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Introduction

A BRIEF NOTE ON THE PURPOSE OF THIS LEGAL MEMORANDUM

This legal memorandum is designed to serve as a self-contained, comprehensive explanation for prosecutors, judges and ministries of justice and foreign affairs of the solid basis in customary and conventional international law for universal jurisdiction over war crimes, crimes against humanity, genocide, torture, extrajudicial executions and "disappearances", so that they can ensure that such jurisdiction is exercised effectively. The memorandum is also designed to assist these ministries and members of parliament in drafting or amending legislation providing for universal jurisdiction in a manner which is consistent with the requirements of international law, as outlined in Amnesty International's *14 Principles for the Effective Exercise of Universal Jurisdiction*, May 1999 (AI Index: IOR 53/01/99) (also available in Arabic, French and Spanish).

The memorandum was prepared by the International Justice Project in the International Secretariat of Amnesty International. It is designed to meet a need identified during the organization's third-party intervention in the *Pinochet* appeal in the House of Lords and to respond in part to the finding by a group of international experts at a meeting in May 1999 in Versoix, Switzerland that "there is a pressing need for a comprehensive survey of the state of existing national laws relevant to universal jurisdiction prosecutions" (International Council on Human Rights Policy, *Thinking Ahead on Universal Jurisdiction: Report of a Meeting Hosted by the International Council on Human Rights Policy, 6-8 May 1999* (August 1999)). Shorter papers for the general public explaining the subject and suggesting action they can take to ensure that their state can and does exercise universal jurisdiction are also scheduled to be published in Arabic, English, French, Spanish and other languages). **The Amnesty International publications are available on the following Websites: http://www.amnesty.org and http://www.iccnow.org.**

For the convenience of the reader, the memorandum defines the crimes subject to universal jurisdiction. It identifies the relevant scholarly writings and other evidence demonstrating that international law permits, and in some situations requires under the *aut dedere aut judicare* (extradite or prosecute) principle, states to exercise universal jurisdiction or to extradite suspects to a state able and willing to do so or to surrender them to an international criminal court with jurisdiction over the crime or suspect. In particular, the memorandum reviews the extensive state practice concerning universal jurisdiction at the national and international level - such as national legislation, jurisprudence, adoption of international instruments and government statements - for each crime separately, country by country. Although this approach leads to some inevitable overlap, consultation with government officials and members of parliaments has indicated that separate analyses of the jurisdiction over each crime are more likely to be useful to a reader with an international perspective seeking to understand the legal basis for universal jurisdiction, including state practice, over particular crimes than a discussion limited to a series of country surveys. However, Amnesty International's national sections and groups intend to prepare separate memoranda for government officials and members of parliament in their countries addressing the need to enact or amend national legislation to implement international criminal law with respect to territorial and universal jurisdiction and the obligation to cooperate with the International Criminal Tribunals for the former Yugoslavia and Rwanda and the International Criminal Court.

The memorandum attempts to be as comprehensive as possible with respect to universal jurisdiction provisions, given the information available. Nevertheless, this memorandum should be seen merely as a preliminary study of a difficult to research issue designed to encourage others to examine the question in depth. Although every effort has been made by Amnesty International's Researchers and the International Justice Project to verify the accuracy of the information in more than 130 countries in consultation with experts on national law in particular countries, some errors will no doubt have crept in. Therefore, Amnesty International would welcome any corrections or updates, which should be sent to the International Justice Project, either by e-mail (ijp@amnesty.org) or fax (+44-207-956-1157). The memorandum also addresses definitions of crimes, principles of criminal responsibility and defences in many of the countries mentioned, but these discussions are intended only to illustrate some of the common strengths and weaknesses of legislation and jurisprudence. No attempt has been made to discuss these matters in detail in any country. Another important caveat is that much of the legislation has never been used or its scope defined by courts. Therefore, the

memorandum should not be seen as a handbook for litigators, but as an introduction to the question in each country discussed. In each case, the reader must locate the full texts of the legislation and court decisions and consult local counsel to be sure of their meaning.

The legal research in this rapidly changing area of international law is not, of course, complete, and most previous studies of state practice have either not been comprehensive or are now, like the Harvard Research in 1935, out of date. However, Amnesty International, jointly with the T.M.C. Asser Instituut in the Netherlands, and in cooperation with other non-governmental organizations and independent experts, hopes to be able to establish a database in 2001which would include the texts of all relevant legislation and jurisprudence on national implementation of states' obligations to bring to justice persons responsible for crimes under international law, such as genocide, crimes against humanity, war crimes, torture, extrajudicial executions and "disappearances", and certain ordinary crimes of international concern. This database would be accessible to anyone through the Internet. For further information on this database, see T.M.C. Asser Instituut website: http://www.asser.nl.

A NOTE ON SOURCES AND CITATION

Every possible effort has been made to cite the original text of legislation and cases and, as a general rule, the texts of legislation and court decisions, which are not always easily available, quoted in the original language. United Nations documents, which are readily available on the Internet in the six official and working languages, are cited only in English. This approach will assist the reader since many of the texts have proved difficult to translate into English and many of the translations available are not always completely accurate. Limited resources have also meant that not all of Amnesty International's own translations into English have been revised or checked by legal experts. If the legislation or court decision is known to be available on the Internet, this address is usually given. However, materials, such as United Nations documents or press reports, which are easy to locate on the Internet do not include Internet addresses. Full citations of the sources of legislation and court decisions are usually given only the first time they are cited in the memorandum.

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Amnesty International is grateful for the invaluable assistance provided by four organizations in particular. Human Rights Watch supplied a copy of its 1998 internal study of universal jurisdiction, extradition and mutual legal assistance concerning torture, based on state reports to the Committee against Torture and its examination of those reports. The International Committee of the Red Cross assisted in locating information concerning universal jurisdiction over war crimes and genocide. Some of this information on its IHL database has been published on its worldwide web page (*obtainable from* http://www.icrc.org/ihl-nat. Redress has published an extensive study of universal jurisdiction in certain European countries, *Universal Jurisdiction in Europe since 1990 for war crimes, crimes against humanity, torture and genocide*, 30 June 1999 (*obtainable from* http://www.redress.org), and its former legal director, Fiona McKay commented extensively on an early draft. The T.M.C. Asser Instituut located and copied difficult to find texts of penal codes and criminal procedure codes. It also wishes to thank the law firm of Noronha Advogados, 4th floor, 193/195 Brompton Road, London SW3

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Of course, views expressed in this memorandum, which sometimes differ from those of the experts consulted, are those of Amnesty International and the International Justice Project alone is responsible for any errors.

AMNESTY INTERNATIONAL'S *14 PRINCIPLES ON THE EFFECTIVE EXERCISE OF UNIVERSAL JURISDICTION* (originally published in May 1999, AI Index: IOR 53/01/99)

1. *Crimes of universal jurisdiction.* States should ensure that their national courts can exercise universal and other forms of extraterritorial jurisdiction over grave human rights violations and abuses and violations of international humanitarian law.

2. *No immunity for persons in official capacity.* National legislatures should ensure that their national courts can exercise jurisdiction over anyone suspected or accused of grave crimes under international law, whatever the official capacity of the suspect or accused at the time of the alleged crime or any time thereafter.

3. *No immunity for past crimes.* National legislatures should ensure that their courts can exercise jurisdiction over grave crimes under international law no matter when they occurred.

4. *No statutes of limitation.* National legislatures should ensure that there is no time limit on the liability to prosecution of a person responsible for grave crimes under international law.

5. *Superior orders, duress and necessity should not be permissible defences.* National legislatures should ensure that persons on trial in national courts for the commission of grave crimes under international law are only allowed to assert defences that are consistent with international law. Superior orders, duress and necessity should not be permissible defences.

6. *National laws and decisions designed to shield persons from prosecution cannot bind courts in other countries.* National legislatures should ensure that national courts are allowed to exercise jurisdiction over grave crimes under international law in cases where the suspects or accused were shielded from justice in any other national jurisdiction.

7. *No political interference.* Decisions to start or stop an investigation or prosecution of grave crimes under international law should be made only by the prosecutor, subject to appropriate judicial scrutiny which does not impair the prosecutor's independence, based solely on legal considerations, without any outside interference.

8. *Grave crimes under international law must be investigated and prosecuted without waiting for complaints of victims or others with a sufficient interest.* National legislatures should ensure that national law requires national authorities exercising universal jurisdiction to investigate grave crimes under international law and, where there is sufficient admissible evidence, to prosecute, without waiting for a complaint by a victim or any other person with a sufficient interest in the case.

9. *Internationally recognized guarantees for fair trials.* National legislatures should ensure that criminal procedure codes guarantee persons suspected or accused of grave crimes under international law all rights necessary to ensure that their trials will be fair and prompt in strict accordance with international law and standards for fair trials. All branches of government, including the police, prosecutor and judges, must ensure that these rights are fully respected.

10. *Public trials in the presence of international monitors.* To ensure that justice is not only done but also seen to be done, intergovernmental and non-governmental organizations should be permitted by the competent national authorities to attend and monitor the trials of persons accused of grave crimes under international law.

11. *The interests of victims, witnesses and their families must be taken into account.* National courts must protect victims, witnesses and their families. Investigation of crimes must take into account the special interests of vulnerable victims and witnesses, including women and children. Courts must award appropriate redress to victims and their families.

12. *No death penalty or other cruel, inhuman or degrading punishment.* National legislatures should ensure that grave crimes under international law are not punishable by the death penalty or any other cruel, inhuman or degrading punishment.

13. *International cooperation in investigation and prosecution.* States must fully cooperate with investigations and prosecutions by the competent authorities of other states exercising universal jurisdiction over grave crimes under international law.

14. *Effective training of judges, prosecutors, investigators and defence lawyers.* National legislatures should ensure that judges, prosecutors and investigators receive effective training in human rights law, international humanitarian law and international criminal law.

UNIVERSAL JURISDICTION: The duty of states to enact and enforce legislation - Introduction

DEFINITION AND SCOPE OF CRIMES SUBJECT TO UNIVERSAL JURISDICTION

Universal jurisdiction is used in this legal memorandum to describe the ability of the prosecutor or investigating judge of any state to investigate or prosecute persons for crimes committed outside the state's territory which are not linked to that state by the nationality of the suspect or of the victim or by harm to the state's own national interests.

Crimes subject to universal jurisdiction fall into three categories:

(1) ***Crimes under international law***, such as war crimes, crimes against humanity and genocide, as well as torture, extrajudicial executions and "disappearances";[1]

(2) ***crimes under national law of international concern***, such as hijacking or damaging aircraft, hostage-taking and attacks on diplomats;[2] and

(3) ***ordinary crimes under national law***, such as murder, abduction, assault and rape.[3]

[1] *Crimes under international law* are crimes by individuals defined by international law itself and which international law permits or requires states to punish. *See, for example*, Ian Brownlie, *Principles of Public International Law* 308 (Oxford: Oxford University Press 5th ed. 1998). Some writers argue that legal persons other than states may be held criminally responsible for such crimes. See, for example, some of the articles in the report of the International Colloquium, Berlin 1998 in Albin Eser, Günter Heine & Barbara Huber, eds, *Criminal Responsibility of Legal and Collective Entities* (Freiburg: Max-Planck-Institut für ausländisches und internationales Strafrecht 1999). The International Military Tribunal at Nuremberg found several organizations criminally responsible for crimes under international law, but the statutes of all other international criminal courts have limited their jurisdiction to individuals.

Some scholars make a further distinction, between crimes *under* international law, i.e. crimes defined by international law that international law permits or requires *states* to prosecute, from crimes *of* international law, i.e. crimes defined by international law and prosecuted at the international level by *international* courts. This distinction, to the extent it ever had any validity, is now largely out of date, as the crimes within each category are identical. Even if the categories are seen as not identical, they should both be seen as increasingly resembling each other, so the jurisdictional principles in this memorandum apply to both. Some still contend that the distinction should be maintained with respect to the question of immunity. Such advocates, while recognizing that there is no official immunity for crimes of international law in international criminal courts, claim that official immunities, such as head of state or diplomatic immunities, must be recognized by national courts. For a brief summary of the reasons why such immunities should not be so recognized, see Chapter Fourteen, Section VIII.

[2] Customary international law permits - and some treaties require in the absence of extradition - states to exercise universal jurisdiction over *crimes under national law of international concern*, which are crimes committed by individuals and defined differently by the national law of each state, such as piracy (before it became a clearly defined crime under international law), counterfeiting, theft of nuclear materials, hijacking, certain forms of hostage-taking in peacetime, attacking diplomats, acting as mercenaries, drug-trafficking and attacks on United Nations and associated personnel (the latter are now increasingly considered to violate customary international law).

[3] Customary international law permits - and some treaties require in the absence of extradition - states to exercise universal jurisdiction over *ordinary crimes under national law*, such as murder, assault or even car thefts,

which are crimes in almost every national legal system. As indicated in this paper, many states have legislation authorizing their courts to exercise such jurisdiction or have entered into agreements with other states permitting jurisdiction over such crimes to be exercised. This category of crimes does not include crimes which are not crimes in most legal systems, such as violations of anti-trust laws or of prohibitions of trade with certain countries. The scope of extraterritorial jurisdiction over these crimes remains controversial. Of course, it also does not include violations of criminal prohibitions in national law which themselves are contrary to international law, such as provisions criminalizing conduct permitted or protected by international law.

These three types of crimes by individuals which are subject to universal jurisdiction should be distinguished from a fourth category, crimes by states (international crimes), which are outside the scope of this paper.[4]

As demonstrated in this memorandum, with respect to each of the three categories of crimes international law *permits* states to exercise universal jurisdiction over persons suspected of committing such crimes outside the territory under their jurisdiction. In addition, there is increasing support for the view that states may not harbour persons suspected of such crimes in their territory or under their jurisdiction, but, under the *aut dedere aut judicare* (extradite or prosecute) rule are *required* to exercise jurisdiction over such persons no matter where the crime occurred or to extradite them to a state able and willing to do so or to surrender them to an international criminal court with jurisdiction over the suspect and the crime. To the extent that the *aut dedere aut judicare* principle may not yet be fully recognized as customary international law for all such crimes under international law, the evidence in this memorandum indicates that it is an emerging general principle of law recognized by states. Moreover, Amnesty International believes that logic and morality dictate that this principle should be implemented by all states.

Of course, it is crucial that trials wherever they take place must exclude the possibility of the death penalty or other cruel, inhuman or degrading treatment or punishment and be scrupulously fair in accordance with international law and standards.[5] In one respect, trials based solely on universal jurisdiction may offer an advantage over trials based on territorial jurisdiction or on other forms of extraterritorial jurisdiction. The prosecutor and judges will not be linked to suspect or victim by nationality and the forum's own particular interests will not have been directly affected. Therefore, as has been evidenced in recent cases, it is more likely that the court will not only be impartial than one exercising another form of jurisdiction, but will be seen by all concerned, particularly when the crimes occurred in the course of armed conflict or ethnic and religious persecution, to be impartial.

The recent decision by the House of Lords on 24 March 1999 authorizing a magistrate's court to decide whether to extradite former President Augusto Pinochet Ugarte of Chile to Spain on charges of torture and conspiracy to torture, the arrest of former President Hissène Habré of Chad in February 2000 in Senegal on charges of torture and crimes against humanity and the arrest of a man alleged to

[4] *International crimes* are crimes committed by states, but the International Law Commission, after lengthy discussion, decided at its session in 2000 to replace the concept of state crimes in its Draft Code of State Responsibility with the new category of "serious breaches of obligations owed to the international community as a whole". *See* International Law Commission, Report on the work of its fifty-second session (1 May-9 June) and 10 July-18 August 2000), 55 U.N. G.A.O.R., 55th Sess. Supp. (No. 10), U.N. Doc. A/55/10 (2000), Appendix (Draft articles provisionally adopted by the Drafting Committee on second reading, Art. 41). Support was expressed by government delegations for this change in the Sixth Committee discussions of the International Law Commission's 2000 Report. *See* Summaries of the work of the Sixth Committee, *obtainable from* http://www.un.org/law/cod/sixth/55/summary.htm. *See also* James Crawford, Pierre Bodeau & Jacqueline Peel, *The ILC's Draft Articles on State Responsibility: Toward Completion of a Second Reading,* 94 Am. J. Int'l L. 660 (2000), *obtainable from* http://www.asil.org. For the background of this controversial issue see *Symposium: State Responsibility*, 10 Eur. J. Int'l L. 339-460 (1999). Although the term "international crime" has widespread popular usage - and sometimes is loosely used even by scholars, national prosecutors and courts and governments - it is useful to maintain the distinction between crimes of individual responsibility, on the one hand, and concepts of state responsibility, whether under the now outdated concept of international crimes or the new concept of serious breaches of obligations owed to the international community as a whole, on the other.

[5] The relevant international law and standards are described in detail in Amnesty International, *Fair Trials Manual*, December 1998 (AI Index: POL 30/02/98).

be Miguel Angel Cavallo, a former Argentine naval officer, in Mexico on charges of torture are simply the most well known recent examples of national courts exercising universal jurisdiction. However, as this memorandum demonstrates, they are only three of an increasing number of cases dating back to trials of brigands and persons accused of war crimes in the Middle Ages in which national courts have exercised universal or other forms of extraterritorial jurisdiction under customary or conventional international law.

THE FOUR-PRONGED EFFORT TO END IMPUNITY

The exercise of universal jurisdiction is one small, but very important, part of a much broader four-pronged effort to end impunity at the national and international level for such crimes. At the ***national level***, states continue to have the primary responsibility for bringing to justice those responsible for crimes under international law. Ideally, this responsibility should be performed by the ***state in which the crimes occurred (territorial state)***, where most of the evidence will be found and the accused, victims and witnesses are likely to be located and to be able to understand the legal system and language of the court.[6] However, in many cases this is not possible, either because the territorial state is unable or unwilling to do so or because the suspect has fled into exile in another state. In such cases, the ***other states*** in the international community must do so, ***by exercising universal or some other form of extraterritorial jurisdiction***. As discussed in this memorandum, approximately 125 states - roughly two-thirds of the number of UN member states - have legislation of varying degrees of effectiveness and scope permitting the exercise of universal jurisdiction over one or more crimes and courts in a dozen countries have exercised such jurisdiction. A number of different models of legislation exist and the past decade suggests that the dawn of the 21st century will usher in an exciting period of legislative and judicial creativity in the use of universal jurisdiction to end impunity.

