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

WAR CRIMES: STATE PRACTICE AT THE NATIONAL LEVEL

I. Types of legislation

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

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

A. Express authorization to exercise universal jurisdiction over war crimes

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

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

Some of the older legislation appears to be limited to ***war crimes committed during***

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

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

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

C. Universal jurisdiction over crimes defined or listed in treaties

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

A number of states with universal jurisdiction legislation in this third model have signed, but not yet ratified, certain international humanitarian law treaties. It is important to discuss their legislation for at least two reasons. First, a state which has signed but not yet ratified a treaty is ***obliged under international law not to take any steps which would tend to defeat the object and purpose of the treaty pending a decision on ratification***.[1] A state which harboured a person suspected of crimes

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

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

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

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

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

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

E. Constitutions or legislation directly incorporating international law

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

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

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

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

Automatic incorporation on ratification. Some states provide in their national constitutions or legislation that ***international law, either conventional or customary, is part of national law***, but do not expressly refer to jurisdiction. In some of these states following this fifth model, such as ***Algeria, Chile, Egypt, Greece,*** such provisions have been interpreted, by the government - usually in reports to the Committee against Torture - or by courts or commentators, to permit courts to apply international law directly, including customary law rules or treaty provisions concerning both the definitions of crimes and the exercise of universal jurisdiction, and to investigate and prosecute persons accused of crimes under international law, such as war crimes. In other states with automatic incorporation provisions in their constitutions, reports or statements by the government, such as ***Afghanistan,*** are somewhat ambiguous and, in the absence of further state practice or other evidence, it is not entirely clear whether national courts can exercise universal jurisdiction.[3]

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

II. Country by country review (Algeria to Hungary)

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

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

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

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

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

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

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

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

As Algeria has ratified the Geneva Conventions, under this principle its courts may exercise universal jurisdiction over conduct amounting to grave breaches of the Geneva Conventions. As of 1

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

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

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

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

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

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

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

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

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

The Argentinean Law on Extradition of Foreigners of 1885 (Law 1612) provided in Article 5 for a general obligation *aut dedere aut judicare* for ordinary crimes committed by foreigners outside the territory of Argentina.[12] In 1997 a new Extradition Law was passed which no longer includes a general obligation *aut dedere aut judicare.* However, that does not necessarily mean that there is no such obligation in the Argentinean legal system.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[15] Alejandro E. Alvarez, Eduardo E. Bertoni & Miguel Boo, *Argentine*, 24, an unpublished paper for the *Etude comparée des criteres de competence juridicionelle en matière de crimes internationaux,* Paris, 2 to 3 July 2001.
Sagués, Néstor Pedro, *Los delitos "contra el derecho de gentes" en la Constitución Argentina*, in ED volume 131.

interpretation.[16]

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

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

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

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

The Supreme Court decision in the *Peyrú* case was cited approvingly by Judge Gustavo Bossert, in his November 1995 judgment in the *Priebke* case, when he approved the extradition from Argentina to Italy of a former German SS officer on charges of war crimes committed in Italy during the Second World War. Judge Bossert also stated that the Congress could not reduce the scope of this constitutional mandate because the authorization for universal jurisdiction found its basis in the Constitution, which authorized the Legislature only to determine the place where the trial would take place.[19] The Supreme Court found that the Legislature had done this in a law enacted in 1863 establishing a general norm of organization of the jurisdiction of Federal courts. Regarding this finding

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

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

[19] *P. 457. I. R.O., Priebke, Erich s/ solicitud de extradición - causa nº 16.063/94, Buenos Aires, 2 de noviembre de 1995*, para. 50. This court said:

> "That support for this view is to be found in the fact that, when the Constituent Assembly decided that the Argentinian Republic should have international criminal jurisdiction over *iuris gentium* crimes even when committed outside national boundaries (see p.541.XXIV, 'Peyrú, Diego Alberto - extradition request', 6th 'considering= of the opinion of judges Moliné J O=Connor, Belluscio, Petracchi, Levene, López, Bossert and Boggiano, delivered on 23 February 1995), it only gave the lawmaker the ability to rule on 'where the trial should take place' in those particular circumstances 'by enacting a special law' (Article 18 of the Constitution).

The original Spanish text reads:

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

by the Supreme Court, Judge Bossert stated in the *Priebke* case:

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

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

"In accordance with the above, Art. 118 of the National Constitution should be understood as incorporating the modern principles of international law, at least those relating to criminal matters (given that this norm refers to "crimes" under international law). This interpretation is not only in closest conformity with the literal text of the Constitution (which, rather than establishing a catalogue of crimes and principles under international law,

[20] *Priebke* case, *supra*, n. 19, para. 51. The original Spanish text reads:
"51) Que a diferencia de otros sistemas constitucionales como el de los Estados Unidos de América en el que el constituyente le atribuyó al Congreso la facultad de "definir y castigar" las "ofensas contra la ley de las naciones" (artículo I, Sección 8), su par argentino al no conceder similar prerrogativa al Congreso Nacional para esa formulación receptó directamente los postulados del derecho internacional sobre el tema en las condiciones de su vigencia y, por tal motivo, resulta obligatoria la aplicación del derecho de gentes en la jurisdiccion nacional de conformidad con lo dispuesto por el artículo 21 de la ley 48 ya citado."
P. 457. I. R.O., Priebke, Erich s/ solicitud de extradición - causa nº 16.063/94, Buenos Aires, 2 de noviembre de 1995, para. 51. (citing Art. 21 of Law 48 of 1863 (Jurisdiction and competence of the national courts)).

Art. 21 of Law 48 of1863 (Jurisdiction and competence of national courts) provides:
"National courts and judges shall, in the exercise of their functions, apply the Constitution as the supreme law of the Nation, laws approved or to be approved by Congress, treaties agreed with foreign nations, the particular laws of the Provinces, general laws in force prior to the founding of the Nation and the principles of international law, as required respectively by the cases subject to their jurisdiction, in the given order of priority." (English translation by Amnesty International)
Spanish text reads:
"Los tribunales y jueces nacionales en el ejercicio de sus funciones procederán aplicando la Constitución como ley suprema de la Nación, las leyes que haya sancionado o sancione el Congreso, los tratados con naciones extranjeras, las leyes particulares de las Provincias, las leyes generales que han regido anteriormente a la Nación y los principios del derecho de gentes, según lo exijan respectivamente los casos que se sujeten a su conocimiento, en el orden de prelación que va establecido."
Ley 48, 1863, art. 21 (Jurisdicción y competencia de los tribunales nacionales).

includes language accommodating the evolution of the law) as well as with the idea expressed by Alberdi; it is all the more compelling because it enables the Argentinian Republic and its judicial system to comply with developments in international criminal law to which our country has contributed, as was seen in Chapter III. Moreover, this contribution can be traced back to the men who founded the institutional structure of our Nation, whose commitment to the prosecution of crimes under international law is reflected in Article 118 (formerly 102) of the National Constitution.

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

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

[21] The original Spanish text reads:

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

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

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

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

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

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

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

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

" *Corresponde al Congreso:*

(...)

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

La Declaración Americana de los Derechos y Deberes del Hombre; la Declaración Universal de Derechos Humanos; la Convención Americana sobre Derechos Humanos; el Pacto Internacional de Derechos Económicos, Sociales y Culturales; el Pacto Internacional de Derechos Civiles y Políticos y su Protocolo Facultativo; la Convención sobre la Prevención y la Sanción del Delito de Genocidio; la Convención Internacional sobre la Eliminación de todas las Formas de Discriminación Racial; la Convención sobre la Eliminación de todas las Formas de Discriminación contra la Mujer; la Convención contra la Tortura y otros Tratos o Penas Crueles, Inhumanos o Degradantes; la Convención sobre los Derechos del Niño; en las condiciones de su vigencia, tienen jerarquía constitucional, no derogan artículo alguno de la primera parte de esta Constitución y deben entenderse complementarios de los derechos y garantías por ella reconocidos. Sólo podrán ser denunciados, en su caso, por el Poder Ejecutivo Nacional, previa aprobación de las dos terceras partes de la totalidad de los miembros de cada Cámara.

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

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

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

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

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

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

Although some have contended that the Extradition Law of 1885 had been repealed in 1888 when the Code of Penal Procedure (*Código de Procedimiento en Materia Penal*) entered into force through Law 2372[25] the government itself has rejected this interpretation . It declared in 1989 that, "[t]hus, where extradition is inoperative, the obligation to prosecute exists"and confirmed that Article 5 of the Extradition Law of 1885 was still in force.[26]

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

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

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

"No se concederá la extradición:

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

. . . .

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

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

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

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

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

"Si el requerido para la realización de un proceso fuese nacional argentino, podrá optar por ser juzgado por los tribunales argentinos, a no ser que fuere aplicable al caso de un tratado que obligue a la extradición de nacionales.

La calidad de nacional argentino deberá haber existido al momento de la comisión del hecho, y deberá subsistir al momento de la opción.

Si el nacional ejerciere esta opción, la extradición será denegada. El nacional será entonces juzgado en el país, según la ley penal argentina, siempre que el Estado requirente preste conformidad para ello, renunciando a su jurisdicción, y remita todos los antecedentes y pruebas que permitan el juzgamiento.

Si fuere aplicable al caso un tratado que faculta la extradición de nacionales, el Poder Ejecutivo, en la oportunidad prevista en el artículo 36, resolverá si se hace o no lugar a la opción."

Artículo 12 Ley 24767.

As of 1989, Argentina appears to have implemented the *aut dedere aut judicare* obligations on a number of occasions, although it is not entirely clear whether it was based on the extradition law, the treaties directly under the Constitution or on the basis of implementing legislation.[28] In 1997, the government stated that "Argentina applies the principle *aut dedere aut punire,* as laid down in the international agreements that are binding on it. In cases where no agreement exists, the principle applies to nationals, and also in respect of acts having consequences within its territory."[29]
Later on the government stated that

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

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

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

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

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

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

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

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

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

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

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[32] In the Priebke case judges Julio S. Nazareno and Eduardo Moline O'Connor stated the following when discussing whether Priebke could be extradited for crimes that were not implemented in Argentinean legislation in a traditional manner:

A41) (...) That is why their [modern humanitarian treaties] clauses are presumed to be applicable and have therefore been deemed by legal doctrine to be, on the whole, clear and complete enough to be directly enforcable by States parties and individuals with no need for direct implementation (...)

42) That the fact that the description of the offence given in the aforesaid international instruments does not determine the nature and length of the penalty is not an impediment to reaching this conclusion because, under the current state of international relations, the fact that the documents themselves do not do so is in keeping with the mode of implementation recognized in that sphere for criminal offences of that kind, .@

Spanish original:

"41) (...) De allí que sus [los tratados humanitarios modernos] cláusulas gozan de la presunción de operatividad y así han sido consideradas por la doctrina por ser, en su mayoría claras y completas para su directa aplicación por los Estados partes e individuos sin necesidad de implementación directa (...)

42) Que no obsta a esta conclusión que la descripción típica contenida en los mentados instrumentosnternacionales no establezca la naturaleza de la pena ni su monto pues su falta de determinación en los propios documentos responde a la modalidad de implementación que infracciones de contenido penal de esa naturaleza reconocen en ese ámbito, conforme al estado actual de las relaciones internacionales."

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

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

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

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

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

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

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

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

In 1987, a committee of inquiry found that persons who were suspected of serious war crimes during the Second World War were residing in Australia.[39] When, as a result of public pressure,

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

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

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

[38] *Ibid.*, § 3.

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

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

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

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

Section 7 (1) and (3) defines when a serious crime is a war crime extremely restrictively by requiring proof of an intent to persecute or a genocidal intent, neither of which are elements of war crimes.[41] Section 11 provides that only an Australian citizen or resident can be charged under the 1988 Act, but the person need not have been a citizen or resident of Australia at the time of the crime. Therefore, the 1988 Act restricts the scope of universal jurisdiction its courts may exercise to persons present in Australia for some period of time who were suspected of a limited class of war crimes committed in Europe during the Second World War against victims who were "British or subjects or citizens of any power allied or associated with his Majesty in any war". The 1988 Act is one of the rare instances when a state has restricted the scope of universal jurisdiction legislation. Jurisdiction under the 1988 Act does not include non-resident suspects who are only temporarily in Australia on a tourist or transit visa.

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

[41] Section7 of the 1988 Act states:
"(1) A serious crime is a war crime if it was committed:
(a) in the course of hostilities in a war;
(b) in the course of an occupation;
(c) in pursuing a policy associated with the conduct of a war or with an occupation; or
(d) on behalf of, or in the interests of, a power conducting a war or engaged in an occupation.
. . . .
(3) A serious crime is a war crime if it was:
(a) committed:
(i) in the course of political, racial, or religious persecution; or
(ii) with intent to destroy in whole or in part a national, ethnic, racial or religious group, as such; and
(b) committed in the territory of a country when the country was involved in a war or when the territory of the country was subject to an occupation."

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

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

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

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

> "33. . . . Australia's international personality would be incomplete if it were unable to exercise a jurisdiction to try and to punish offenders against the law of nations whose crimes are such that their subjection to universal jurisdiction is conducive to international peace and order. As the material drawn from international agreements and UNGA resolutions acknowledges, international law recognizes a State to have universal jurisdiction to try suspected war criminals whether or not that State is under an obligation to do so and whether or not there is any international concern that the State should do so.
> . . . .
> 37. . . . War crimes, being violations of the laws and customs of war, thus consist in acts which transgress the limitations imposed by those laws and customs. Such transgressions are universally condemned and are internationally recognized as crimes which can be tried according to international law by the courts of any nation into whose hands the offender falls."[45]

> Similarly, in the same case Judge Toohey stated:

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

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

> "(1) A person who, in Australia or elsewhere, commits, or aids, abets or procures the commission by another person of, a grave breach of any of the Conventions or of Protocol I is guilty of an indictable offence.
> (2) [list of grave breaches omitted]

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

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

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

(3) This section applies to persons regardless of their nationality or citizenship."[47]

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

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

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

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

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

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

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

[49] International Criminal Court (Consequential Amendments) Bill 2001, A Bill for an Act to amend the *Criminal Code Act 1995* and certain other Acts in consequence of the enactment of the *International Criminal Court Act 2001*, and for other purposes, Exposure Draft, L:\Treaties folder\Treaties reviews\International Criminal Court\Legislation\ex draft CA Bill 220801.doc 30/8/2001 3:29 PM, Schedule 1- Amendment of the Criminal Code Act 1995, § 268.123 (1) (Geographical jurisdiction) (*obtainable from* http://www.aph.gov.au/house/committee/jsct). That provision reads: "Section 15.4 (extended geographical jurisdiction - Category D) applies to genocide, crimes against humanity and war crimes." The current wording of Section 15.4 describes the extended geographical jurisdiction of Category D as follows:

"If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:
(a) whether or not the conduct constituting the alleged offence occurs in Australia; and
(b) whether or not a result of the conduct constituting the alleged offence occurs in Australia."

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

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

[51] English translation by Amnesty International.

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

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

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

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

> "(1) Citizens of the Azerbaijan Republic and stateless persons who permanently reside on the territory of Azerbaijan shall be held criminally responsible under the present Code for the act (action or inaction) committed outside the territory of the Azerbaijan Republic, if this act is considered as a crime by the legislation of the Azerbaijan Republic, as well as by the legislation of the foreign state where the crime was committed and if they have not been tried in a foreign State for this crime.
>
> (2) Foreigners and stateless persons might be held criminally responsible under the present

[52] Article 65.1 provides:
"Acts other than those mentioned in §§ 63 and 64 that have been committed abroad are subject, insofar as the acts are also liable to punishment under the law of the scene of the crime, to Austrian criminal law:
. . . .
2. If at the time of the act the perpetrator was a foreigner, trespassed within the country and for a reason other than the nature or feature of his act is not extradited abroad.
(2) The punishment is to be determined so that the perpetrator is not disadvantaged as regards the overall effect compared to the law of the scene of the crime.
(3) If there is no penal authority at the scene of the crime, then it suffices if the act is punishable under Austrian law.
(4) The liability to punishment lapses however:
1. If the liability to punishment of the act is cancelled under the law of the scene of the crime;
2. If the perpetrator has been finally acquitted or otherwise released from prosecution by a court of the state in which the act was committed;
3. If the perpetrator has been finally convicted by a foreign court and the punishment has been totally enforced or, if it has not been enforced, has been waived or its enforceability has been barred by limitation under the foreign law."

[53] Constitution of Azerbaijan, Art. 151.

Code in case of commitment of a crime outside the territory of the Azerbaijan Republic against the citizens of the Azerbaijan Republic, against the interests (advantages) of the Azerbaijan Republic, as well as in cases covered by international treaties to which the Azerbaijan Republic is a party and if they have not been tried in a foreign State for this crime.

(3) Foreigners and stateless persons who committed crimes against peace and humanity, war crimes, terrorism, driving away an aircraft, taking hostages, tortures, marine piracy, illegal circulation of drugs and psychotropous substances, counterfeiting or producing or selling false securities, directing attacks against the persons or international organizations who enjoy the international protection, crimes related to radioactive materials, other crimes punishment for which results from the international treaties to which the Azerbaijan Republic is a party, not depending on the place of commitment of the crime, shall be held criminally responsible and punished under the present Code."[54]

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

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

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

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

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

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

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

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

. . . .

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

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

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

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

Article 3 of the Geneva Conventions Act of 1980 states:

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

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

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

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

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

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

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

Second, Article 6 (4) states that the Criminal Code imposes criminal responsibility on a person for certain war crimes listed in Article 6 (3) who has not been tried for those crimes in the territorial state and who is prosecuted in Belarus.[62] Article 6 (3) provides that the present Code applies, independently of criminal legislation in force in the territory where the crime was committed, to the following crimes: production, stockpiling or proliferation of prohibited means of warfare (Art. 129), employment of weapons of mass destruction (Art. 134), violation of the laws and customs of war (Art. 135), criminal violation of the norms of international humanitarian law in armed conflict (Art. 136), failure to act and issuing a criminal order during armed conflict (Art. 137) and other crimes committed outside the territory of Belarus which can be prosecuted by virtue of an international treaty binding on Belarus.[63] The wording appears to make all persons suspected of these crimes subject to the jurisdiction of national courts in the circumstances identified in Article 6 (4).

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

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

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

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

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

[64] The 1993 law was amended on 10 February 1999 to change its name to *Loi relative à la répression des violations graves du droit international humanitaire* and to expand its scope to include genocide and crimes against humanity. The law renumbered the 1993 section dealing with war crimes. Section 3 of Article 1 of the amended version concerning war crimes provides:

"The grave breaches listed below which cause injury or damage, by act or omission, to persons or objects protected by the Conventions signed at Geneva on 12 August 1949 and approved by the Act of 3 September 1952, and by Protocols I and II additional to those Conventions adopted at Geneva on 8 June 1977 and approved by the Act of 16 April 1986, shall - without prejudice to the criminal provisions applicable to breaches committed out of negligence - constitute crimes under international law and be punishable in accordance with the provisions of the present Act:

1° willful killing;

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

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

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

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

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

7° hostage-taking;

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

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

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

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

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

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

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

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

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

17° the transfer by the occupying power of parts of its own civilian population into the territory it occupies, in the case of an international armed

included in Section 3 includes many of the war crimes listed in Article 8 of the Rome Statute, in a number of respects the definitions provide greater protection to civilians and other protected persons.[65] Somewhat confusingly, all three crimes are identified as "breaches", rather than crimes.

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conflict, or by the occupying authority in the case of a non-international armed conflict;

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

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

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

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

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

65 The original French text of Section 3 reads:

"§ 3. Constituent des crimes de droit international et sont réprimées conformément aux dispositions de la présente loi, les infractions graves énumérées ci-après, portant atteinte, par action ou omission, aux personnes et aux biens protégés par les Conventions signées à Genève le 12 août 1949 et approuvées par la loi du 3 septembre 1952 et par les Protocoles I et II additionnels à ces Conventions, adoptés à Genève le 8 juin 1977 et approuvés par la loi du 16 avril 1986, sans préjudice des dispositions pénales applicables aux autres infractions aux conventions visées par la présente loi et sans préjudice des dispositions pénales applicables aux infractions commises par négligence:

1° l'homicide intentionnel;

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

expériences biologiques;

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

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

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

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

7° la prise d'otages;

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

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

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

ces dons soient volontaires, consentis et destinés à des fins thérapeutiques;

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

12° le fait de lancer une attaque sans discrimination atteignant la population civile ou des biens de caractère civil, en sachant que cette attaque causera des pertes en vies humaines. des blessures aux personnes civiles ou des dommages aux biens de caractère civil, qui seraient excessifs par rapport à l'avantage militaire concret et direct attendu, sans préjudice de la criminalité de l'attaque don't les effets dommageables, même proportionnés à l'avantage militaire attendu, seraient incompatibles avec les principes du droit des gens, tels qu'ils résultent des usages établis, des principes de l'humanité et des exigences de la conscience publique;

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

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

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

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

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

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

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

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

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

Article 2 provides for punishments, up to a maximum of life imprisonment. Article 3 provides that persons who manufacture, hold or transport instruments, devices or objects used to commit or facilitate the commission of a grave breach identified in Article 1 shall be punished as if they had committed the grave breach. Article 4 defines ancillary crimes of ordering, proposing, inciting, participating, failing to prevent or end and attempting grave breaches, although it does not expressly provide for command and superior responsibility for such breaches. Section 1 of Article 5 excludes political, military or national interest or necessity as a justification of a grave breach. Section 2 of Article 5 provides that superior orders are not a defence to genocide, a crime against humanity as defined in the act or a grave breach of the Geneva Conventions or Protocol, but it fails to exclude superior orders as a defence to violations of common Article 3 or of Protocol II of other international humanitarian law. Section 3 of Article 5 expressly states that "[t]he immunity attributed to the official capacity of a person does not prevent the application of the present Act."[66] However, certain principles of criminal responsibility applicable to ordinary crimes are applicable to crimes under the 1999 law.[67] Article 8 provides that statutes of limitation do not apply to breaches of Article 1 of the Act.[68]

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

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

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

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

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

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

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

customary law.[71]

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

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

Ndindiliyimana arrest. In January 1996, another Rwandan, Augustin Ndindiliyimana, was arrested at the request of the Rwanda Tribunal and transferred to the Tribunal on 22 April 2000.

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

Trial and conviction of Higanirio, Ntezimana, Mukangango and Kizito. Vincent Ntezimana was indicted by the 40th Chamber of the Tribunal of First Instance in Brussels on 22 July1996 for grave breaches of the Geneva Conventions and violations of Protocols I and II in the Prefecture of Butare in Rwanda between 6 April and 27 May 1994.[72] In June 2000, he, Alphonse Higaniro Sister Gertrude Mukangango and Sister Julienne Kizito were committed for trial before the Brussels Court of Azzizes (*la Cour d'assises de Bruxelles-Capitale*) pursuant to the 1993 law on charges of war crimes during international armed conflict and other crimes under international law. All four were permitted to remain at liberty pending trial, which started on 16 April 2001. Alphonse Higaniro was convicted of all charges and sentenced to 20 years in prison; Sister Gertrude Mukangango was sentenced to 15 years in prison; Sister Julienne Kizito was convicted of all charges and sentenced to 12 years in prison; and Vincent Ntezimana was convicted on some of the charges, but acquitted on others and sentenced to 12 years in prison.[73]

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

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

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

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

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

parties to address the questions of jurisdiction, admissibility and the merits.[74] Oral arguments on the merits are scheduled for 15 October 2001.[75]

[74] The briefing schedule, as subsequently modified, required the DRC to file its memorial on X 2001 and Belgium its counter-memorial on 17 September 20001.

