (which would necessarily include exercising universal jurisdiction in certain cases) over a person suspected of certain categories of crimes or to extradite the person to a state able and willing to do so or to surrender the person to an international criminal court with jurisdiction over the suspect and the crime;
- The vast majority of states – including many African states - have already enacted legislation providing for universal jurisdiction and, in particular, as part of implementing the Rome Statute at the national level, most states parties have provided for universal jurisdiction as a tool to enforce international justice to some extent;
- States which have not done so already must enact effective legislation ensuring that they can and will prosecute those against whom there is sufficient admissible evidence that they committed crimes under international law and that victims can obtain reparations for such crimes.
- The official capacity as head of state or government or foreign minister does not and should not grant him or her impunity from prosecution for crimes under international law, such as genocide, crimes against humanity, war crimes, torture and enforced disappearances.
- The subject should be discussed again in the Sixth Committee in the same format as at the current session, bearing in mind that the Committee will have another opportunity to discuss this topic later in the session when it considers the study by the International Law Commission of the topic *aut dedere aut judicare*, which will also address universal jurisdiction.

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