[6] Menno T. Kamminga, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, Committee on International Human Rights Law and Practice, International Law Association, London Conference 2000 (*Final ILA Report*) 21 ("Gross human rights offenders should be brought to justice in the state in which they committed their offences. In the absence of such proceedings, full advantage should be taken of the possibility to bring perpetrators to trial on the basis of universal jurisdiction.").

This conclusion and recommendation was endorsed by the International Law Association. International Law Association, Res. 9/2000, adopted at the 69th Conference, London, 25-29 July 2000. The resolution stated that it "ADOPTS the Report's conclusions and recommendations, as revised at the Conference, which should be read in conjunction with the Report" and

> "REQUESTS the Secretary-General of the Association to forward the Final Report to the Secretary-General of the United Nations, the United Nations High Commissioner for Human Rights, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and to draw it to the attention of States".

See also Menno T. Kamminga, *The Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, in International Law Association, *Report of the Sixty-Eighth Conference held at Taipei, Taiwan, Republic of China, 24-30 May 1998*, 563, 564 (London 1998) (1998 ILA Report) ("For various reasons, perpetrators are best brought to justice within the state in which they committed their offences. Trials in the territorial state offer the best chance at uncovering the necessary evidence, are most likely to satisfy the (families of) the victims, are most likely to offer a fair trial to the defendant and are most likely to act as an effective deterrent.").

These two types of jurisdiction for addressing impunity at the national level - territorial and extraterritorial - have been supplemented since the Second World War at the ***international level.*** First, there have been ***four*** **ad hoc** ***international criminal tribunals***. The International Military Tribunal at Nuremberg (Nuremberg Tribunal) was established by the Allies in 1945 pursuant to a treaty to try senior Nazis for crimes against peace, war crimes and crimes against humanity.[7] The International Military Tribunal for the Far East (Tokyo Tribunal) was established by the Supreme Commander for the Allied Powers to try senior Japanese officials for these three crimes.[8] The International Criminal Tribunal for the former Yugoslavia (Yugoslavia Tribunal) and the International Criminal Tribunal for Rwanda (Rwanda Tribunal), with jurisdiction over war crimes, crimes against humanity and genocide, were set up by the Security Council pursuant to its powers under Chapter VII of the United Nations (UN) Charter to restore and maintain international peace and security.[9] Second, in the near future, these efforts will be strengthened by a permanent ***International Criminal Court*** established pursuant to the Rome Statute of the International Criminal Court (Rome Statute), with jurisdiction over genocide, crimes against humanity, war crimes and, when a definition and procedure are agreed, aggression.[10]

However, because territorial states continue to have the primary responsibility for bringing to justice those responsible for these crimes and because international courts have only limited resources, the latter can only supplement, not replace, national courts. Moreover, the jurisdiction of *ad hoc* international criminal tribunals has had geographic, temporal and even nationality limits. The jurisdiction of the International Criminal Court, apart from referrals by the Security Council, will be limited in most cases to crimes committed in the territory of a state party to the Rome Statute or by a national of a state party after the entry into force of the Statute for the state.[11] Even when the Court has concurrent jurisdiction with states, under the complementarity principle it will only be able to act when states are unable or unwilling to do so.[12] Therefore, to the extent territorial states remain unable or unwilling to investigate and prosecute crimes such as genocide, crimes against humanity and war crimes, universal jurisdiction will remain an important tool of international justice.

[7] The Charter of the International Military Tribunal (Nuremberg Charter) was annexed to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement), 8 August 1945, 8 U.N.T.S. 279, 59 Stat. 1544. The Nuremberg Charter was an international treaty, signed initially by the Provisional Government of the French Republic, the United Kingdom, the United States and the Union of Soviet Socialist Republics, and later by 19 other states (Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela and Yugoslavia).

[8] Charter of the International Criminal Tribunal for the Far East, Tokyo (Tokyo Charter), 19 January 1946, T.I.A.S. 1589.

[9] S.C. Res. 825 (1993) (annexing the Statute of the International Criminal Tribunal for the former Yugoslavia) (Yugoslavia Statute); S.C. Res. 955 (1994) (annexing the Statute of the International Criminal Tribunal for Rwanda) (Rwanda Statute).

[10] Rome Statute of the International Criminal Court, adopted at Rome on 17 July 1998, U.N. Doc. PCNICC/1999/INF/3 (1999). This text incorporates corrections to the English text circulated by the United Nations through 12 July 1999. Further corrections in some of the language versions are expected.

[11] Rome Statute, Arts 12, 13.

[12] Rome Statute, Preamble, Arts 1, 17.

I. BRIEF OUTLINE OF THE LEGAL MEMORANDUM

This memorandum consists of an Introduction and fifteen chapters, each separately printed.

Introduction (AI Index: IOR 53/002/2001). The introduction explains how the evidence studied in the memorandum is the evidence normally used to determine the scope of customary international law and general principles of law accepted by the international community. It briefly explains that the subject of the memorandum is addressing impunity through criminal investigations and prosecutions, not supplementary mechanisms, such as truth commissions and methods for obtaining reparations for victims in civil litigation or in the course of criminal proceedings. The practical reasons for universal jurisdiction are examined, such as the failure of territorial states to act and the absence of international criminal courts and limits on the scope of their jurisdiction. The impact of universal jurisdiction as a catalyst for action by territorial states and deterrence is noted. In addition, the memorandum looks at the legal, philosophical and moral rationales for the use of universal jurisdiction, including the threat crimes under international law pose to the international and national legal fabric, the attack they represent on fundamental values shared by the international community, the international or universal character of the crimes and the threat they often pose to international peace and security. Finally, the memorandum answers the various political, legal and practical criticisms which have been made about universal jurisdiction.

Chapter One - Definitions (AI Index: IOR 53/003/2001). This chapter describes the different types of jurisdiction, including the five principles of geographic jurisdiction (*ratione loci*). These are territorial jurisdiction (based on the place where the crime occurred) and four types of extraterritorial jurisdiction: active personality jurisdiction (based on the nationality of the suspect), passive personality jurisdiction (based on the nationality of the victim), protective jurisdiction (based on harm to the forum state's own national interests) and universal jurisdiction (not linked to the nationality of the suspect or victim or to harm to the forum state's own national interests).

Chapter Two - The history of universal jurisdiction (AI Index: IOR 53/004/2001). This chapter briefly describes the evolution of the practice of universal jurisdiction from trials of suspected brigands and war criminals in the Middle Ages, and later efforts to repress piracy and slave trading, to prosecutions of suspected torturers today. In particular, it looks at the exercise of universal jurisdiction in the aftermath of the Second World War, its abandonment along with other efforts to investigate and prosecute crimes committed during that conflict and its revival in the past decade, as well as its impact on the fight against impunity in territorial states.

Chapters Three to Twelve describe the legal basis for universal jurisdiction and state practice at the international and national level in approximately 120 countries concerning universal jurisdiction over war crimes, crimes against humanity, genocide, torture and other crimes. As described in these chapters, there is an extensive, but still incomplete, international legal framework permitting - and sometimes requiring - national courts to exercise universal jurisdiction over crimes under international law such as war crimes, crimes against humanity and genocide, as well as torture, extrajudicial executions and "disappearances". Legislative and constitutional provisions generally fit within one of five models: (1) express authorization to exercise universal jurisdiction over specific crimes under international law; (2) authorization to exercise universal jurisdiction over ordinary crimes under national law; (3) authorization to exercise universal jurisdiction over crimes defined or listed in treaties; (4) authorization to exercise universal jurisdiction over crimes under customary international law or general principles of law; and (5) direct incorporation of international law into national law. However, there are a number of variations within each model and some states

have more than one type of provision. This part of the memorandum describes cases in approximately a dozen countries where courts have exercised universal jurisdiction under such provisions.

Chapter Three - War crimes: The legal basis for universal jurisdiction (AI Index: IOR 53/005/2001). This chapter describes the scope of war crimes subject to universal jurisdiction and then lays out the evidence of scholars and state practice at the international level concerning such jurisdiction. Almost every state is a party to the Geneva Conventions of 1949, which require states parties to search for, arrest and bring to justice persons suspected of grave breaches of those Conventions in their own courts, to extradite suspects to any state requesting extradition or to surrender them to an international criminal court. Grave breaches include the following acts if committed in connection with an ***international armed conflict*** against persons or property protected by the relevant Geneva Convention: wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or a protected person to serve in the forces of the hostile power; wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed by the Third Geneva Convention or a protected person of such rights prescribed in the Fourth Geneva Convention; unlawful deportation or transfer or unlawful confinement of a protected person; and taking of hostages. Protocol I expands the scope of application of these grave breaches and contains an extensive list of additional grave breaches, also subject to universal jurisdiction. In addition to grave breaches, there are a wide range of prohibitions under customary and conventional international humanitarian law applicable to international armed conflict which are considered to be war crimes and, therefore, subject to universal jurisdiction.

In addition, there now is substantial state practice, including legislation and prosecutions, demonstrating that national courts may exercise universal jurisdiction over persons responsible for war crimes committed in ***non-international armed conflict***, including serious violations of common Article 3 of the Geneva Conventions, Protocol II to these Conventions and certain conduct which, if it were committed during an international armed conflict, would be a war crime. It is also increasingly accepted that if states do not do so, then they should extradite the suspects to a state able and willing to do so or surrender them to an international criminal court with jurisdiction over the crimes and suspects.

As of 1 September 2001, 189 states were parties to the Geneva Conventions of 1949 and 159 states were parties to Protocol I.[13] As of the same date, 151 states were parties to Protocol II.[14]

[13] All but two of the 189 UN Members (the only exceptions being the Marshall Islands and Nauru) and both UN Observer states, the Holy See and Switzerland, were parties to the Geneva Conventions of 1949 as of 1 September 2001. The following states were parties to Protocol I as of the same date: Albania, Algeria, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Democratic People's Republic of Korea, Democratic Republic of the Congo, Djibouti, Dominica, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Holy See, Honduras, Hungary, Iceland, Ireland, Italy, Jamaica, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Republic of Korea, Monaco, Mongolia, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Palau, Panama, Paraguay, Peru, Poland, Portugal, Qatar, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, SaoTome and Principe, Saudi Arabia, Senegal, Seychelles,

Chapter Four - Parts A and B - State practice at the national level (AI Index: IOR 53/006/2001 and IOR 53/007/2001). This chapter describes state practice at the national level, including legislation, criminal investigations and court judgments. As of 1 September 2001, approximately 120 states are known to have legislation which would permit them to exercise universal jurisdiction over certain other conduct which could amount to war crimes if committed in international armed conflict or, in some cases, non-international armed conflict. The courts of almost a dozen states since the end of the Second World War have exercised universal jurisdiction over war crimes, including ***Australia, Austria, Belgium, Canada, Denmark, France, Germany, Israel, Switzerland, the United Kingdom*** and ***the United States***.

Sierra Leone, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Suriname, Swaziland, Sweden Switzerland, Syrian Arab Republic, Tajikistan, The former Yugoslav Republic of Macedonia, United Republic of Tanzania, Togo, Tunisia, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom, Uruguay, Uzbekistan, Vanuatu, Venezuela, Viet Nam, Yemen, Yugoslavia (Federal Republic of), Zambia and Zimbabwe.

[14] As of 1 September 2001, the following 151 states were parties to Protocol II: Albania, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Djibouti, Dominica, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Holy See, Honduras, Hungary, Iceland, Ireland, Italy, Jamaica, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Maldives, Mali, Malta, Mauritania, Mauritius, Micronesia (Federated States of), Republic of Korea, Monaco, Mongolia, Namibia, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Palau, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, SaoTome and Principe, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Suriname, Swaziland, Sweden, Switzerland, Tajikistan, The former Yugoslav Republic of Macedonia, United Republic of Tanzania, Togo, Trinidad and Tobago, Tunisia, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom, Uruguay, Uzbekistan, Vanuatu, Venezuela, Yemen, Yugoslavia (Federal Republic of), Zambia and Zimbabwe.

Crimes against humanity (Chapters Five and Six). Chapter Five - Crimes against humanity: The legal basis for universal jurisdiction (AI Index: IOR 53/008/2001). This chapter defines crimes against humanity and then lays out the evidence of scholars and state practice at the international level concerning universal jurisdiction over such crimes. Crimes against humanity are now recognized in Article 7 of the Rome Statute to include the following acts, when committed as part of a widespread or systematic pattern of such acts, pursuant to a state or organizational policy: murder, extermination, enslavement, deportation or forced displacement of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape and other crimes of sexual violence, persecution, "disappearances", the crime of apartheid and other inhumane acts. As of the 31 December 2000 deadline for signature, 139 states had signed the Rome Statute and 37 of these states had ratified it as of 1 September 2001.[15] In addition, two treaties expressly recognize universal jurisdiction over two specific crimes against humanity, one on the crime of *apartheid* and the other on torture.[16] It is now generally accepted that every state is permitted to

[15] As of 1 September 2001, 37 states had ratified the Rome Statute: Andorra, Antigua and Barbuda, Argentina, Austria, Belgium, Belize, Botswana, Canada, Costa Rica, Croatia, Denmark, Dominica, Fiji, Finland, France, Gabon, Germany, Ghana, Iceland, Italy, Lesotho, Luxembourg, Mali, Marshall Islands, Netherlands, New Zealand, Norway, Paraguay, San Marino, Senegal, Sierra Leone, South Africa, Spain, Sweden, Tajikistan, Trinidad and Tobago and Venezuela; other states had signed, but not yet ratified, it: Albania, Algeria, Angola, Armenia, Australia, Bahamas, Bahrain, Bangladesh, Barbados, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Central African Republic, Chad, Chile, Colombia, Comoros, Congo, C^te d= Ivoire, Cyprus, Czech Republic, Democratic Republic of the Congo, Djibouti, Dominican Republic, Ecuador, Egypt, Eritrea, Estonia, Gambia, Georgia, Greece, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iran (Islamic Republic of), Ireland, Israel, Jamaica, Jordan, Kenya, Kuwait, Kyrgyzstan, Latvia, Liberia, Liechtenstein, Lithuania, Macedonia (The Former Yugoslav Republic of), Madagascar, Malawi, Malta, Mauritius, Mexico, Monaco, Mongolia, Morocco, Mozambique, Namibia, Nauru, Niger, Nigeria, Oman, Panama, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, St. Lucia, Samoa, Sao Tome and Principe, Seychelles, Slovakia, Slovenia, Solomon Islands, Sudan, Switzerland, Syrian Arab Republic, Tanzania (United Republic of), Thailand, Uganda, Ukraine, United Arab Emirates, United Kingdom, United States of America, Uruguay, Uzbekistan, Yemen, Yugoslavia (Federal Republic of), Zambia and Zimbabwe.

[16] International Convention on the Suppression and Punishment of the Crime of *Apartheid*, *adopted by* U.N. G.A. Res. 3068 (XXVIII) of 30 November 1973, 28 U.N. G.A.O.R. Supp. (No. 30) at 75, U.N. Doc. A/9030 (1973); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted by* U.N. G.A. Res. 39/46, 39 U.N. G.A.O.R. Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).

As of 1 September 2001, the following 101 states were parties to the *Apartheid* Convention: Afghanistan, Algeria, Antigua and Barbuda, Argentina, Armenia, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Benin, Bolivia, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Central African Republic, Chad, China, Colombia, Congo, Costa Rica, Croatia, Cuba, Czech Republic, Democratic Republic of the Congo, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guyana, Haiti, Hungary, India, Iran (Islamic Republic of), Iraq, Jamaica, Jordan, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lesotho, Liberia, Libyan Arab Jamahiriya, Macedonia (The Former Yugoslav Republic of), Madagascar, Maldives, Mali, Mauritania, Mexico, Mongolia, Mozambique, Namibia, Nepal, Nicaragua, Niger, Nigeria, Oman, Pakistan, Panama, Peru, Philippines, Poland, Qatar, Romania, Russian Federation,

exercise universal jurisdiction over crimes against humanity. It is also increasingly accepted that no state may harbour a person suspected of such crimes, but must exercise jurisdiction, extradite the person to a state able and willing to do so or surrender the suspect to an international court.

Chapter Six - Crimes against humanity: State practice at the national level (AI Index: IOR 53/009/2001). This chapter describes state practice at the national level, such as legislation and cases, concerning universal jurisdiction over crimes against humanity, including *apartheid*, torture and slave trading or trafficking in persons. As of 1 September 2001, almost 100 states are known to have legislation which would permit their courts to exercise universal jurisdiction over at least some conduct which could amount to crimes against humanity in time of peace.[17] Prosecutors have opened investigations or commenced prosecutions in a dozen of these states since the Second World War based on universal jurisdiction over conduct amounting to crimes against humanity, or have arrested persons at the request of states seeking to exercise such jurisdiction, including: ***Austria, Belgium, Canada, Germany, Israel, Mexico, Netherlands, Paraguay, Senegal, Spain, the United Kingdom*** and ***the United States***, although the effort in ***Senegal*** ultimately failed.

Genocide (Chapters Seven and Eight). Chapter Seven - Genocide: The legal basis for universal jurisdiction (AI Index: IOR 53/010/2001). This chapter describes the scope of the crime of genocide as defined in the Genocide Convention and customary international law and then lays out the evidence of scholars and state practice at the international level concerning universal jurisdiction over this crime. Genocide, as defined in the Genocide Convention, involves certain prohibited acts, such as killing members of a national, ethnical, racial or religious group, committed with intent to destroy, in whole or in part, that group, as such. It is now beyond doubt that every state, whether party to the

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Rwanda, Saint Vincent and the Grenadines, Sao Tome and Principe, Senegal, Seychelles, Slovakia, Slovenia, Somalia, Sri Lanka, Sudan, Suriname, Syrian Arab Republic, Tanzania (United Republic of), Togo, Trinidad and Tobago, Tunisia, Uganda, Ukraine, United Arab Emirates, Venezuela, Viet Nam, Yemen, Yugoslavia (Federal Republic of), Zambia and Zimbabwe.

As of this date, one state, Kenya, had signed, but not yet ratified it.

As of 1 September 2001, the following 126 states were parties the Convention against Torture: As of 1 September 2001, the following 126 states were parties to the Convention against Torture: Afghanistan, Albania, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Chad, Chile, China, Colombia, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, the Federal Republic of Yugoslavia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Honduras, Hungary, Iceland, Indonesia, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Latvia, Lebanon, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Macedonia (The former Yugoslav Republic of), Malawi, Mali, Malta, Mauritius, Mexico, Monaco, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Niger,Nigeria, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saint Vincent and the Grenadines, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, Somalia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Tajikistan, Togo, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Kingdom, United States of America, Uruguay, Uzbekistan, Venezuela, Yemen and Zambia.