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

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

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

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

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

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

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

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

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

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

The United Kingdom's Geneva Conventions Act 1957 applied to British Honduras under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below), at least before 1 January 1970. Belize became independent on 21 September 1981. Article 134-1 of the Constitution of Belize provides that the existing laws in force on the day of independence were to continue in effect and, as far as is known, the 1959 Order in Council has not been repealed either before or after independence.[82]

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

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

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

instead, Belgium would propose that other states should amend their legislation. La rentré politique étonnante de Guy Verhofstadt, 27 August 2001.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

There are several conditions which must be satisfied before a court may exercise jurisdiction under Article 123 (2). A prosecution may not be instituted if the suspect has served a sentence abroad for the crime, if the suspect has been released by a final and binding decision of a foreign court or if the territorial state requires the prosecution to be instituted by a personal complaint and no complaint has been filed.[94] Although the general rule is that the crime must also be punishable under the law of the territorial state, it may be prosecuted pursuant to Article 124 (4) if the act at the time it was committed was considered a criminal offence under general legal principles accepted by the international community at the time it was committed and the Republic Public Prosecutor then authorizes a prosecution.[95] War crimes are not subject to statutes of limitations.[96] The wording of the articles concerning amnesties and pardons suggests that the immunity from prosecution where a suspect has benefited from an amnesty or received a pardon applies only to amnesties or pardons issued by the Republika Srpska, not to foreign amnesties or pardons.[97]

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

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

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

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

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

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

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

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

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

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

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

Article 7 (Part II) (a) of the Brazilian Criminal Code provides that national courts have custodial universal jurisdiction to try crimes which were committed abroad and which Brazil is obliged to repress under a treaty. The suspect must be in Brazil, the act must also be punishable in the territorial state (double criminality), extradition for the crime must be authorized under national law and the suspect must not have been acquitted, have completed a sentence or have been pardoned. It appears that this provision may include treaties which simply require prosecution, without an *aut dedere aut judicare* obligation. Article 7 (Part II) (a) provides:

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

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

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

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

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

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

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

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

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

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

"Aplica-se a lei penal militar, sem prejuízo de convenções, tratados e regras de direito internacional, ao crime cometido, no todo ou em parte, no território nacional, our fora dele, ainda que, neste caso, o agente esteja sendo processado ou tenha sido julgado pela justiça estrangeira."
Código Militar Penal, Decreto-lei n. 1.001, de 21 de outubro de 1969, publicado no Diário Oficial da União, de 21-12-1969, Art. 7º.

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

Under Article 10 of the Military Penal Code, during armed conflict, a number of bodies of law are considered military crimes: crimes specified in the Code as applying during wartime, military crimes during peacetime, crimes in foreign occupied territory and crimes committed in zones of military operation.[103] Peacetime crimes within the scope of Article 10 which could include war crimes if committed during armed conflict include: homicide, genocide, infliction of bodily harm and sexual offences.[104] Wartime crimes which could amount to war crimes include: homicide.[105] The definition of wartime (*Tempo de guerra*) speaks of declarations of war or recognition of a state of war, traditionally concepts associated with international armed conflict, but it is not known if this term would receive an interpretation in keeping with the contemporary law of armed conflict, which includes non-international armed conflict.

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

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

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[103] Military Penal Code, Art. 10. It provides:

"In times of war, military crimes are considered to be:

I – those especially prescribed under this Code for times of war;

II – military crimes prescribed for times of peace;

III – crimes prescribed under this Code, although they may also exist with the same definition under a common or special penal code, whosoever the perpetrator may be, when practised:

a) in national or foreign militarily occupied territory;

b)in any place, if they jeopardise or could jeopardise preparation, efficiency or military operations, or in any other way attempt against the security of the Country outside its boundaries or if they could expose it to danger;

IV – crimes defined under a common or special penal code, although not prescribed under this Code, when practised in a zone of effective military operations or in militarily occupied foreign territory."

The original text in Portuguese reads:

"Consideram-se crimes miitares, em tempo de guerra:

I - os especialmente previstos neste Código para o tempo de guerra;

II - os crimes militares previstos para o tempo de paz;

III - os crimes previstos neste Código, embora também o sejam com igual definição na lei penal comum ou especial, quando praticados, qualquer que seja o agente:

a) em território nacional, ou estrangeiro, militarmente ocupado;

b) em qual lugar, se comprometem ou podem comprometer a preparação, a eficiência ou as operações militares ou, de qualquer outra forma, atentam contra a segurança externa do País ou podem expô-la a perigo;

IV - os crimes definidos na lei penal comum ou especial, embora não previstos neste Código, quando praticados em zona de efetivas operações militares ou em território estarangeiro, miitarmente ocupado."

Cádigo Militar Penal, Art. 10º.

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

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

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

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

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

Bulgaria is a party to Hague Convention IV, the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but had not yet ratified it as of 1 September 2001. Bulgaria is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and the Penal Code excludes statutes of limitations for war crimes.[109] The Penal Code provides for the recognition of official immunity, but only insofar as the immunity is consistent with international law.[110] The rule of *ne bis in idem* does not preclude a trial in Bulgaria of someone previously tried abroad, although the sentence of the foreign court shall be taken into account.[111] Although Article 79 (1) (3) of the Penal Code prohibits prosecutions where an amnesty exists, it appears to be intended to apply only to amnesties granted by Bulgaria.[112] Command and superior responsibility is recognized to a limited extent.[113]

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

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

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

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

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

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

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

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

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

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

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

If the crime committed abroad carries a penalty of less than five years' imprisonment, the request for prosecution must have been preceded by a complaint by the victim or an official denunciation by the authorities of the territorial state; a prosecution is barred if the suspect has been tried and there has been a final judgment or, after a conviction, has received a pardon or amnesty; and a prosecution may not proceed unless the accused is in Burundi.[115] Thus, it may be possible to charge a person suspected of a crime abroad who is outside the country, but no further proceedings to prosecute the person may occur until the person is found in Burundi.

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

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

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

Décret-loi nº 1/6 du 4 avril 1981 portant réforme du code pénal, art. 4.

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

> *"Quand l'infraction est commise à l'étranger contre un particulier et que la peine maximum prévue par la loi du Burundi est de cinq ans de servitude pénale au moin, cette requête doit être prédée d'une plainte de la partie offensée ou d'une dénonciation officielle de l'autorité du pays où l'infraction a été commise. Toutefois, pour les infractions autres que celles attentatoires à la sûreté de l'Etat, celles relative à la contrefaçon des sceaux de l'Etat et des monnaies nationales, aucune poursuite n'a lieu si l'inculpé justifie qu'il a été jugé définitivement à l'étranger et, en cas de condamnation, qu'il a subi, prescrit sa peine, obtenu sa grâce ou son amnistie. Sauf pour les infractions attentatoires à la sûreté de l'Etat et de contrefaçon des sceaux de l'Etat ou de falsification de monnaies nationales, la poursuite n'a lieu que si l'inclulpé est au Burundi."*

Ibid., art. 5.

[116] *Decret-loi Nº 1/.../...du.../.../1997 portant procédures de poursuites et de mise en jugement des personnes coupable de crimes de genocide ou de crimes contre l'humanité, art. 1.* That article reads:

> *"La présente loi a pour objet l'organisation des procédures de poursuites et de mise en jugement des*

personnes coupables d'actes commis à partir du 21 Octobre 1993, actes qualifés et sanctionnés par le Code Pénal et qui constituent:

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

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

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

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

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

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

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

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

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

[119] Penal Code, Sec. 10 (1) of the Republic of Cameroon (1 August 1975). The official French version states:

> *"La loi pénale de la République s'applique aux faits commis à l'étranger par un citoyen ou par un résident, à condition qu'ils soient punissables par la loi du lieu de leur commission et soient qualifiés crimes ou délits par les lois de la République".*

République Unie du Cameroun, Code Pénal, Art. 10 (1). According to the official commentary to Section 10, it will be up to the courts to determine as a question of fact whether a person is a resident, with the main criteria being "the foreigner's habitual presence in Cameroon, a stay with some degree of permanence and stability", and other useful indications being "[t]he practice of some permanent occupation, and the payment of income tax". It adds that "[n]either the tourist nor the passing traveller, even on business, count as resident".

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

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

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

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

The 1945 War Crimes Regulations (Canada) and the Act respecting War Crimes of 31st August, 1946. Immediately after the Second World War, Canadian military courts were able to exercise universal jurisdiction over war crimes, pursuant to the 1945 War Crimes Regulations (Canada).[121] Section 6 (1) of the War Crimes Regulations gave the convening officer the power to arrest a person when it was believed the suspect had "at any place committed a war crime". However, it appears that the only prosecutions by Canadian military courts were based on crimes committed against members of the Canadian armed forces.[122] New prosecutions in Commonwealth countries were then stopped on 31 August 1948 (see Chapter Two, Section III.B).

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

[121] War Crimes Regulations (Canada), promulgated by Order in Council, 30 August 1945. The 1945 Regulations were similar to the British Royal Warrant of 14 June 1945, Army Order 81/45 (for the text and scope, see the entry on the United Kingdom in this chapter). An authoritative commentary has stated that the 1945 Regulations were limited in scope than the British Royal Warrant since they did not provide for jurisdiction over crimes against humanity and aggression. United Nations War Crimes Commission, 4 *Law Reports of Trials of War Criminals* 126 (London: H.M.S.O. 1948). Regulation 3 stated: "The custody, trial and punishment of persons charged with or suspected of war crimes shall, on and after the date hereof, be governed by these Regulations." Regulation 2 (f) defined a war crime as "a violation of the laws or usages of war committed during any war in which Canada has been or may be engaged at any time after the ninth day of September, 1939". The 1945 Regulations were subsequently re-enacted by the Act respecting War Crimes of 31st August, 1946 (10 George VI Chap. 73). The Act was to continue into force until a day fixed by proclamation of the Governor in Council. It is not known if the Act is still in force.

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

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

After it was discovered in the early 1980s that many persons suspected of committing war crimes and crimes against humanity as members of Axis forces during the Second World War, the public outcry led the government in 1985 to establish a commission to investigate. The Commission of Inquiry on War Criminals (Deschênes Commission) compiled a list of 883 suspects and issued a comprehensive report which recommended enactment of legislation to permit prosecutions of such suspects.[126] Article 7 of the Canadian Criminal Code, enacted in response to the Commission's recommendations, provided for universal jurisdiction over war crimes and crimes against humanity committed outside Canada that if committed in Canada would have been an offence under Canadian law at the time of the act or omission (for cases under this legislation, see below).[127] In 1991, Section 3

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

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

[124] Section 3 (2) provides:

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

[125] Section 3 (4) provides:

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

[126] Deschênes Report, *supra, n.123*,827. Although the Commission expressed doubt whether customary or conventional international law authorized Canada to exercise universal jurisdiction over persons suspected of war crimes committed during the Second World War, it declared that Canada could do so "inasmuch as war crimes are violations of the general principles of law recognized by the community of nations, which art. 11 (g) of the *Canadian Charter of Rights and Freedoms* has enshrined in the Constitution of Canada." *Ibid.*, 132.

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

> "7. (3.71) Notwithstanding anything in this Act or any other Act, every person who, either before or after the coming into force of this subsection, commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at the time of the act or omission shall be deemed to commit that act or omission in Canada at that time if,
>
> (a) at the time of the act or omission,
>
> (i) that person is a Canadian citizen or is employed by Canada in a civilian or military capacity,
>
> (ii) that person is a citizen of, or is employed in a civilian or military capacity by, a state that is engaged in an armed conflict against Canada, or
>
> (iii) the victim of the act or omission is a Canadian citizen or a citizen of a state that is allied with Canada in an armed conflict; or
>
> (b) at the time of the act or omission, Canada could, in conformity with international law, exercise

(1) of the Geneva Conventions Act of 1965 was amended to provide for universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I and serious violations of Protocol II.[128]

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

[128] See footnote 125.

Canada has ratified the Rome Statute. In July 2000, it enacted the Crimes against Humanity and War Crimes Act to implement the Rome Statute, in part by expressly providing that a person present in Canada suspected of previously committing one or more of the crimes in Articles 6, 7 and 8 pursuant to Article 8 of the Act "may be prosecuted".[129] It is not entirely clear whether this provision limits the exercise of universal jurisdiction to custodial universal jurisdiction. The plain wording of the Act would suggest that the police or prosecutor could open an investigation with a view to requesting extradition to Canada before a prosecution was commenced pursuant to an indictment and some Canadian lawyers have suggested that this interpretation may well be correct. However, several of the government officials connected with the drafting of this provision have claimed that there would be no jurisdiction to open an investigation if a suspect was not present in Canada. It is likely that the correct interpretation of the phrase "may be prosecuted" will have to await judicial determination whether the police or prosecutor had jurisdiction to conduct such a preliminary investigation, but it remains to be seen whether the police or a prosecutor will attempt to do so. Another problem with the Act is that it authorizes a number of impermissible defences, including the defence of superior orders to war crimes under certain circumstances.[130] Section 48 of the Act provides that no person subject of requests for surrender by the International Criminal Court or the Yugoslav or Rwanda Tribunals "may claim immunity under common law or by statute from arrest or surrender", thus, leaving by implication the ability to claim any official immunity with respect to prosecution in Canada or to a request for extradition. It appears that statutes of limitation do not apply to crimes in the Act.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[137] Section 12 provides:

"(1) If a person is alleged to have committed an act or omission that is an offence under this Act, and the person has been tried and dealt with outside Canada in respect of the offence in such a manner that, had they been tried and dealt with in Canada, they would have been able to plead *autrefois acquit*, *autrefois convict*

or pardon, the person is deemed to have been so tried and dealt with in Canada."
(2) Despite subsection (1), a person may not plead *autrefois acquit*, *autrefois convict* or pardon in respect of an offence under any of sections 4 to 7 if the person was tried in a court of a foreign state or territory and the proceedings in that court
(a) were for the purpose of shielding the person from criminal responsibility; or
(b) were not otherwise conducted independently or impartially in accordance with the norms of due process recognized by international law, and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person to justice."

(2) Investigations and prosecutions. In the period from 1987 to 1992, four criminal prosecutions were instituted under Article 7 of the Criminal Code in Canadian civilian courts, based on universal jurisdiction over non-Canadians accused of war crimes against humanity during the Second World War, but none led to a conviction.[138] The acquittal in one of those cases, the *Finta* case, was upheld on appeal by the Court of Appeal and then in 1994 by the Supreme Court.[139] In part because of the restrictive interpretation of Section 7 by Canadian courts, the government announced a change in January 1995 in approach from emphasizing criminal prosecution to seeking revocation of citizenship, similar to the approach in the United States.[140] As part of this effort, 1,651 cases were reviewed, and although "all cases are evaluated for both criminal prosecution as well as revocation proceedings", none led to a prosecution.[141] In the autumn of 1997, the government conducted a review of its War Crimes Program and on 21 July 1998 announced that 14 cases from the Second World War would be initiated over the next three years and that additional cases would be developed.[142] Significantly, both the Department of Justice and the Royal Canadian Mounted Police received additional funding to investigate and prosecute cases of crimes committed abroad since the Second World War.[143]

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

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

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

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

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

[141] *Ibid.*, 4.

[142] *Ibid.*, 6.

[143] *Ibid.*

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

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

> "as a consequence, the State of Chile took upon itself in the aforementioned Conventions the obligation of guaranteeing the security of persons who might be participating in armed conflicts within its territory,

especially if they were detained, it being forbidden to take measures designed to cover up wrongs committed against specific persons or to ensure that their perpetrators remain unpunished, especially bearing in mind that international agreements should be fulfilled in good faith. As regards the Convention its aim is to guarantee the basic rights emanating from human nature, its application should be pre-emininent, since this Supreme Court has repeatedly recognized when passing sentence 'that, as is clearly shown in the official historical record of how the constitutional norm contained in article 5 of the Fundamental Charter was established, the internal sovereignty of the State of Chile is limited by the rights which emanate from human nature: values which stand above any law which the State authorities, including the Constituent Power itself, might pass, and which means that they cannot be disregarded.'. . .

In such circumstances, the failure to apply such provisions constitutes an error in law which must be corrected by means of this appeal, especially if it is borne in mind that, under the principles of international law, international treaties must be interpreted and applied by States in good faith; from which it there follows that, unless the respective Conventions have been denounced, domestic law should comply with them and that the legislator should ensure that any new laws comply with the said international instruments so that any transgression of their principles is avoided . . .".

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

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

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

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

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

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

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

Third, Article 3 of the Military Justice Code of 1925 provides military courts with universal jurisdiction over occupied territory and crimes committed by soldiers.[148] Apparently, the Military Justice Code, which includes a number of war crimes listed in the 1907 Hague Convention and Regulations as crimes under national law in Book III, Title III (Crimes against International Law), has not been amended in more than three-quarters of a century. Article 261 provides that certain war crimes are crimes under national law.

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

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

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

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

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

1. When they occur within a territory which militarily occupied by the Chilean armed forces;

2. When they concern offences committed by soldiers in the course of duty or when undertaking military assignments;

3. When they concern offences against the sovereignty of the State and its external or internal security." Military Justice Code, Art. 3.) (English translation by Amnesty International).

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

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

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

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

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

> "1. Unless provided for to the contrary by an international agreement enforceable in Macau or in accordance with the dictates of judicial cooperation, the criminal law of Macau shall also apply to acts committed outside Macau:
> . . . .
> c) By a resident of Macau against a non-resident, or by a non-resident against a resident, provided that:
> (1) the party is in Macau,
> (2) The act would also be punished by the legislation of the place where it was committed, except where no punitive power acts in that place, and
> (3) It constitutes a crime which permits the handing over of the agent and this cannot be granted,
> . . . .
> 2. The criminal law of Macau also applies to acts committed outside Macau provided that the obligation to try them results from an international agreement enforceable in Macau or in accordance with the dictates of judicial cooperation."[153]

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

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

> *"Salvo disposição em contrário constante de convenção internacional aplicável em Macau ou de acordo no domínio da cooperação judiciária, a lei penal de Macau é ainda aplicável a factos practicados fora de Macau:*
> . . . .
> *c) Por residente de Macau contra não-residente, ou por não-residente contra residente, sempre que:*
> *(1) O agente for encontrado em Macau;*
> *(2) Os factos forem também puníveis pela legislação do lugar em que tiverem sido praticados, salvo quando nesse lugar não se exercer poder punitivio; e*
> *(3) Constituírem crime que admita entrega do agente e esta não possa ser concedida . . .*
> . . . .
> *2. A lei penal de Macau é ainda aplicável a factos praticados fora de Macau sempre que a obrigação de os julgar resulte de convenção internacional aplicável em Macau ou de acordo no domínio da cooperação*

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

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

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

"The Colombian Penal Code shall apply to:
. . . .
6. Any foreigner who has committed an offence outside Colombia against a foreigner, as long as the following conditions are met:
(a) That he is present on Colombian territory;
(b) That the crime is punishable in Colombia by a minimum prison sentence of not less than three years;
(c) That the crime is not a political offence, and

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

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

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

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

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

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

[154] *"La ley penal colombiana se aplicará: . . .*

6) Al extranjero que haya cometido en el exterior un delito en perjuicio de extranjero, siempre que se reúnan estas condiciones:

a) Que se halle en territorio colombiano;

b) Que el delito tenga señalada en Colombia pena privativa de la libertad cuyo mínimo no sea inferior a tres años;

c) Que no se trate de delito político, y

d) Que solicitada la extradición no hubiere sido concedida por el gobierno colombiano. Cuando la extradición no fuere aceptada no habrá lugar a proceso penal.

En el caso a que se refiere el presente numeral no se prodecerá sino mediante querella o petición del Procurador General de la Nación y siempre que no hubiere sido juzgado en el exterior." Law 599 of 2000 issuing a new Penal Code, promulgated on 24 July 2000, effective July 2001. *Diario Oficial, Nº 44097.*
The wording of the former Penal Code *Código Penal (Decreto-Ley 100 de 1980) Art. 15 (6)* was the same except for a minor change (while the former Article used the term *numeral* in the last paragraph the new one uses *ordinal*) . (English translation by Amnesty International).

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

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

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

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

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

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

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

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

[158] *Ley 599 (2000) Libro Segundo (Parte Especial). Titulo II. DELITOS CONTRA PERSONAS Y BIENES PROTEGIDOS POR EL DERECHO INTERNACIONAL HUMANITARIO. Capítulo Unico.* (The original text in Spanish is *obtainable from* http://www.unifr.ch/derechopenal/ljcolombia/l1t2cu.htm).
Under Law 599 of 2000, all of the following crimes are punishable by at least three years' imprisonment "when occasioned by and committed in the course of armed conflict": *Art.135 Homicidio en persona protegida* (Homicide of a protected person within the meaning of the treaties on international humanitarian law ratified by Colombia); *Art. 136 Lesiones en persona protegida* (Injury to the physical integrity of health of a protected person within the meaning of the treaties on international humanitarian law ratified by Colombia); *Art. 137 Tortura en persona protegida* (torture of a protected person); *Art. 138 Acceso carnal violento en persona protegida* (Carnal access by means of violence, committed against a protected person); *Art. 139 Actos sexuales violentos en persona protegida* (Violent sexual acts against a protected person); *Art. 141 Prostitución forzada o esclavitud sexual* (Forced prostitution or sexual slavery of a protected person); *Art. 142 Utilización de medios y métodos de guerra ilícitos* (Use of illegal means or methods of war, that is, those which are prohibited or which are designed to cause unnecessary suffering or loss or superfluous evils); *Art. 143 Perfidia* (Perfidy); *Art. 144 Actos de terrorismo* (Acts of terrorism, that is, committing or ordering to be committed indiscriminate or excessive attacks or targeting the civilian population with attacks, reprisals, or acts or threats of violence whose main objective is to terrorize the civilian population); *Art. 145 Actos de barbarie* (Acts of barbarity to the extent not already covered, including allowing no quarter, attacking non-combatants, abandoning the wounded or sick, carrying out acts designed to leave no survivors or killing the sick or wounded or other acts of barbarity prohibited by the international treaties ratified by Colombia); *Art. 146 Tratos inhumanos y degradantes y experimentos biológicos en persona protegida* (Inhuman and degrading treatment and biological experiments, committed against protected persons); *Art. 147 Actos de discriminación racial* (Acts of racial discrimination, including the practice of racial segregation, or carrying out inhuman or degrading treatment based on other distinctions of an unfavourable character which violate human dignity); *Art. 148 Toma de rehenes* (Hostage taking); *Art. 149 Detención ilegal y privación del debido proceso* (Illegal detention and denial of due process); *Art. 150 Constreñimiento a apoyo bélico* (Forced military service of a protected person); *Art. 151 Despojo en el campo de*

batalla (Plunder of the belongings of a corpse or of a protected person); *Art. 152 Omisión de medidas de socorro y asistencia humanitaria* (Failure to provide aid and humanitarian assistance to protected persons when there is a duty to provide such aid and assistance); *Art. 153 Obstaculización de tareas sanitarias y humanitarias* (Impeding health and humanitarian work); *Art. 154 Destrucción y aprropiación de bienes protegidos* (Destruction and appropriation of protected property); *Art. 155 Destrucción de bienes e instalaciones de carácter sanitario* (Destruction of medical equipment and installations, without any justification of overriding military necessity, and without having taken prior adequate and timely protective measures); *Art. 156 Destrucción o utilización ilícita de bienes culturales y de lugares de culto* (Destruction or illicit use of cultural property or places of worship, without any justification of overriding military necessity, and without having taken prior adequate and timely protective measures); *Art.157 Ataque contra obras e instalaciones que contienen fuerzas peligrosas* (Attacks against works or installations which contain dangerous forces, including dams, dikes, electrical power plants, nuclear or other works or installations wich contain dangerous forces, without any justification of overriding military necessity); *Art. 159 Deportación, expulsión, traslado o desplazamiento forzado de población civil* (Deportation, expulsion, transfer or forced displacement of the civilian population, without military justification); *Art. 160 Atentados a la subsistencia y devastación* (Acts designed to deny subsistence and devastation, by attacking, rendering useless, retaining or taking properties or means indispensable to the subsistence of the civilian population); *Art. 161 Omisión de medidas de protección a la población civil* (Omission of means of protection for the civilian population, by those required to provide such means); *Art. 162 Reclutamiento ilícito* (Illegal recruitment, that is, recruiting or forcing minors to participate directly or indirectly in hostilities or armed actions); *Art. 163 Exacción o contribuciones arbitrarias* (Imposing arbitrary exactions or contributions); *Art. 164 Destrucción del medio ambiente* (Destruction of the environment, by means or methods designed to cause extensive, lasting and severe damage to the environment).