The following nine states had signed, but not yet ratified, the Convention as of the above date: Comoros, Dominican Republic, Gambia, Guinea-Bissau, India, Ireland, Nicaragua, Sao Tome and Principe and Sudan.

[17] The lower numbers are because many of the states with Geneva Conventions Acts do not have legislation providing for universal jurisdiction over other crimes under international law.

Genocide Convention or not, is permitted to exercise universal jurisdiction over persons suspected of genocide. In addition, there is support for the view that states are also required to exercise such jurisdiction over persons suspected of genocide found in territory under their control, to extradite the person to a state able and willing to do so or surrender the suspects to an international criminal court. As of 1 September 2001, 132 states had ratified the Genocide Convention.[18]

Chapter Eight - Genocide: State practice at the national level (AI Index: IOR 53/011/2001). describes state practice at the national level concerning universal jurisdiction over genocide, including legislation and criminal investigations and prosecutions. Approximately 70 states have legislation which would permit their courts to exercise jurisdiction over at least some of the acts constituting genocide. A number of national courts have exercised universal jurisdiction over persons suspected of genocide or authorized their extradition them to other states able and willing to do so, including: ***Germany, Israel, Mexico*** and ***Spain.***

[18] As of 1 September 2001, 132 states had ratified the Genocide Convention (Afghanistan, Albania, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Canada, Chile, China, Colombia, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Federal Republic of Yugoslavia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Haiti, Honduras, Hungary, Iceland, India, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Jamaica, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Malaysia, Maldives, Mali, Mexico, Monaco, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Macedonia (the former Yugoslav Republic of), Norway, Pakistan, Panama, Papua New Guinea, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Vincent and the Grenadines, Saudi Arabia, Senegal, Seychelles, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Togo, Tonga, Tunisia, Turkey, Uganda, Ukraine, United Kingdom, United Republic of Tanzania, United States, Uruguay, Uzbekistan, Venezuela, Viet Nam, Yemen and Zimbabwe) and three states had signed, but not yet ratified, it (Bolivia, Dominican Republic and Paraguay).

Torture (Chapters Nine and Ten). Chapter Nine - The legal basis for universal jurisdiction (AI Index: IOR 53/012/2001). This chapter defines torture and lays out the evidence of scholars and state practice at the international level concerning universal jurisdiction over torture. Although torture is a war crime when committed during armed conflict and a crime against humanity when committed as part of a widespread or systematic pattern of crimes against humanity, it is also a crime under international law when committed in other circumstances. As of 1 September 2001, 126 states had accepted binding legal obligations under the Convention against Torture to exercise universal jurisdiction over persons found in their territory who are suspected of torture or to extradite them to a state able and willing to do so.[19]

Chapter Ten - State practice at the national level (AI Index: IOR 53/013/2001). This chapter discusses state practice at the national level, including legislation and judicial action, concerning universal jurisdiction over torture.

Extrajudicial executions and "disappearances" (Chapters Eleven and Twelve). Chapter Eleven - Extrajudicial executions (AI Index: IOR 53/014/2001). Some extrajudicial executions could amount to the grave breach of wilful killing if committed during international armed conflict or serious violations of common Article 3 or Protocol II if committed in non-international armed conflict. Extrajudicial executions are crimes against humanity when committed on a widespread or systematic basis pursuant to a state or organizational policy. When extrajudicial executions are committed with the requisite intent, they can constitute the genocidal act of murder. However, it is beginning to be recognized that even when committed in other circumstances they are violations of international law and states are starting to make such acts crimes under national law, in some cases, subject to universal jurisdiction.

Chapter Twelve - "Disappearances" (AI Index: IOR 53/015/2001). "Disappearances" are crimes against humanity when committed on a widespread or systematic basis pursuant to a state or organizational policy. However, it is beginning to be recognized that even when committed in other circumstances they are violations of international law and states are starting to make such acts crimes under national law, in some cases, subject to universal jurisdiction.

Chapter Thirteen - Universal jurisdiction over ordinary crimes of international concern (AI Index: IOR 53/016/2001). There is a broad range of widely ratified treaties which impose an *aut dedere aut judicare* obligation on states with respect to crimes of international concern such as aircraft hijacking and sabotage, hostage taking, attacks on internationally protected persons, including diplomats, drug trafficking, attacks on ships and navigation, theft of nuclear materials, counterfeiting and attacks on UN and associated personnel. This rapidly developing framework of international justice is both confirmation of a customary international law rule permitting universal jurisdiction over such crimes, but also persuasive evidence of an emerging general principle of law that states are under an *aut dedere aut judicare* obligation when persons suspected of serious crimes abroad are found in their territory.

Chapter Fourteen - Overcoming obstacles to implementing universal jurisdiction (AI Index: IOR 53/017/2001). This chapter describes how the obstacles to exercising universal jurisdiction can be overcome. Such obstacles include the absence of any legislation or inadequate legislation, inadequate knowledge of universal jurisdiction or crimes under international law in the national criminal justice

[19] For the 126 states that were parties to the Convention against Torture and the nine states had signed, but not yet ratified, as of 1 September 2001, see footnote 16 above.

system, lack of political will to implement such jurisdiction, political interference with the exercise of universal jurisdiction, difficulties in obtaining evidence, the absence or inadequacy of extradition agreements, amnesties or similar measures of impunity and immunities.

Chapter Fifteen - Recommendations and Annexes (AI Index: IOR 53/018/2001. Despite the widespread state practice documented in the memorandum, many states need to do more to build an effective international system of justice. Some states need to amend existing legislation to remove flaws. Others without any legislation must enact laws providing for universal jurisdiction over crimes under international law. All states should enforce their legislation effectively to guarantee that there are no safe havens for those responsible for the worst crimes in the world. Amnesty International makes a number of concrete recommendations in this chapter to states, intergovernmental organizations and non-governmental organizations concerning the contents of such legislation and how to ensure that universal jurisdiction is effectively exercised so that one day with respect to these crimes there will truly be "one law for one world".[20]

Bibliography. A short bibliography provides an introduction to the literature on the crimes discussed in the memorandum, the law on universal jurisdiction in specific countries and the law on universal jurisdiction with respect to specific crimes.

Appendix: The appendix is a chart indicating ratifications and signatures of selected treaties containing *aut dedere aut judicare* universal jurisdiction provisions.

II. THE NATURE OF THE EVIDENCE

[20] *The Kingdom of Spain v. Augusto Pinochet Ugarte*, Bow Street Magistrate's Court, 8 October 1999, 3 (as the London Metropolitan Magistrate, Ronald Bartle, stated in permitting the extradition of the former President of Chile to Spain to face charges of torture and conspiracy to torture).

The evidence in this memorandum includes not only the authority of leading scholars and international criminal courts, but also widespread state practice at the national and international level, such as legislation, jurisprudence of national courts, statements of government officials, press releases, military manuals, reports of diplomatic correspondence, adoption of resolutions by the United Nations (UN) General Assembly and adoption of treaties providing for universal jurisdiction. Such evidence is used by the International Court of Justice to determine "international custom, as evidence of a general practice accepted as law" under Article 38 of its Statute, which identifies the sources of law to decide cases.[21] Moreover, national legislation is particularly persuasive with respect to the requirement of *opinio juris* because it expresses the view of two branches of the government of the state, the legislative and executive, that the state practice (legislation) is permissible under international law; when national courts exercise universal jurisdiction pursuant to such legislation, then - with rare exceptions as in the challenges by Spanish prosecutors in the *Pinochet* case - all three branches are demonstrating that they consider such jurisdiction permissible under international law. In addition, the broad range of types of evidence cited in the memorandum is also directly relevant in determining general principles of law accepted and recognized by states under Article 38.[22]

III. ADDRESSING IMPUNITY THROUGH CRIMINAL INVESTIGATIONS AND PROSECUTIONS

Amnesty International has made campaigning to end impunity by bringing those responsible for crimes under international law to justice through effective and fair prosecutions on the basis of universal jurisdiction, without the death penalty or other cruel, inhuman or degrading punishment a key part of its work for many years.[23]

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[21] *See* Ian Brownlie, *Principles of Public International Law* 5 (Oxford: Oxford University Press 5th ed. 1998) "The material sources of custom are very numerous and include the following: diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices, orders to naval forces, etc., comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly.") (footnotes omitted); Robert Jennings & Arthur Watts, 1 *Oppenheim's International Law* 26 (London and New York: Longman 9th ed. 1992) (paperback edition 1996) ("The practice of states in this context [Article 38] embraces not only their external conduct with each other, but is also evidenced by such internal matters as their domestic legislation, judicial decisions, diplomatic dispatches, internal government memoranda, and ministerial statements in Parliaments and elsewhere.") (footnote omitted).

The *opinio juris* of states may be determined by examining the practice of states at the domestic level and at the international level, including the adoption of treaties, voting in intergovernmental organizations and conferences and decisions of international courts. *See, for example, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.),* Merits, Judgment, 27 June 1986, 1986 I.C.J. Rep., para. 185 (noting ratification by parties to a case of treaties embodying a rule as a factor in determining *opinio juris*); Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Armed Conflicts: A Positivist View*, 93 Am. J. Int'l L. 302, 306-307 (2000); *ibid.*, 311 ("Modern positivism . . . considers the acceptance of the practice of *international* bodies by states, e.g., in the cases of the Yugoslavia and Rwanda Tribunals and the Nuremberg and Tokyo Tribunals, as establishing the required *opinio juris*.") (footnote omitted, emphasis in the original).

[22] Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Austrl. Y. B. Int'l L. 82, 105 (1988-89).

[23] *See, for example, 12-Point Program for the Prevention of Torture by Agents of the State*, Point 7 (Prosecute) ("Those responsible for torture must be brought to justice. This principle should apply wherever alleged torturers happen to be, whatever their nationality or position, regardless of where the crime was committed and the nationality of the victims, and no matter how much time has elapsed since the commission of the crime. Governments must exercise universal jurisdiction over alleged torturers or extradite them, and cooperate with each

other in such criminal proceedings. Trials must be fair. An order from a superior officer must never be accepted as a justification for torture."), in Amnesty International, *Take a Step to Stamp Out Torture* 124, 126 (AI Index: ACT 40/13/00), *updating 12-Point Program for the Prevention of Torture*, Point 8 (Prosecution of alleged torturers) ("Those responsible for torture should be brought to justice. This principle should apply wherever they happen to be, wherever the crime was committed and whatever the nationality of the perpetrators or victims. There should be no 'safe haven' for torturers."), in Amnesty International, *Torture in the Eighties* 249, 250 (AI Index: ACT 04/01/84) (1984); *Amnesty International's 14-Point Program for the Prevention of "Disappearances"*, Point 11 (Prosecution) ("Governments should ensure that those responsible for 'disappearances' are brought to justice. This principle should apply wherever such people happen to be, wherever the crime was committed, whatever the nationality of the perpetrators or victims and no matter how much time has elapsed since the commission of the crime. Trials should be in the civilian courts. The perpetrators should not benefit from any legal measures exempting them from criminal prosecution or conviction."), in Amnesty International, *"Disappearances: and Political Killings: Human Rights Crisis of the 1990s - A Manual for Action*, 289, 291, February 1994, (AI Index: ACT 33/01/94); *Amnesty International's 14-Point Program for the Prevention of Extrajudicial Executions*, Point 11 (Prosecution) ("Governments should ensure that those responsible for extrajudicial executions are brought to justice. This principle should apply wherever such people happen to be, wherever the crime was committed, whatever the nationality of the perpetrators or victims and no matter how much time has elapsed since the commission of the crime. Trials should be in the civilian courts. The perpetrators should not benefit from any legal measures exempting them from criminal prosecution or conviction."). *Ibid.*, 292, 293.

A. The right to justice for victims and society

The reasons for addressing crimes under international law such as war crimes, crimes against humanity and genocide, as well as torture, extrajudicial executions and "disappearances" through prosecutions, rather than through other methods, are many. Victims and their families demand justice. Such judicial determinations of individual guilt or innocence end the attributions of collective responsibility on ethnic, racial, religious, national and political grounds and make it possible for effective reconciliation. As the Security Council declared when establishing the Rwanda Tribunal:

> ". . . in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace[.]"[24]

Societies riven by conflict are then able to reconstruct themselves on the basis of justice, thus minimizing the possibility of endless cycles of violence.[25]

B. Other aspects of the fight against impunity not covered in the memorandum

[24] S.C. Res. 955 (1994).

[25] Jaime Malmud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 Hum. Rts Q. 1, 4 (1990) ("[W]here authoritarian dictatorships have previously flourished, restoring credibility in democratic institutions is essential. To achieve this goal, a transitional government must demonstrate that the principle that the law applies to all citizens is of overriding importance.").

Final judicial determinations of guilt or innocence are one aspect of satisfaction, a form of reparations; establishing the truth is another. Each of the five internationally recognized types of reparations - restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition - are essential components of the struggle against impunity.[26] However, this memorandum does not specifically address a number of other methods of addressing impunity which are supplementary to criminal trials designed to determine the guilt or innocence of particular individuals.

For example, the memorandum does not discuss the important technique which is emerging in certain countries of ***civil litigation*** by or on behalf of victims against persons suspected of crimes under international law to obtain reparations or ***seeking reparations in the course of a criminal trial*** in those states where this is possible. In some states, such civil litigation can be conducted against persons who are alleged to have committed crimes in another country based on what might be called "civil universal jurisdiction".[27] However, the term universal jurisdiction is generally still reserved for criminal cases and this paper follows the current usage.

Another way of addressing impunity that is outside the scope of this paper has been the use of ***truth commissions***. Over the past decade, truth commissions have become a standard part of the changes in governments, conflict resolution and peace building in situations involving a legacy of massive human rights violations. However, such bodies perform different functions from courts, such as establishing a comprehensive historical record, making recommendations for reform and providing reparations to victims. They are supplementary to, not a replacement for, criminal investigations and prosecutions, which seek to render justice in individual cases. In some cases, truth commissions have even become mechanisms for impunity by providing for amnesties to prevent criminal investigations

[26] Question of the impunity of perpetrators of human rights violations (civil and political), Final Report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, Annex II: Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Joinet Principles), Principles 36 to 50, U.N. Doc. E/CN.4/Sub.2/1997/20 (1997); UN Commission on Human Rights Independent Expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of International Human Rights and Humanitarian Law (Final Draft), 18 January 2000 (Van Boven-Bassiouni Principles), U.N. Doc. E/CN.4/2000/62/Rev.1 (2000), Principles 15-25. The UN Commission on Human Rights requested the Secretary-General to circulate the draft Van Boven-Bassiouni Principles to member states requesting their comments, requested the High Commissioner for Human Rights to hold a consultative meeting in Geneva for all interested governments, intergovernmental organizations and non-governmental organizations with consultative status with the Economic and Social Council (ECOSOC) "with a view to finalizing the principles and guidelines on the basis of the comments submitted" and to consider the outcome of this meeting at its session in 2001. UN Comm'n on Hum. Rts Res. E/CN.4/RES/2000/41 of 20 April 2000.

[27] For the most recent article on the international implications of such civil litigation and awards of reparations in criminal trials, see Beth Van Shaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 Harv. Int'l L.J. 141 (2001). For descriptions of such civil litigation in the United States, see Beth Stephens & Michael Ratner, *International Human Rights Litigation in U.S. Courts* (Irvington-on-Hudson, New York: Transnational Publishers, Inc. 1996); Ralph G. Steinhardt & Anthony D'Amato, *The Alien Tort Claims Act: An Analytical Anthology* (Ardsley, New York: Transnational Publishers, Inc. 1999). For the argument that the same rules which permit universal jurisdiction over crimes permit any state to exercise similar civil jurisdiction, see Kenneth C. Randall, *Federal Courts and the International Human Rights Paradigm* 163-193 (Durham and London: Duke University Press 1990). *See also Restatement (Third) of the Foreign Relations Law of the United States* § 404, Comment b. ("In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy.").

and prosecutions (see Chapter Fourteen, Section VII below).[28]

[28] Truth commissions, if properly constituted and with sufficient powers and resources, can play an important role in establishing an authoritative record of the past and in providing victims with a forum to testify about the abuses they suffered and, in some cases, to obtain redress. However, truth commissions are not a substitute for justice. They usually cannot compel witnesses to testify or ensure that those who commit perjury will be prosecuted; they are inherently vulnerable to politically imposed limitations and manipulation; their structure, mandate, resources, power to obtain all relevant information, willingness or ability to investigate sensitive cases and, in some cases, even the final wording of their report, are often determined by the political forces that created them.

This memorandum also does not address the debates over the role of justice in achieving reconciliation.[29] Finally, it does not address criticisms of the rationale for criminal prosecutions and punishment as a response to crime.[30]

IV. PRACTICAL REASONS FOR UNIVERSAL JURISDICTION

Despite the millions of acts of genocide, crimes against humanity, war crimes, cases of torture, extrajudicial executions and "disappearances" committed since the end of the Second World War, only a handful of individuals have ever been brought to justice by national courts in the territories or jurisdictions where they occurred. Many of those responsible for these crimes have been able to travel outside their countries - either voluntarily on state business or pleasure trips or involuntarily after going into exile - with complete impunity. Indeed, in most case when suspects are at liberty abroad one can presume, absent a convincing showing by the territorial state to the contrary, that the reason is that the territorial state has not only failed to fulfill its responsibilities under international law, but also that it is

[29] For the standard arguments supporting truth commissions and amnesties in territorial states as an alternative to prosecution for crimes under international law, see José Zalaquet, *Balancing Ethical Imperatives and Political Restraints - The Mathew O. Tobriner Memorial Lecture*, 43 Hast. L. J. 1425 (1992); *see also* Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction* 86, 90-91 (July/August 2001) ("The unprecedented and sweeping interpretation of international law in *Ex parte Pinochet* would arm any magistrate anywhere in the world with the power to demand extradition, substituting the magistrate's own judgment for the reconciliation procedures of even incontestably democratic societies where alleged violations of human rights may have occurred. . . . It is an important principle that those who commit war crimes or systematically violate human rights should be held accountable. But the consolidation of law, domestic peace, and representative government in a nation struggling to come to terms with a brutal past has a claim as well. The instinct to punish must be related, as in every constitutional democratic political structure, to a system of checks and balances that includes other elements critical to the survival and expansion of democracy.").