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

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

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

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

Costa Rica is a party to the Geneva Conventions and Protocols I and II. It has ratified the Rome Statute, but had not yet enacted implementing legislation as of 1 September 2001. Article 374 of the Penal Code provides for a sentence of ten to 15 years' imprisonment for

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

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

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

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

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

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

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

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

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

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

· ***Croatia:*** The courts of the former Yugoslavia had been able to exercise universal jurisdiction

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

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

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

over ordinary crimes since 1929 (see Chapter Two, Section II.A). Today, Croatian courts may exercise universal jurisdiction over conduct amounting to war crimes in two situations.

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

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

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

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

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

> "(4)The criminal legislation of the Republic of Croatia shall be applied to an alien who, outside the territory of the Republic of Croatia, commits against a foreign state or another alien a criminal offense for which, under the law in force in the place of crime, a punishment of five years of

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

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

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

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

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

> "99. The principle of *aut dedere, aut judicare*, stipulated in article 7 of the Convention [against Torture] is also incrporated in the Croatian legal system. . . .
> 100. If the evidence shows that the crime has been committed in a foreign country and the extradition has not been approved, a public attorney will, bring criminal charges against the foreigner. This request has to be submitted to the competent county court. In this manner, the Croatian legal system guarantees that a person, whose extradition has been denied, will be prosecuted and put on trial as any other person in accordance with the principles of the pending Criminal Code."

Ibid., paras 99-100.

imprisonment or a more severe penalty may be applied.
(5) In the cases referred to in paragraphs 2 [active personality] and 3 [protective jurisdiction] of this Article,the criminal legislation of the Republic of Croatia shall be applied only if the perpetrator of the criminal offense is found within the territory of the Republic of Croatia, or has been extradited to it, and in the case referred to in paragraph 4 of this article, only if the perpetrator is found within the territory of the Republic of Croatia and is not extradited to another state." [167]

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

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

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

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

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

[170] Criminal Code, Art.16 (Particularities Regarding the Institution of Criminal Proceedings for Criminal Offenses Committed Outside the Territory of the Republic of Croatia). That article states:
"(1) In the cases specified in article 14, paragraphs 3 and 4 of this Code, criminal proceedings for the purposes of applying the criminal legisaltion of the Republic of Croatia shall not be instituted:
-if the prepetrator has served in full the sentence imposed on him in a foreign state;
-if the perpetrator has been acquitted by a final judgment in a foreign state, or if he has beeen pardoned, or if the statutory time limitation has expired under the law in force at the place of crime;
-if, under the law in force at the place of crime, criminal proceedings may be instituted only upon a motion, a consent or a private charge of the person against whom the criminal offense had been committed, and such a motion was not made or a private charge was not was not brought, or the consent was not given.
(2) If, in the cases specified in article 14, paragraphs 2, [3?]and 4 of thisCode such an act does not constitute a criminal offense under the law in force in the country of the perpetration, criminal proceedings may be instituted only upon the approval of the State Attorney of the Republic of Croatia.
(3) In the case referred to in Article 14, paragraph 4 of this Code, when the committed act is not punishable under the law in force in the country in which it was committed but is deemed to be a criminal offense according to the general principles of law of the international community, the StateAttorney of the Republic of Croatia may authorize the institution of criminal proceedings in the Republic of Croatia and the application of criminal legislation of the Republic of Croatia."

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

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

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

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

Prosecutions based on Article 5.3 "may proceed only at the request of the Minister of Justice".[174] Sentences that have been served or partially served abroad for the same crime are credited to any sentence imposed by a Cuban court.[175]

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

[172] Penal Code, Art. 5.1 (English translation by Amnesty International) (apparently, this provision covers persons extradited to Cuba, although the text is not clear). The original Spanish text reads:

> *"La ley penal cubana es aplicable a los cubanos y personas sin ciudadanía residentes en Cuba que cometan un delito en el extranjero, si se encuetran en Cuba o son extraditados."*

Código penal, artículo 5.1.

[173] Penal Code, Art. 5.3 (English translation by Amnesty International). The original Spanish text reads:

> *"La ley penal cubana es aplicable a los extranjeros y personas sin ciudadanía no residentes en Cuba que cometan un delito en el extranjero, si se encuentran en Cuba y no son extraditados, tanto si residen en el territorio del Estado en que se perpetran los actos como en cualquier otro Estado y siempre que el hecho sea punible también en el lugar de su comisión. Este último requisito no es exigible si el acto constituye un delito contra los intereses fundamentales, políticos o económicos, de la República, o contra la humanidad, la dignidad humana o la salud colectiva, o es perseguible en virtud de tratados internacionales."*

Código penal, artículo 5.3.

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

> *"En los casos previstos en el apartado 3 de este artículo, sólo se procede a instancia del Ministro de Justicia."*

Código penal, artículo 5.5.

[175] Penal Code, Art. 5.4 (English translation by Amnesty International). The original Spanish text reads:

> *"La sanción o la parte de ella que eldelincuente haya cumplido en el extranjero por el mismo delito, se le abona a la impuesta por el tribunal cubano; pero si, dada la diversidad de clases de ambas sanciones, esto no es posible, el cómputo se hace de la manera que el tribunal conidere más justa."*

Código penal, artículo 5.4.

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

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

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

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

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

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

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

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

Cyprus is a party to the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but had not yet ratified it as of 1 September 2001. This legislation permits Cypriot courts to exercise universal jurisdiction over violations of the Geneva Conventions and Protocol I now, and, possibly, over crimes which fall within the jurisdiction of the International Criminal Court when Cyprus ratifies the Rome Statute and it enters into force.

[176] Penal Code, Art. 116 (2). The original Spanish text reads:

"En igual sanción incurre el que, violando las normas del Derecho Internacional, bombardee, ametralle o ejerza sevicia sobre la población civil indefensa."

Código penal, artículo 116 (2).

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

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

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

First, Section 19 of the Criminal Code provides that Czech law applies to certain war crimes committed abroad by foreign nationals and stateless persons not resident in the Czech Republic. That section states in relevant part:

> "The Czech law shall apply when determining liability to punishment for . . . use of a forbidden weapon and unpermitted conduct of war (section 262), cruelty in war (section 263), persecution of citizens (section 263a), plunder in an area of military operations (section 264), abuse of internationally-recognized and state insignia (section 265) . . . even if such a crime was committed

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

> "(1) Whoever, independently of his nationality, commits within or outside the Republic's [territory] a serious [illegible word] violation or participates, or associates [himself] or persuades another to commit a serious violation of provisions of the Geneva Conventions among the following articles of the related conventions, which are: [listing the grave breaches provisions of the Geneva Conventions] is guilty of an offence and in case of his conviction -
> (i) if the serious violations referred to are premeditated murder of a protected person under the Convention, is subject to a life sentence;
> (ii) in the case of other serious violations referred to above, is subject to a maximum sentence of 14 years' imprisonment."

[179] Article 4 of the 1979 law provides:

> " (1) Any person, irrespective of nationality, who commits within or without the Republic any serious violation of the provisions of the Protocol or connives with , assists or incites another to commit such a violation is guilty of an offence and in the event of his conviction-
> (i) where the aforesaid serious violation amounts to premeditated homicide of a person protected by the provisions of the Protocol, he shall be subject to the penalty of life imprisonment;
> (ii) where another violation is involved, as stated above, he shall be subject to the penalty of imprisonment for a term not exceeding fourteen years.
> (2) Where an offence falling within the prescription of this article is committed outside the Republic, the perpetrator may be proceeded against, charged, tried and punished for this offence anywhere in the Republic as if the offence had been committed in this country; and the offence for all purposes connected with the trial or punishment thereof is deemed to have been committed in this country.
> (3) Where in court proceedings conducted pursuant to this Law a question should arise as to the circumstances in which this application is warranted under Article 1, paragraphs 3 and 4 of this Protocol, the Minister shall address such question; and a certificate evidencing any relevant decision and bearing the signature of the Minister or another acting on his behalf shall be admitted as documentary proof, and this shall be deemed to be signed until such time as the contrary is proved."

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

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

abroad by a foreign national (an alien) or a stateless person who does not reside (i.e. has no permanent permit to reside) on the territory of the Czech Republic."[180]

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

"Czech law shall also be applied to determine the punishability of an act committed abroad by an alien or a stateless person who is not a resident of the Republic, if:

(a) the act is also punishable under the law in force in the territory where it was committed; and

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

(b) the offender is apprehended on the territory of the Republic and is not extradited to a foreign State for criminal prosecution."[181]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 3 of Book 1, Section 1 of the Penal Code of Zaire (*Code Pénal Zairois*) (1982), which is believed to be still in effect, provides for custodial universal jurisdiction over crimes committed outside national territory which are punishable by more than two months, unless the suspect is extradited. The prosecution must be authorized by the State Prosecutor's Office, but if the offence is punishable under national law by a sentence of at least five years' imprisonment, the prosecution must have been based on a complaint by the victim or the territorial state. Article 3 states:

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

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

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

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

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

Except in the circumstances provided for by Title VIII and the first two sections of Title III of Book Two of the Criminal Code, proceedings may be brought only if the accused party is present in Zaïre."[189]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 8 (6) of the Penal Code permits courts to exercise universal jurisdiction over some conduct, such as murder and rape, that is an ordinary crime under national law in Denmark and the territorial state, amounting to war crimes. Although Section 8 (6) does not expressly require that an extradition request have been made and refused, but simply that the transfer have been rejected, Danish commentators have stated that this requirement is implied.[194] It is not clear, however, that such a request was made and denied by any state in the one case under this section involving grave breaches of the Geneva Conventions (see discussion below). Decisions whether to prosecute under Section 8 are not taken by an independent prosecutor, but by a political official, the Minister of Justice.[195]

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

> " (1) Acts committed outside the territory of the Danish state by a Danish national or by a person resident in the Danish state shall also be subject to Danish criminal jurisdiction in the following circumstances, namely;
> 1) where the act was committed outside the territory recognized by international law as belonging to any state, provided acts of the kind in question are punishable with a sentence more severe than simple detention; or
> 2) where the act was committed within the territory of a foreign state, provided that it is also punishable under the law in force in that territory.

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

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

[194] Bukh, *supra, n.192*,346; *Implementation of international humanitarian law by Denmark: Report by the International Law Committee of the Danish Red Cross,* 320 Int'l Rev. Red Cross 583 (1997), Recommendations, § 2.

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

(2) The provisions in Subsection (1) above shall similarly apply to acts committed by a person who is a national of, or who is resident in Finland, Iceland, Norway or Sweden, and who is present in Denmark."[196]

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

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

Denmark is a party to Hague Convention IV, the Geneva Conventions and Protocols I and II. It has ratified the Rome Statute, but had not yet enacted implementing legislation as of 1 September 2001. However, Danish legislation providing for the ratification of the Rome Statute gives the Ministers of Foreign Affairs and Justice broad powers to implement various obligations related to cooperation with the International Criminal Court and it is not clear what further legislation is necessary.[199]

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

"1) any person who serves in the military defence or follows a unit thereof;

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

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

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

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

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

[201] *Ibid.*, § 5 (2).

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

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

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

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

> "According to international law, a State has the right to punish the crime of genocide, crimes against humanity and violations of the Hague Conventions, in pursuance of the principle of universal jurisdiction. For these crimes, however, there is no obligation to prosecute. Article 8, Section 6, of the Penal Code establishes jurisdiction for these crimes, depending on three conditions: *primo*, another State must have requested the extradition of the person in question; *secundo*, extradition must have been denied by the Danish authorities; and *tertio*, the alleged behaviour must be a crime under Danish law. It appears that the decision to assume jurisdiction could be influenced by political considerations, such as relations with other States. However, the Minister of Justice, who has to take the decision whether to prosecute or not, is bound by obligations of international law.
>
> When the Danish Penal Code was drafted, no consideration was given to international

[202] *Ibid.*, § 6.

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

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

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

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

humanitarian law. This may cause problems when the legal basis necessary for the prosecution of some types of war crimes must be established. Maximum and minimum penalties, for example, are the same in wartime as in peacetime.

Furthermore, the Code has no provision for a number of war crimes, and as a result these crimes cannot be prosecuted in Denmark."[207]

The International Law Committee recommended:

"When the legislation is revised it should be made clear that only objective considerations are relevant to the decision whether to prosecute in cases concerning breaches of international humanitarian law.

A study should be carried out on the possibilities for more efficient prosecution of breaches of international humanitarian law.

. . . .

Article 9 of the Military Penal Code should be rephrased so that actions contrary to international humanitarian law performed by subordinates obeying an order incur penal responsibility."[208]

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

(2) Prosecution for war crimes. In November 1994, the Danish High Court (*Ostre Landsrets*) in Copenhagen, acting on the basis of universal jurisdiction over grave breaches of the Third and Fourth Geneva Conventions, conferred by Article 8 (5) of the Penal Code, convicted Refik Sari_ after a jury trial of 14 out of 25 charges of assault and aggravated assault under Articles 245 and 246 of the Penal Code, in 1993 of detainees in a detention camp in Bosnia and Herzegovina and sentenced him to eight years' imprisonment.[209] The conviction was affirmed by the Supreme court on appeal. In rejecting the challenge to Danish jurisdiction made on the ground that the offences could not be characterized as grave breaches of the Third and Fourth Geneva Conventions, the Supreme Court stated:

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

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

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

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

[210] *Public Prosecutor v. T.*, Supreme Court (*Hojesteret*), Judgment, 15 August 1995, *Ugeskrift for Retsvaesen* 838 (1995) (English translation by the Legal Service of the Ministry of Foreign Affairs) (a brief excerpt

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

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

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

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

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

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

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

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

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

> "1. The existing laws shall, as from the commencement of the Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order.
> . . . .
> For the purposes of this paragraph. the expression "existing law" means any Act, Ordinance, law, rule, regulation, order or other instrument made in pursuance of or continued in force by or under the former Constitution and having effect as part of the law of Dominica or of any part thereof immediately before the commencement of the constitution ."

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

commission of the crime. For the current Penal Code: http://www.suprema.gov.do/codigos/WelcomeC.htm

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

The Dominican Republic is a party to the Geneva Conventions and Protocols I and II. It has not signed the Rome Statute and as of 1 September 2001 it had not yet ratified it. It is not known if the Dominican Republic has defined war crimes as crimes under national law, so prosecutions under Article 14 may have to be for ordinary crimes such as murder, abduction, assault and rape. In addition, prosecutions pursuant to Article 14 are prohibited if the person was convicted abroad for the same acts and served the sentence or the case is subject to a statute of limitations.

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

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

> "2.1 With regard to the serious criminal offences listed under Section 10.1 (a) [genocide], (b) [war crimes], (c) [crimes against humanity] and (f) [torture] of UNTAET Regulation 2000/11, as specified in Sections 4 to 7 of the present regulation, the panels shall have universal jurisdiction.
> 2.2 For purposes of the present regulation, 'universal jurisdiction' means jurisdiction irrespective of whether;
> (a) the serious criminal offence at issue was committed within the territory of East Timor;
> (b) the serious criminal offence was committed by an East Timorese citizen; or
> (c) the victim of the serious criminal offence was an East Timorese citizen."
> 2.3 With regard to the serious criminal offences listed under Section 10.1 (d) [murder under the Penal Code] to (e) [sexual offences under the Penal Code] of UNTAET Regulation No. 2000/11 as

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[213] Penal Code, Art. 16. It provides:

> "In the circumstances specified in the two previous articles, prosecution of the offences shall be undertaken at the instigation of the Attorney General and must be preceded by the institution of proceedings by the victim or his successors or presentation of an official complaint by the victim or his successors or presentation of an official complaint by the authority of the country where the offence was committed."

The original Spanish text reads: *"En los casos previstos en los dos artículos anteriores, la persecución de las infracciones se ejercerá a requerimiento del ministerio público, y debe ser precedida de una querella de la víctima o de sus causahabientes o denuncia oficial por parte de la autoridad del país donde la infracción se ha cometido."*

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

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

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

specified in Sections 8 to 9 of the present regulation, the panels established within the District Court in Dili shall have exclusive jurisdiction only insofar as the offence was committed in the period between 1 January 1999 and 25 October 1999.
2.4 The panels shall have jurisdiction in respect of crimes committed in East Timor prior to 25 October 1999 only insofar as the law on which the serious criminal offence is based is consistent with Section 3.1 of UNTAET Regulation No. 1999/1 or any other UNTAET Regulation.
2.5 In accordance with Section 7.3 of UNTAET Regulation No. 2000/11, the panels established by the present regulation shall have jurisdiction (*ratione loci*) throughout the entire territory of East Timor."[215]

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

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

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

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

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

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

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

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

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

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

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

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

The provisions in the Penal Code provide two possible bases for Ecuadoran courts to exercise custodial universal jurisdiction over certain war crimes.[218]

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

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

5a. offences against international law;

. . . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

He also noted that there was no national law or jurisprudence providing for universal jurisdiction, but did not say that the jurisdictional provisions of treaties and customary international law - as opposed to the substantive norms embodied in those treaties or customary international law - could not be directly enforced by Egyptian courts when the conduct abroad was defined as a crime (such as murder, abduction, assault or rape) under Egyptian law.[223] Another expert, Walid Abelgawad,
has argued that, in the past, although Egypt was in principle a monist state, when Egypt ratified treaties requiring states parties to investigate and prosecute crimes, it had enacted legislation defining the crimes and punishments in national law rather than relying on courts to exercise jurisdiction over such conduct directly under international law.[224] He also indicated that it was more likely for an Egyptian court to apply directly international criminal law reducing or eliminating criminal penalties than to try someone for a crime under international law directly that was not defined as a crime under Egyptian law.[225]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[230] *See ibid.*,21.

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

[232] *Ibid.*, 22.

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

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

possible to locate jurisprudence on that matter.

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

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

[235] Article 10 of the current Penal Code provides:
"Criminal legislation shall also apply to offences committed by anyone whosoever in a place not subject to Salvadoran jurisdiction, provided that they affect property internationally protected by specific agreements or rules of international law or seriously undermine universally recognized human rights." (English translation in El Salvador's initial report to the Committee against Torture, U.N. Doc. CAT/C/37/Add.4, 12 October 1999, para. 152).

The original Spanish text reads: *"También se aplicará la ley penal a los delitos cometidos por cualquier persona en un lugar no sometido a la jurisdicción salvadoreña, siempre que ellos afectaren bienes protegidos internacionalmente por pactos específicos o normas del derecho internacional o impliquen una grave afectación a los derechos humanos reconocidos universalmente."*

[236] Article 9 of the former Penal Code provided:
"Salvadorean law shall also apply to offences committed abroad which, under international agreements, treaties and conventions, are considered to have an international dimension and, as such, subject to the jurisdiction of the Salvadorean courts; but preference shall be given to the claim of the State in whose territory the offence has been committed to exercise jurisdiction as long as it does so before criminal proceedings have been started against the accused." *"Se aplicará también la ley salvadoreña a los delitos cometidos en el extranjero que de acuerdo a pactos, tratados o convenciones internacionales, se consideren delitos de trascendencia internacional y que deban ser juzgados por la ley salvadoreña; pero se dará preferencia a la pretensión del Estado en cuyo territorio se hubieren cometido, si reclamare el juzgamiento antes que se inicie el ejercicio de la acción penal en contra del imputado.*
En los casos señalados en este artículo y en el anterior se aplicará la ley vigente en el lugar de la comisión del hecho, si sus disposiciones son más favorables al imputado que las de la ley salvadoreña." Códigos Penal y Procesal Penal (Con sus Ultimas Reformas, Octubre 1993) Capitulo I: Aplicacion de la Ley Penal en el Espacio, Art. 9 (Extraterritorialidad, Principio de Universalidad. (English translation by Amnesty International).

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

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

> "Offences shall not be time-barred in the following cases: torture,acts of terrorism, kidnapping, genocide, violations of the laws and customs of war, enforced disappearance of persons, political, ideological, racial, sexual or religious persecution, provided that the acts in question were committed after the entry into force of this Code."[239]

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

Article17 of the *Ley Organica del Poder Judicial* (Organic Law of the Judicial Power) provides that national courts have jurisdiction over foreigners who commit crimes outside the national territory when this is provided for by law.[240] It is not known if the Penal Code or other

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

The original text in Spanish reads:

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

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

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

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

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

[240] Organic Law of the Judicial Power, Art. 17 (English translation by Amnesty International) . That article states: "The Judges and Courts of Equatorial Guinea shall try Guineans or foreigners who have committed any of the following crimes outside the national

national law expressly provides for universal jurisdiction. It is probable that the term "law" means national and not international law but it has not been possible to confirm that point.

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

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

territory: . . . 3. Any other crimes, as provided for by law." The original text in Spanish reads: *"Serán juzgados por - los Jueces y Tribunales ecuatoguineaos, los guineanos o extranjeros que - fuera del territorio de la Nación hubieren cometido alguno de los delitos siguientes: . . . 3. Cualesquiera otros delitos, - cuando así se disponga por Ley." Ley Orgánica del Poder Judicial, Número 10/1984, de fecha - 20 de Junio.* Paragraph 1 deals with national security and Paragraph 2 addresses crimes committed abroad by government officials.

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

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

> "(1) A citizen of the Republic of Estonia, a citizen of a foreign country or a stateless person can be prosecuted under the present code for the act committed outside of Estonia:
>
> 1) if under an international treaty there has been presented a request to prosecute the offender and the act is punishable as a criminal offence in the place where it was committed or no criminal law of any country is in force in that place;
>
> . . . .
>
> (2) This code is in force in respect of acts committed outside the reach of the present code that are offences under the present code and the act is punishable as a criminal offence according to criminal law of the place it was committed or no criminal law of any country is in force in that place:
>
> 1) if the offender was a citizen of the Republic of Estonia or became a citizen of the Republic of Estonia after committing that act, or
>
> 2) if the offender was a citizen of a foreign country or a stateless person and detained in Estonia and shall not be extradited to any other country.
>
> 3) Regardless of the law of the place where the act was committed, this code is in force in respect of acts which are punishable as criminal offences under an international treaty concluded by the Republic of Estonia even if the act is committed outside the borders of the Republic of Estonia."[242]

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

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

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

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

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

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

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

Estonia is a party to the Geneva Conventions and to Protocols I and II. It has signed the Rome Statute but it had not yet ratified it as of 1 September 2001. Numerous war crimes are defined as crimes under the current Criminal Code and that Code does not differentiate between international and non-international armed conflict.[244] The new Penal Code will provide that a broader range of war crimes are crimes under Estonian law and will continue to apply in both international and non-international armed conflict.[245] There is no express limitation of the scope of these crimes to conduct during an international armed conflict, so it is possible that they may apply to non-international armed conflict, although it has not been possible to obtain any definitive commentary on this point. Estonia is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and Section 53 (5) of the current Penal Code provides that statutes of limitation do not apply to war crimes and crimes against humanity. This prohibition will be continued in the new Penal Code and will also be applicable to offences that are subject to life imprisonment (crimes against humanity and genocide).[246] The new Penal Code will provide for command and superior responsibility for war crimes and exclude superior orders as a defence.[247]

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

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

"[a]ny person who has committed in a foreign country:

(a) an offence against international law or an international offence specified in Ethiopian

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

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

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

[247] *Ibid.*, § 88 (Punishment for the offences prescribed in this chapter [Chapter 8 - Offences (Crimes) against the humanity and international security). The first paragraph of this section defines the principle of command and superior responsibility in more detail than in the current Criminal Code and the second paragraph excludes superior orders as a defence:

"(1) In addition to the direct perpetrator of the offence prescribed in this chapter, the representative of state power or military authority who has given a command for committing an offence or under whose consent the offences has been committed or who has not prevented committing the offence although it has been in his or her power, shall be punished.

(2) Commitment of a crime prescribed in this chapter under a command of the representative of state power or military authority does not exclude punishment of the perpetrator of the crime."

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

> legislation, or an international treaty or a convention to which Ethiopia has adhered;
> . . . .
> Shall be liable to trial in Ethiopia in accordance with the provisions of this Code and subject to the general conditions mentioned hereinafter (Art. 19 and 20 (2)) unless he has been prosecuted in the foreign country.
> (2) Nothing in this article shall affect the provisions of articles 14 and 15 (2).[249]

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

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

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

The universal jurisdiction in Articles 17 and 18 is classified as "subsidiary" jurisdiction in the Penal Code and is subject to a number of conditions under Article 19 (Conditions for subsidiary application) and under Article 20 (Effect of foreign sentences). Article 19 states:

"(1) In the application of this Code it shall be presumed:

(a) that the complaint or denunciation by the victim or his dependants was lodged when it is a condition for prosecution and trial under the law of the place of commission of the offence or under Ethiopian law;

(b) that the offender is within the territory of the Empire and has not been extradited, or that extradition was obtained by reason of the offence committed;

(c) that the offence was not legally pardoned in the country of commission and that prosecution is not barred either under the law of the country where the offence was committed under Ethiopian law.

(2) Prosecution shall be instituted by the Attorney General after consultation with the Minister of Justice.

(3) The punishment to be imposed under this Code shall not be more severe than the heaviest penalty prescribed by the law of the country of commission where such country is recognized by Ethiopia."[251]

Article 20 provides:

"(1) In all cases where Ethiopian courts have a subsidiary jurisdiction only (Art. 15 (1) [active personality jurisdiction over members of the Ethiopian armed forces], 17 and 18), the offender cannot be tried and sentenced in Ethiopia if he was regularly discharged or acquitted for the same act in a foreign country.

(2) If the offender was tried and sentenced in a foreign country but did not undergo his punishment, or served only part of it in the said country, the punishment, or the remaining part thereof, may if it is not barred by limitation, be enforced according to the forms prescribed by this Code. The provisions of Art. 12 (3) shall apply mutatis mutandis to this Article."[252]

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

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

[251] Ethiopian Penal Code, Art. 19.

[252] Ethiopian Penal Code, Art. 20.

> "This view, however, is contrary to the exigencies of international co-operation in the struggle against criminality and has, therefore, not been taken in Ethiopia. In connection with Art. 17, reference was made to the principle of universal jurisdiction. Art. 18 goes further in that direction; it is based on the idea that the principle of universal jurisdiction should apply not only in the case of international offences which endanger the whole community of nations, but also in the case of any offence of extreme seriousness committed in violation of any national law. Consequently, a person having committed in any country an offence of the utmost gravity and having taken refuge in another country, should be tried by the courts of the country of refuge, if he cannot be tried at the place of commission. This extensive conception of the principle of universal jurisdiction, though it is not unanimously admitted, has been included in the Ethiopian Code not only for reasons pertaining to international co-operation, but also because of the right of the country of refuge to protect itself. For, if a person should commit several offences of robbery in a foreign country and then take refuge in Ethiopia without having been tried for such offences in the said country, it might be dangerous to leave him at large in Ethiopia, where he might resume his criminal activity. He may, therefore, be tried by an Ethiopian court even though the country of commission has not expressly delegated its jurisdiction to Ethiopia."[253]

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

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

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[253] Philippe Graven, *An Introduction to Ethiopian Penal Law (1-84 Penal Code)* 49 (Oxford: Oxford University Press 1965).

[254] These include: war crimes against the civilian population "in violation of the rules of public international law and of international conventions" (Article 282); war crimes against wounded, sick or shipwrecked persons (Article 283); war crimes against prisoners and interned persons (Article 284); pillage, piracy and looting (Article 285); certain ancillary crimes (Article 286); dereliction of duty towards the enemy (Article 287); illegal means of combat (Article 288); breach of an armistice or treaty (Article 289); certain guerrilla activities (Article 290); ill-treatment of wounded, sick and prisoners (Article 291); denial of justice (Article 292); hostile acts against international humanitarian organizations (Article 293); abuses of international emblems and insignia (Article 294); and hostile acts against the bearer of a flag of truce (Article 295).

[255] Federal Courts Proclamation No. 25/1996, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, No. 13, 15 February 1996. It states:

"Federal Courts shall have jurisdiction over the following criminal cases:

. . . .

3) offences against the law of nations;

4) offences involving foreign nationals; . . ."

[256] Articles 19 and 20 (2) contain *general principles* for exercising criminal jurisdiction in Ethiopia, such as the principle of *ne bis in idem*, immunities for certain individuals and exclusion of jurisdiction over members of the Ethiopian armed forces. However, Article 17 (2) refers to *special principles* which override these general principles. Under these special principles, an Ethiopian enjoying immunity who is accused of committing a crime under international law in another country may be tried under Article 14 and a member of the Ethiopian armed forces who commits such a crime in another country may be tried pursuant to Article 15 (2). Both types of suspects may be tried again in Ethiopia despite the general principle of *ne bis in idem* applicable in other cases. Graven, *supra*, n. 254, 46-47.

"The Federal Republic of Yugoslavia fulfills in good faith the obligations contained in international treaties to which it is a contracting party.

International treaties which have been ratified and promulgated in conformity with the present Constitution and generally accepted rules of international law shall be a constituent part of the internal legal order."[257]

Article 107 (2) of the 1976 Criminal Code of Yugoslavia provides for custodial universal jurisdiction over any crime punishable by at least five years' imprisonment:

"Yugoslav criminal law applies to a foreigner who commits a criminal act abroad against a foreign country or a another foreigner, for which this law provides imprisonment for a term of five years or a heavier penalty, provided the perpetrator is found on the territory of the [Federal Republic of Yugoslavia] and is not extradited to a foreign country. Unless it is stipulated otherwise in this law, in such a case the court may not impose a heavier punishment than the one provided by the law of the country in which the criminal act has been committed."[258]

[257] Constitution of the Federal Republic of Yugoslavia, 27 April 1992, as amended to 6 July 2000, Art. 16 (English translation in Gisbert H. Flanz, *Federal Republic of Yugoslavia*, *in* Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc.) (Release 2000-7, November 2000)).

[258] Criminal Code of Yugoslavia, adopted 28 September 1976, effective 1 July 1977, Art. 107 (2). The English translation is *obtainable from* http://pbosnia.kentlaw.edu/resources/legal/bosnia/criminalcode_fry.htm.

The Criminal Code prohibits a number of war crimes.[259] There are several conditions which must be satisfied before a court may exercise jurisdiction under Article 107 (2). Article 108 (2) provides that a prosecution may not be instituted if the suspect has served a sentence abroad for the crime or has been acquitted or pardoned, if the prosecution is barred by a statute of limitations and if, the territorial state requires the consent of the victim and the victim has not consented.[260] According to Article 108 (3), a prosecution under Article 107 may be commenced only if the act is punishable in the territorial state, unless the relevant federal or local prosecutor authorizes a prosecution for a crime under the law of the Federal Republic of Yugoslavia.[261] Even if the crime is not punishable under the law of the territorial state, it may be prosecuted pursuant to Article 108 (4) if the Federal Public Prosecutor authorizes it if the act at the time it was committed was considered a criminal act under general legal principles accepted by the international community at the time it was committed.[262]

The Federal Republic of Yugoslavia is a party to the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. Article 100 of the Criminal Code provides that statutes of limitation for war crimes are excluded, and the Federal Republic of Yugoslavia is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[263]

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

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[259] Criminal Code of Yugoslavia, Art. 142 (War crime against the civilian population), Art. 143 (War crime against the wounded and sick), Art. 144 (War crime against prisoners of war), Art. 145 (Organizing a group and instigating the commission of genocide and war crimes), Art. 146 (Unlawful killing or wounding of the enemy), Art. 147 (Marauding), Art. 148 (Making use of forbidden means of warfare), Art. 149 (Violating the protection granted to bearers of flags of truce) and Art. 150 (Cruel treatment of the wounded, sick and prisoners of war).

[260] Article 108 (2) provides:
"In cases referred to in articles 106 and 107 of this law, [prosecution] shall not be instituted if:
(1) the offender has completely served the sentence to which he has been sentenced abroad;
(2) the offender has been acquitted by a legally effective foreign judgement, or if his punishment has been barred by lapse of time, amnestied or pardoned abroad;
(3) by foreign law the criminal act may only be prosecuted upon request by the damaged party and such request has not been filed."

[261] The English translation of Article 108 (3) is not entirely clear. It reads:
"In cases referred to in articles 106 and 107 of this law, prosecution shall be instituted only if the act committed is also punishable [under the law of the country of commission?]. If in cases referred to in articles 106 and 107, paragraph 1 of this law, such criminal act is not punishable under the law of the country of commission, prosecution may be instituted only upon the approval on the part of the Federal Public Prosecutor for criminal acts defined in the federal criminal code, that is to say upon the approval on the part of the public prosecutor of a republic or autonomous province for criminal acts defined in the criminal codes of the republic or autonomous province."

[262] Article 108 (4), which appears to overlap with Article 108 (3), to some extent, provides:
"It is only after the approval on the part of the Federal Public Prosecutor that prosecution may be instituted in the [Federal Republic of Yugoslavia] in cases referred to in Article 107, paragraph 2 of this law, regardless of the law of the country in which the criminal act has been committed, if at the time of the commission the act in question was considered a criminal act in accordance with the general legal principles recognized by the international legal community."

[263] Criminal Code, Art. 100 ("A criminal prosecution and the execution of sentence are not subject to the statute of limitations for criminal acts referred to in articles 141 to 145 of this law, as well as for other criminal acts which pursuant to international agreements are not subject to the statute of limitations.").

Although Fiji does not have a Geneva Conventions Act, the United Kingdom's Geneva Conventions Act 1957 applies to the state under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below), which is listed in the 1985 Revision of Subsidiary Legislation. Fiji is a party to the Geneva Conventions, but it has not ratified either Protocol I or II. It has ratified the Rome Statute, but as of 1 September 2001 it had not yet enacted any implementing legislation.

· ***Finland:*** Finnish courts may exercise universal jurisdiction over certain war crimes under three provisions.

Finland appears to follow a dualist approach to conventional and customary international law obligations. The Constitution requires that Parliament accept and bring into force international legislative obligations and the President to do so with respect to other obligations. However, treaty obligations which restrict the scope of the application of criminal law appear to apply directly. Section 15 (Treaties and international custom binding on Finland) of Chapter 1 (Scope of application of the criminal law of Finland). It states:

> "If an international treaty binding on Finland or another statute or regulation that is internationally binding on Finland in some event restricts the scope of application of the criminal law of Finland, such a restriction shall apply as agreed. The provisions in this chapter notwithstanding, the restrictions on the scope of application of Finnish law based on generally recognised rules of international law shall also apply."[264]

The first legislative provision, Section 7 (International offence) of Chapter 1 (Scope of application of the criminal law of Finland) of the Finnish Penal Code provides:

[264] Finnish Penal Code, Ch. 1, § 15. The English translations of the Penal Code cited in this memorandum are from an unofficial translation prepared by persons in the Ministry of Justice and used by the government in Finland's response of 15 July 1999 to a questionnaire by the Committee against Torture. Another English translation is *obtainable from* http://wings.buffalo.edu/law/bclc/finnish.htm.

> "Finnish law shall apply to an offence committed outside of Finland where the punishability of the act, regardless of the law of the place of commission, is based on an international agreement binding on Finland or on another statute or regulation binding on Finland (*international offence*). Further provisions on the application of this section shall be issued by Decree".[265]

Section 7 applies to anyone, whether a citizen of Finland or not. Its broad wording would suggest that punishable acts based on common Article 3 and Protocol II, as well as grave breaches of the Geneva Conventions and Protocol I, would be included.[266] Apparently, it would also apply to acts which are punishable under the Rome Statute as war crimes, although this is not expressly stated. This interpretation is supported by the broad definition of war crime under the Penal Code (see below). A decree has been issued defining certain war crimes as international offences.[267]

Second, paragraphs 1 and 3 of Section 6 (Offence committed by a Finn) of Chapter 1 provide that Finnish law applies to persons resident in Finland at the time of offence or at the beginning of the trial and to persons found in Finland who are citizens or permanent residents of Nordic countries. They provide:

> "(1) Finnish law shall apply to an offence committed outside of Finland by a Finnish citizen. If the offence was committed in territory not belonging to any State, it is a precondition for punishability that, under Finnish law, the act may be punishable by imprisonment for more than six months."
> (2) A person who at the time of the offence was, or at the beginning of the trial is, a Finnish citizen is deemed to be a Finnish citizen.
> (3) The following are deemed equivalent to a Finnish citizen:
> (1) a person who at the time of the offence was, or at the beginning of the trial is, permanently resident in Finland, and

[265] *Ibid.*, Ch. 1, Sec. 7.

[266] This interpretation is supported by the application of the law prior to 1996 to common Article 3 and Protocol II. Section 3 (1) of Chapter 1 of the Finnish Penal Code of 1889, as amended in 1975, provided that the jurisdiction of Finnish courts was normally based upon the territorial, protective and representational principles (where double criminality is present). However, Section 3 (2) of Chapter 1 of the Penal Code provided that notwithstanding this provision

> "an alien may be sentenced according to the law of Finland even when the offence committed by him is not punishable according to the law of the place of the act if this offence is:
> 1. a war crime . . .".

Chapter 13 (2) of the Penal Code gave courts jurisdiction over any person who has committed certain specific war crimes "or in another manner breaches the provisions of an international treaty dealing with the waging of war and binding on Finland". The broad wording indicates that courts would have had jurisdiction over violations of common Article 3 and Protocol II.

[267] Decree on the application of Chapter 1, section 7 of the Penal Code (627/1996). Section 1 provides: "For the purposes of Chapter 1, section 7 of the Penal Code, the following offences shall be considered international crimes: . . .2) Such war crime, violation of human rights in a state of emergency, serious war crime which must be considered a grave breach of the Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Relative to the Treatment of Prisoners of War, and Relative to the Protection of Civilian Persons in time of War (FTS/ 8/1955), as well as the Protocol Additional to the Geneva Conventions, relating to the protection of victims of non-international armed conflicts (FTS 82/1980))." (English translation *obtainable from* http://www.icrc.org/ihl-nat/ihl-nat). The English translation is not free from ambiguity and it appears that it was intended to cover each of the following: any war crime, any violation of human rights in a state of emergency, any serious war crime or other punishable act that amounts to a grave breach of the Geneva Conventions and some violations of Protocol II. However, it is not clear why grave breaches of Protocol I were not expressly included, although they would be war crimes.

(2) a person who is caught in Finland and who at the beginning of the trial is a citizen of Denmark, Iceland, Norway or Sweden or at that time is permanently resident in one of those countries."[268]

Third, Section 8 (Other offence committed outside of Finland) of this chapter states that Finnish law applies to offences carrying a penalty of more than six months if the territorial state has requested prosecution or requested extradition and it was refused. It reads:

"Finnish law shall apply to an offence committed outside of Finland which, under Finnish law, may be punishable by imprisonment for more than six months, if the State in whose territory the offence was committed has requested that charges be brought in a Finnish court or that the offender be extradited because of the offence, the extradition request has not been granted."[269]

Finland is a party to Hague Convention IV, the Geneva Conventions and Protocols I and II. It has ratified the Rome Statute and enacted implementing legislation on 28 December 2000.[270] Finland has provided in its Penal Code that certain war crimes are crimes under national law.[271] The definition of war crime in Section 1 of Chapter 11 appears to include any violation of an international humanitarian law treaty or customary international law, including all or most of the crimes in the Rome Statute.[272]

[268] Finnish Penal Code, Ch. 1, Sec. 6 (1), (3).

[269] Finnish Penal Code, Ch. 1, Sec. 8.

[270] The Act to implement and apply the Rome Statute of the International Criminal Court (Nr. 1284/2000) (An unofficial English translation by Prof. Ari-Matti Nuutila of the University of Turku, Finland is *obtainable from* http://iccnow.org).

[271] Penal Code of Finland, Law 39/1889, Ch. 11 (War crimes and offences against humanity) (Law 578/1995), Sec. 1(War crime); Sec. 2 (Aggravated war crime); Sec. 3 (Petty war crime). However, petty war crimes carry a maximum penalty of at most six months, so they would not fall within the scope of section 8 of Chapter 1. Two other provisions criminalize conduct during armed conflict which amounts to war crimes: Penal Code, Ch. 11, § 4 (Violation of human rights in a state of emergency) (Law 578/1995) and § 5 (Aggravated violation of human rights in a state of emergency). Finland no longer has a military penal code or military code of procedure. Military disciplinary offences were incorporated into the Penal Code in Chapter 45 (Military offences) in 1981.

[272] Penal Code, Ch. 11, Sec. 1("A person who in an act of war . . . (3) otherwise violates the provisions of an international agreement on warfare binding on Finland or the generally acknowledged and established rules and customs of war under public international law shall be sentenced for a war crime to imprisonment for at least four months and at most six years.").

There are a number of restrictions on the scope of universal jurisdiction. A ten-year statute of limitations applies to war crimes and a twenty-year statute of limitations for aggravated war crimes.[273] The Prosecutor-General must approve the filing of criminal charges in certain cases.[274] Charges may not be brought if there has been a final judgment abroad, except when the crime is an international offence within the scope of Section 7.[275] Contrary to the rule of international law in the Nuremberg Charter and other international instruments, superior orders are a defence to war crimes, crimes against humanity, genocide and torture, in certain circumstances.[276] However, this defence should not be considered applicable in the light of Section 15 of Chapter 1, which provides that international law restrictions prevail over Finnish criminal law.

Although there is no requirement of dual criminality with respect to prosecutions under Section 7, Section 11 imposes such a requirement with respect to Section 6 (apart from certain limited exceptions) and to Section 8 of Chapter 1.[277] There are no express provisions in the Penal Code concerning recognition of official immunities of foreigner officials. Therefore, pursuant to Section 15 of Chapter 1 of the Penal Code, official immunities of foreign officials are recognized only to the extent that such immunities must be recognized under international law.

· ***France:*** French courts may exercise universal jurisdiction over war crimes, but only in two situations. First, they may do so if the crimes were committed by a person who subsequently became a French national and, second, if they were committed in the former Yugoslavia since

[273] Penal Code, Ch. 8 (Statute of limitations), Sec. 1 (Law 138/1973) (paragraph 1 provides that "[a] sentence shall not be passed if charges have not been brought (1) within twenty years, if the most severe penalty provided for the offence is fixed-term imprisonment for over eight years, (2) within ten years, if the most severe penalty is imprisonment for more than two years and at most eight years[.]"). The maximum penalty for petty war crimes is four months, for war crimes and violations of human rights in a state of emergency it is six years and it is 12 years for aggravated war crimes and aggravated violations of human rights in a state of emergency.

[274] The general rule is that "[a] criminal case shall not be investigated in Finland without a prosecution order by the Prosecutor-General, where (1) the offence was committed abroad . . ." Penal Code, Ch. 1, Sec. 12 (Prosecution order by the Prosecutor-General), Law 205/1997, para. 1. "However, the order by the Prosecutor-General shall not be required, if (1) the offence was committed by . . . a foreigner permanently resident in Finland . . . [or] (2) the offence was committed in Denmark, Iceland, Norway or Sweden and the competent public prosecutor of the place of commission has requested that the offence be tried in a Finnish court." *Ibid.*, para. 2.

[275] Penal Code, Ch. 1, Sec. 13 (Foreign judgment), para. 2 (3). Section 13 (Foreign judgment) (2) (Law 814/1998) (3) of Chapter 1 provides that the Prosecutor-General may institute a prosecution in Finland for "an international offence referred to in section 7" even if there has been a foreign judgment for the same act, but Section 13 (3) requires that any sentence served be taken into account.

[276] *Ibid.*, Ch. 3 (Vindication and mitigation) (Law 621/1967), § 10a (1). It provides:
"A subordinate soldier shall be sentenced to punishment for an act that he/she has committed in accordance with the order of a superior officer only if he/she has clearly understood that by obeying the order he/she would be breaking the law or his/her duty or service. If, however, the act has occurred under circumstances in which the subordinate could not have disobeyed the order, he/she may remain unpunished."

[277] *Ibid.*, Ch. 1, § 11. Paragraph 1 states:
"If the offence has been committed in the territory of a foreign State, the application of Finnish law may be based on sections 5 [passive personality], 6 and 8 only if the offence is punishable also under the law of the place of commission and a sentence could have been passed for it by a court of that foreign State. In this event, a sanction that is more severe than what is provided by the law of the place of commission shall not be imposed in Finland."
Paragraph 2 of Section 11 provides that, "[e]ven if the offence is not punishable under the law of the place of commission, Finnish law shall apply to it if it has been committed by a Finnish citizen or a person referred to in Section 6 (3) (1) [a person who at the time of the offence was, or at the beginning of the trial is, permanently resident in Finland] and the penalty for it has been laid down in [listing several specific sections covering sexual abuse of children].

1991 or in Rwanda in 1994 or in neighboring countries in that year, if by Rwandans.

(1) Constitutional and legislative provisions. Relevant legislative provisions are reinforced by the Constitution.

Constitution. The Preamble of the current French Constitution of 1958 refers to the Constitution of 1946, which declares that "[t]he French Republic, faithful to its traditions, conforms to the rules of international public law."[278] Article 55 of the French Constitution of 1958 provides that "[t]reaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws, subject, for each agreement or treaty, to its application by the other party."[279] However, as explained below, French courts have not treated these constitutional provisions as authorizing them, in the absence of legislation, to implement the jurisdictional provisions of international humanitarian law or other international treaties or customary international law.

Article 689 and related articles of the Penal Code. Article 55 of the Constitution is implemented in part by Article 689 of the Criminal Procedure Code (*Code de procédure pénal*), which provides:

> "The authors of and accomplices in offences committed outside the territory of the Republic may be prosecuted and tried in French courts when, pursuant to the provisions of the Criminal Code, Book 1, or of another legislative instrument, French law is applicable or when an international convention gives French courts jurisdiction to deal with the matter."[280]

Article 689 is followed by Article 689-1, which introduces a series of articles providing that French courts can exercise universal jurisdiction over persons found in France who are responsible for one of the violations listed in these articles. Article 689-1 states:

> "Pursuant to the international conventions referred to below, any person who renders himself guilty outside the territory of the Republic of any of the offences enumerated in those articles may, if in France, be prosecuted and tried by French courts. This article shall apply to attempts to commit any of those offences whenever such attempts are punishable[.]"[281]

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[278] The original French text of the Preamble of the 1946 Constitution reads: *"La République française, fidèle à ses traditions, se conforme aux règles du droit public international."*

[279] The original French text of Article 55 reads:

"Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois sous réserve, pour chaque accord ou traité, de son application par l'autre partie."

(English translation in Vlad G. Spitzer, *France*, in Albert P. Blaustein & Gisbert H. Flanz, eds, *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. June 1998).

[280] Code of Criminal Procedure, as amended by the Act of 16 December 1992, Art. 689 (English translation in the second periodic report of France to the Committee against Torture, U.N. Doc. CAT/C/17/Add.18, 8 October 1997, para. 54. The original French text of Article 689 provides:

"Les auteurs ou complices d'infractions commises hors du territoire de la République peuvent être poursuivis et jugé par les juridictions françaises soit lorsque, conformément aux dispositions du livre 1er du Code pénal ou d'un autre texte législatif, la loi française est applicable, soit lorsqu'une convention internationale donne compétence aux juridictions françaises pour connaître d l'infraction."

Code de procédure pénale, art. 689.