However, scholars have demonstrated that international law imposes a duty on territorial states to prosecute. *See, for example,* Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 Cal. L. Rev. 451 (1990); ____, *Impunity and Human Rights in International Law and Practice* (New York/Oxford: Oxford University Press 1995), and Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L. Rev. 2537 (1991). Similarly, UN bodies have recognized that territorial states have a duty under international law to bring to justice those responsible for violations of human rights and humanitarian law. *See, for example,* S.C. Res. 1291 (2000) of 24 February 2000 (calling upon all parties to the conflict in the Democratic Republic of the Congo "to bring to justice those responsible" for genocide, crimes against humanity or war crimes); G.A. Res. 54/179 of 24 February 2000 (calling upon the Democratic Republic of the Congo "[t]o fulfil its responsibility to ensure that those responsible for human rights violations are brought to justice"); UN Comm'n on Hum. Rts Res. 2000/15 of 18 April 2000 (calling upon the Democratic Republic of the Congo "[t]o put an end to impunity and to fulfil its responsibility to ensure that those responsible for human rights violations and grave breaches of international humanitarian law are brought to justice"). For a minority dissenting view, see Michael P. Scharf, *Swapping Amnesty for Peace: Was there a Duty to Prosecute International Crimes in Haiti?*, 31 Tex. Int'l L. J. 1 (1996).

[30] For a discussion of some of the arguments against any criminal prosecutions of those responsible for crimes under international law, see Tom J. Farer, *Restraining the Barbarians: Can International Criminal Law Help?*, 22 Hum. Rts Q. 90 (2000); Mark J. Osiel, *Why Prosecute? Critics of Punishment for Mass Atrocity*, 22 Hum. Rts Q. 118 (2000). Some scholars, while accepting the basic principle that persons responsible for crimes under international law should be brought to justice, contend that only a few high-level persons responsible for planning or ordering the crimes or who committed particularly atrocious crimes should be prosecuted. See, for example, the discussion of the Argentine government strategy for prosecuting members of the armed forces for crimes committed under the military government in the 1970s and 1980s in Carlos Santiago Nino, *Radical Evil on Trial* (New Haven: Yale University Press 1996). For a more general discussion about the various rationales for prosecution and punishment of crime, see Mike Maguire, Rod Morgan & Robert Reiner, *The Oxford Handbook of Criminology* (Oxford: Clarendon Press 2d ed. 1997).

unlikely to do so. Suspects should be brought to justice in the states where they are found, extradited to a state able and willing to do so in a fair trial without the death penalty or other cruel, inhuman or degrading treatment or punishment or surrendered to an international criminal court.

A. Failure of territorial states to act

There are many reasons why territorial states fail to fulfill their obligations to bring those responsible for grave crimes under international law to justice. Often courts in the state where the crimes occurred (territorial state) are unable to exercise jurisdiction because the territorial state has not yet enacted the necessary legislation making the crime under international law a crime under national law or such legislation is inadequate.

However, even when the territorial state has fulfilled its international obligations to enact such legislation, there are a number of reasons why prosecutors and investigating judges may fail to act. The entire legal system may have collapsed.[31] The courts could be functioning, but incapable of bringing those responsible to justice for reasons such as lack of resources or inability to provide security for suspects, victims, witnesses or others in the proceedings. They could be functioning, with adequate resources, but lacking in the political will to bring those responsible to justice. They could have sufficient resources and political will, but be prevented from exercising jurisdiction by the executive authorities. The authorities may themselves be involved in committing such crimes.[32] Transitional governments are sometimes reluctant to prosecute members of the former government and may even give those responsible amnesties or the benefit of other measures of impunity.[33] Therefore, when the territorial state fails to act, it makes sense to permit - or even require - the criminal justice systems of other states to exercise jurisdiction on behalf of the international community, either when the suspects come into their jurisdictions or by requesting extradition from the state where the suspect is located.

B. Absence of international criminal courts and limits on scope of their jurisdiction

[31] Willard Cowles, *Universality of Jurisdiction over War Crimes*, 33 Cal. L. Rev. 177, 194 (1945) ("[T]here is often no well-organized police or judicial system at the place where the acts are committed, and both the pirate and the war criminal take advantage of this fact, hoping thereby to commit their crimes with impunity.").

[32] Kamminga, *1998 ILA Report, supra,*, n. 6, 564 ("In practice . . . human rights offenders are usually not prosecuted domestically for the obvious reason that they acted with complicity of the authorities. By prosecuting offenders the authorities would risk exposing their own involvement.").

[33] Kamminga, *1998 ILA Report, supra*, n. 6, 564 ("Even after a repressive government has been replaced, the new authorities are often extremely reluctant to prosecute offenders linked to the *ancien régime*. The new authorities may fear that the military might intervene if they did so or they may consider that national reconciliation is best served by other mechanisms than criminal trials. This has resulted in the well known phenomenon of amnesties. . .").

The international community will continue to need to rely on national prosecutions since it is unlikely - and, perhaps, undesirable since it would be unable to handle all the cases - that there ever would be an international criminal court with exclusive, comprehensive jurisdiction over crimes under international law.[34] The jurisdiction of the Yugoslavia and Rwanda Tribunals is limited to certain time periods, to certain crimes under international law and to crimes committed in two limited geographic areas.[35] The jurisdiction of the Rwanda Tribunal is further limited when the conduct occurred outside Rwanda to crimes committed by Rwandan citizens.[36] Nearly 80% of the government delegations at the Rome Diplomatic Conference on the International Criminal Court supported the proposal of the Republic of Korea to give the International Criminal Court the same universal jurisdiction that all states have under international law.[37] However, as a result of a political compromise designed to encourage certain states to ratify the Rome Statute or at least not oppose it, the Statute does not include such jurisdiction.[38] In addition, jurisdiction is limited to only certain crimes under international law and to crimes committed after the Statute enters into force. In any event, it is unlikely that there will be many more *ad hoc* international criminal tribunals established in the future.[39] Moreover, even when the International Criminal Court has concurrent jurisdiction with states, under the principle of complementarity it will act only when states are unable or unwilling to exercise jurisdiction.[40]

[34] *Democratic Republic of the Congo v. Belgium*, Request for the Indication of Provisional Measures, Int'l Ct. of Justice, 8 December 2000 (*obtainable from* http://www.icj-cij.org) (Declaration of Ad Hoc Judge Christine Van den Wyngaert) ("In the absence of supranational enforcement mechanisms, national criminal prosecution before domestic courts is the only means to enforce international criminal law. States have not only a moral, but also a legal obligation under international law to ensure that they are able to prosecute international core crimes domestically.").

[35] Yugoslavia Statute, Arts 1 to 5; Rwanda Statute, Arts 1 to 4.

[36] Rwanda Statute, Art. 1 ("The International Criminal Tribunal for Rwanda shall have the power to prosecute . . . Rwandan citizens responsible for such violations committed in the territory of neighbouring States . . .").

[37] *The Numbers: NGO Coalition Special Report on Country Positions*, *The Rome Treaty Conference Monitor*, Special Issue of the NGO Coalition for an International Criminal Court, 13 July 1998.

[38] For the background to the final package proposal, see Philippe Kirsch and John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 Am. J. Int'l L. 2, 10-11 (1999); and Philippe Kirsch, *Introduction*, in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* xxvi (Baden-Baden, Germany: Nomos Verlagsgesellschaft 1999).

[39] Efforts for more than a decade to persuade the Security Council to set up an *ad hoc* international criminal tribunal for Iraq have failed. The recent trend has been to establish mixed tribunals - national courts or panels of national courts with foreign or international components as in East Timor, Cambodia and, possibly, Sierra Leone. However, these special courts are often designed to investigate and prosecute only a small number of those suspected of responsibility for crimes under international law, such as senior leaders and those suspected of the most serious crimes, and, in the case of Cambodia, primarily targeting persons from only one faction in one particular period. Law on the Establishment of Extra-Ordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (unofficial translation by the Legal Assistance Unit, UNCOHCHR), Art. 1 ("The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of the Cambodian penal law, international humanitarian laws and custom, and international Conventions recognized by Cambodia, that were committed during the period from April 17, 1975 to January 6, 1979.").

[40] Rome Statute, Preamble, Arts 1 & 17.

The District Court of Jerusalem in the *Eichmann* case cited the absence of an international criminal court as one rationale for exercising universal jurisdiction over war crimes and crimes against humanity:

> "The abhorrent crimes defined in this law are not crimes under Israel law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (delicta juris gentium). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial."[41]

[41] *Attorney General of Israel v. Eichmann*, 36 Int'l L. Rep. 18, 26 (Israel Dist. Ct. Jerusalem 1961), *aff'd* 36 Int'l L. Rep. 277 (Israel Sup. Ct. 1962).

Scholarly authorities have made similar arguments.[42] As the Chair of the Committee of the Whole of the 1998 Rome Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Philippe Kirsch, recently observed:

> "It must be understood that no one expects the ICC, on its own, to deter all crimes. The ICC must be part of a framework of measures to sustain a culture of accountability, including increased domestic prosecution of such crimes, greater use of universal jurisdiction, and greater international cooperation in suppressing international crimes."[43]

C. Catalyst for action by territorial states

The exercise of universal jurisdiction has acted as a catalyst in a number of territorial states for efforts to eliminate amnesties and similar measures to ensure impunity or to investigate and prosecute those responsible.[44] A prominent international human rights lawyer has explained the impact of the arrest in London of the former President of Chile on the judicial system back home:

> "Previously timid Chilean judges began looking for chinks in the dictator's legal armour. After decades of silence, Pinochet's former collaborators stepped forward to tell of his role in covering up atrocities, revelations that have had a snowball effect. The number of criminal cases against Pinochet jumped to dozens, then hundreds. By the time British Home Secretary Jack Straw sent Pinochet back to Chile, ostensibly on health grounds, the myth of his immunity had been totally shattered."[45]

[42] Andrea Bianchi, *Immunity versus Human Rights: The* Pinochet *Case,* 10 Eur. J. Int'l L. 237, 250 (1999) ("It would be unrealistic to expect that international criminal law can effectively be enforced only by international tribunals. International tribunals may play a strong symbolic role and are more likely to be perceived as an impartial forum, but prosecution by municipal courts will remain crucial.") (footnote omitted); Sheldon Glueck, *War Criminals: Their Prosecution & Punishment* 100 (New York: Alfred A. Knopf 1944); Kamminga, *Final ILA Report, supra,*n. 6, 10 (noting that the limited jurisdiction of the International Criminal Court "is likely to leave a large gap that can only be filled through the exercise of universal jurisdiction"); L.C. Green, *International Crimes and the Legal Process,* 29 Int'l & Comp. L.Q. 567, 569 (1980).

[43] Philippe Kirsch, *The International Criminal Court: Current Issues and Perspectives,* 64 Law & Cont. Probs 3, 4-5 (2001).

[44] Kamminga, *Final ILA Report, supra,* n. 6, 4 (observing that the exercise of universal jurisdiction had a "positive impact on the willingness of the territorial state to bring proceedings against gross human rights offenders"), 9 ("[t]he principal motivating force behind the increased willingness of states to try perpetrators of war crimes and crimes against humanity on the basis of universal jurisdiction has been the establishment of the ICTY and ICTR. More and more states have adopted implementing legislation and policies enabling them to bring persons to trial on the basis of universal jurisdiction as a direct result of Security Council decisions under Chapter VII of the UN Charter. Furthermore, the example set by the ICTY and ICTR in bringing perpetrators to trial is likely to have inspired and given courage to prosecutorial activities at the domestic level.").

[45] Reed Brody, *Justice: The First Casualty of Truth?, The Nation* 25 (30 April 2001).

For example, as described below in Chapter Two, Sections V and VI, criminal investigations abroad based on universal jurisdiction have either led to efforts in the countries where the crimes occurred to end amnesties and similar impunity measures and to open criminal investigations of certain crimes which were not covered by such measures or they have given such efforts new impetus. Perhaps even more importantly, such investigations based on universal jurisdiction have had a more direct impact by eroding the culture of impunity in territorial states with respect to other crimes. They have encouraged victims, families of victims, ordinary citizens, prosecutors, judges and even politicians to call for reopening closed doors to the past by reconsidering amnesties and similar measures of impunity, exploiting gaps in such measures and investigating and prosecuting crimes. As the UN Secretary-General, Kofi Annan, recently stated, "[t]he application of this principle [universal jurisdiction] can be an essential stimulus for justice and reconciliation in the country of origin of the perpetrator."[46]

D. Deterrence

The exercise of universal jurisdiction is likely to act as a general deterrent, at least to some extent, to crimes under international law, both with regard to current criminal activity and in the long term.[47] This is one of the most frequently cited grounds for bringing those responsible to justice for such crimes.[48] For example, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions warned in 1993,

> "lessons should be drawn from the past, and the vicious cycle of ethnic violence which has drenched both Burundi and Rwanda in blood must be broken. To this end, the impunity of the perpetrators of the massacres must be definitively brought to an end and preventive measures to avoid the recurrence of such tragedies must be designed."[49]

[46] Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict, U.N. Doc. S/2001/331, 30 March 2001, para. 12.

[47] Kamminga, *1998 ILA Report*, *supra*, n. 6, 564 ("Impunity of the perpetrators of gross human rights offences . . . has been widely identified as one of the main causes of the continuing recurrence of such abuses. Although no reliable figures are available, it is clear that only a small proportion of those who commit genocide, crimes against humanity or war crimes are ever brought to justice. It is fair to assume that their impunity acts as a major encouragement to future offenders. Methods need therefore [to] be found to ensure that more perpetrators are actually brought to justice."). Nevertheless, in the *Final ILA Report* , *supra*, n. 6, 3, Kamminga cautioned that the "supposed deterrent effect" of universal jurisdiction, "as always in the field of criminal law, . . . should not be overstated".

[48] The UN Secretary-General has noted that "[w]ell-publicized prosecutions can deter crimes in current and future conflicts." Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict, U.N. Doc. S/22001/331, 30 March 2001, para. 11. The General Assembly has cited the deterrent rationale for prosecuting crimes under international law on a number of occasions: U.N. G.A. Res. 2583 (XXIV) of 15 December 1969 (stating that it was "*[c]onvinced* that the thorough investigation of war crimes and crimes against humanity, and the detection, arrest, extradition and punishment of persons responsible for war crimes and crimes against humanity, constitute an important element in the prevention of such crimes . . . ."); U.N. G.A. Res. 2712 (XXV) of 15 December 1970 (same point); U.N. G.A. Res. 2840 (XXVI) of 18 December 1971 (same point). Similarly, the UN Commission on Human Rights has emphasized "the importance of combatting impunity to the prevention of violations of human rights and humanitarian law." Comm'n Hum. Rts Res. 2000/68 of 27 April 2000, para. 1.

[49] Report by the Special Rapporteur, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights resolution 1993/71, U.N. Doc. E/CN.4/1994/7, 7 December 1993, para. 171.

The effectiveness of the deterrent is likely to depend, first, on factors applicable to the repression of crime generally - such as the certainty of arrest, prosecution and conviction, the severity of punishment and the amount of reparations - and, second, on special factors related to universal jurisdiction. The empirical evidence of the general and specific deterrent effect of prosecutions at the domestic level is limited and often controversial and beyond the scope of this paper.[50]

The effectiveness of deterrence at the international level is also difficult to document.[51] At the international level, it has been argued, on the one hand, that the existence of the Yugoslavia Tribunal did not prevent the Srebenicia massacre and, on the other, that this massacre would not have occurred if the states contributing personnel to United Nations Protection Force (UNPROFOR) had been fulfilling their responsibilities under international law to search for, arrest and bring to justice those responsible for crimes under international law or to surrender those who had been indicted by the Yugoslavia Tribunal. Similarly, it has been claimed by some that the existence of the Yugoslavia Tribunal did not deter members of either the Kosovo Liberation Army (KLA) or the Federal Republic of Yugoslavia and Serbian forces from committing crimes in Kosovo and by others that the lack of a credible law enforcement effort was to blame and that the scale of crimes would have been worse without the Tribunal.[52] Moreover, the reported digging up of graves in Kosovo to remove and hide the bodies of victims of war crimes and crimes against humanity is seen as evidence that the threat of prosecution by the Yugoslavia Tribunal is now beginning to be taken seriously.[53]

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[50] The literature on this subject is vast. *See, for example,* Norval Morris, *The Honest Politician's Guide to Crime Control* (1972). One international criminal law expert has argued that, "Whereas it is debatable whether criminal law in general has a deterrent effect on potential law-breakers, there seem to be good reason to assume that, with respect to war criminals, it can have such an effect." Christine van den Wyngaert, *The Suppression of War Crimes under Additional Protocol I, in* Yoram Dinstein & Mala Tabory, eds, *International Law at a time of Perplexity* 197, 205 (Dordrecht: Martinus Nijhoff 1989). She added that in the few war crimes trials for crimes committed since the Second World War, the accused

> "were not social outcasts or marginal people, but in general 'respectable' persons who were hi[g]hly esteemed by their superiors. As such, unlike ordinary criminals, they did not belong to the category of persons in need of [being] 'resocialised'. On the contrary, they were, in many instances, rather 'over-socialised', in that they were willing to do anything that was in the interests of their country. . . . [T]hey often mistakenly assumed that their behaviour could be justified under domestic law. It is submitted that if potential offenders were better informed concerning the illegality of certain acts and the non-applicability of the defences of necessity and superior orders, many war crimes could be avoided."

Ibid., 206.

[51] As Philippe Kirsch has recently stated, "There is an ongoing argument on the deterrent effect, if any, of the action of international tribunals. Yet debate on deterrence is necessarily inconclusive. How can you demonstrate why something - in this instances, the commission of crimes - has not occurred or has diminished in magnitude?" Kirsch, *supra,* n. 43, 4.

[52] Kamminga, *Final ILA Report* 3-4 (observing that "serious crimes on a massive scale continued to be committed in Kosovo after the Chief Prosecutor of the Yugoslavia Tribunal (ICTY) had announced her intention of investigating and prosecuting these crimes in a letter addressed to President Milosovic and other senior officers".). Others have seen the efforts to hide the bodies of ethnic Albanians in Kosovo who had been "disappeared" and extrajudicially executed as evidence that those responsible feared prosecution by the Yugoslavia Tribunal.