[281] Code of Criminal Procedure, as amended by the Act of 16 December 1992, entered into force on 1 March 1994, Art. 689-1 (English translation in the second periodic report of France, *supra, n.281*, para. 56. The

The articles that follow, 689-2 to 689-7, provide jurisdiction over persons in the circumstances identified in Article 689-1 who violated certain specific treaties, none of which is an international humanitarian law treaty. As explained below, French courts have held that Article 689 and subsequent articles do not provide for universal jurisdiction over war crimes.

Universal jurisdiction over war crimes in the former Yugoslavia and Rwanda. However, French courts may exercise universal jurisdiction over war crimes if they were committed in the former Yugoslavia since 1991 or in Rwanda in 1994 or in neighboring countries in that year, if by Rwandans, but not by nationals of France or other countries.

original French text of Article 689-1 provides:

> *"En application des conventions internationales visées aux articles suivants, peut être poursuivie et jugée par les juridicitions françaises, si elle se trouve en France, toute personne qui s'est rendue coupable hors du territoire de la République de l'une des infractions énumerées par ces articles. Les dispositions du présent article sont applicables à la tentative de ces infractions, chaque fois que celle-ci est punissable."*

French Law 95-1 of 2 January 1995, which implements Security Council Resolution 827 establishing the Yugoslavia Tribunal, gives French courts jurisdiction over persons who commit such crimes, as well as war crimes during international armed conflict, in the former Yugoslavia since 1991, if they are found in France.[282] Similarly, under Law 96-432 of 22 May 1996, French courts can exercise universal jurisdiction over violations of Article 4 of the Rwanda Statute, which includes violations of common Article 3 of the Geneva Conventions and of Protocol II committed in Rwanda. It stated that

> "according to articles 1 and 2 of the above-mentioned act of 22 May 1996, the offenders or the accomplices of the acts that constitute, under articles 2 to 4 of the Statute of the International Tribunal, grave transgressions against the Conventions of Geneva of 12 August 1949, violations of the laws or customs of war, genocide or crimes against humanity, can, when they are found in France, be prosecuted and judged by the French jurisdictions, while applying French law[.]"[283]

However, it did not find that the provisions of these treaties was too general a character to create rules of extraterritorial jurisdiction. That law, which implements Security Council Resolution 955 establishing the Rwanda Tribunal, provides such courts with jurisdiction over violations of common Article 3 and Protocol II committed in Rwanda during 1994.[284]

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[282] Article 2 of that law provides French courts with universal jurisdiction over grave breaches of the Geneva Conventions, violations of the laws and customs of war, genocide and crimes against humanity, as defined in Articles 2 to 5 of the Yugoslavia Statute, committed in the former Yugoslavia:

"Les auteurs ou complices des infractions mentionnées à l'article 1er peuvent être poursuivis et jugés par les juridictions françaises, en application de la loi française, s'ils sont trouvés en France. Ces dispositions sont applicables à la tentative de ces infractions, chaque fois que celle-ci est punissable. . ."

Loi n. 95-1 du 2 janvier 1995.

[283] *Munyeshyaka, Jugement, Cour de cassation, Chambre criminelle, No. 96-82.491 PF*, 6 January 1998, *Bulletin des Arrêts de la Cour de Cassation, Nº1, Chambre Criminelle, janvier 1998, reprinted in* 102 *Revue générale de Droit international public* 825 (1998/3); English translation by Louise Wesseling Plug in 1Y.B. Int'l Hum. L. 598, 599 (1998). The original French text reads:

"Attendu que, selon les articles 1er et 2 de la loi du 22 mai 1996 précité, les auteurs ou complices des actes qui constituent, au sens des articles 2 à 4 du statut du tribunal international, des infractions graves aux Conventions de Genève du 12 août 1949, des violations des lois ou coutumes de guerre, un génocide ou des crimes contre l'humanité, peuvent, s'ils sont trouvés en France, être poursuivis et jugés par les juridictions françaises, en application de la loi française[.]"

Although the accused was not charged with war crimes, the court expressly stated that French courts could exercise universal jurisdiction over all the crimes within the Rwanda Tribunal's jurisdiction (for further information about this case see Chapter Ten, Section II).

[284] Article 1 of the 1996 law on cooperation with the Rwanda Tribunal provides in part:

"Pour l'application de la résolution 955 du Conseil de sécurité des Nations unies du 8 novembre 1994 instituant un tribunal international en vue de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda, ainsi que les citoyens présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins, entre le 1er janvier et le 31 décembre 1994, la France participe à la répression des infractions et coopère avec cette jurisdiction dans les conditions fixées par la présente loi.

Les dispositions qui suivent sont applicable à toute personne poursuivie à raison des actes qui constituent, au sens des articles 2 à 4 du statut du tribunal international, des infractions graves à l'article 3 commun aux conventions de Genève du 12 août 1949 et au protocole additionnel II auxdites conventions en date du 8 juin 1977, un génocide ou des crimes contre l'humanité."

Article 2 of this law provides:

"Les articles 2 à 16 de la loi n. 95-1 du 2 janvier 1995 portant adaptation de la législation française aux dispositions d la résolution 827 du Conseil de sécurité des Nations unies instituant un tribunal international en vue de juger les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yugoslavie despuis 1991 sont applicables aux personnes visées à l'article 1er."

Loi n. 96-432 du 22 mai 1996, arts. 1 et 2.

Universal jurisdiction over persons who subsequently become French nationals. In addition to the above legislative provisions, Article 113-6 of the Penal Code (*Code pénal*), which permits French courts to try persons for crimes under French law committed abroad if the person subsequently becomes a French national. That article provides:

> "French criminal law is applicable to any felony (*crime*) committed by a French national outside the territory of the Republic.
>
> It is applicable to misdemeanours (*délits*) committed by French nationals outside of territory of the Republic if the conduct is punishable by the legislation of the country where it has been committed.
>
> This present article applies even though the accused acquired French nationality subsequent to the conduct imputed to him or her."[285]

[285] Penal Code, Art. 113-6 (English translation in *The French Penal Code of 1994 as amended of January 1, 1999* (Littleton, Colorado: Fred B. Rothman & Co. 1999) (Edward A. Tomlinson trans.)). The original French text reads:

> *"La loi pénale française est applicable à tout crime commis par un Français hors du territoire de la République.*
>
> *Elle est applicable aux délits commis par des Français hors du territoire de la République si les faits sont punis par la législation du pays où ils ont été commis.*
>
> *Il est fait application du présent article lors même que le prévenu aurait acquis la nationalité française postérieurement au fait qui lui est imputé."*

Code pénal, art. 113-6 (Paris: Dalloz 1997/1998).

France is a party to Hague Convention IV, the Geneva Conventions and Protocols I and II. It has ratified the Rome Statute and is now preparing implementing legislation. Military courts have jurisdiction over war crimes in an outdated law adopted during the Second World War, shortly after the liberation of Paris.[286] Although the *Code de justice militaire* (Code of Military Justice) has been repeatedly amended, it does not expressly include grave breaches of the Geneva Conventions or of Protocol I or other violations of these treaties or of Protocol II.[287] France has a statute of limitations of 10 years for crimes, which includes war crimes.[288]

(2) Investigations and court decisions. Courts have interpreted French legislation restrictively.

[286] *Ordonnance du 28 août 1944 relative à la répression des crimes de guerre.*

[287] The following persons are subject to the Code of Military Justice: prisoners of war (Art. 63), minors who are 18 when they are nationals of an occupied state or an enemy state at the time of the crimes (Arts 64 & 69) and enemy nationals or persons acting in the interests of the enemy in a territory under the authority of France or in a zone of military operations acting against a stateless person or a refugee residing in either area when such persons have committed crimes not justified by the laws and customs of war (Art. 70). The original text in French of Article 70 reads:

> *"Sont de la compétence des juridictions des forces armées les crimes et délits commis depuis l'ouverture des hostilités par les nationaux ennemis ou par tous agents au service de l'administration ou des intérêts enemis, sur le territoire de la République ou sur un territoire soumis à l'autorité de la France ou dans toute zone d'opérations de guerre, soit à l'encontre d'un national ou d'un protégé français, d'un militaire servant ou ayant servi sous le drapeau français, d'un apatride ou réfugié résidant sur un des territoires visés ci-dessus, soit au préjudice des biens de toutes les personnes physiques visées ci-dessus et de toutes les personnes morales françaises, lorsque ces infractions, même accomplies à l'occasion ou sous le prétexte du temps de guerre, ne sont pas justifiées par les lois et coutumes de la guerre. Est réputée commise sur le territoire de la République toute infractioni don't un acte caractérisant un de ses éléments constitutifs a été accompli en France."*

Code de justice militaire, Loi nº 82-621 du 21 juillet 1982 Journal Officiel du 22 juillet 1982 rectificatif JORF 3 août 1982 en vigueur le 1er mai 1983, art. 70.

Several offences against military discipline which constitute war crimes are expressly listed as crimes in the Code of Military justice, including pillaging (Art. 427), robbing wounded, sick, shipwrecked and the dead (Art. 428) and misuse of Red Cross insignia in violation of the laws and customs of war (Art. 439), following a general provision which states that these offences are without prejudice to criminal prosecution for conduct amounting to *crimes* (felonies) and *délits* (misdemeanours), in particular those which are contrary to the laws and customs of war and international conventions (Art. 383). The original text in French of Article 383 reads:

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

Code de justice militaire, Loi nº 82-621 du 21 juillet 1982 Journal Officiel du 22 juillet 1982 rectificatif JORF 3 août 1982 en vigueur le 1er mai 1983, art. 383. However, Article 383 seems to simply provide that these offences can also be punished under some other provision.

[288] *Code de procédure pénale (Paris: Litec 9e ed. 1996/1997), art. 7 (L. n. 92-1336, 16 déc. 1992, art. 7 ; L. n. 93-913, 19 juill. 1993).*

Javor. On its face, Article 689 of the Criminal Procedure Code would appear to be self-executing and to authorize French courts to exercise universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I. Indeed, in 1994, a French investigating judge (*juge d'instruction*) in the *Javor* case held that French courts could exercise universal jurisdiction under the Geneva Conventions over a person suspected of responsibility for grave breaches of those Conventions against Bosnian nationals who was later found in France.[289] However, many observers were surprised when this ruling was reversed by the *Cour d'appel* (Court of Appeal). The court held that the provisions of the Geneva Conventions were too general to create criminal jurisdictional and that no French law had implemented these provisions.[290] This decision was affirmed by the *Cour de cassation* (Court of Cassation).[291] The *Cour de cassation* gave the same two reasons for its decision on this point as the *Cour d'appel*. First, France had not enacted any legislation implementing the *aut dedere aut judicare* obligation in the Geneva Convention. Second, the conventions could have no direct effect in the French legal system because "their provisions have too general a character to be able directly to create rules on extraterritorial jurisdiction in criminal matters."[292] This decision has been severely criticized by leading French legal scholars. For example, Brigitte Stern has argued that Article 689 contemplated the Geneva Conventions and she also suggested that French courts might have relied upon customary international law.[293]

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[289] In re *Javor, N. Parquet 94 052 2002/7, Ordonnance, Tribunal de grande instance, Paris,* 6 May 1994 (Getti, J.). However, the following year another judge in the same court came to the opposite conclusion. *Dupaquier et Gatari contre Zigiranyirazo et Hahimana, N. Parquet 943252005/6, Ordonnance d'incompetence, Tribunal de Grande instance, 23 février 1995* (Hervé Stephan, J.). That judge concluded that the *aut dedere aut judicare* provisions concerning grave breaches of the Geneva Conventions created only an obligation on states parties to enact these provisions into law and that they were too general to be applied by French courts and did not exclude the possibility that states parties need only adopt other categories of extraterritorial jurisdiction, rather than universal jurisdiction:

> "These articles only create an obligation on the contracting parties to translate into national law the rules they define; Whereas it must first be noted that the wording of the aforementioned articles is conceived in a general manner, unlike some of the texts mentioned; that in particular there is no mention, if only expressly to exclude them, of the usual criteria relating, for example, to the place where the acts were committed, to the nationality of the victims or of the perpetrators, or to their place of refuge after the event." (English translation by Amnesty International)

The original French text reads:

> *"[C]es articles ne créent qu'une obligation à la charge des parties contractantes de traduire en droit interne les règles qu'ils définissent; Attendu qu'il doit être tout d'abord relevé que la rédaction des articles précités est conçues de manière générale, contrairement d'ailleurs à d'autres textes évoqué; qu'en particulier n'y figurent pas, ne serait-ce que pour les exclure expressément, les critères habituellement retenus relatifs, par example, au lieu de commission des faits, à la nationalité des victimes ou des auteurs, ou à leur lieu de refuge ou de résidence postérieurments aux faits."*

As indicated above in Chapter Three, Part II, there appears to be no basis for this interpretation in the drafting history.

[290] In re *Javor, Dossier N. A 94/ 02071, Arrêt, Cour d'appel, Paris,* 24 November 1994 (stating that *"[c]es dispositions revêtent un caractère trop général pour créer directement des règles de compétence en matière pénale"* and that *"aucun texte portant adaptation de la législation française aux dispositions . . . des Conventions de Genève n'est intervenu"*).

[291] *Javor, Arrêt, no. 132, Cour de cassation, chambre criminelle, 26 mars 1996, 1996 Bulletin des Arrrêts de la Cour de Cassation, Chambre Criminelle, nos. 1-6, 379.*

[292] In re *Javor,* (The court stated *"qu'en l'absence d'effet direct des dispositions des quatre Conventions de Genève, relatives à la recherche et à la poursuite des auteurs d'infractions graves, l'article 689 du Code de procédure pénale ne saurait recevoir application".*) (English translation in Brigitte Stern, In re *Javor,* 93 Am. J. Int'l L. 525, 527, n. 14 (1999)).

[293] Stern, In re *Javor, supra, n. 293,* 528-529; _____, *La compétence universelle en France: le cas des crimes commis en ex-Yougoslavie et au Rwanda,* 40 Ger. Y.B. Int'l L. 280, 293-294, 296-299 (1997). *See also* Claude Lombois, *De la compassion territoriale,* Rev. Sc. Crim., Apr. - Jun. 1995, 399; Michel Massé, *Ex-Yugoslavie,*

Munyeshyaka. However, the *Cour de cassation* reached a different conclusion with respect to violations of international humanitarian law committed in non-international armed conflict in Rwanda. On 6 January 1998, it held in the *Wenceslas Munyeshyaka* case that, pursuant to French Law 96-432 of 22 May 1996, French courts could exercise universal jurisdiction over violations of Article 4 of the Rwanda Statute, which includes violations of common Article 3 of the Geneva Conventions and of Protocol II committed in Rwanda. It stated that

> "according to articles 1 and 2 of the above-mentioned act of 22 May 1996, the offenders or the accomplices of the acts that constitute, under articles 2 to 4 of the Statute of the International Tribunal, grave transgressions against the Conventions of Geneva of 12 August 1949, violations of the laws or customs of war, genocide or crimes against humanity, can, when they are found in France, be prosecuted and judged by the French jurisdictions, while applying French law[.]"[294]

However, it did not find that the provisions of these treaties was too general a character to create rules of extraterritorial jurisdiction. That law, which implements Security Council Resolution 955 establishing the Rwanda Tribunal, provides such courts with jurisdiction over violations of common Article 3 and Protocol II committed in Rwanda during 1994 (for the text, see discussion above under legislation). Presumably, the earlier French Law 95-1 of 2 January 1995, which implements Security Council Resolution 827 establishing the Yugoslavia Tribunal, similarly gives French courts jurisdiction over persons who commit such crimes, as well as war crimes during international armed conflict, in the former Yugoslavia since 1991, if they are found in France (for the text, see discussion above).

Restrictions on the scope of French legislation. In addition to the limited geographic and temporal scope of legislation concerning war crimes, the outdated definitions of conduct falling within the jurisdiction of military tribunals as war crimes and the ten-year statute of limitations, French courts have further restricted the scope of war crimes.

French courts have imposed a strict custodial jurisdiction limitation on the exercise of universal jurisdiction which makes it almost impossible for prosecutors or investigating judges to investigate crimes abroad unless, as in the *Munyeshaka* case, the suspect was living openly in the country and readily identifiable. As noted above, Articles 689-1 and 689-2 to 689-7, as well as the 1995 and 1996 laws concerning the former Yugoslavia and Rwanda, require that the suspect be found in France. In the *Javor* case, Judge Getti had interpreted this requirement broadly, permitting all the activities of the preliminary inquiry (*actes d'instruction*) to be conducted with a view to identifying the suspect and determining the appropriate charges so that the suspect could

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[294] *Munyeshyaka, Jugement, Cour de cassation, Chambre criminelle, No. 96-82.491 PF*, 6 January 1998, *Bulletin des Arrêts de la Cour de Cassation, N°1, Chambre Criminelle, janvier 1998, reprinted in* 102 *Revue générale de Droit international public* 825 (1998/3) (a corrected version of the decision reportedly was issued on 10 February 1998); English translation by Louise Wesseling Plug in 1Y.B. Int'l Hum. L. 598, 599 (1998). The original French text reads:

> *"Attendu que, selon les articles 1er et 2 de la loi du 22 mai 1996 précité, les auteurs ou complices des actes qui constituent, au sens des articles 2 à 4 du statut du tribunal international, des infractions graves aux Conventions de Genève du 12 août 1949, des violations des lois ou coutumes de guerre, un génocide ou des crimes contre l'humanité, peuvent, s'ils sont trouvés en France, être poursuivis et jugés par les juridictions françaises, en application de la loi française[.]"*

Although the accused was not charged with war crimes, the court expressly stated that French courts could exercise universal jurisdiction over all the crimes within the Rwanda Tribunal's jurisdiction (for further information about this case see Chapter Ten, Section II).

either be arrested if in France or extradition requested. The *Cour d'appel* and *Cour de cassation* held that no jurisdiction existed even for such preliminary steps unless it could be proved that the suspect was in France.

The interpretation by the *Cour d'appel* and *Cour de cassation* is problematic for at least three reasons. First, it prevents France from implementing the provisions of the Geneva Conventions, which expressly authorize states parties to request other states to extradite persons suspected of grave breaches, even if they have no link to the requesting state, thus limiting the effectiveness of France as an agent of the international community able to act when other states parties fail to fulfill their responsibilities under international law to bring such persons to justice. Second, it prevents France from fulfilling effectively its duty to cooperate with other states in tracing and arresting persons suspected of war crimes, particularly with respect to persons suspected of crimes within the jurisdiction of the Yugoslavia and Rwanda Tribunals and the future International Criminal Court. Third, it makes it impossible for victims to invoke the resources of the prosecutor or investigating magistrate to locate a suspect believed to be in France. Since victims are often in exile with limited resources, they will not have the same ability to locate such suspects or to do so in a way which will not alert them and lead to their flight. The requirement that the suspect be found in France is in marked contrast to the use of trials *in absentia* based on territorial and passive personality jurisdiction, such as in the *Astiz* case.[295]

It has been argued that another problem with French law concerning universal jurisdiction concerning war crimes is that it is limited to universal jurisdiction over such crimes as defined in French, rather than international, law. The wording of paragraph 2 of Article 1 of the 1995 law concerning the former Yugoslavia and of paragraph 2 of Article 1 of the 1996 law concerning Rwanda appears to require prosecution for war crimes as defined in the Statutes of the two Tribunals. However, a leading commentator on French law concerning universal jurisdiction has stated that, in effect, the definitions used by courts in prosecutions pursuant to these two provisions will be more restrictive definitions under French law.[296]

[295] *Astiz, Arrêt, N°1893/89, Cour d'assises de Paris, 16 mars 1990.* See also *Astiz, Arrêt, N°1 893.89, Cour d'appel de Paris, 2ème Chambre d'accusation, 20 Octobre 1989.*

[296] Stern, *La compétence universelle, supra, n.294,* 298.

Unfortunately, France reportedly does not intend to give its courts universal jurisdiction over any of the war crimes within the jurisdiction of the International Criminal Court when it enacts implementing legislation or to modify the restrictive custodial jurisdiction limitations on extraterritorial jurisdiction, although it apparently is likely to repeal the statute of limitations for war crimes.[297] Unless this current intention is changed, French legislation providing for universal jurisdiction over war crimes will continue to be limited to war crimes in the former Yugoslavia since 1991 and in Rwanda in 1994, and war crimes in 1994 committed by Rwandan citizens in neighbouring countries, except for torture (see Chapter Ten, Section II), although it does provide for passive personality jurisdiction over war crimes.

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

The United Kingdom's Geneva Conventions Act 1957 (except for Section 4 and Section 8 (2)) applied to the Gambia prior to independence under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below). Gambia became independent on 18 February 1965. On 1 September 1959, the Gambia adopted legislation providing that Section 4 (1) of the Geneva Conventions Act 1957 would apply to the Gambia as of that date.[298] As far as is known, neither the 1959 Order in Council nor the 1959 Act have been repealed since that date.

Gambia is a party to the Geneva Conventions and Protocol I and II. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. It has not been possible to determine if national law expressly provides that statutes of limitations do not apply to grave breaches, but Gambia is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

· ***Georgia:*** Georgian courts may exercise universal jurisdiction over conduct amounting to war crimes in three situations, based on legislative provisions whose origins can be traced back to Russian universal jurisdiction legislation of 1903 (see Chapter Two, Section II.A). The relevant legislative provisions are reinforced by Article 6 (2) of the Constitution, which reads:

> "The legislation of Georgia conforms with universally recognized principles and norms of international law, international treaties or agreements of Georgia which are not against the Constitution of Georgia have superior legal force in relation to internal normative acts."[299]

This constitutional provision is supplemented by Article 6 (International Treaty in Legislation of Georgia) of the Law on International Treaties of Georgia, which provides:

"1. An international treaty of Georgia is an integral part of the legislation of Georgia.

[297] Statement by a senior official of the Ministry of Justice at a conference organized by the International Law Society in Berlin, 21-22 October 2000.

[298] Laws of the Gambia, Chapter 24:01, Geneva Conventions - An Act to enable effect to be given to certain International Conventions done at Geneva on the 12th day of August, 1949, and for purposes connected therewith, 1 September 1959, Preamble, para. 3.

[299] The Constitution of Georgia, adopted 24 August 1995, Art. 6 (2) (English translation in Gisbert H. Flanz, *Georgia - Booklet 2, in* Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. August 1996) (Release 96-5 Kevin Jones trans.)). The comma appears to be a typographical error for either a semi-colon or a full stop.

2. An international treaty of Georgia, unless it is contrary to the Constitution of Georgia, shall have preferential legal force with respect to municipal normative acts.
3. The provisions of officially published international treaties of Georgia establishing rights and duties of a specific character and not requiring the adoption of municipal clarifying normative acts shall operate in Georgia directly."[300]

It has not been possible to locate any jurisprudence or commentary on Article 6 (2) of the Constitution or Article 6 of the Law on International Treaties that would indicate whether either provision would be independent bases for exercising universal jurisdiction over crimes abroad.

The first legislative provision, paragraph 1 of Article 5 (Criminal responsibility for a crime committed overseas) of the Criminal Code of Georgia provides universal jurisdiction over aliens permanently resident in Georgia who commits acts abroad which are crimes under the Code, as well as crimes under the law of the territorial state. That provision states:

"A citizen of Georgia as well as a person permanently resident in Georgia but not possessing citizenship who commits abroad such an action considered by this Code which is deemed a crime according to the legislation of the state where it is committed will be liable for criminal responsibility according to this Code, if they have not been condemned in another state."[301]

Second, Article 5 (2) permits national courts to exercise universal jurisdiction over aliens permanently resident in Georgia who commit acts abroad which are crimes under the Code and under international undertakings, even if not crimes under the law of the territorial state. It reads:

"A citizen of Georgia as well as a person permanently resident in Georgia but not possessing citizenship who commits abroad such an action considered by this Code which is not deemed a crime according to the legislation of the state where it is committed will be liable for criminal responsibility according to this Code, if this is a serious or particularly serious crime directed against the interests of Georgia or if criminal responsibility for this crime is considered according to Georgia's international undertakings."[302]

Third, Article 5 (3) provides universal jurisdiction over foreigners and stateless persons not permanently resident in Georgia who have committed a serious crime within the meaning of Georgia's international undertakings. That provision states:

[300] Law on International Treaties of Georgia, adopted 16 October 1997, Art. 6 (English translation in 4 *Sudebnik* 398, 392 (1999)).

[301] Criminal Code of Georgia, 22 July 1999, Art. 5 (1) (English translations of Code by Amnesty International). Previously such jurisdiction appears to have been provided in Article 6 of the Code. Initial report of Georgia to the Committee against Torture, U.N. Doc. CAT/C/28/Add.1, 17 June 1996), para. 75. The second periodic report to the Committee against Torture, submitted on 15 November 1999, covering the period from 1996 to July 1999, does not mention the new Criminal Code or suggest that there has been any change in the scope and conditions of universal jurisdiction.

[302] Criminal Code of Georgia, Art. 5 (2). Previously, such jurisdiction appears to have been provided in Article 6 of the Code. Initial report of Georgia, *supra, n. 302*, para. 76.

> "The citizen of a foreign country who has committed a crime abroad as well as a person not holding citizenship who do not live permanently in Georgia will be liable to criminal responsibility according to this Code, if this is a serious or particularly serious crime directed against the interests of Georgia or if criminal responsibility for this crime is considered according to Georgia's international undertakings, if indeed they have not been condemned in another state."[303]

Georgia is a party to the Geneva Conventions and Protocol I and II. It has signed the Rome Statute, but as of 1 September 2001, it had not yet ratified it. Certain war crimes in international and non-international armed conflict are made crimes under the Criminal Code in Chapter XLVII (Crimes against the Peace and Security of Mankind and International Humanitarian Law) in the Fourteenth Section of the Code (Crimes against Humanity).[304] Georgia is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and the Criminal Code provides that statutes of limitation are not applicable to war crimes.[305]

· ***Germany:*** There are two provisions in the *Strafgesetzbuch* (StGB), German Penal Code of 1871, as amended, which permit courts to exercise universal jurisdiction over conduct amounting to war crimes. Their origins can be traced back to proposals made in the Weimar Republic in 1927 (see Chapter Two, Section II.A).[306]

These legislative provisions are reinforced by Article 25 of the Constitution, which provides that international law has priority over legislation: "The general rules of international law shall be an integral part of federal law. They shall override laws and directly establish rights and obligations for the inhabitants of the federal territory."[307] German legal commentary indicates, however, that the principle of legality in Article 103 (2) of the Constitution is interpreted to prohibit a national court from trying a person for a crime under international law unless the conduct is a crime under national law at the time it occurred.[308] Thus, to the extent that the conduct is prohibited only as an ordinary

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[303] Criminal Code of Georgia, Art. 5 (3). Previously, such jurisdiction appears to have been provided in the Code, although it is not clear whether it was in Article 6 or some other article. Initial report of Georgia, *supra, n.302,* para. 76.

[304] Criminal Code of Georgia, Art. 411 (The deliberate transgression of the norms of international humanitarian law at a time of armed conflict); Art. 412 (The deliberate transgression of the norms of international humanitarian justice at a time of inter-state or intra-state armed conflict by the creation of a danger to health or by physical maiming").

[305] Criminal Code of Georgia, Art. 71 (Freeing from criminal responsibility because of the passage of the term of a statute of limitation); Art. 76 (Freeing from serving punishment because of lapse of time from the guilty verdict). Both provisions state that a statute of limitation will not apply in a case involving Georgia's international undertakings.

[306] Parts of the analysis of German legislation and jurisprudence in this memorandum draw upon two unpublished papers: Luc Reydams, *Germany*, a draft chapter of his book, *Universal Jurisdiction in International Law* (Oxford: Oxford University Press 2001) (forthcoming), and Robert Roth & Yvan Jeanneret, *Rapport sur le droit allemand, 22 juin 2001*, unpublished draft manuscript submitted for discussion at the *Etude comparée des critères de compétence juridictionnelle en matière de crimes internationaux (crimes contre l'humanité, génocide, torture, crimes de guerre, terrorisme)*, Paris, 2 to 3 July 2001.

[307] The Basic Law of the Federal Republic of Germany, 23 May 1949, as amended to June 1993, together with the text of the 40th amendment of 20 December 1993 (Official English translation in Gisbert H. Flanz, *Germany, in* Albert P. Blaustein & Gisbert H. Flanz, eds, *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. August 1994) (Release 94-6).

[308] Roth & Jeanneret, *supra, n.307,* 3 to 4 (*citing* H. Tröndle & T. Fischer, *Strafgesetzbuch und*

crime, such as murder, rather than as a crime under international law, it will be subject to the limitations applicable to ordinary crimes under national law, which in many cases are wholly inappropriate to crimes of this gravity.

(1) Legislation. First, paragraph 9 of Section 6 (Conduct outside Germany affecting internationally protected interests) of the German Penal Code permits courts to exercise universal jurisdiction (*Weltrechtsprinzip*) over conduct amounting to war crimes. It provides that

Nebengesetze (Munich 49th ed. 1999) § 6 N.9.; H. H. Jescheck & T. Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil* 164 (Berlin 5th ed. 1996); Christiane Nill-Theobald, *"Defences" bei Kriegsverbrechen am Beispiel Deutschlands und der USA* (Freiburg im B. 1998) [37ss.BverfG *in* NStZ 2001, 241]).

> "[r]egardless of the law of the place of commission, the German criminal law is also applicable to the following acts committed outside of Germany: . . . (9) Acts which, on the basis of an international treaty binding on the Federal Republic of Germany, are to be prosecuted even in cases when such acts have been committed abroad."[309]

In a prosecution pursuant to this paragraph, the suspect would be charged with an ordinary crime under international law, such as murder or rape, not directly with the crime under international law, such as grave breaches of the Geneva Conventions or Protocol I.[310] The problems with relying on ordinary crimes under German law to prosecute war crimes under international law have led to calls to incorporate war crimes in the Penal Code as part of the implementing legislation for the Rome Statute (see below in this entry).[311] There is no express requirement that the suspect be in Germany at the time an investigation is opened.[312]

In addition to Section 6 (9) of the Penal Code, Section 7 (2) provides for universal jurisdiction in two situations. First, German criminal law applies to persons who were foreigners at the time of the crime but subsequently acquired German citizenship and, second, it applies to foreigners arrested in Germany for acts punishable in the territorial state, if the suspect is not extradited:

> "(2) The German criminal law is likewise applicable to crimes committed abroad if such conduct is punishable by the law of the place where it occurred, or if no criminal law enforcement existed at the place where the crime was committed, and if the perpetrator:
> 1. was a German at the time of the crime or acquired German citizenship thereafter, or

[309] German Penal Code of 15 May 1871 (*Strafgesetzbuch vom 15. Mai 1871*) (StGB), § 6 (9). Published in *Bundesgesetzblatt* 1160 (1987).

[310] A leading commentator on German legislation concerning crimes under international law has stated that "in recent years the clause dealing with Germany's international obligations [Section 6 (9)] has always been understood as embodying the Geneva Conventions and the Additional Protocols." Horst Fischer, *Some Aspects of German State Practice Concerning IHL*, 1 Y. B. Int'l L. 380, 382 (1998). However, since war crimes and crimes against humanity are not, as such, defined as crimes under national law, if German courts exercise universal jurisdiction over such crimes,

> "the German Penal Code applies in full, including its definitions of crimes, rules about attempt, participation, justification and mitigating circumstances. German law and not international law forms the basis for a judgement, as is made clear by the introductory sentence of sections 3-7 stating that 'German law applies'. The current prosecution of the penal code in question, be it murder, taking of hostages or damage to property."

Ibid., 383.

[311] Some of these problems are described in Fischer, *supra, n.311*,387-389.

[312] As explained in Chapter Three, Section II.B.2, the Geneva Conventions envisage states parties requesting the extradition of person suspected of grave breaches of the Conventions whenever the requesting state can make out a *prima facie* case; they do not require that the suspect have been in the requesting state's territory or jurisdiction at any time prior to the request. Similarly, Article 5 (3) of the Convention against Torture envisages states parties being able to exercise any form of jurisdiction under their national legislation, without requiring the suspect's presence before initiating an investigation. It could be argued that the phrase, "Acts which, on the basis of an international treaty binding on the Federal Republic of Germany, are to be prosecuted even in cases when such acts have been committed abroad", includes situations when the treaty has permissive language as well as when it contains obligatory language, but it has not been possible to locate any definitive jurisprudence on this question.

2. was a foreigner at the time of the crime, was apprehended within Germany and, although the extradition statute would permit extradition for the type of offense involved, was not extradited either because a request for extradition was never made, or was refused, or because extradition is not feasible."[313]

There is no statute of limitations for murder, but statutes of limitations for ordinary crimes under national law would apply to other conduct amounting to war crimes or crimes under international law, except for genocide.[314] German law incorporates international law with respect to official immunities.[315] However, it also extends immunity to representatives of states visiting Germany on an official invitation. This provision reportedly was enacted for the visit of Ernest Honecker, the head of the East German Communist Party, in 1987, but was not designed to address the question of crimes under international law generally. The current failure to define war crimes as crimes under national law means that prosecutions for conduct amounting to war crimes will be subject to principles of criminal responsibility, defences and other restrictions that are not applicable to crimes under international law. This result has been criticized.[316] The *ne bis in idem* principle incorporated in Article 103 (3) of the Constitution does not preclude a prosecution in Germany for a crime that has been the subject of a foreign judgment.[317]

[313] Penal Code, § 7 (2). English text in *Federal Penal Code of the Republic of Germany* (Fred R. Rothman 1987). The government has explained that

"[u]nder section 7 (2), item 2 of the Penal Code, German criminal law is applicable to foreigners living in Germany for an act punishable by the law of the place where it occurred if the offender was not extradited either because a request for extradition was never made, or was refused, or because extradition is not feasible 'although the Extradition Act (*Auslieferungsgesetz*) would permit extradition for the type of offence involved'."

Initial report of Germany to the Committee against Torture, U.N. Doc. CAT/C/12/Add.117 March 1992, para. 58.

German authority is split on whether the legal norm in the territorial state must be identical. Reydams, *supra, n.307*.

Some scholars argue that this section is not based on universal jurisdiction (*Universalitätsprinzip*), but rather on the principle of vicarious (representational) jurisdiction (*stellvertretende Strafrechtspflege*). *See, for example,* Christoph J.M. Safferling, *Public Prosecutor v. Djaji_*, 92 Am. J. Int'l L. 528, 530 (1998). However, as indicated in Chapter One, Section II.E.3, representational jurisdiction should be seen as simply one form of universal jurisdiction, that is, jurisdiction over conduct abroad not linked to the forum state by the nationality of the accused or victim or by harm to the forum state's own interests. Moreover, it is difficult to see how Germany would be "representing" the interests of the territorial state if it refused a request to extradite and prosecuted the suspect for a crime under international law based on the ordinary crime under the German Penal Code.

[314] Penal Code, § 78 (2) (no statute of limitations for murder or genocide). Other statutes of limitations are addressed in paragraphs 1, 3 and 4 of Section 78 and other provisions related to statutes of limitations are found in Sections 78a, 78b, 78c, 79, 79a and 79b. German scholarly authority is split on whether a prosecution pursuant to Section 7 (2) could proceed if it were otherwise barred by a statute of limitations in the territorial state. Reydams, *supra, n.307.*

[315] German Judicature Act (GVG), *Gerichtverfassungsgesetz*, § 20 (2).

[316] *See* Roth & Jeanneret, *supra, n.307,* 6 (*citing* C. Nill-Theobald, *supra*, n.309).

[317] Article 51 (3) of the *Strafgesetzbuch* (StGB), Penal Code, provides that "if the convicted person has been punished abroad for the same offence, the new sentence will be offset against the foreign sentence if it has been served."

In contrast to the normal rule under the German concept of legality in Section 152 of the *Strafprozeßordnung* (StPO), Code of Criminal Procedure, which provides for mandatory prosecution (*Legalitätsprinzip*) whenever there is a sufficient factual basis, Section 153 of this code provides that the Public Prosecutor may exercise discretion not to prosecute (*Opportunitätsprinzip*) a case based on extraterritorial jurisdiction, subject to approval by the Chief Public Prosecutor of the *Bundesgerichtshof* (BGH), Federal Supreme Court, in three situations where other interests are determined to outweigh the public interest in a prosecution, so that decisions could be made - or be perceived to be made - on the basis of political, rather than legal considerations.[318] The proposed legislation for implementing the Rome Statute would modify this discretion (see below).

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

[318] *Strafprozeßordnung* (StPO), Code of Criminal Procedure, Section 153c (1). That provision states in part:

"The prosecution may refrain from prosecuting a criminal offence:
1. which has been committed outside the territorial application of this statute or which has been committed by a participant in a criminal offence in this territory which was perpetrated outside the territorial application of this statute,
2. which a foreigner has committed within Germany on a foreign ship or aircraft,
3. if a punishment has already been executed abroad against the accused for the offence and if the punishment to be expected in Germany would be negligible after credit is given for the punishment imposed abroad or if the accused has been finally and conclusively acquitted outside Germany for the offence."

English translation in the initial report of Germany to the Committee against Torture, *supra*, n.314, para. 66.

Proposed implementing legislation for the Rome Statute. A draft bill to implement the Statute is now being considered by the government that would define war crimes, crimes against humanity and genocide as crimes under German law in a special new Code of Crimes under International Law.[319] It would also provide for universal jurisdiction and abolish the severely criticized judicially created requirement of a link to Germany (see discussion below).[320] It would also modify the scope of the

[319] For background on the proposed code, see Claus Kreß, *Vom Nutzen eines deutschen Völkerstrafgesetzbuchs* (Baden-Baden 2000).

[320] Rome Statute of the International Criminal Court of 17 July 1998 Act [*Gesetz zum Römischen Statut des Internationalen Strafgerichtshofes vom 17. Juli 1998*]. Published in II *Bundesgesetzblatt* 1393 (2000). The implementing legislation for the Rome Statute is likely to define war crimes and other crimes within the International Criminal Court's jurisdiction as crimes under German criminal law. The Federal Ministry of Justice asked an expert group to assist its legislative work on the draft implementing legislation. On 2 May 2001, this expert group presented the report of its proceedings, with the *Entwurf Völkerstrafgesetzbuch* (EGVStB), Draft of a law for the introduction of a people's penal code, and a commentary on the draft legislation, to the Federal Minister of Justice (English translations cited in this memorandum are by Amnesty International). Federal Ministry of Justice, Press Release of 2 May 2001 (*Bundesministerium der Justiz, Mitteilungen, Berlin, am 2. Mai 2001, Expertenarbeitsgruppe übergibt Entwurf eines Völkerstrafgesetzbuchs, international abgestimmte Strafgesetze gegen Schreibtischtäter und Folterknechte*). The Ministry of Justice will prepare a draft bill for the Parliament, based on the expert group's draft, which was sent to other ministries and the justice departments of the Lander, as well as to certain non-governmental organizations, for comment. The original German texts of the report and the press release are *obtainable from* http://www.bmj.bund/de.

Article 1 (Range of application - Principles of international law), § 1 of the draft legislation prepared by the expert group would eliminate the judicially created requirement of a link to Germany. It states: "This law is valid for all crimes listed even if the crime was committed abroad and has no relevance to Germany." The original German text reads:

> *"Artikel 1(Erster Teil Allgemeine Regelungen), § 1(Anwendungsbereich - Weltrechtsprinzip). Dieses Gesetz gilt für alle in ihm bezeichneten Verbrechen, auch wenn die Tat im Ausland begangen wurde und keinen Bezug zum Inland aufweist."*
>
> The commentary on this provision explains:
>
> "The crimes dealt with in the VstGB, which are throughout directed against the vital interests of the international community and are therefore not confined by frontiers are therefore subject to the principles of international law. Because of the special nature of these offences, there is no inadmissible interference in the sovereignty of other states in the trial of foreign countries or foreign nationals. Therefore the existence of special 'references to Germany' (settlement Lagodny/Nill-Theobald.JR 2000,205 206.: Eser in the fiftieth anniversary edition BGH page 26ff) does not apply to foreign states when applying the German penal code. Since the Federal Court has to date represented a divergent view of § 6 StGB in their interpretation (compare BGHSt 45 64 66; recent open verdict of the BGH of the 21.02.2001.3StR372/00) it is made explicitly clear by the wording of § 1 that there is no need for special reference to Germany for offences according to the VStGB. It is, however, to be noted that the validity of the ability to prosecute regarding foreign states is limited in specific ways according to the VStGB Article 3 no.2 EGVStGB § 153ff StPO."

The original text in German reads:

> *"Die im VStGB geregelten Straftaten richten sich durchweg gegen die vitalen Interessen der Völkergemeinschaft, haben folglich grenzüberschreitenden Charakter und unterliegen deshalb dem Weltrechtsprinzip. Wegen der besonderen Stoßrichtung dieser Delikte liegt in der Aburteilung von Auslandstaten auch ausländischer Staatsangehöriger keine unzulässige Einmischung in die Souveränität anderer Staaten. Für die Anwendbarkeit des deutschen Strafrechts auch auf Auslandstaten bedarf es deshalb nicht des Bestehens eines speziellen "Inlandsbezugs" (vgl. Lagodny/Nill-Theobald, JR 2000, 205, 206; Eser, in: Festgabe 50 Jahre BGH, S. 26 ff., jeweils m.w.N.). Da der Bundesgerichtshof bisher bei der Auslegung von § 6 StGB insoweit eine abweichende Auffassung vertreten hat (vgl. BGHSt 45, 64, 66; neuerdings offener Urteil des BGH vom 21.02.2001, 3 StR 372/00) ist durch die Formulierung von § 1 ausdrücklich klargestellt, dass es jedenfalls für die Taten nach dem VStGB eines besonderen Inlandsbezugs nicht bedarf. Es ist allerdings zu beachten, dass die Geltung der Anklagepflicht in Bezug auf Auslandstaten nach dem VStGB durch den in Artikel 3 Nr. 2 EGVStGB vorgesehenen § 153f StPO in spezifischer Weise eingeschränkt ist."*

See, generally, Horst Fischer, *Untersuchung und Strafverfolgung von Verletzungen des Rechtes des bewaffneten Konfliktes: Nationale Gesetze und Verfahren, internationale Zusammenarbeit auf militärischer und rechtlicher Ebene, in* Horst Fischer and Sascha Rolf Lüder (eds.), *Völkerrechtliche Verbrechen vor dem Jugoslawien-Tribunal, nationalen Gerichten und dem Internationalen Strafgerichtshof* 193 (1999); Horst Fischer, and Sascha Rolf Lüder, *La*

discretion of the public prosecutor to decline to prosecute in universal jurisdiction cases when the suspect is being prosecuted by an international criminal court, the state of the suspect's nationality or the territorial state.[321] However, the proposed reform would not require the Public Prosecutor to

répression des violations du droit international humanitaire dans la legislation nationale allemande, in C. Pellandini, ed., *Répression nationale des violations du droit international humanitaire (systèmes Romano-Germaniques)* 227 (1998).

[321] Article 3 (Change in the procedure of the trial), § 1 of the draft adds a new section 153f to the *Strafprozeßordnung* (StPO), Code of Criminal Procedure. It reads:

"The public prosecution can~refrain from the prosecution of a crime which according to ''7 to 15 of the Code of Crimes under International Law is liable, in cases of '153c section~ 1 No. 1 and 2 , if the accused is not in Germany and his stay there is not expected. This only applies~if in the cases of '153c section 1 the accused is German ,the crime comes before an international court of law ,or a state in which the crime was committed ,or where the relations of the injured party reside.
(2.)The public prosecution is to refrain from pursuing a crime which is liable according to §§ 7 to 15 of the Code of Crimes under International Law in cases of §§ 153c section 1 No. 1and 2 if:
1. If there is no criminal suspicion against a German
2. No criminal act has been committed against a German
3.No suspect criminal is or is expected to be in Germany and
4.The crime is prosecuted in an international court of law or by a state where the crime was committed , or whose national is suspected of the crime ,or has been injured by the crime.
The same holds good when a foreigner accused of a crime committed abroad resides in Germany, but the requirements according to clause 1 No. 2 and 4 are complied with and the transfer to an international court or the extradition to a prosecuting state are admissible and intended."

The original German text reads:

"(1) Die Staatsanwaltschaft kann von der Verfolgung einer Tat, die nach §§ 7 bis 15 des Völkerstrafgesetzbuches strafbar ist, in den Fällen des § 153c Abs. 1 Nr. 1 und 2 absehen, wenn sich der Beschuldigte nicht im Inland aufhält und ein solcher Aufenthalt auch nicht zu erwarten ist. Ist in den Fällen des § 153c Abs.1 Nr.1 der Beschuldigte Deutscher, so gilt dies jedoch nur dann, wenn die Tat vor einem internationalen Gerichtshof oder durch einen Staat, auf dessen Gebiet die Tat begangen oder dessen Angehöriger durch die Tat verletzt wurde, verfolgt wird.
(2) Die Staatsanwaltschaft soll von der Verfolgung einer Tat, die nach §§ 7 bis 15 des Völkerstrafgesetzbuches strafbar ist, in den Fällen des § 153c Abs. 1 Nr. 1 und 2 absehen,wenn.
1. kein Tatverdacht gegen einen Deutschen besteht,
2. die Tat nicht gegen einen Deutschen begangen wurde,
3. kein Tatverdächtiger sich im Inland aufhält und ein solcher Aufenthalt auch nicht zu erwarten ist, und
4. die Tat vor einem internationalen Gerichtshof oder durch einen Staat, auf dessen Gebiet die Tat begangen wurde, dessen Angehöriger der Tat verdächtig ist oder dessen Angehöriger durch die Tat verletzt wurde, verfolgt wird.
Dasselbe gilt, wenn sich ein wegen einer im Ausland begangenen Tat beschuldigter Ausländer im Inland aufhält, aber die Voraussetzungen nach Satz 1 Nr. 2 und 4 erfüllt sind und die Überstellung an einen internationalen Gerichtshof oder die Auslieferung an den verfolgenden Staat zulässig und beabsichtigt ist."

The expert group explained:

"For crimes that are liable under VStGB the wide latitude in judgement of the public prosecution is curtailed by special decree in § 153f StPO. §153c paragraph1 no1 and 2 grant immunity of prosecution to foreign states and crimes by foreigners on foreign ships in Germany. According to article 3 no1 all crimes that are punishable through VStGB~ are exempted by application of § 153c paragraph 1 no1 and 2 of the StPO. The substitution by special regulation of numbers 1 and 2 does not exclude the possibility of exemption of prosecution or curtailment of proceedings in the criminal proceedings or after § 28 IStGHG(see above under A.IVas special directive in relation to IStGH)."

The original German text reads:

"Für Taten, die nach dem VStGB strafbar sind, wird der weite Ermessenspielraum der Staatsanwaltschaft, den § 153c Abs. 1 Nr. 1 und 2 StPO für das Absehen von der Verfolgung bei Auslandstaten und bei Taten von Ausländern auf ausländischen Schiffen im Inland einräumt, durch eine besondere Ermessensstrukturierung in § 153 f StPO beschränkt. Durch Artikel 3 Nr. 1 werden deshalb Taten, die nach dem VStGB strafbar sind, vom Anwendungsbereich des § 153c Abs. 1 Nr. 1 und 2 StPO ausgenommen. Die Ersetzung der Nummern 1 und 2 durch eine Sonderregelung schließt aber sonstige Möglichkeiten des Absehens von der Verfolgung oder der Verfahrenseinstellung nach der Strafprozessordnung oder etwa nach

demonstrate, before declining to prosecute, that the territorial state or the state of the suspect's nationality would ensure a fair trial without the possibility of the death penalty or that these states would not conduct sham proceedings.