[53] Marc Semo, *Charniers de la purification en Serbie: Des cadavres d'Albanais amenés du Kosovo en camion sont exhumés, Liberation,* 3 July 2001.

In the context of universal jurisdiction, however, the very uncertainty of the extent to which states have implemented their obligations under international law to enact legislation has had an impact on at least one aspect of government behaviour. Many government officials or former officials at all levels now inquire before foreign travel to determine the likelihood of arrest. For example, former President Suharto of Indonesia is reported to have cancelled a trip in 1999 to ***Germany*** for medical treatment for fear of arrest.[54] Iraq's Deputy Prime Minister Tariq Aziz is said to have decided not to travel to ***Italy*** to attend a 1999 conference entitled Peace, Prosperity and an End to War.[55] Israel's Prime Minister, Ariel Sharon, is reported to have cancelled an official trip to ***Belgium*** in July 2001 after a complaint was lodged against him alleging that he was responsible for intentional killings in 1982 of civilians in the Sabra and Chatila refugee camps in Lebanon.[56] Subsequently, it was reported that Foreign Ministry experts were preparing a list of countries with universal jurisdiction legislation and that the director of the Prime Minister's office had stated that Israeli officials should avoid "any nation in which they could find themselves in an embarrassing situation".[57] After the ***Spanish*** investigating judge, Baltasar Garzón issued 37 warrants for former high-ranking Chilean military and civilian officials, many of them are reported to have cancelled plans to travel abroad, such as retired General Jorge Ballerino and two former cabinet ministers, Pablo Baraona and Gonzalo Garcia.[58] Even when states fail to arrest visitors who are alleged to be responsible for crimes under international law, such as ***South Africa*** during the visits of the former head of the Dergue of Ethiopia, Mengistu, and Foday Sankoh of Sierra Leone, or ***Austria*** during the visit of Izzat Ibrahim al-Duri, the Deputy Commander-in-Chief of the Armed Forces of Iraq and Vice-Chairman of Iraq's Revolutionary Command Council, to Vienna, the resulting public outcry has made it less likely that persons facing such allegations will travel in the future to those countries (see Chapter Ten, Section II).

Although the prospect of limited opportunities to travel abroad may have a minimal impact on those planning crimes and the restrictions on places for holidays, shopping and a comfortable retirement may be a minor factor in deciding whether to inflict torture, the risks of prosecution may prevent those who have committed crimes such as torture from fleeing to places, such as refugee camps, where they would intimidate or harm others in exile. Moreover, steps taken by states seeking to exercise universal jurisdiction to seize assets of suspects in their own territory or, through the use of mutual legal assistance, in the territory of other states, are likely to have an impact on such people. Recent reports that bulldozers were being used in Syria to dig up bodies of those killed in Tadmor in 1980 to remove and hide the bodies suggest that the threat of national prosecutions either in Syria or abroad in a credible one.[59] In any event, it is clear that even those states which have well-developed

[54] *Suharto Fears the Pinochet Effect, The Independent*, 22 August 1999.

[55] U.S. Department of State, *Saddam Hussein's Iraq*, 13 September 1999 (as updated 24 March 2000), *obtainable from* http://www.usinfo.state.gov.

[56] BBC World Service, *Sharon 'preparing war crimes defence',* 26 July 2001 (noting that an official spokesperson had stated that the cancellation was for "calendar reasons")).

[57] This account is based on a number of sources, including: *Israel warns army, security officials of prosecution danger in Europe*, 26 July 2001; Jean-Luc Renaudie, *Sabra et Chatila: Sharon prend les menaces d'inculpation au sérieux,* AFP, 26 July 2001; Moshe Weizman, *Israel creates list of potentially problematic countries,* Jerusalem *Post*, 26 July 2001.

[58] *Pinochet Aides Fear Leaving Chile*, Associated Press, 23 April 1999.

[59] Robert Fisk, *Victims of Palmyra slaughter return to haunt Syria's new leader, The Independent,* 9 July 2001.

criminal justice systems with significant resources and dedicated to the rule of law are unable to deter all serious crimes in their own territories. Therefore, the justification for prosecutions cannot rest on deterrence alone.

V. LEGAL, PHILOSOPHICAL AND MORAL RATIONALES FOR UNIVERSAL JURISDICTION

There are a number of legal, philosophical and moral rationales which have been advanced in support of the rule of customary and conventional international law permitting states to exercise universal jurisdiction over crimes under international law and ordinary crimes of international concern or requiring them to do so if they do not extradite the persons suspected of such crimes. These rationales include the threat these crimes pose to the international legal fabric (as well as to the national legal fabric in the states where suspects are found without steps to investigate and, if appropriate, prosecute or extradite them), their attack on fundamental legal values shared by the international community, their international character and, in some cases, the threat they pose to international peace and security. Although any one of them would be sufficient, the first two are particularly compelling grounds for the exercise of universal jurisdiction.

However, none of these rationales may be strictly necessary since, as demonstrated in this paper, customary international law also permits national courts to exercise universal jurisdiction over ordinary crimes.[60] In such cases, the rationale is based on traditional concepts of state sovereignty under which states may exercise extraterritorial jurisdiction over crimes under national law, unless there is a contrary rule of international law. In a similar vein, a body of distinguished experts in the Council of Europe has stated that "[p]ublic international law does not impose any limitations on the freedom of states to establish forms of extraterritorial jurisdiction where they are based on international solidarity between states in the fight against crime".[61] Although much of the legislation cited in this memorandum also applies to ordinary crimes under national law, the discussion focuses on the ability

[60] *The Lotus (France v. Turkey)*, P.C.I.J., Ser. A., No. 9 (1927), 4. In that case, the International Court of Justice stated, after recognizing that under international law, absent a permissive rule to the contrary, a state may not exercise its power in any form in the territory of another state:

> "It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. . . . Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.
>
> This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States; it is in order to remedy the difficulties resulting from such variety that efforts have been made for many years past, both in Europe and America, to prepare conventions the effect of which would be precisely to limit the discretion at present left to States in this respect by international law, thus making good the existing lacunae in respect of jurisdiction or removing the conflicting jurisdictions arising from the diversity of principles adopted by the various States.
>
> In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty."

Ibid., 19.

[61] European Committee on Crime Problems, *Extraterritorial Criminal Jurisdiction* 27 (Strasbourg: Council of Europe 1990).

of national courts acting pursuant to such legislation to exercise universal jurisdiction over conduct which amounts to crimes under international law. Of course, it stands to reason that if national courts can exercise universal jurisdiction over conduct which is an ordinary crime under national law, then they certainly can do so when the conduct also amounts to a far more serious crime under international law.

A. Threat to the international legal fabric

Crimes under international law undermine the international framework of international law and it is appropriate that states, as creatures of international law whose rights and duties are defined by international law, act as agents for the international community in bringing to justice anyone who has committed such crimes.[62] This role is consistent with the current international legal framework, which largely depends on implementation and enforcement of international law by national authorities and courts.[63] As a commentator recently explained,

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[62] The concept of national sovereignty is no longer seen as permitting states unrestricted licence, but as describing their rights and concomitant obligations within an international framework of law. Amnesty International, *The international criminal court: Making the right choices - Part III - Ensuring effective state cooperation*, November 1997 (AI Index: IOR 40/13/97), Section II.A.2.c. As the authors of a leading treatise on international law have pointed out:

> "There is similarly increasing acceptance that the rules of international law are the foundation upon which the rights of states rest, and no longer merely limitations upon states' rights which, in the absence of a rule of law to the contrary are unlimited. Although there are extensive areas in which international law accords to states a large degree of freedom of action (for example, in matters of domestic jurisdiction), it is important that freedom is derived from a legal right and not from an assertion of unlimited will, and is subject ultimately to regulation within the legal framework of the international community."

Robert Jennings & Arthur Watts, 1 *Oppenheim's International Law* 12 (London and New York: Longman 9th ed. 1992) (paperback edition 1996). *See also* Hersch Lauterpacht, 2 *International Law: Collected Papers* 15-16 (E. Lauterpacht ed. 1975) (stating that international law ultimately is based on the "will of the international community" rather than the "will of individual states"); Richard Falk, *The Interplay of Westphalia and Charter Conceptions of International Legal Order* in R. Falk, F. Kratochwil & S. Mendlovitz eds., *International Law: A Contemporary Perspective* 116-142 (1985); Hans Kelsen, *General Theory of Law and State* 354 (Cambridge, Massachusetts: Harvard University Press 1949) ("It is international law, as a legal order superior to the States, that makes possible the creation of norms valid for the sphere of two or more States, that is, international norms."); Bianchi, *supra,* n. 42, 271-272 (the emergence of concepts of *jus cogens* prohibitions and obligations *erga omnes* "converge in purporting the existence of an international public order based on a commonality of core values and interests which are regarded as fundamental by the international community as whole").

This shift in the conception of the international legal framework from the system established three and a half centuries ago with the peace of Westphalia ending the Thirty Years' War in 1648 has been particularly marked since the adoption of the Rome Statute on 17 July 1998 and the arrest three months later on 16 October 1998 of the former President of Chile. As an international relations expert recently observed:

> "Modern international law, which has taken shape since 1945, accepts that state sovereignty is not absolute and that all states can be subjected to certain fundamental legal obligations, even if their consent cannot always be directly demonstrated in relation to them. Contemporary international law, on the other hand, recognizes that there exists an international public order. The very definition of the state and of its powers and rights is not a given. Instead, it is the international constitutional order which assigns or limits powers which may be exercised by states and other international actors. Whatever its technical legal complexity, the Pinochet case highlights at a very fundamental level the present state of transformation from modern international law to an international constitutional system.
>
> The reality of this transformation, and the difficulties still encountered in relation to it, are evident when considering the issue of state jurisdiction, and especially the slowly increasing scope of universal jurisdiction."

Marc Weller, *On the hazards of foreign travel for dictators and other international criminals*, 75 Int'l Aff. 599 (1999).

[63] Kamminga has noted that a prosecutor exercising universal jurisdiction pursuant to the Convention

against Torture "is acting as an agent of the international legal order". *Final ILA Report, supra,* n. 6, 8. *See also In re Piracy Jure Gentium,* [1934] AC 586, 589 ("With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes and the trial and punishment of the criminals, are left to the municipal law of each country."); Glueck, *supra,* n. 42, 100 (noting that in the context of piracy, "the violation of the law involved is one which concerns the entire Community of Nations, and the prosecuting State is acting, in effect, as agent of all civilized States in vindicating the law common to them all."); *Greenspan's Modern Law of Land Warfare* 420 (1959) ("Since each sovereign power stands in the position of a guardian of international law, and is equally interested in upholding it, any state has the legal right to try war crimes even though the crimes had been committed against the nationals of another power and in a conflict to which that state is not a party."); Marc Henzelin, *Le Principe de l'Universalité en Droit Pénal International: Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité* 412 (Bâle/Genève/Munich: Helbing & Lichtenhahn & Bruxelles: Bruylant 2000) (noting that Allied military courts and tribunals that tried persons for war crimes and crimes against humanity were acting as agents of the international community: *"Elles agissaient en tant qu'agents exécutifs de la communauté internationale."*); Hans Kelsen, *General Theory of Law and State* 345 ((Cambridge, Massachusetts: Harvard University Press 1949); Peter Mohacsi & Péter Polt, *Estimation of War Crimes and Crimes against Humanity According to the Decision of the Constitutional Court of Hungary,* 67 *Revue Internationale de Droit Pénal* 333, 335 (1996) ("In the case of war crimes and crimes against humanity, it is, in effect, the criminal jurisdiction of the international community that is exercised through that of the Hungarian State under the conditions and with the safeguards specified by the community of nations.").

> "the case for having municipal courts adjudicate cases involving individual crimes of international law seems compelling. Theoretical and practical considerations mandate this solution. The very notion of crimes of international law postulates that they constitute an attack against the international community as a whole and, therefore, any state is entitled to punish them."[64]

The Supreme Court of Israel in the *Eichmann* case explained:

> "Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed."[65]

More than a third of a century ago, the scholar F.A. Mann cited the threat to the international legal order as providing the rationale for universal jurisdiction over crimes under international law:

[64] Bianchi, *supra*, n. 42, 250 (footnote omitted).

[65] *Attorney General of Israel v. Eichmann*, 36 Int'l L. Rep. 277, 304 (Israel Sup. Ct. 1962). This view of the role of national courts was approved by a United States Court of Appeals when approving the extradition to Israel of a person accused of war crimes and crimes against humanity during the Second World War:

> "The underlying assumption is that the crimes are offences against the law of nations or against humanity and that the prosecuting nation is acting for all nations. This being so, Israel or any other nation, regardless of its status in 1942 or 1943, may undertake to vindicate the interest of all nations by seeking to punish the perpetrators of such crimes."

Demjanjuk v. Petrovsky, 776 F. 2d. 571, 583 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

> "The second exception [to the general rule that states do not have criminal jurisdiction over crimes committed by aliens abroad] arises from the character of certain offences. This is such as to affect and, therefore, justify and perhaps even compel every member of the family of nations to punish the criminal over whom jurisdiction can in practice be exercised. These are crimes which are founded in international law, which the nations of the world have agreed, usually by treaty, to suppress and which are thus recognized not merely as acts commonly treated as criminal, but dangerous to and, indeed, as attacks upon the *international* order. Traffic in women and children, trade in narcotics, falsification of currency, piracy and trade in indecent publications are crimes covered by such treaties, and therefore by the principle of universality. By its very nature this principle can apply only in a limited number of cases, but the existence of a treaty is not a prerequisite of its application. It is founded upon the accused's attack upon the international order as a whole.[66]

> As one scholar recently argued:

> "[I]f States have accepted the idea of universal jurisdiction, they have done so because these activities [piracy, war crimes, crimes against humanity, hijacking and the sabotage of aircraft] pose a threat to each and every State, thus justifying a global extension of the principle of jurisdiction to all areas not covered by another State's jurisdiction (in the unextended, strictly territorial sense of that term)."[67]

Other authorities have cited similar rationales.[68]

B. Threat to the national legal fabric when a suspect is present in the territory

A related justification which has been advanced in those cases where the suspect is present in the territory of a state is that the presence of a person suspected of crimes who is not investigated or prosecuted undermines the legal fabric of the state and also embarrasses the state in its relations with the rest of the international community. The Harvard Research in 1935 discussed at some length the scholarly authority supporting this rationale, stating that "[i]f disturbance of the legal order within a State's territory is considered the most persuasive reason for penal jurisdiction, such disturbance may be found in the presence unpunished of an offender who has committed crimes elsewhere."[69]

[66] F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 *Recueil des Cours* 1 95 (1964 - Part I) (footnotes omitted, emphasis in original); *see also* Yoram Dinstein, *Universality Principle and War Crimes, in* Michael Schmitt & Leslie Green, eds, *The Law of Armed Conflict: Into the Next Millennium*, 71 Int'l L. Stud. 17, 22 (U.S. Naval War College 1998) (citing this justification: "All States are supposed to have a stake in suppressing *delicta juris gentium* [crimes under international law], and all are simultaneously endowed with the authority to exercise universal jurisdiction.").

[67] Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press 1999), 64.

[68] For example, Cowles noted that "while the State whose nationals were directly affected has a primary interest, all civilized States have a very real interest in the punishment of war crimes. 'The unpunished criminal is itself a menace to the social order'." Cowles, *supra,* n. 31, 217. Kamminga has stated, "By qualifying certain crimes as being subject to universal jurisdiction the international community signals that they are so appalling that they represent a threat to the international legal order. Justice requires that there should be no safe haven for the perpetrators of such crimes." *Final ILA Report* 3.

[69] Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 Am. J. Int'l L. 435, 580 (Supp. 1935).

Certainly, the known presence of a person suspected of crime in the state enjoying complete impunity from international justice tends to undermine the respect for the law in the state where the suspect has taken refuge. As was argued during the parliamentary debates in the Netherlands on the bill to implement the Convention against Torture in support of universal jurisdiction,

> "A veritable shock wave would go through the Dutch legal order if, faced with the presence in this country of a foreign national recognized as a torturer by witnesses and victims, the courts were to declare themselves incompetent to hear the case."[70]

More recently, a German court gave a similar rationale in support of exercising universal jurisdiction over a person found in Germany who was suspected of war crimes and genocide:

> "Considerations of international law are important, but one should not overlook the fact that the prosecution of a foreigner for crimes committed abroad serves also an interest of the State of residence, viz. not to become a refuge for offenders who have committed crimes against under customary and conventional international law. Not to prosecute would undermine the trust of the German citizens in the national and international legal order (*Rechtsbewährungsprinzip*). Furthermore, since the ICTY and the competent territorial State do not wish to take over the proceedings, Germany has an interest not to be perceived by the international community as a haven for international criminals."[71]

C. The attack on fundamental values shared by the international community

The principle of universal jurisdiction over certain crimes is often justified on the basis that the crimes, whether crimes under international law or crimes of international concern, are an attack on fundamental values shared by the international community.[72] For example, 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

[70] English translation in the initial report of the Netherlands to the Committee against Torture, U.N. Doc. CAT/C/9/Add.1, 20 March 1990, para. 40.