Criminal investigations and jurisprudence. Most criminal cases are prosecuted in regional courts of the *Länder* (states), but pursuant to Federal criminal procedure. Most crimes fall within the jurisdiction of the *Landesgerichte,* State District Courts. Judgments of the State District Courts can be reviewed by the *Oberlandesgerichte* (Higher Regional Courts, sometimes translated as the State Supreme Courts or State Courts of Appeals). However, some crimes, such as genocide pursuant to Section 120 (8) of the German Judicature Act (GVG), can be tried in the *Oberlandesgerichte*. Appeals from these courts go to the *Bundesgerichtshof* (BGH), Federal Supreme Court (sometimes translated as the Federal High Court, Federal Court of Appeals or the Federal Court of Justice). A further challenge on constitutional grounds in the *Bundesverfassungsgericht* (BverfG), Federal Constitutional Court, is also possible in certain circumstances.

There have been several criminal investigations and prosecutions in Germany based on universal jurisdiction of persons suspected of war crimes abroad.

Djaji_. In the *Djaji_* case, the accused was convicted on 23 May 1997 by the *Bayerisches Oberlandesgericht* (Bay OLG), Bavarian Higher Regional Court, at Munich, of committing grave breaches of the Fourth Geneva Convention and Protocol I in Bosnia and Herzegovina , although he was acquitted on charges of genocide and attempted genocide, and sentenced to five years in prison.[322] He had been charged with murder under Section 211 of the Penal Code, genocide under Section 220a, unlawful deprivation of liberty under Section 239, violations of Article 3 (common Article 3) of the Fourth Geneva Convention and, based on Articles 146 and 147 of that treaty, grave breaches. The court held that it had jurisdiction over genocide under Section 6 (1) of the Penal Code (see Chapter Eight, Section II). The court held that the conflict was international and reportedly based its jurisdiction over conduct amounting to grave breaches, including murder and unlawful deprivation of liberty, on Section 6 (9) of the Penal Code, rather than 7 (2) (2).[323]

It has not been possible to locate and translate the entire decision, but an authoritative account of its reasoning on universal jurisdiction describes how it balanced the competing *aut dedere aut judicare* rule incorporated in the Geneva Conventions with the principle of noninterference in the internal affairs of states:

§ 28 IStGHG (s. oben unter A.IV) als Sondervorschrift im Verhältnis zum IStGH nicht aus."

[322] *Public Prosecutor v. Djaji_*, Judgment, No. 20/96 (Higher Regional Court of Bavaria 23 May 1997) [*Bayerisches Oberlandesgericht, Urteil vom 23. Mai 1997 - 3 StR 20/96*]. *See* Christoph Safferling, *Public Prosecutor v. Djaji_*, 92 Am. J. Int'l L. 528 (1998). A comment on the case by Kai Ambos is in *Neue Zeitschrift für Strafrecht* (NStZ) 138 (1998) and an abstract of this case in English is *obtainable from* http://www.icrc.org/ihl-nat/ihl-nat.

[323] Fischer, *supra, n.311,* 384-385. However, there are varying accounts of whether the court also relied on Section 7 (2) (2) as a basis for jurisdiction.

> "It concluded that public international law, far from barring prosecution, corroborated and supported the conclusion that the arguments in favour of prosecuting war criminals in Germany prevail over the limiting principle of noninterference. It considered prosecution as one measure among many others implemented by the international community - be they political, military or humanitarian in nature - aimed at limiting and eventually terminating the policy of expansion and oppression, as well as deportations and other human rights violations, on the territory of the former Yugoslavia. In view of all these efforts by the international community, national prosecution could not possibly infringe international law. The court concluded that it would be 'intolerable' under these circumstances if war criminals could live in liberty in Germany. Moreover, the aim of the prosecution was seen as international in nature. The international community is attempting to deter crimes against civilians during armed conflict."[324]

The court also found that prosecution in this case serve Germany's interest in not being seen as a haven for international criminals:

> "Considerations of international law are important, but one should not overlook the fact that the prosecution of a foreigner for crimes committed abroad serves also an interest of the State of residence, viz. not to become a refuge for offenders who have committed crimes against under customary and conventional international law. Not to prosecute would undermine the trust of the German citizens in the national and international legal order (*Rechtsbewährungsprinzip*). Furthermore, since the ICTY and the competent territorial State do not wish to take over the proceedings, Germany has an interest not to be perceived by the international community`
> as a haven for international criminals."[325]

For the court's discussion of the judicially created link to Germany, see below in this entry.

[324] Safferling, *supra*,*n.314,* 531-532 (summarizing judgment).

[325] *Djaji_* case, *ibid*.

Jorgi_. On 26 September 1997, Nikolai Jorgi_ was convicted of 30 counts of murder in Bosnia and Herzegovina amounting to grave breaches of the Fourth Geneva Convention and 11 counts of genocide by the *Oberlandesgericht Düsseldorf* (OLG Düsseldorf), Higher Regional Court at Düsseldorf and sentenced to life imprisonment.[326] He had been charged with murder, genocide, unlawful deprivation of liberty, bodily injury, robbery and receiving stolen goods, under Sections 211, 220a, 223, 223a, 239, 249, 250 and 255 of the Penal Code and of violations of Article 3 (common Article 3) of the Fourth Geneva Convention and, based on Articles 146 and 147, of grave breaches of that treaty. The court reportedly stated that it had jurisdiction over the ordinary crimes amounting to grave breaches pursuant to Article 6 (9) of the Penal Code and over genocide under Article 6 (1).[327] As in the *Djaji_* case, the court held that the conflict was international. For the discussion of the judicially created requirement of a link, see discussion below in this entry. The conviction was upheld on appeal by the *Bundesgerichtshof* (BGH), Federal Supreme Court.[328] For its discussion of the judicially created link, see discussion in this entry below. A constitutional challenge was rejected by the *Bundesverfassungsgericht* (BvergG), German Constitutional Court, in 2001.

Sokolovi_. On 29 November 1999, the *Oberlandesgericht Düsseldorf* (OLG Düsseldorf), Higher Regional Court at Düsseldorf, convicted the accused inflicting physical injuries on Muslim civilians in five cases in May 1992 in Bosnia and Herzegovina and unlawfully detaining Muslim civilians in 56 cases, conduct amounting to grave breaches of the Fourth Geneva Convention, and genocide and abetting genocide in these cases and sentenced him to nine years in prison.[329] He had been a resident of Germany for twenty years and received a pension from the German government. On 21 February 2001, the *Bundesgerichtshof* (BGH), Federal Supreme Court, confirmed the judgment.[330] For the question of any link, see discussion of this case in this entry below.

Kuslji_. On 15 December 1999, two weeks after the conviction of Maksim Sokolovi_, the *BayObLG* convicted Kjuradj Kuslji_, the former police commander of Vrbnica, 40 kilometers south of Banja Luka in Bosnia and Herzegovina, of genocide and six murders constituting grave breaches of the Fourth Geneva Convention. He had lived in Germany before the war in the former Yugoslavia. He was sentenced to life imprisonment. On 21 February 2001, the *Bundesgerichtshof* (BGH), Federal Supreme Court, confirmed the judgment.[331] For the discussion of any judicially created link, see below.

The severely criticized judicially created requirement of a link to Germany. No link to Germany

[326] *Jorgi_* case, Judgment, Higher Regional Court at Düsseldorf, 6 September 1997 [*Oberlandesgericht Düsseldorf, Urteil vom 6. September 1997*] (abstract in English *obtainable from* http://www.icrc.org/ihl-nat). A comment on this case by Kai Ambos is published in *Neue Zeitschrift für Strafrecht* (NStZ) 404, Heft 8 (1999).

[327] *Ibid.*

[328] *Jorgi_* case, Judgment, Federal Supreme Court, 30 April 1999 [*Bundesgerichtshof, Urteil vom 30. April 1999 - 3 StR 215/98*].

[329] The description of this case is based on the account in the press release describing the decision by the Federal Supreme Court affirming the judgment (see following footnote).

[330] *Sokolovi_* case, Judgment, Federal Supreme Court, 21 February 2001 [*Bundesgerichtshof, Urteil vom 21. Februar 2001 - 3 StR 372/00*]. The case is summarized in: *In addition to the prosecution of genocide, German courts also competent for the prosecution of other atrocities committed during "ethnic cleansing" in Bosnia-Herzegovina*, Press release, No. 11/2001, Federal Supreme Court, Karlsruhe, 21 February 2001 (English translation by Amnesty International) (*Deutsche Gerichte neben der Verfolgung von Völkermord auch für die Verfolgung anderer Greueltaten während der "ethnischen Säuberungen" in Bosnien-Herzegwina zuständig, Mitteilung der Pressestelle, Nr. 11/2001)*. *See also* Helmut Kerscher, *BGH stärkt Verfolgung von Kriegsverbrechern, Die Süddeutsche Zeitung*, 22 February 2001 (*obtainable from:* http://www.suddeutche.de).

[331] BGH 3 StR 244/00 - Bechluss v. 21. Februar 01.

is expressly required in Section 6 (9) or Section 7 (2), but several courts have stated in cases involving universal jurisdiction over war crimes and other crimes under international law, as well as ordinary crimes of international concern, that some link to Germany, such as residence, is required.

The first of the series of cases creating the requirement of a link to Germany was the *Tadi_* case. The Federal Supreme Court on 13 February 1994 held that a link between the crime of genocide and Germany was required to ensure that the principle of non-intervention in other states' internal affairs was not infringed. It found such a link in the case because the person suspected of crimes in Bosnia and Herzegovina had lived in Germany for several months, was arrested there, the alleged acts were closely connected with other crimes the prosecution of which was compulsory under international law and the international community, including Germany, had adopted political, military and humanitarian measures in the former Yugoslavia:

> "German penal law applies by virtue of § 6(1) to genocide committed abroad independently from the law of the territorial State (so-called universality principle). Prerequisites, however, are that international law does not forbid this and that there is a legitimate link (*ein legitimierender Anknüpfungspunkt*) in the concrete case; only then is the application of German penal law to extraterritorial conduct by foreigners justified. Absent such a link the forum State violates the non-interference principle which requires States to respect the sovereignty of other States . . . .
> The fact that the accused resides voluntarily since several months in Germany, that he has established here his center of interests (*Lebensmittelpunkt*), and that he was arrested here constitute(s) a link. Whether such a connection with the forum State is always sufficient must not be decided because there are further legal and political considerations in this case which carry so much weight that Germany's exercise of universal jurisdiction seems not merely justified but even required."[332]

In the 1976 *Dost* case, which involved the exercise of universal jurisdiction pursuant to Section 6 (5) of the Penal Code over an ordinary crime of international concern, drug trafficking, the *Bundesgerichtshof* (BGH), Federal Supreme Court, stated that there was no consensus concerning the extent of restrictions in international law on the application of by a national legislature of its criminal sanctions and that it was "inclined to accept the proposition that any extension of State criminal jurisdiction to offences committed abroad by aliens requires the presence of some factor, connecting the case to the forum, which constitutes a justifiable basis for the exercise of jurisdiction".[333] However, it also stated that there were "no clear criteria under international law for determining the weight to be given to such factors and the extent to which they may affect the national legislature's competence to establish such norms".[334] Apart from this restrictive interpretation of international law, the court found that international law permitted the exercise of universal jurisdiction independent of an extradition request or double criminality and that there was no requirement under international law that the exercise of universal jurisdiction be based on a treaty.[335]

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[332] *Tadi_* case, Decision, Federal Supreme Court, 13 February 1994 [*BGH-Ermittlungsrichter, Beschluß vom 13. Februar 1994, 1 BGs 100/94*] (abstract of this case in English *obtainable from* http://www.icrc.org/ihl-nat). The English translation is based on the translation in Reydams, *supra*, n. 307. A note on this decision by Dietrich Oehler is in NStZ 485 (1994).

[333] *Dost* case, 74 Int'l L. Rep.166, 168 (1976). *See also* BGH, NJW 507 (1977).

[334] *Ibid.*

[335] On the first point, the court stated that the legislature could under international law provide in Section 6 (5) for universal jurisdiction over drug trafficking without requiring an extradition request or double criminality:

> "The legislator could have chosen to adopt the vicarious enforcement of criminal law (*stellvertretende Strafrechtspflege*), under which the liability of an offender to prosecution under German law is dependant upon the existence of corresponding provisions under the *lex loci* and the fact that the offender has not been extradited although his extradition would have been admissible in the circumstances (cf. § 7(2)(2)). Contrary

In the *Djaji_* case, the *Bayerisches Oberlandesgericht* (BayOLG), Bavarian Higher Regional Court, at Munich held in May 1997 that there was a sufficient link to overcome the principle of non-intervention in the internal affairs of states because the accused was living in Germany and because the forum state was not acting in its own interests, but was in representing the entire community of states. The court held that Germany could exercise universal jurisdiction as long as it did not violate the principle of non-interference in the internal affairs of states and that this principle required the existence of sufficient links.[336] In this case, it found sufficient links because the accused had freely become a German resident and because

to the submissions contained in the grounds of appeal, however, this was not the only legally valid path which the legislature could have followed."

Ibid. As to the second point, the court explained that Germany could exercise universal jurisdiction over crimes independently of a treaty: "There is in fact no general rule of international law prohibiting the application of the principle of universality of law in the absence of special provision by international convention." *Ibid.*, 169. *See also* BGH, NJW 2168, 2170 (1987).

[336] *Djaji_*, No. 20/96, Judgment, Higher Regional Court of Bavaria, 23 May 1997 (reported in Safferling, *supra, n.314)* [*Bayerisches Oberlansdesgericht, Urteil vom 23. Mai 1997 - 3 StR 20/96*] (abstract of this case in English *obtainable from* http://www.icrc.org/ihl-nat). The English translation is based on a translation in Reydams, *supra, n. 307)*

> "Germany, together with other States, has participated in a UN sanctioned operation aimed at alleviating the consequences of violations of humanitarian law. This indirect interaction between breaches of humanitarian law on the one hand and protection of victims on the other establishes a link for the prosecution before German courts. Germany, by doing so, does not act out of self-interest. Rather, it stands up for the interests of the world community as expressed in the UN resolutions on the conflict in Yugoslavia."[337]

The court also found that prosecution in this case serve Germany's interest in not being seen as a haven for international criminals (see passage quoted above in this entry).

In the *S.B. and D.B.* case, the *Bundesgerichtshof* (BGH), Federal Supreme Court, held in December 1998 that the presence alone of the person making a complaint was an insufficient link, although this statement has not been repeated in other cases. The court stated:

> "Without a meaningful point of contact respect for the sovereignty of other States (non-interference principle) can hardly be assured and the municipal criminal justice system would be overloaded with the 'world wide' prosecution of offences.
>
> The only link with Germany is the plaintiff's presence. Even if he were the victim of any of the alleged crimes – which is doubtful – there would not be a sufficient connection. The presence of a crime victim is not an appropriate basis for German jurisdiction because it usually is a matter of pure coincidence with no relation to the offence and offender. If it were an adequate criterion this would lead to an endless and internationally questionable extension of national jurisdiction. German courts would have to deal with cases for which it is manifest from the start that there are very few chances to properly investigate and try them.
>
> It is quite another thing when the offender is present in Germany; in that case there is an internationally undisputed linking point for the exercise of jurisdiction."[338]

The Higher Regional Court at Düsseldorf held on 26 September 1997 that the judicially created link was satisfied in the *Jorgi_* case because the accused lived in Germany from 1969 to 1992, he was registered at his house in Bochum at the time of his arrest and his wife and daughter lived in Germany at that time, so his permanent place of residence was Germany, and he was arrested in Germany.[339] In 1999, the Federal Supreme Court affirmed on this point, stating that any prosecution based on Section 6 under the universality principle required an additional link to Germany.[340]

[337] *Djaji_* case, *ibid.*

[338] *Bundesgerichtshof, Beschluß vom 11. Dezember 1998 - 2 Ars 499/98, reprinted in* 5 *Neue Zeitschrift für Strafrecht* 236 (1999). The English translation is based on the translation in Reydams, *supra*, n.307.

[339] *Jorgi_* case, Judgment, Higher Regional Court at Düsseldorf, 6 September 1997 [*Oberlandesgericht Düsseldorf, Urteil vom 6. September 1997*](abstract in English *obtainable from* http://www.icrc.org/ihl-nat).

[340] *Jorgi_ case, Federal Supreme Court, 3d Strafsenat, 30 April 1999 [Bundesgerichtshof, Urteil vom 30. April 1999* - 3 StR 215/98].

However, the judicially created requirement of a link has been criticized.[341] Possibly in reaction to this criticism, courts have started to retreat from the requirement of a link. For example, in December 2000, the *Bundesverfassungsgericht* (Constitutional Court) in the *Jorgi_* case noting the criticism of the judicially created link, in particular by Kai Ambos, decided to leave open the question whether it was required. The Constitutional Court stated:

> "The question whether, like the appealed decisions state, that another link is necessary because of the [principle of] non-interference, does not have to be answered here. . . . Because the claim that in this case the Federal Supreme Court's assertion of jurisdiction was *ultra vires* is unfounded, the question can be left open."[342]

Similarly, in the *Kuslji_* case, the Federal Supreme Court on revision in a decision issued on 21 February 2001 upholding the conviction and the sentence left the question whether a link is required open.[343] The trial court, the *Bayerisches Oberlandesgericht* (BayOLG), Bavarian Higher Regional Court, had held on 15 December 1999 that the accused was guilty of genocide and murder as a grave breach of the Fourth Geneva Convention; the Supreme Court amended the conviction to abetting genocide, but let the murder conviction stand.

On the same day that the Supreme Court issued its decision in the *Kuslji_* case, 21 February 2001, it held in the *Sokolovi_* case that although there would have been insufficient links in this case under the judicially created link requirement, the fact that Germany was a party to the Fourth Geneva Convention was a sufficient link when the accused had been convicted of murder as a grave breach of that Convention. According to a translation of the press summary of the Supreme Court's decision,

> "According to the principle of universal jurisdiction in Section 6 (9) of the Criminal Code, this obligation [to search for and bring to justice persons suspected of grave breaches] applies to the Federal Republic of Germany for the prosecution of criminal acts that foreigners have committed on foreigners abroad if the requirements of the 4th Geneva Convention are otherwise fulfilled. The Higher Regional Court accepted this free from legal error and in particular regarded the severe physical mistreatment of five Muslim men by the defendant as serious violations of the Convention, as it is covered by the notion of torture, but at least meets the requirements of inhuman treatment. The Supreme Court has left open the other legal question, as to whether in

[341] For critical comments on the judicially created requirement of a link, see Kai Ambos, *Aktuelle Probleme der deutschen Verfolgung von "Kriegsverbrechen" in Bosnien-Herzegowina*, 20 *Neue Zeitschrift für Strafrecht* 226 (1999); _____, [comment on *Djaji_* case] *Neue Zeitschrift für Strafrecht* 138 (NStZ) (1998); Stefan van Heeck, *Der aktuelle Fall: Die Anwendung deutschen Strafrechts auf Balkankriegsverbrechen, Humanitäres Völkerrecht-Informationsschriften* 27, 27 (2000); Claus Kreß, *Völkerstrafrecht in Deutschland, Neue Zeitschrift für Strafrecht* 617 (2000); Otto Lagodny & Christiane Nill-Theobald, *Urteilsanmerkung, Juristische Rundschau* 205 (2000); Sascha Rolf Lüder, *Eröffnung der deutschen Gerichtsbarkeit für den Völkermord im Kosovo?*, 53 *Neue Juristische Wochenschrift* 269 (2000); Sascha Rolf Lüder & Gregor Schotten, *A Guide to State Practice Concerning International Humanitarian Law: Germany*, 2 Y. B. Int'l Hum. L. 362 (1999); Reinhard Merkel, *Universale Jurisdiktion bei völkerrechtlichen Verbrechen: Zugleich ein Beitrag zur Kritik des § StGB, in* Klaus Lüderssen, ed., *Aufgeklärte Kriminalpolitik oder Kampf gegen das Böse? Band III* 238 (Baden-Baden: Makrodelinquenz 1998); Gerhard Werle, *Völkerstrafrecht und geltendes deutsches Strafrecht*, 55 *Juristenzeitung* 755 (2000); _____, *Urteilsanmerkung, Juristenzeitung* 1181 (1999); Steffen Wirth & Jan C. Harder, *Die Anspassung des deutschen Rechts an das Römische Statut des Internationalen Strafgerichtshofs aus Sicht deutscher Nichtregierungsorganisationen, Zeitschrift für Rechtspolitik* 144 (2000).

[342] *Jorgi_* case, Judgment, *Bundesverfassungsgerichtshof* (BverfG), Constitutional Court, 2 BvR 1290/99 *vom* 12.12.2000, Absatz Nr. (1-49 (*obtainable from* http://www.bverfg.de). The English translation is based on translation in Reydams, *supra, n.307.*

[343] *Kuslji_* case, Federal Supreme Court, Judgment of 21 February 2001 [*Bundesgerichtshof, Urteil vom 21. Februar 2001* - 3 StR 244/00].

the case of a duty of prosecution of the Federal Republic of Germany based on a national treaty it further depends on an additional 'domestic connection' in the person of the defendant or on the criminal acts. The Higher Regional Court regarded such additional points of contact legitimizing the exercise of German criminal jurisdiction still to be necessary; it saw them free from legal error in the many years' residence of the defendant in the Federal Republic of Germany and the circumstance that even before his arrest he had registered as unemployed in Germany in 1996 and was drawing a pension."

The trial court, the *Oberlandesgericht Düsseldorf*, had convicted the accused on 29 November 1999. Reportedly, it stated that it had jurisdiction over over the accused pursuant to Section 6 (9) and that the case satisfied the requirement of a link to Germany because the accused was a resident of Germany and had been a resident for twenty years and received a pension from the government.

· ***Ghana:*** Ghanaian courts can exercise universal jurisdiction over grave breaches and other violations of the Geneva Conventions and of Protocol I and, possibly, other war crimes identified in treaties Ghana has signed. Article 56 (4) (n) of the Courts Act, 1993 states:

"Any person (whether a citizen of Ghana or not) is liable to be tried and punished in Ghana for the respective offence if he does an act which if done within the jurisdiction of the courts of Ghana would have constituted any of the following offences -

. . . .

(n) any other offence which is authorised or required by a convention or treaty to which the Republic is a signatory to be prosecuted and punished in Ghana."[344]

Ghana is a party to the Geneva Conventions and Protocol I, which require states parties to prosecute or extradite persons suspected of responsibility for grave breaches of those treaties and require states parties to take other steps to suppress other violations. This obligation can be satisfied by prosecutions. Other violations would include violations of common Article 3. Ghana is a party to Protocol II and to the Rome Statute, but as of 1 September 2001 had not yet enacted any implementing legislation.[345] However, it is expected that drafting implementing legislation will include universal jurisdiction over war crimes and other crimes within the Court's jurisdiction. Pending the enactment of such legislation, and in the absence of provisions providing that grave breaches and other war crimes are crimes under national law, it would appear that Article 56 (4) (n) would permit Ghanaian courts to exercise universal jurisdiction over conduct amounting to grave breaches of the Geneva Conventions and Protocol I which also is a crime under national law, such as murder and manslaughter.[346] It is not known if Ghana expressly provides that statutes of limitation do not apply to war crimes, but it is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

· ***Greece:*** Greek courts may exercise universal jurisdiction over grave breaches of the Geneva Conventions and, possibly, over other war crimes, pursuant to national law dating to 1950 and the Constitution. Article 28 (1) of the Greek Constitution provides:

"The generally acknowledged rules of international law, as well as international conventions as of

[344] Ghanaian Courts Act, 1993, Act 459, Art. 56 (4) (n).

[345] Although the Rome Statute does not expressly *authorize* states parties to exercise universal jurisdiction over crimes within the Court's jurisdiction, the states parties recognize in the Preamble that it is "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".

[346] The provisions prohibiting murder and manslaughter are found in the Ghanaian Criminal Code, 1960, Act 29, Arts 46 *et seq.*

the time they are sanctioned by law and become operative according to the conditions therein shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law. The enforcement of the rules of international law and of international conventions to aliens does always depend on the condition of reciprocity."[347]

[347] Constitution of Greece, Art. 28 (1) (English translation in Gisbert H. Flanz, *Greece, in* Albert P. Blaustein & Gisbert H. Flanz, eds, *Constitutions of the Countries of the* World (Dobbs Ferry, New York: Oceana Publications, Inc. December 1988) (Louis Pagonis trans.). For interpretation of this provision, see Emmanuel Roucounas, *Grèce, in* Pierre-Marie Eisemann, ed., *L'Intégration du droit international et communautaire dans l'ordre juridique national* 287 (The Hague/London/Boston: Kluwer Law International 1996). In two recent decisions, courts held that Article 14 (7) of the International Covenant on Civil and Political Rights prevailed over contrary provisions in Article 8 of the Penal Code. Judgment 1574/1999 of the Court of Appeal of Athens; Judgment 286/1999 of the Court of Appeal of Piraeus.

The government has stated that, pursuant to this article, treaties ratified by Greece "formed an integral part of domestic law" and "took precedence over any domestic legislation which might be contrary to it."[348]

Paragraph k of Article 8 (Offenses Abroad Always Punishable by Greek Law) of the Greek Penal Code provides that

> "Regardless of the law of the place of commission, Greek criminal law is applicable to Greeks and aliens for the following offences committed abroad: . . . (k) Any other offence to which Greek criminal law shall be made applicable by express provision or international agreement signed and ratified by the Greek state."[349]

Greece has ratified the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but as of 1 September 2001 had not yet ratified it. It appears that grave breaches of the Geneva Conventions are not expressly defined as crimes under national law, but some war crimes are defined as crimes under the Greek Military Penal Code, although it has not been possible to determine if civilian courts can exercise jurisdiction over these crimes or if military courts can exercise universal jurisdiction over crimes in the Military Penal Code.[350] Therefore, it is possible that war crimes committed abroad might have to be prosecuted as ordinary crimes, such as murder, abduction, assault or rape. Article 9 (2) of the Greek Penal Code expressly provides that certain bars to prosecution for conduct abroad, such as prior conviction or acquittal in a foreign court, foreign statutes of limitation and foreign pardons, do not apply to prosecutions pursuant to Article 8.[351] Defences and principles of criminal responsibility under the Penal Code are not fully consistent with international law with regard to war crimes.[352]

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

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[348] Summary records of examination by the Committee against Torture of the second periodic report of Greece, U.N. Doc. CAT/C/SR. 182 (1994), para. 8.

[349] Penal Code of 1950, Statute 1492 of 17/17, August 1950, Art. 8 (k) (English translation in *The Greek Penal Code* (South Hackensack, N.J.: Fred B. Rothman & Co. and London: Sweet & Maxwell Limited 1973)).

[350] Military Criminal Code, Law 2287/1995, Government Gazette A 20/1-2-1995, in force 1 August 1995 (unofficial translation by Dr. Maria Gavouneli, Hellenic Institute of International and Foreign Law, 1 Y. B. Int'l Hum. L. 535 (1998), Art. 156 (Insults, threats or violence against a prisoner of war), Art. 156 (Outrages against a prisoner of war), Art. 159 (Coercion of a prisoner of war into providing information), Art. 161 (Violence against non-combatants).

[351] The first paragraph of Article 9 (Offences abroad Not Punishable by Greek Law) precludes prosecution for acts committed abroad in certain circumstances, but the second paragraph expressly provides that these exclusions do not apply to prosecutions pursuant to Article 8:

"_____ No criminal prosecution shall ensue for an offence committed abroad:

_____ a) If the accused has been tried abroad and found not guilty, or found guilty and given full punishment;

_____ b) If under the applicable foreign law prosecution for the offense is barred by lapse of time, or if execution of punishment is barred by lapse of time, or if punishment is remitted;

c) If under the applicable foreign law a complaint from a private person is required for prosecution, and that has not been submitted or has been waived.

2. These provisions are not applicable to offences under Article 8."

Ibid., Art. 9.

[352] Superior orders are a defence in certain circumstances. Penal Code, Art. 21. There is no principle of command or superior responsibility in the Penal Code.

Although Grenada is not known to have a Geneva Conventions Act, the United Kingdom's Geneva Conventions Act 1957 applied to the West Indies Federation under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below), at least before 1 January 1970. Grenada became independent on 7 February 1974. As far as is known, the 1959 Order in Council has not been repealed either before or after independence.

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

· ***Guatemala:*** Guatemalan courts may exercise universal jurisdiction over war crimes.

The relevant legislative provision is reinforced by Article 46 (Pre-eminence of International Law) of the Constitution, which provides that "[t]he general principle is established that in the field of human rights treaties and agreements approved and ratified by Guatemala have precedence over municipal law." [353] The government has stated that treaties, apparently including their jurisdictional provisions, can be applied directly by national courts. [354] This constitutional provision is supplemented by Article 16 of the Criminal Procedure Code (*Código Procesal Penal*) of 1996 which provides that courts and other authorities responsible for trials must fulfill the obligations imposed on them by international treaties in the matter of respect for human rights.[355]

Article 5 (5) (e) of the Guatemalan Penal Code (*Código Penal*) provides that Guatemalan criminal law applies to

> "[a]ny offence which, by virtue of a treaty or convention, is punishable in Guatemala, even if the offence is not committed in Guatemalan territory[.]".[356]

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[353] Constitution of the Republic of Guatemala, 31 May 1985, Art. 46 (English translation in *Guatemala - Booklet 3, in* Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. January 1997) (Release 97-1 Reka Koerner trans.).

[354] The government has stated that under Article 46 of the Constitution treaties ratified by Guatemala take precedence over internal law and can be invoked directly in national courts, subject to prior approval by the Congress and President making them part of domestic law. It informed the Committee against Torture that

> "According to article 46 of the Constitution, treaties and conventions accepted and ratified by Guatemala, in matters of human rights, take precedence over internal law. Consequently, the provisions of the Convention [against Torture] can be applied directly, subject to prior approval by the Congress of the Republic and the Executive Branch, through the appropriate decree or order, making them part of Guatemala's domestic law (political Constitution of the Republic of Guatemala, arts. 46, 171 and 183)."

Initial report of Guatemala to the Committee against Torture, U.N. Doc. CAT/C/12/Add.5 (1994), para. 14.

[355] *Article 16 of the Code of Penal Procedure: "Respect for Human Rights. The courts and other authorities involved in criminal proceedings must carry out the duties imposed on them by the Constitution and international treaties concerning respect for human rights."* (English translation by Amnesty International).
Código Procesal Penal, Art. 16 (Respeto a los derechos humanos) ("Los tribunales y demás autoridades que intervengan en los procesos deberán cumplir los deberes que les impone la Constitución y los tratados internacionales sobre respeto a los derechos humanos."). (published 5 June 1996, in force 18 June 1996).
Spanish original obtainable from:
http://www.minugua.guate.net/derhum/CDROM/Normativa/Leyes%20Guate/Codigo%20procesal%20penal.htm.

[356] *Código Penal. Art. 5 (5) (Extraterritorialidad de la ley): "Este Código también se aplicará: ...5.-Por delito que, por tratado o convención , deba sancionarse en Guatemala, aun cuando no hubiere sido cometido en su territorio..."* (English translation by Amnesty International). Article 10 (a) of Supreme Court Order No. 8-94 and Article 11 of Supreme Court Order 9-94 state which courts in Guatemala have jurisdiction over extraterritorial crimes. These orders are considered to be binding only on the members of the Supreme Court. (Spanish original available from http://www.unifr.ch/derechopenal/ljguate/cpguateidx.htm)

Guatemala has ratified Hague Convention IV, the Geneva Conventions and Protocols I and II. It has also expressly provided in Article 378 (Offences against the duties of humanity) of the Penal Code that a broad range of war crimes are crimes under national law.[357]

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

The United Kingdom's Geneva Conventions Act 1957 applied to British Guiana under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below), at least before 1 January 1970. Guyana became independent on 26 May 1966. On 3 March 1962, it enacted the Geneva Conventions (Supplementary Provisions) Act, which provided for appeals by prisoners of war.[358] As far as is known, neither the 1959 Order in Council nor the 1962 Act have been repealed.

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

· ***Honduras:*** Honduran courts may exercise custodial universal jurisdiction over war crimes.

The relevant legislative provision is supplemented by Articles 15, 16 and 18 of the Constitution. Article 15 states in part that Honduras supports the principles and practices of international law, that promote the solidarity and self-determination of peoples, non-intervention and the strengthening of universal peace and harmony." [359] Article 16 reads in part: "International treaties entered into by Honduras with other States form part of the domestic law as soon as they enter into force."[360] Article 18 provides that "[I]n case of conflict between the treaty or convention, and the law, the former shall prevail."[361] It has not been possible to locate any jurisprudence or commentary on Articles 15, 16 and 18 of the Constitution that would indicate whether any of these provisions would be independent bases for exercising universal jurisdiction over crimes abroad.

Article 5 (5) of the Penal Code (*Código Penal*) states that national courts have custodial universal jurisdiction over crimes committed outside the country when it is permitted by international treaties or when the crime is in grave violation of universally recognised human rights. . That article reads:

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[357] *Código Penal, Art. 378 (Delitos contra los deberes de la humanidad). Quien violare o infringiere deberes humanitarios, leyes o convenios con respecto a prisioneros rehenes de guerra, heridos durante acciones bélicas, o que cometiere cualquier acto inhumano contra población civil, o contra hospitales o lugares destinados a heridos será sancionado con prisión de veinte a treinta días."* (Article 378 states:

> "Anyone who infringes or breaches their humanitarian duties or the laws or conventions regarding prisoners of hostages of war, or those wounded in war, or who commits any inhumane act against the civilian population or against hospitals or places set aside for the wounded, shall be liable to imprisonment for a period of twenty to thirty years.") (English translation by Amnesty International)

[358] Laws of Guyana (Rev. ed. 1973), Cap. 15:04, An Act to supplement the applied Act entitled the Geneva Conventions Act, 1957, so as to enable full effect to be given in relation to Guyana to certain International Conventions done at Geneva on the twelfth day of August, nineteen hundred and forty-nine.

[359] Constitution of the Republic of Honduras of 1982, Decree No. 131 of 11 January 1982, Art. 15 (English translation published by the General Secretariat of the Organization of American States and reprinted in Gisbert H. Flanz, *Honduras, in* Albert P. Blaustein & Gisbert H. Flanz, eds, *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. December 1982).

[360] *Ibid.*, Art. 16.

[361] *Ibid.*, Art. 18.

"The Honduran courts shall also be competent to try offences committed abroad in the following cases as long as the accused are present in Honduras:

. . . .

(5) If, in accordance with international conventions to which Honduras is a party], the offence lies within the purview of Honduran law for reasons other than those mentioned in the preceding paragraphs [dealing with other forms of extraterritorial jurisdiction], or is in grave violation of universally recognized human rights. Preference shall nevertheless be given to the jurisdiction of the State in whose territory the criminal act was committed as long as it claims jurisdiction before criminal proceedings are initiated in the relevant Honduran court."[362]

[362] Article 5 (5) of the Penal Code (Decree No. 144-83 published in La Gaceta Nr.24.264 12 March 1984. Amended by Decree Nr. 191-96 27 November 1996) *"Los tribunales hondureños conocerán, asimismo, de los delitos cometidos en el extranjero cuando el imputado se halle en Honduras y concurra alguna de las situaciones siguientes:*

(...)

5) Cuando de conformidad con los convenios internacionales de que Honduras forme parte, el delito se encuentre sometido a la ley penal hondureña por razones distintas de las mencionadas en los numerales precedentes o lesione gravemente los derechos humanos universalmente reconocidos. Se dará preferencia, sin embargo, a la pretensión del Estado en cuyo territorio se haya cometido el hecho punible con tal que la haga valer antes de que se ejercite en el juzgado hondureño competente la respectiva acción penal."

(English translation by Amnesty International).

Before the reform to the Penal Code of 1996 the article stated as follows:

"The Honduran courts shall also be competent to try offences committed abroad in the following cases as long as the accused are present in Honduras:

. . . .

(5) When, in accordance with international conventions or the principles of international law, the offence lies within the purview of Honduran law for reasons other than those mentioned in the preceding provisions [dealing with other forms of extraterritorial jurisdiction], preference shall nevertheless be given to the right of the State where the punishable act was committed to proceed with appropriate legal action against the person responsible before instituting proceedings in whichever Honduran court is competent to hear the case."

" Los Tribunales hondureños conocerán, asimismo, de los delitos cometidos en el extranjero, siempre que los imputados se hallaren en Honduras, en los siguientes casos: . . . 5.Cuando de conformidad con las convenciones internacionales, o los principios del Derecho Internacional, el delito cayese bajo el imperio de la Ley hondureña por razón distinta de las mencionadas en las disposiciones precedentes, se dará preferencia, empero, a la pretensión del Estado en cuyo territorio se hubiere cometido e hecho punible, con tal que la haga valer, antes de incoarse en el tribunal hondureño competente, la respectiva acción penal contra el imputado." Código Penal, Artículo 5. (English translation by Amnesty International).

Article 5 also provides: "In cases covered by this article, the law in force in the place where the offence was committed shall be applied if it favours the accused." *("En los casos contemplados en este Artículo se aplicará la Ley vigente en el lugar de la comisión del delito, si fuere más benigna.")* (English translation by Amnesty International).

A draft bill introduced in July 2000 would renumber and modify this provision, if adopted, sometime in 2002. Under Article 21 of this proposal, the first paragraph would state that Honduran law would apply to crimes committed on Honduran territory, except in cases permitted by international agreements entered into by Honduras.[363] In addition, under the fourth paragraph of this article, Honduran law would apply to foreigners present in Honduras who had committed violations of international humanitarian law.[364]

Honduras has ratified the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but it had not yet ratified it as of 1 September 2001.

Articles 318-321 of the Penal Code provide for crimes against international law (*Delitos contra el derecho de gentes*). Piracy and genocide are included but not war crimes. The draft bill would define certain war crimes as crimes under national law.[365]

· ***Hungary:*** Hungarian courts have been able to exercise universal jurisdiction over ordinary crimes committed abroad since 1878 (see Chapter Two, Section II.A). Today, two legislative provisions permit Hungarian courts to exercise universal jurisdiction over war crimes committed abroad, and it is possible that they may also do so directly, based on the incorporation of international law under the Constitution.

Section 4 (1) (a) (formerly, Section 5 (a) of the 1961 Hungarian Criminal Code) of Act IV of 1978 on the Criminal Code permits national courts to exercise universal jurisdiction over conduct which is a crime both under Hungarian law and the law of the place where it was committed. Section 4 (1) (c) (formerly, Section 5 (b) of the 1961 Code) authorizes national courts to exercise universal jurisdiction over certain crimes against humanity (which are defined to include war crimes), regardless whether it is a crime under the law of the place where it occurred, but the decision whether to prosecute in such cases must be made by the Attorney General, a political official. Article 4 in its entirety reads:

[363] Draft Penal Code of Honduras (First Draft), June 2000, Bk. One (General Part), Chap. III (Realization and Application of the Criminal Law), Art. 21 (Application of the Criminal Law), para. 1. The first paragraph (Principle of Territoriality) states in relevant part: "Honduran criminal law shall be applied to crimes and misdemeanours committed on Honduran territory, except in cases permitted by international agreements which the country has approved and ratified or under international regulations or treaties which have been accepted."). The original Spanish text reads: *"Pincipio de territorialidad: La ley penal de Honduras se aplicará por los delitos y faltas cometidos en el territorio de Honduras, salvo las excepciones dispuestas en convenios internacionales aprobados y ratificados por el país, o en reglas y tratados internacionales aceptados." Proyecto Código Penal de Hondureño (Primer Borrador), Junio 2000, Libro Primero (Parte General), Capítulo III (Realización y Aplicación de la Ley Penal), Artículo 21 (Aplicación de la Ley Penal).*
Obtainable from http://www.congresociel.gob.hn/C/p/borrador.htm

[364] *Ibid.*, Art. 21, para. 4. The fourth paragraph states in relevant part: "The Principle of Universality: Honduran criminal law shall be applied to Hondurans or foreigners present in the country who have committed any of the following offences outside of national territory: Crimes against international humanitarian law. . . . In the cases above, Honduran criminal law shall be applied as long as the person who is criminally liable has not been acquitted or given an amnesty or has not served a sentence abroad or been sentenced by an International Court". The original Spanish text reads: *"Principio de Universalidad: La ley penal de Honduras se aplicará a los hondureños o extranjeros que se encuentren en el país, que hayan cometido fuera del territorio nacional alguno de los siguientes delitos: Delitos contra el derecho Internacional Humanitario. . . . En los casos anteriores, la ley penal de Honduras se aplicará siempre que el penalmente responsable no haya sido absuelto, amnistiado o haya cumplido condena en el extranjero, o haya sido condenado por Tribunal International." Ibid.*

[365] Draft Penal Code of Honduras (First Draft), June 2000, Bk. One (General Part), Title XVII (Crimes against International Humanitarian Law), Chapter II (Attacks on persons protected by International Humanitarian Law) Art.455-458.

"(1) Hungarian law shall also apply to acts committed by non-Hungarian citizens abroad, if they are
a) criminal acts in accordance with Hungarian law and are also punishable in accordance with the law of the place of perpetration,
b) it is a criminal act against the state (ChapterX), excluding espionage against allied armed forces (Section 148), regardless of whether it is punishable in accordance with the law of the place of country where committed,
c) crimes against humanity (Chapter XI) or any other crime, the prosecution of which is prescribed by an international treaty.
(2) Espionage (Section 148) against allied armed forces by a non-Hungarian citizen in a foreign country shall be punishable according to Hungarian penal law, provided that such offence is also punishable by the law of the country where committed.
(3) In the cases described in Subsections (1)-(2) the indictment shall be ordered by the Attorney General."[366]

In addition to these two provisions, Article 7 (1) of the Hungarian Constitution states that "[t]he legal system of the Republic of Hungary accepts the universally recognised rules and regulations of international law, and harmonises the internal laws and statutes of the country with the obligations assumed under international law."[367] In 1993, the Constitutional Court held that this provision means that these rules form part of Hungarian law without any further transformation.[368] In addition, it may also mean that the rules concerning jurisdiction over crimes under international law can be enforced directly by national courts, although there seems to be no jurisprudence on this specific point.[369]

[366] Act IV of 1978 on the Criminal Code, Sec. 4 (English translations of Act IV are *obtainable from* http://www.era.int/domains/corp.PDF). The text of Section 4 is essentially the same with respect to war crimes as Section 5 of the 1961 Code. *See* Criminal Code of the Hungarian People's Republic, Act V of 1961, Sec. 5 (English translation in *Criminal Code of the Hungarian People's Republic* (Budapest: Athenaeum Printing House 1962)).

[367] Constitution of the Republic of Hungary of 1949, as amended through 22 November 1994, Art. 7 (1) (English translation in *Hungary - Supplement, in* Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. March 1999) (Release 99-2 Barbara Toszegi trans.).

[368] Constitutional Court of Hungary, Ruling No. 53/1993 (X.13). Although it has not been possible to locate a copy of the Constitutional Court's decision in English, an authoritative commentary on Hungarian law states that the statement in Article 7 (1) of the Constitution that "the legal system of the Republic of Hungary shall accept the generally recognized rules of international law" means that

> "these rules form part of Hungarian law without special (further) transformation. It expresses, furthermore, that Hungary participates in the community of nations on the basis of this provision, meaning that such participation is a constitutional precept for domestic law. Hence, the Constitution and domestic law should be interpreted in such a way as to ensure actual application of the generally accepted rules of international law."

Imre Wiener,*Criminal Law, in* Attila Harathy, ed., *Introduction to Hungarian Law* 183, 187 (The Hague/London/Boston: Kluwer Law International 1998).

[369] A commentary on Hungarian criminal law seems to suggest that Hungarian courts may directly enforce prohibitions on war crimes and crimes against humanity, but does not expressly state that they can do so:

> "The provisions on war crimes and crimes against humanity, as well as the conditions for their punishability, are also determined by international law. These crimes are prosecuted and punished by the community of nations either directly or by requiring States to do so. The rules relative to the punishment of war crimes and crimes against humanity are *jus cogens* norms of international law, because these crimes threaten mankind and international coexistence in their foundations. A State refusing to undertake this obligation may not be a member of the international community. The rules on war crimes and crimes against humanity undoubtedly form part of customary international law, and of the general principles recognized by the community of nations, or, in the terminology of the Hungarian Constitution, of 'the generally recognized rules of international law'. These rules are 'accepted' by Hungarian law, as is stated in the first sentence of Para. (1) Art. 7, and are therefore part, without transformation or adaptation, of the 'obligations under international law', with which domestic law must be in harmony by virtue of the same article (second sentence)."

Ibid., 187-188. Subsequently, the commentary distinguishes crimes which treaties require states parties to punish, such as forgery and aircraft hijacking, where individuals "may only be held responsible for acts covered by the treaties if those acts are treated as crimes by domestic law", from war crimes and crimes against humanity, where individual responsibility "is based on international law regardless of its regulation by domestic law". *Ibid.*, 188. *See also* Péter Mohacsi & Péter Polt, *Estimation of War Crimes and Crimes against Humanity According to the Decision of the Constitutional Court of Hungary*, 67 *Revue Internationale de Droit Pénal* 333 (1996).

Hungary is a party to the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but as of 1September 2001 it had not yet ratified it, although it was expected to do so in 2001. A number of war crimes are defined as crimes under the Criminal Code in Chapter XI (Crimes against Humanity).[370] War crimes are not subject to a period of limitations and Hungary is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[371] Official immunities are recognized, but only to the extent provided by international law.[372] Foreign verdicts preclude prosecutions in Hungary except in cases where the Attorney General, a political official, decides otherwise and in such cases the foreign sentence served would be deducted from the sentence imposed by a Hungarian court.[373] The Criminal Code is not fully consistent with international law with regard to defences.[374]

END OF CHAPTER FOUR - PART A

[370] Act IV of 1978 on the Criminal Code, Sec.158 (Violence against the Civilian Population), Sec. 159 (War-time Looting), Sec. 160 (Sinful Warfare), Sect. 160/A (Use of Weapons Prohibited by International Treaty), Sec. 161 (Battlefield Looting), Sec. 162 (Infringement of armistice), Sec. 163 (Violence against a War Emissary), Sec. 164 (Misuse of the Red Cross), Sec. 165 (Other war crimes).

[371] Act IV of 1978 on the Criminal Code, Sec.33 (2). That provision states:

"a) war crimes defined in Sections 11 and 13 of Decree No. 81/1945. (II.5).) ME, enacted by Act VII of 1945 and amended and complemented by Decree No. 1440/1945. (V.1) ME;

b) other crimes against humanity (Chapter XI)[.]"

A commentary on Hungarian criminal law has stated that "[t]he punishability of crimes which the legislator deems to be of extreme gravity does not fall under limitation." Wiener, *supra,n.369,*194.

[372] *Ibid.*, Sec. 5. That section provides:

"The criminal indictment of persons enjoying diplomatic immunity and other immunity based on international law shall be governed by international treaties, and failing this, by international practice. In the issue of international practice, the declaration made by the Minister of Justice shall be governing."

[373] *Ibid.*, §6 (Effect of Foreign Verdicts).

[374] *See, for example,* Act IV of 1978 on the Criminal Code, § 26 (Constraint and Menace) (exonerating a person who acts under the influence of constraint or menace rendering the person incapable of acting according to his or her will); § 123 (1) (Reasons Excluding Punishability) (permitting the defence by soldiers of superior orders).