[71] *Djaji_* case, Judgment, No. 20/96 (Higher Regional Court of Bavaria 23 May 1997) [*Bayerisches Obertes Lansdesgericht, Urteil vom 23. Mai 1997* - 3 StR 20/96] (English translation based on a translation in Luc Reydams, *Germany*, a draft chapter of his book, *Universal Jurisdiction in International Law* (Oxford: Oxford University Press) (forthcoming). The government of El Salvador has given a similar rationale for including in the new Penal Code universal jurisdiction over persons responsible for human rights violations:

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

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

[72] For an early account of this rationale, see Henri Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal* 143-147 (Paris: Librairie du Recueil Sirey 1928).

has custody of the perpetrators may punish them according to its law applicable to such offences."[73]

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

Other courts and authorities have cited the same rationale for the rule.[74] In 1950, the Supreme Military Tribunal of Italy in the *General Wagener* case, involving territorial jurisdiction, when rejecting an argument that shooting ten Italian civilians in reprisal for the killing of a German soldier was a political crime, cited the same rationale as that often given for universal jurisdiction over war crimes:

> "They concern norms which, by their highly ethical and humanitarian content, have a character not territorial, but universal. In the international law of war there exists the principle, commonly accepted . . . , that a State can punish directly soldiers belonging to the forces of enemy belligerents, fallen into its power, who have participated in actions representing violations of international norms concerning war, in the case where the common conscience of civilized people is offended by certain barbarous and inhuman acts which they have committed. From the solidarity of different nations, aiming to ameliorate to the greatest extent possible the horrors of war, flows the necessity of *promulgating rules which do not know barriers, and which strike at those who commit a crime, wherever it occurs*. . . ."[75]

D. The crimes have an international or universal character

[74] The District Court of Jerusalem noted that the abhorrent crimes in the *Eichmann* case "struck at the whole of mankind and shocked the conscience of nations." *Attorney General of Israel v. Eichmann*, 36 Int'l L. Rep. 18, 26 (Israel Dist. Ct., Jerusalem 1961), *aff'd,* 36 Int'l L. Rep. 277, 291, 293 ("Those crimes entail individual criminal responsibility because they . . . affront the conscience of civilized nations.") (Sup. Ct. Israel 29 May 1962). Others have cited the same rationale: *Polyukhovich v. Australia*, (1991) 172 CLR 501, F.C. 91/026 (*obtainable from* http://www.austlii.edu.au/cases/cth/high_ct/172clr501.html) (Toohey, J.), para. 34 ("Where conduct, because of its magnitude, affects the moral interests of humanity and thus assumes the status of a crime in international law, the principle of universality must, almost inevitably, prevail . . ."); Cowles, *supra*, n. 31, 217 (recalling that "[i]n 1943 Lord Atkin truly said that 'the conscience of the whole civilized world has been aroused by these barbarities, and surely we are all concerned in seeing that the criminals should be brought to justice'.") (footnote omitted); Lyal S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* 104 (Dordrecht: Martinus Nijhoff Publishers 1992) ("The concept of universal jurisdiction for breaches of the laws of war originated on grounds that the nature of the crime is so odious as to be the concern of the international community to ensure that offenders are caught and punished according to international law.").

[75] *General Wagener* case, *Revista Penale* 753 (Sup. Mil. Trib. Italy 1950); also reported in Antonio Cassese, *Diritto internazionale bellico moderno-Tesi e documenti* 545, 573 (Pisa: Libreria scientifica G. Pellegrini 1973). The English translation by Amnesty International is based on a French translation in Antonio Cassese, *Violence et droit dans un monde divisé* 141 (Paris: Presses Universitaires de France 1990) (retaining the emphasis in the translation). The Supreme Military Tribunal further explained:

> "[The crimes] do not offend the political interest of a particular State or the political rights of one of its citizens. They are, on the contrary, *crimes against humanity*, and as has been demonstrated above, these norms have a universal character, and not simply a territorial one. Therefore, these crimes are, and by their legal characterization and by their particular nature, of a different category and in opposition to that of political crimes. The latter, in principle, only are only of interest to a State to the extent of those who have committed them, *the former in contrast interest all the civilized States, and must be combatted and punished, in the same way that one combats and one punishes the crime of piracy, the trafficking in women and children, the practice of slavery, whatever the place where they have been committed.*"

Diritto internazionale bellico moderno-Testi e documenti, supra, 580-581.

Some authorities have stated that the very nature of crimes under international law as crimes which have an international character permits any state to exercise universal jurisdiction. For example, this reason was cited as one basis for the exercise of universal jurisdiction by both the District Court of Jerusalem and the Supreme Court of Israel in the *Eichmann* case.[76] Others have also cited this reason alone as being sufficient.[77]

E. Threats to international peace and security

Moreover, certain crimes under international are considered to threaten the peace and security of humanity itself. Indeed, the International Law Commission has consistently treated the crimes of genocide, crimes against humanity and war crimes as crimes which threaten international peace and security.[78] This argument has its greatest force when the crimes are committed on a large scale or where they lead to cross-border refugee flows or conflicts which might draw in other states.[79] This rationale was invoked by the Security Council when it established the Yugoslavia and Rwanda Tribunals.[80] It is also one of the reasons that Article 13 (b) of the Rome Statute provides that the

[76] *Attorney General of Israel v. Eichmann*, 36 Int'l L. Rep. 18, 34 (Dist. Ct. Jerusalem 12 December 1961) (Since genocide is a crime under international law, "[i]t follows, therefore, in accordance with the accepted principles of international law, that the jurisdiction to try such crimes is universal."), *aff'd*, 36 Int'l L. Rep. 277, 287 ("It is the peculiarly universal character of these crimes [genocide, crimes against humanity and war crimes] that vests in every State the authority to try and punish anyone who participated in their commission."), 299 ("there is full justification for applying here the principle of universal jurisdiction since the international character of 'crimes against humanity' (in the wide meaning of the term) dealt with in this case is no longer in doubt") (Israel Sup. Ct. 1962).

[77] Virginia Morris & Michael P. Scharf, 1 *The International Criminal Tribunal for Rwanda* 305 ("one of the distinguishing characteristics of crimes under international law is the jurisdiction conferred on all States to prosecute and punish the perpetrators of such crimes. A State may exercise jurisdiction in such cases whenever the alleged perpetrator is found in its territory."), 306 ("The exceptional conferral of jurisdiction on all States for crimes under international law, which is sometimes referred to as the principle of universal jurisdiction, is consistent with the unique character of the crimes . . .") (footnotes omitted) (Irvington-on-Hudson: Transnational Publishers, Inc. 1998); Jonathan M.Wenig, *Enforcing the Lessons of History: Israel Judges the Holocaust*, in Timothy L.H. McCormack & Gerry J. Simpson, eds, *The Law of War Crimes: National and International Approaches* 103, 107 (The Hague: Kluwer Law International 1997).

[78] Draft Code of Offences against the Peace and Security of Mankind, 9 U.N. G.A.O.R. Supp. (No. 9) at 11, U.N. Doc. A/2693 (1954), *reprinted in* 45 Am. J. Int'l L. 123 (1954) (Supp.); Draft Code of Crimes against the Peace and Security of Mankind, 49 U.N. G.A.O.R. Supp. (No. 10), U.N. Doc. A/46/10 at 238 (1991); Draft Statute for an International Criminal Court, Report of the International Law Commission on the work of its forty-sixth session, 2 May - 22 July 1994, 49 U.N. G.A.O.R. Supp. (No. 10), U.N. Doc. A/49/10 (1994), 29-140; Draft Code of Crimes against the Peace and Security of Mankind, 51 U.N. G.A.O.R. Supp. (No. 10), U.N. Doc. A/51/10 (1996), 14-104, *reprinted in* II (2) Y.B. Int'l Law Comm'n 131 (1996).

[79] As the Supreme Court of Israel explained in the *Eichmann* case, "the interest in preventing and punishing acts belonging to the category in question - especially when they are perpetrated on a very large scale - must necessarily extend beyond the borders of the State to which the perpetrators belong and which evinced tolerance or encouragement of their outrages; for such acts can undermine the foundations of the international community as a whole and impair its very stability." *Attorney General of Israel v. Eichmann*, 36 Int'l L. Rep. 277, 296 (Sup. Ct. Israel 29 May 1962).

[80] U.N. S.C. Res. 827 (1993) (determining that "widespread and flagrant violations of international humanitarian law. . . . , including reports of mass killings, massive, organized and systematic detention and rape of women, and the continued practice of 'ethnic cleansing'" continued "to constitute a threat to international peace and security"); U.N. S.C. Res. 955 (1994) (similar rationale).

Court may exercise its jurisdiction over genocide, crimes against humanity and war crimes if "[a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations". However, this particular rationale is of less relevance in most cases where the crimes under international law are committed by one or two individuals or involve a limited number of victims.

VI. ANSWERS TO CRITICISMS OF UNIVERSAL JURISDICTION

As explained below, none of the criticisms which have been made of the exercise of universal jurisdiction are persuasive. These criticisms fall into three broad categories: political, legal and practical.

A. Political and other considerations

One of the most common objections to the exercise of universal jurisdiction has been that it is inconsistent with the ***national sovereignty*** of the territorial state.[81] Whatever the merit of such an argument with respect to the exercise of extraterritorial jurisdiction over *ordinary crimes under the national law of the forum state*, as this paper demonstrates, it has no relevance to the exercise of universal jurisdiction over conduct amounting to *crimes under international law* and *crimes of international concern* when the forum state is acting on behalf of all states in the international community. This contention was made by Chile in the *Pinochet* case and squarely rejected by the House of Lords.[82]

It is often argued that it is ***preferable to try a person in the territory where crime occurred***. As a general rule in an ideal world, this is 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 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 argued in the *Pinochet* case that it was a better forum to try the former President for crimes it had not investigated for more than a quarter century.[83] However, not only did it fail to request his extradition at any point during the litigation in the United Kingdom, it had made any trial in Chile for crimes committed between 1973 and 1978 almost impossible at the time of the hearings by granting him an amnesty in 1978 and by giving him immunity as a Senator for Life for any crimes which occurred between 1973 and 1990.

Many would agree that a trial in Chile in the political climate after the former President returned would have had a far greater impact on the re-establishment of the rule of law in that country

[81] For example, one scholar, arguing that only belligerents, not neutrals, should be able to exercise universal jurisdiction over war crimes, stated: "To authorize nations to try every war crime committed somewhere in this world in a completely foreign war has great disadvantages. Prosecution in such cases may be regarded as meddling and intervening in other's affairs." B.V.A. Röling, *The Law of War and National Jurisdiction since 1945*, 100 *Recueil des cours* 329 (1960 - Part II).

[82] Counsel for the Republic of Chile claimed that it had intervened "to defend its national sovereignty and to assert its own interest in having these matters dealt with in Chile". Statement of Lawrence Collins, Q.C. before the House of Lords Appellate Committee, 28 January 1999. However, Chile never sought the extradition of its former President.

[83] *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others ex parte Pinochet*, Case for the Republic of Chile, Case Nos. CO/4083/98, CO/4122/98 (House of Lords, App. Comm. 14 January 1999), 4.

and in developing national bulwarks against the repetition of such crimes in the future than a trial abroad. However, such a trial would have been politically impossible in Chile in October 1998. It was only the impact of the prolonged absence of the former President on Chilean society, the persistence of a Chilean investigating judge and the courageous decisions of the appellate courts to lift the former President's immunity which finally made a trial possible in the territorial state and then only for a fraction of the crimes with which he was charged in the Spanish court's indictment. Similarly, although the Spanish *Audiencia Nacional* (National Criminal Court) declined on 13 December 2000 to authorize a criminal investigation of genocide, torture, "terrorism" and other crimes allegedly committed by senior military officers in Guatemala, it was solely because it had not been established at the time of it decision that Guatemalan judges would refuse to act if the complaint had been presented to them and it left open the possibility that the complaint could be reinstated if the situation changed (for a discussion of this case, see Chapter Eight, Section II).

A related claim made in the *Pinochet* case by the former President's supporters was that the exercise of universal jurisdiction would ***destabilize the democratic transition in the territorial state***.[84] However, national elections took place peacefully in December 1999 and courts had permitted certain criminal investigations and prosecutions of crimes under international law to proceed even before the former President returned home. International and Chilean observers generally agree that the impact of the arrest of the former President has strengthened, rather than weakened, democratic institutions and restored the independence of the judiciary.[85] Indeed, Chilean President Ricardo Lagos declared in April 2001 that judicial institutions were now functioning normally in Chile.[86]

[84] For example, Professor John Norton Moore of the Center for National Security Law at the University of Virginia School of Law, has claimed that exercising universal jurisdiction over persons such as the former President of Chile, Augusto Pinochet, might undermine those working for democracy in the territorial state: "If you have a practice of prosecuting national leaders who voluntarily lead a transition to democracy, it is an enormous mistake to then be seeking to prosecute those individuals internationally for human rights violations over objections from their own countries". Siobhan Morrissey, *International Law Universal Prosecutor*, 87 A.B.A.J. 66, 68-69 (March 2001). *See also Introduction, The Princeton Principles on Universal Jurisdiction* 25 (Princeton, New Jersey: Program in Law and Public Policy 2001) (". . . the imprudent or untimely exercise of universal jurisdiction could disrupt the quest for peace and national reconciliation in nations struggling to recover from violent conflict or political oppression"). The *Princeton Principles* were adopted on the initiative of a former United States Assistant Secretary of State for European and Canadian Affairs, Stephan A. Oxman, and the President of the American Association for the International Commission of Jurists, William J. Butler, and adopted at a meeting of academic scholars and judges from around the world on 27 January 2001.

[85] As an eminent Chilean human rights lawyer, Roberto Garretón, has stated, "October 16 [1998] was fundamental, so that we could at last complete our transition to democracy." Brody, *supra*, n. 45, 26. *See also* Christine Legrand, *La rue est calme à Santiago malgré la colère des partisans de Pinochet*, *Le Monde*, 11 August 2000.

[86] *Ricardo Lagos: "le cas Pinochet montre que notre justice fonctione normalement", Le Monde, 17 avril 2001.* After reviewing the course of the criminal proceedings against the former President, he stated: "Therefore, the institutions function normally in Chile and I believe that is the most important thing." (*"Donc, les institutions fonctionnent normalement au Chili et je crois que c'est le plus important.").* This view is in marked contrast to his statement two years before, in which he had contended that the arrest "has created strong political tensions and threatens to fracture further a society that remains deeply embittered and divided over Pinochet's legacy". Ricardo Lagos, *The Pinochet dilemma*, Foreign Policy (Spring 1999) (*obtainable from* http://www.findarticles.com/m1181/114/54336730/pl/article.jhtml).

It has also been claimed, most frequently made by opponents of justice, that the exercise of universal jurisdiction would lead to ***international tensions***.[87] However, the inevitable tensions resulting from criminal investigations and prosecutions of such crimes are often exaggerated. The international tensions in the Pinochet case between Chile, on the one hand, and Belgium, France, Spain, the United Kingdom and Switzerland, on the other, never led to a break in diplomatic relations, but were resolved in a judicial process.[88] Similarly, the Democratic Republic of the Congo invoked the jurisdiction of the International Court of Justice to challenge an international arrest warrant for its acting foreign minister.[89] Similarly, although Ariel Sharon, Prime Minister of Israel, decided not to visit Belgium after a criminal complaint had been filed against him with a prosecutor in that country alleging that he was responsible for war crimes, crimes against humanity and genocide for killings of thousands of civilians at two refugee camps outside Beirut in 1982, he met Belgian leaders on the same visit in a neighbouring country and diplomatic relations continue.

[87] The Dutch scholar, Röling, who served as a judge on the Tokyo Tribunal, argued that if

> "a Brazilian state official were prosecuted here in Italy for having tortured someone in Brazil in his official capacity: that would lead to enormous international tensions. It would mean that one government in effect condemns the other government as a criminal government. It could well lead to the severance of all relations between them. And that after the decision of just a local judge. It would really disturb peace in the world."

B.V.A. Röling & Antonio Cassese, *The Tokyo Trial and Beyond* 95 (Cambridge: Polity Press 1993). The initial report of the Netherlands to the Committee against Torture stated that a similar explanation had been given in Dutch parliamentary papers published at the time the Netherlands was considering ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

> "Where such States [which had a connection with the crime] are deemed by other States to be failing to exercise their jurisdiction sufficiently, this can easily create the temptation to intervene in the affairs of that State and can even lead to a political conflict, and the criminal law is hardly the most appropriate instrument for tackling political differences."

U.N. Doc. CAT/C/9/Add.1 (1990), para. 40.

[88] Although the Spanish Foreign Minister justified his refusal to permit Judge Garzón to seek judicial review in a United Kingdom court of the quasi-judicial procedure adopted by the Home Secretary to determine whether the former President was fit to stand trial in part on the basis that such a challenge would "damage our relations with Chile and South America" (*Spanish FM expects to suspend Pinochet's extradition,* AFP, 16 February 2000), Belgium did seek such judicial review. The challenge by Belgium was resolved by an English court without a diplomatic incident. *R. v. Secretary of State for Home Department ex parte Kingdom of Belgium*, Judgment, Case Nos. CO/236/2000, CO/238/2000 (Supreme Court of Judicature, Queen's Bench Division 15 February 2000).

[89] *Democratic Republic of the Congo v. Belgium*, Application, 17 October 2000. Although counsel for the Democratic Republic of the Congo claimed that the Belgian international arrest warrant for its then acting foreign minister would put the entire system of relations between states in danger, counsel for Belgium pointed out that the arrest warrant had not led to a break in diplomatic relations. Oral arguments by M. Ntumba Luaba Lumu, 22 November 2000 and by Daniel Devadder, 21 November 2000. All oral and written pleadings in this case are obtainable from http://www.icj-cij.org.

Nevertheless, one observer has complained that prosecutions based on universal jurisdiction "are undertaken without sufficient political control to avoid dire consequences".[90] Of course, political control over prosecutions and trials is antithetical to justice and contrary to the obligations of states to ensure an independent judicial system.[91] To the extent that there are diplomatic tensions between particular countries, the appropriate response is not to eliminate universal jurisdiction, but to ensure that all states have effective legislation permitting its exercise and to ensure that independent prosecutors and investigating judges take decisions on the basis of the normal legal criteria for deciding whether to investigate or prosecute cases based on territorial jurisdiction (see discussion below in this section of appropriate neutral criteria).

One authority has contended that it could lead to ***retaliatory mock trials*** against nationals of the forum state.[92] However, there is no evidence that any of the cases in which states have exercised universal jurisdiction have led to such retaliation.

[90] Madeline H. Morris, *Jurisdiction in a Divided World: Conference Remarks*, 35 New Eng. L. Rev. 337, 338 (2001).

[91] International Covenant on Civil and Political Rights, Art. 14 (1) (providing in part that "[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."). Principles 1 to 6 of the UN Basic Principles on the Independence of the Judiciary provide:

> "1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
>
> 2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
>
> 3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
>
> 4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
>
> 5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals."

Moreover, such political control would be inconsistent with the duties of prosecutors to "[c]arry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination" and to "act with objectivity". UN Guidelines on the Role of Prosecutors, Guideline 13 (a) and (b).

[92] Röling & Cassese, *supra*, n. 87, 95 (views of Röling). Lord Browne-Wilkinson, who was the presiding judge in the second hearing before the House of Lords in the *Pinochet* case, subsequently expressed fears that the exercise of universal jurisdiction over persons who were not nationals of a state party to a treaty recognizing universal jurisdiction over the crime would "resort to force". *Commentary, The Princeton Principles, supra*, n. 84, 49 n. 20.

A number of observers have suggested that ***states will use universal jurisdiction to achieve political ends***.[93] A leading contemporary critic of universal jurisdiction, former United States Secretary of State Henry Kissinger, has recently stated, in response to supporters of the use of universal jurisdiction that "[t]he danger lies in pushing the effort to extremes that risk substituting the tyranny of judges for that of governments; historically, the dictatorship of the virtuous has often led to inquisitions and even witch-hunts".[94] He contended that the international system "must not allow legal principles to settle political scores", suggested that extradition procedures to handle requests by states seeking to exercise universal jurisdiction "provide an opportunity for political harassment long before the accused is in a position to present any defense" that could turn "into a means to pursue political enemies rather than universal justice" and would allow partisans "to project their battles into the various national courts by pursuing adversaries with extradition requests".[95] He claimed that there are no institutional restraints on national prosecutors or investigating judges.[96]

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[93] *See, for example,* Morris, *supra,* n. 90, 338 ("there is a real risk of prosecutions that are politically motivated"); Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (London: Allen Lane 1999) (contending that the *Demjanjuk* case was an example "of the danger that some states will exploit universal jurisdiction for political ends", although the Supreme Court of Israel reversed the conviction on appeal on evidentiary grounds). Similarly, Bowett argued:

> "[T]here will be a strong 'political' element in many war crimes trials, and there must be a risk of this influencing the actions of the State assuming jurisdiction. For example, if the *Eichmann* precedent is valid, why should not Sweden, or Poland, or Yugoslavia indict some former American serviceman for alleged war crimes in Vietnam? The general antipathy in those countries to the whole American involvement in Vietnam may well serve to prompt the prosecuting authorities to take action, and to prejudice any subsequent trial."

Derek Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources,* 53 Brit. Y.B. Int'l L. 1, 12 (1982). The only trials of Americans for war crimes committed in Vietnam were in United States military courts sitting in Vietnam or in the United States. *See* Gary D. Solis, *Son Thang: An American War Crime* (New York/Toronto/London/Sydney/Auckland: Bantam Books 1998) ; *United States v. Calley*, 46 C.M.R. 1131 (Ct. Mil. Rev.), *aff'd*, 22 U.S.C.M.A. 534, 48 C.M.R. 19 (Ct. Mil. App. 1973), *rev'd*, 382 F. Supp. 650 (M.D. Ga. 1974, *rev'd* 519 F.2d 184 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); *United States v. Medina*, 1971 WL 12769 (CMA), 43 C.M.R. 243, 20 U.S.C.M.A. 403 (1971).

One author has recently claimed that national war crimes generally - both based on territorial and on universal jurisdiction - are "partial, biassed and selective" and should, instead, take place in an international criminal court. Gillian Triggs, *National Prosecutions of War Crimes and the Rule of Law*, in Helen Durham & Timothy L.H. McCormack, *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* 175, 177, 179-183 (The Hague/London/Boston: Martinus Nijhoff Publishers 1999). Although many of the trials based on *territorial* jurisdiction in Europe in the immediate aftermath of the Second World War and during the Cold War in the Soviet Union and Eastern Europe of persons accused of war crimes and crimes against humanity have been criticized as unfair, there has generally been far less criticism on the grounds of unfairness of procedure or partiality of trials of persons accused of such crimes when national courts were exercising *universal* jurisdiction. The apparent selectivity in universal jurisdiction has more to do with the travel plans of suspects and the general lack of political will from the end of the 1940s to the early 1990s to investigate and prosecute persons suspected of such crimes on *any* theory of jurisdiction, rather than selectivity among suspects. In any event, the proper response to these problems is to increase the procedural protections of suspects, enact or strengthen national legislation in all countries and send a message from the highest level to prosecutors and courts everywhere to treat these crimes with the same seriousness as with respect to ordinary crimes, such as murder, abduction, assault and rape.

[94] Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction,* Foreign Affairs 86 (July/August 2001).

[95] *Ibid.,* 86 & 92. *See also Introduction, The Princeton Principles, supra,* n. 84, 24-25 ("Improper exercises of criminal jurisdiction, including universal jurisdiction, may be used merely to harass political opponents, or for aims extraneous to criminal justice."); 26 (warning of "the potential dangers of the abusive or vexatious exercise of criminal jurisdiction, including universal jurisdiction").

Similarly, Lord Browne-Wilkinson, the presiding judge in the second hearing before the House of Lords in the *Pinochet* case, later expressed concern about the possible political use of universal jurisdiction over crimes under

international law in the absence of treaty provisions expressly limiting such jurisdiction to the nationals of states parties. He said that

> "[i]f the law were to be so established, states antipathetic to Western powers would be likely to seize both active and retired officials and military personnel of such Western powers and stage a show trial for alleged crimes. Conversely, zealots in Western States might launch prosecutions against, for example, Islamic extremists for their terrorist activities. It is naïve to think that, in such cases, the national state of the accused would stand by and watch the trial proceed: resort to force would be more probable. In any event the fear of such legal activities would inhibit the use of peacekeeping forces when it is otherwise desirable and also the free interchange of diplomatic personnel."

Commentary, Ibid., 49 n. 20.

[96] Kissinger, *supra*, n. 94, 88.

However, there is little evidence that prosecutors or investigating judges, who have to make the difficult decisions on the allocation of scarce investigative resources, have sought since Nuremberg and Tokyo to advance political goals of the government of the day or even their own political goals through the exercise of universal jurisdiction. Indeed, the investigating judges who have exercised universal jurisdiction most actively in Belgium and Spain have investigated suspects from a wide variety of political backgrounds in different regions of the world for crimes committed since the outbreak of the Second World War. Prosecutors and investigating judges in other countries who have been requested to open criminal investigations, including Australia, Austria, Canada, Denmark, Ecuador, France, Germany, Israel, Luxembourg, the Netherlands, Senegal, Sweden, Switzerland, the United Kingdom and the United States, have exercised the same impartiality. None have used universal jurisdiction as a political tool or allowed victims or their families to do so. The factual basis for the charges in the indictments issued so far based on universal jurisdiction has been thoroughly and carefully documented with extensive eye-witness testimony and documentary evidence in almost every case. As one international expert has stated, "The concern of some observers that *Pinochet* has created a new era of officious intermeddling is exaggerated."[97] In marked contrast to this remarkable degree of prosecutorial responsibility in the investigation and prosecution of crimes based on universal jurisdiction, is the widespread and routine abuse of territorial jurisdiction in many countries around the world documented on a depressingly regular basis in Amnesty International's annual reports and other publications.[98]

[97] Ruth Wedgwood, *International Criminal Law and Augusto Pinochet*, 40 Va. J. Int'l L. 829, 835 (2000). Indeed, even one of the leading proponents of the view that universal jurisdiction is likely to be misused for political ends admits that "if the potential for improper use of universal jurisdiction is so great, then it is perplexing that we do not seem more examples of its misuse." Morris, *supra*, n. 90, 357. No such examples of its misuse, however, are cited.

[98] *See, for example,* Amnesty International, *Report 2001*, AI Index: POL 10/001/2001.

There are a number of safeguards against any possible future abuse at the national and international level. For example, in Spain, investigating judges are chosen by lot for cases, as was Judge Baltazar Garzón in the investigation of the role of Argentine military officers in Operation Condor.[99] In addition, as Judge Garzón has explained, "The judge in Spain, when he encounters crimes that are committed outside the national territory, cannot initiate the investigation . . . . He has to have something brought before him, some type of lawsuit by an attorney, the state attorney, by the victim or by any citizen."[100] Other safeguards exist in national law to ensure that decisions by independent prosecutors and investigating judges take decisions whether to prosecute on strictly neutral, legal - not political - grounds.[101] Moreover, there has been a widespread reluctance by prosecutors and investigating judges to initiate investigations or prosecutions based on universal jurisdiction.[102] The best and most comprehensive safeguard against feared abuse by prosecutors and

[99] Morrissey, *supra*, n. 84, 69. After this investigation of Operation Condor led to allegations of criminal responsibility of former President Pinochet of Chile, a parallel investigation by another judge was then transferred to Judge Garzón in the interests of judicial economy. The consolidated investigation led to the request for Pinochet's extradition from the United Kingdom.

[100] *Ibid., supra*, n. 84, 70.

[101] For example, in the United Kingdom the Crown Prosecution Service in England and Wales operates under the Code for Crown Prosecutors. The Code, issued in June 1994, is applied by the Crown Prosecution Service "so that it can make fair and consistent decisions about prosecutions". The Code explains that "[t]he duty of the Crown Prosecution Service is to make sure that the right person is prosecuted for the right offence and that all relevant facts are given to the court" (para. 2.2), that Crown Prosecutors "must be fair, independent and objective" and "[t]hey must not be affected by improper or undue pressure from any source" (para. 2.3). Crown Prosecutors are required to consider two factors: the evidential test (para. 4.1) and the public interest test (para. 4.2). Under the evidential test, the prosecutor must determine whether the evidence can be used in court and whether the evidence is reliable (para. 5.3).

A careful reading of the factors which should be considered in applying the public interest test demonstrate that in all but a handful of cases an independent prosecutor would determine that the public interest would favour prosecution pursuant to universal jurisdiction of persons suspected of war crimes, crimes against humanity and genocide whenever the evidential test has been satisfied. Under the public interest test, the basic principle is that "[t]he more serious the offence, the more likely it is that a prosecution will be needed in the public interest" (para. 6.4). Many of the common public interest factors listed in the Code as favouring prosecution would apply to persons suspected of such crimes. None of the common public interest factors against prosecution are likely to be present in cases of genocide, crimes against humanity, war crimes or torture. Apart from the rare case when the prosecution "is likely to have a very bad effect on the victim's physical or mental health" in a manner which outweighs the "seriousness of the offence" (para. 6.6 (e)), these factors would almost never militate in favour of a decision not to prosecute. It is unlikely that in such cases "details may be made public that could harm . . . international relations" (para. 6.6 (h)). In any event, the possibility that a prosecution for genocide, crimes against humanity or war crimes which met the evidential test would harm relations with the government of the state of the suspect's nationality, which would most likely be implicated in the crimes, would necessarily be outweighed by the interests of the rest of the international community in ensuring that crimes which threaten the very fabric of international law.

[102] As the Belgian Tribunal of First Instance in Brussels stated in the *Pinochet* case, "the risk is not that states may overstep their competence but rather that by looking for excuses to justify their alleged incompetence, they condone the impunity of the most serious crimes (which certainly goes against the *raison d'être* of international law)". *Pinochet* decision, 8 November 1998 (English translation in Luc Reydams, *International Decisions:* In re *Pinochet - Belgian Tribunal of First Instance of Brussels*, 93 Am. J. Int'l L. 700, 701 (1999). The original French text reads:

> *"Or, en droit humanitaire, le risque ne semble pas tellement résider dans le fait que les autorités nationales outre passent leur compétence mais bien plutôt dans le réflexe qu'elles auraient de rechercher des prétexes pour justifier leur incompétence, lasissant ainsi la porte ouverte à l'impunité des crimes les plus graves (ce qui est assurément contraire à la raison d'être des règles de droit international)."*

Augusto Pinochet Ugarte, Ordonnance, Dossier nº 216/98, Tribunal de première instance, Bruxelles, 6 novembre

investigating judges of investigations and prosecutions based on universal jurisdiction will be the early establishment of the International Criminal Court and the widest possible ratification of the Rome Statute. The Court will then be able to exercise its jurisdiction under Article 17 in any case where a state is unable or unwilling genuinely to investigate or prosecute cases of genocide, crimes against humanity and war crimes.

1998, 79 *Revue de Droit Pénal et de Criminologie*, 278, 287 (§ 3.3.3).

A related contention by two observers is that there is ***a risk that the right to fair trial would be violated*** in the exercise of universal jurisdiction.[103] There is no convincing evidence cited for this fear that such prosecutions would be more likely to be unfair than prosecutions based on territorial jurisdiction or other forms of extraterritorial jurisdiction, such as protective or passive personality jurisdiction where the forum state is more likely to be perceived as lacking impartiality than a third state without such links to the crime.[104] Indeed, there have been no serious claims that any of the trials of persons so far, which have all been subject to the most searching international scrutiny, have failed to satisfy the strict requirements under international law and standards for fair trial.[105] In addition, one commentator has stated that ***extradition procedures in universal jurisdiction cases are unfair, lengthy and an opportunity for political harassment.***[106] However, while it is true that the fairness and effectiveness of extradition procedures around the world need to be improved, there is no indication that the national procedures in the *Pinochet* case in the United Kingdom, the *Habré* case in Senegal or the *Cavallo* case in Mexico were unfair, more lengthy than in other extradition cases or designed to harass the suspects, all of whom faced numerous charges of the gravest possible crimes, including widespread or systematic torture.

It has also been claimed by one commentator that prosecutions based on universal jurisdiction ***may incorrectly apply international law***.[107] Neither of the examples cited is persuasive.[108]

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[103] Kissinger, *supra,* n. 94, 88 (expressing concern about subjecting "past and future leaders to the possibility of prosecution by national magistrates of third countries without either due process safeguards or institutional restraints"); Morris, *supra,* n. 90, 338 ("there is the real risk of prosecutions that are . . . carried out without due process"), 352-354.

[104] See text at footnotes 97-98.

[105] The only case cited by Morris is the case of Hissène Habré, the former President of Chad, but in that case the alleged interference in the independence of the Senegalese judiciary led to a dismissal of the charges, not an unfair trial.

[106] Kissinger, *supra,* n. 94, 91-92. He said:

> "The accused is not allowed to challenge the substantive merit of the case and instead is confined to procedural issues: that there was, say, some technical flaw in the extradition request, that the judicial system of the requesting country is incapable of providing a fair hearing, or that the crime for which the extradition is sought is not treated as a crime in the country from which the extradition has been requested - thereby conceding much of the merit of the charge. Meanwhile, while these claims are being considered by the judicial system of the country from which extradition is sought, the accused remains in some form of detention, possibly for years. Such procedures provide an opportunity for political harassment long before the accused is in any position to present any defense. It would be ironic if a doctrine designed to transcend the political process turns into a means to pursue political enemies rather than universal justice."

[107] Morris, *supra,* n. 90, 338 ("there is the real risk of prosecutions that apply law that exceeds what is universally accepted as international law").

[108] The first example is the claim that a prosecution for some of the conduct of NATO forces in the former Yugoslavia in 1999 as war crimes might be based on "a view that NATO does not share". *Ibid.*, 352. However, as Amnesty International has documented, some of this conduct did amount to serious violations of international humanitarian law and, in particular, concluded that the attack on 23 April 1999 on the headquarters and studios of the Serbian state television and radio killing at least 16 civilians and injuring a further 16 was "a war crime". Amnesty International, *NATO/Federal Republic of Yugoslavia: "Collateral damage" or unlawful killings?: Violations of the laws of war by NATO during Operation Allied Force,* June 2000 (AI Index: EUR 70/18/00), Sec. 5.3.

The second example, the Spanish court's interpretation of genocide in the *Pinochet* case, is based on a misreading of the case. Both this case and the companion case concerning Argentine military officers, were decided

Some members of the public have claimed that the exercise of universal jurisdiction so far has been largely by ***courts in the North over suspects from the South or by courts of former colonial powers over suspects from former colonies***. However, as documented in this paper, a large number of states in the South and former colonies have legislation permitting the exercise of universal jurisdiction, but simply have not yet exercised it over suspects from other countries. This situation has already begun to change with the arrest of the former President of Chad in ***Senegal*** on 3 February 2000 for crimes against humanity and torture, although the charges of torture were dismissed on appeal. Further changes can be expected in the near future as persons in northern countries who have been responsible for grave crimes in the South travel to states in the South where courts may exercise universal jurisdiction. In any event, when national courts exercise universal jurisdiction over crimes under international law they are acting as agents of the international community.[109] They are not simply enforcing national law.

under Spanish, not international, law. Moreover, the claim that the former President of Chile "was sought to be held criminally liable for conduct which did not constitute the crime charged under international law and did not constitute the crime charged in the country in which the conduct occurred", *ibid.*, 353, overlooks the fact that the widespread and systematic murders, "disappearances" and torture for which he was charged in the indictment were not only crimes against humanity under international law, but also crimes under Chilean law for which he has been charged in Chile (see Chapter Two, Section VI.B). It also overlooks the routine practice of national courts to give great deference to the interpretations of international law by international and foreign courts. In any event, the differences in definitions of crimes in national penal codes and their interpretations by national courts from the definitions under international law and their interpretations by international criminal courts is likely to diminish significantly with the imminent establishment of the International Criminal Court and the enactment of national implementing legislation incorporating the definitions of crimes in the Rome Statute.

[109] *See, for example, Attorney General of Israel v. Eichmann*, 36 Int'l L. Rep. 277, 300 (Sup. Ct. Israel 29 May 1962) ("[T]he State which prosecutes and punishes a person for piracy acts merely as the organ and agent of the international community and metes out punishment to the offender for his breach of the prohibition imposed by the law of nations."); For two of the authorities cited by the Supreme Court, see Hans Kelsen, *Peace through Law* 345 (1944) ("With regard to the pirate, the State punishing him is an organ of the international legal community. For it is international law which the State applies against the pirate."); Glueck, *supra*, n. 42, 100 ("The prosecution must perforce be conducted in the Courts of the State which has seized the pirate; but the violation of the law invoked is one which concerns the entire Community of Nations, and the prosecuting State is acting, in effect, as agent of all civilized States in vindicating the law common to them all."). For other authorities citing the role of national courts as agents of the international community, see Section V.A of this chapter.

A different type of argument was made in the 1970s by two members of the International Law Commission, who argued that universal jurisdiction would lead to ***chaos among competing states***.[110] However, there has been no such competition in the limited number of cases in the past few centuries in which universal jurisdiction has been recognized, any more than there has been among states seeking to exercise extraterritorial jurisdiction over ordinary crimes under national law of international concern such as drug-trafficking, hijacking aircraft and attacks on aircraft, even though treaties with universal jurisdiction contain no system of priority among states (see Chapters Nine (on torture) and Thirteen on other treaties). For example, in the *Pinochet* case, Chile did not seek to extradite its former President, the United Kingdom did not seek to prosecute him in preference to extradition to Spain and the other states seeking his extradition, Belgium, France and Switzerland, did not seek priority over the Spanish extradition request as long as Spain continued to pursue its extradition request. Indeed, the main problem in universal jurisdiction cases is not competition between requesting states to investigate and prosecute suspects; but the lack of political will by prosecutors, investigating judges and political officials with power to decide on extradition requests.

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 to exercise universal jurisdiction would normally have a better claim than the territorial state to act on behalf of the international community, since the presence of the suspect outside the territorial state creates a presumption that the authorities of the territorial state 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 and be able and willing to investigate and prosecute in accordance with international law and standards for fair trial and must not impose the death penalty or other cruel, inhuman or degrading treatment or punishment.

Similarly, if a forum state that does not have custody of a suspect seeks to exercise universal jurisdiction over a suspect in the territorial state or even a third state, it should have the priority over other states if the territorial state or third state is unable or unwilling to investigate and, if there is sufficient admissible evidence, to prosecute the suspect. If the territorial state or third state has not already initiated an investigation or prosecution of the suspect, then that would be compelling evidence that the state was not serious. In any event, the burden should be on the custodial state that has not acted, or appears to be acting in a manner to suggest it is not able or willing to do so in fair and not sham proceedings, to demonstrate that it will do so.

[110] McCaffrey, Y.B. Int'l L. Comm'n (1983), vol. I, 39, para. 22; Tomuschat, Y.B. Int'l L. Comm'n (1986), vol. 1, 153, para. 32 ("[T]o declare every state competent to try an alleged perpetrator of an offence against the peace and security of mankind would lead to chaos . . . a race could well start to obtain the extradition of persons whom the State arresting them did not wish to try; or again a State on one continent might call for the extradition of persons charged with committing atrocities on another continent."), *cited in* Bernard Graefrath, *Universal Criminal Jurisdiction and an International Criminal Court*, 1 Eur. J. Int'l L. 67, 78, 85 (1990). A similar point of view was mentioned in the initial report of the Netherlands to the Committee against Torture, which noted that the Netherlands had traditionally taken a cautious approach to universal jurisdiction, believing that "on the whole the interests of the international legal order are better served by a commitment to close international cooperation than by the imposition of competing unilateral national claims to jurisdiction, particularly if the latter are not accompanied by an obligation to recognize final judgements passed in other States in respect of the same offences (the ne bis in idem principle)." U.N. Doc. CAT/C/9/Add.1 (1990), para. 29.

In the rare case that more than one state genuinely is able and willing to investigate and prosecute, there are a number of practical ways to accommodate each state's shared interest in enforcing international law that are used in cases involving ordinary crimes, where states are seeking to enforce their own laws. First, the states could agree that the suspect should be tried in one state for all crimes under international law and the investigators in each state could cooperate in assisting the forum state to investigate and prosecute.[111] This is consistent with the recognition by all states for more than a quarter of a century of a duty to cooperate in the investigation and prosecution of persons suspected of crimes under international law.[112] Alternatively, they could agree to let one state investigate and prosecute the suspect first for one set of crimes and then to transfer the suspect temporarily to the other state or states for investigation and prosecution of other crimes while evidence is still fresh. In any event, the concepts of conflict of laws, comity and *forum non conveniens*, which were developed to determine which was the appropriate law to apply or forum for *civil* litigation, have little or no bearing in the determination of which state should act on behalf of the international community in a *criminal* case. Evidence that such concepts have no place in the context of universal jurisdiction is their omission from the numerous treaties requiring states to extradite or prosecute suspects (discussed in Chapter Thirteen).

B. Legal objections

[111] For example, Article 8 of the European Convention on the Transfer of Proceedings in Criminal Matters, E.T.S. No. 73, 15 May 1972, provides that one state party may request another state party to take proceedings in a number of situations.

Similarly, in somewhat more narrowly circumscribed circumstances, Article 1 (1) of the European Convention on the Punishment of Road Traffic Offences, E.T. S. No. 52, 30 November 1964, provides that

> "[w]hen a person ordinarily resident in the territory of one Contracting Party has committed a road traffic offence in the territory of another Contracting Party, the State of the offence may, or if its municipal law requires, must, request the State of residence to take proceedings if it has not instituted them itself, or if, having done so, it deems it impossible to carry them through to a final decision or to enforce the penalty in full."

Article 2 requires that the offence be punishable in both states.

[112] UN Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, adopted by the General Assembly in Resolution 3074 (XXVIII) of 3 December 1973. These principles were most recently reaffirmed by the UN Sub-Commission on Human Rights in Resolution 2001/22 of 16 August 2001.

A handful of authorities have claimed that ***international law does not permit*** states to exercise universal jurisdiction over one or more crimes under international law or crimes of international concern or they have contended that there was ***insufficient evidence*** to demonstrate that international law permitted the exercise of universal jurisdiction over such crimes.[113] For example, Henry Kissinger has claimed that "the very concept of universal jurisdiction is of recent vintage".[114] Most of these criticisms are out of date or do not appear to be based on a thorough review of state practice.[115] Indeed, as this paper demonstrates there is overwhelming evidence that international law not only permits national courts to exercise such jurisdiction, but in many cases requires them to do so or to extradite the suspect to a state willing to do so. One scholar has recently claimed that ***states parties to treaties including an aut dedere aut judicare (extradite or prosecute) obligation may not exercise***

[113] *Piracy:* Alfred P. Rubin, *The Law of Piracy* (Newport: Naval War College Press 1988); ____, *Ethics and Authority in International Law* (Cambridge: Cambridge University Press 1997); *war crimes, including grave breaches:* Bowett, *supra*, n. 93, 12; Alfred P. Rubin, *Is the Law of War Really Law? War and Law since 1945*, 17 Mich. J. Int'l L. 643, 651 (1996); *crimes against humanity:* Rosalyn Higgins, *Problems and Process: International Law and How We Use it* 61-62 (Oxford: Oxford University Press 1992); *apartheid:* Bowett, *supra*, n. 93, 12-13; *genocide:* Bowett, *supra*, n. 93, 12; David Freestone, *International Cooperation against terrorism and the development of international law principles of jurisdiction*, in Rosalyn Higgins & Maurice Flory, *Terrorism and International Law* 43, 62 n. 10 (London/New York: Routledge 1997); Higgins, *supra*, 62.

However, many of these conclusions were reached before the recent renaissance in the exercise of universal jurisdiction and at a time when there were no contemporary and comprehensive studies of state practice. The misconception that few states have universal jurisdiction legislation is more widespread than one would expect. *See, for example,* Ruth Wedgwood, *National Courts and the Prosecution of War Crimes*, in Gabrielle Kirk McDonald & Olivia Swaak-Goldman, eds, *Substantive and Procedural Aspects of International Criminal Law* 393, 399 (The Hague/London/Boston: Kluwer Law International 2000) (declaring that "[i]n practice, few countries have passed national laws to delegate universal jurisdiction to their courts", citing only five countries which had done so).

[114] Kissinger, *supra*, n. XXX, 87. He contended:

> "The very concept of universal jurisdiction is of recent vintage. The sixth edition of *Black's Law Dictionary*, published in 1990, does not even contain an entry for the term. The closest analogous concept listed is *hostes humani generis* ("enemies of the human race"). Until recently, the latter term has been applied to pirates, hijackers, and similar outlaws whose crimes were typically committed outside the territory of any state. The notion that heads of state and senior public officials should have the same standing as outlaws before the bar of justice is quite new."

For a brief history of concept and practice of universal jurisdiction since the sixth century, and citation to relevant authorities, see Chapter Two.

[115] Sunga, *supra*, n. 74, 110. He stated in 1992 that the decision in the *Eichmann* case concerning universal jurisdiction was "open to several serious criticisms". In particular, he contended that "the lack of clear recognition of universal jurisdiction by States calls into question the accuracy of the District Court's assertion that *delicta jus gentium* [crimes under international law] give rise to universality of jurisdiction in international law". However, five years later, after renewed use of universal jurisdiction as a basis for opening criminal investigations in several states, including Austria, Belgium, Denmark, France, Germany, Spain and Switzerland, the same author, although stating that "the practi[c]e relating to universal jurisdiction is so sketchy that at present, as a possible jurisdictional basis, it appears to hold little promise for effective national prosecution of crimes under international law", not only recognized that states were permitted to exercise such jurisdiction over certain crimes, but also predicted that,

> "in the future, members of the international community may become less tolerant of a State that knowingly harbours a person suspected of having committed a crime against the peace and security of mankind. The general expectation that such a State either prosecute or extradite the individual without regard to his or her nationality, or the *locus delictum* [place of the crime], may eventually develop into a binding legal obligation."

Lyal S. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation* 250, 254 (The Hague/London/Boston: Kluwer Law International 1997).

universal jurisdiction over nationals of non-states parties.[116] However, there is significant state practice indicating that such jurisdiction is permissible

[116] Morris, *supra,* n. 90, 346. She contended that such treaties "appear baldly to purport to create, by treaty, jurisdiction having no other lawful basis, and to make that jurisdiction applicable to nationals of states that are not parties to the treaties". *Ibid.* This argument is also made by the same author in *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 Law & Contemp. Probs 13 (2000). See also Mason H. Drake, United States v. Yunis: *The D.C. Circuit's Dubious Approval of U.S. Long-Arm Jurisdiction over Extraterritorial Crimes*, 87 Nw. U. L. Rev. (1993).

under international law.[117] National courts have exercised universal jurisdiction under such treaties over nationals of non-state parties usually without protest.[118]

Some have argued that ***certain crimes under international law do not have a sufficiently international aspect*** to justify universal jurisdiction.[119] The claim that torture taking place wholly within one country and perpetrated by the nationals of that country against their own citizens or residents does not have a sufficiently international component to justify international jurisdiction is belied by the numerous international instruments adopted in the past half century which prohibit torture the 126 ratifications of the Convention against Torture, as of 1 September 2001, and the appointment of a UN Special Rapporteur on torture.

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[117] Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 New Eng. L. Rev. 363, 379-382 (2001). *See also* Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States, in* Sarah Sewall & Carl Kaysen, eds, *The United States and the International Criminal Court: National Security and International Law* 213 (Lanham/Boulder/New York/Oxford: Rowman & Littlefield and Washington, D.C. American Academy of Arts and Sciences 2000); _____, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 63 Law & Contemp. Probs 67 (2000).

[118] *United States: United States v. Marino-Garcia*, 679 F.2d 1373 (11th Cir. 1982) (exercising universal jurisdiction pursuant to the 1958 Law of the Sea Convention over nationals of Colombia and Honduras, non-states parties at the time of the arrest, suspected of drug smuggling); *United States v. Yunis*, 681 F. Supp. 896 (D.D.C. 1988) and 924 F.2d 1086 (D.C. Cir. 1991) (exercising universal jurisdiction pursuant to the 1979 Hostage-Taking Convention over national of Lebanon, not a party to the treaty at the time of the arrest, for alleged hostage-taking); *United States v. Rezaq*, 134 F.3d 1121 (D.C.Cir. 1998) (exercising universal jurisdiction pursuant to the 1970 Hague Convention over national of Palestine, not a party to the treaty, for alleged hijacking of aircraft); *United States v. Wang Kun Lue*, 134 F. 3d 79 (2d Circ. 1988) (exercising universal jurisdiction under 1979 Hostage-Taking Convention over national of China, not a party to the treaty, suspected of smuggling aliens). *Netherlands: Public Prosecutor v. S.H.T.*, 74 Int'l Law Rep. 162 (1987) (exercising jurisdiction pursuant to 1970 Hague Convention and 1971 Montreal Convention over national of Palestine, not a party to either treaty).

[119] The initial report of the Netherlands to the Committee against Torture stated that this argument was made concerning torture in Dutch parliamentary papers published at the time the Netherlands was considering ratification of the Convention against Torture:

> "The criminal offense of torture is not intrinsically one which tends to involve more than one country. On the contrary, cases having an international aspect, either because offender and victim possess different nationalities or because the offender has fled abroad or even because the criminal offence has had tangible effects on the territory of another State, are highly exceptional. Experience shows that it is much more typical for offender and victim to be of the same nationality, for the criminal offence to take place on the territory of the State whose nationality they possess and for the offender to have little reason to flee the country as long as he feels he is supported by his social or political environment. . . . Only rarely, in fact, will multinational features be inherent in the offence and will the required international solidarity and common interest exist between the States most involved. The mere fact that torture is an extremely serious offence which arouses great indignation and concern is not in itself sufficient justification for subjecting it to universal jurisdiction."

U.N. Doc. CAT/C/9/Add.1 (1990), para. 40. For a similar contention with respect to war crimes, see Bowett, *supra*, n. 93, 12 (stating that one of the objections to permitting neutral, rather than belligerent states, to exercise extraterritorial jurisdiction was that "whereas all nations (or at least all maritime nations) have a real and even commercial interest in having the sea lanes kept free of pirates, there is no comparable interest in a neutral Power to see war criminals punished").

To the extent that there is a concern about ***differing interpretations of international law by national courts***, this concern applies with equal force to the exercise of territorial jurisdiction and to other areas of international law, which is still enforced primarily by national courts. The jurisprudence of international criminal courts will necessarily influence national courts and limit the scope of such differences. Moreover, national courts generally accord great respect to decisions of international and national courts in other countries which have addressed questions of implementation of international law.

C. Legal and practical difficulties in obtaining evidence abroad

Perhaps the most frequent objections to the exercise of universal jurisdiction are the practical and legal obstacles to obtaining evidence in foreign jurisdictions.[120] For example, Henry Kissinger has expressed concern that the exercise of universal jurisdiction would "subject the accused to the criminal procedures of the magistrate's country, with a legal system that may be unfamiliar to the defendant and that would force the defendant to bring evidence and witnesses from long distances".[121] Such obstacles should not be overlooked, but they usually can be resolved (some of these issues are also addressed in Chapter Fourteen, Section V).

[120] *See, for example,* Bowett, *supra*, n. 93, 12 who stated that the problems of gathering evidence of war crimes in another jurisdiction would be greater than the difficulties in gathering such evidence in piracy cases:

> "[T]he warships of all nations have the right to apprehend pirates on the high seas, so the State asserting jurisdiction will commonly be the State which, because the arrest was effected by its own warship, has the requisite proof to sustain an indictment for piracy. In contrast, the requisite proof for war crimes will be likely to lie either with a belligerent Power or with the State on whose territory the crime was committed."

[121] Kissinger, *supra*, n. 94, 90.

The ***legal obstacles*** to gathering evidence fall into two groups: (1) absence or inadequacies of interstate agreements and (2) political obstruction.[122] First, there is no universal international treaty providing for mutual legal assistance among states for all crimes under international law. There are a number of instruments and arrangements, including: an international model instrument, a recently adopted convention on transnational crimes, a limited number of regional treaties or arrangements, bilateral treaties between some states and some interstate police cooperation.[123] Second, in the limited number of cases where treaties or arrangements exist, they often have restricted scope - such as omitting any measures to compel witnesses to testify.[124] Third, they usually have a list of grounds permitting the requested state in its sole discretion to decline - based on its own assessment of its national interest - to honour the request.[125] Moreover, in many cases, decisions to decline cooperation are taken by executive officials exercising their discretion, not by courts enforcing law. Since states have declared on various occasions, for example in General Assembly resolutions and in the Rome Statute, that they are obliged to cooperate with each other to punish these crimes, it follows that they should either amend existing legal and practical arrangements for mutual legal assistance when states are investigating and prosecuting crimes under international law and crimes of international concern or they should adopt new arrangements to permit more effective cooperation.[126]

Other obstacles to gathering evidence abroad in criminal cases are ***practical***, rather than legal. It is often more expensive to gather evidence abroad. If the requesting state must rely on local authorities in the requested state to conduct interviews with prospective witnesses, to provide witness protection, to issue search and arrest warrants and take other investigative steps, it will often be less speedy and efficient than if the authorities conducting the investigation in the requesting state were to do so. Indeed, in some cases, it may be impossible, particularly if the authorities in the requested state are unsympathetic to the investigation or even complicit in the crimes.[127] It will be essential, of

[122] Some observers have argued that heavy reliance on oral testimony and strict rules of evidence in common law jurisdictions are another legal obstacle. *See, for example,* Kamminga, *Final ILA Report* 17 (arguing that "reducing reliance on oral testimony at trial" is one measure which "may be usefully considered"). Others, however, would consider that such requirements are effective, or even necessary, means to ensure a fair trial which is able to determine guilt or innocence accurately.

[123] *See, for example,* United Nations Model Treaty on Mutual Assistance in Criminal Matters (UN Model Treaty), *adopted* Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August-7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1, I.A.11, *welcomed* U.N. G.A. Res. 45/117, 14 December 1990, 45 U.N. G.A.O.R. Supp. (No. 49A) 215, U.N. Doc. A/RES/45/117.

[124] UN Model Treaty, Art. 13 (requiring consent of person in custody to transfer to foreign state to testify).

[125] *Ibid.*, Art. 4. For a discussion of international instruments concerning mutual legal assistance and the legal obstacles to such assistance, see Amnesty International, *The international criminal court: Making the right choices - Part III: Ensuring effective state cooperation* (AI Index: IOR 40/13/97), Section II.

[126] Amnesty International plans to publish a paper in the near future on the need to strengthen the international system of mutual legal assistance with respect to crimes under international law.

[127] For example, as stated in the initial report of the Netherlands to the Committee against Torture, one of the arguments raised in parliamentary papers against universal jurisdiction over torture was that

> "many instances of torture occur in secrecy, that is to say, in the absence of incidental witnesses, and it may therefore be extremely difficult for a third State which has detained a suspected torturer and has acquired the competence to try him, to obtain the necessary evidence to ensure a successful prosecution, particularly in cases where no co-operation may be expected from the State where the criminal offence took place in providing such evidence under the terms of a mutual legal assistance agreement."

course, for courts to be vigilant to ensure that the accused has effective access to evidence. However, the experience of national prosecutors in ***Austria, Belgium, Canada, Denmark, France, Germany, Israel, Italy, Senegal, Spain, Switzerland*** and the ***United Kingdom*** when exercising universal or other forms of extraterritorial jurisdiction, as well as in investigating other serious crimes, particularly transnational crimes, and the extensive practice of the Yugoslavia and Rwanda Tribunals demonstrates that it is possible to overcome many of these problems with sufficient political will in proceedings that satisfy international standards for fair trial (for a discussion of how some of these obstacles can be overcome, see Chapter Fourteen, Section V).

Not only are all of these arguments against universal jurisdiction without merit, but it is also now accepted - as demonstrated below in this memorandum - that international law permits, and, in many cases, requires, states to exercise universal jurisdiction over war crimes, crimes against humanity, genocide, torture and other crimes under international law or to extradite suspects to states able and willing to do so or to surrender them to an international criminal court.

U.N. Doc. CAT/C/9/Add.1 (1990).