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UNIVERSAL JURISDICTION:
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CHAPTER TWO - THE EVOLUTION OF THE PRACTICE OF UNIVERSAL JURISDICTION

The concept of universal jurisdiction has a long history and has been traced at least to the Code of Justinian in the sixth century.[1] It has been recognized as a general principle of law applicable to crimes under international law or ordinary crimes in the work of many international law scholars since the Middle Ages, including Francisco de Vitoria in the 16th century and Hugo Grotius in the 17th century.[2] However, the focus of this memorandum is largely on state practice. An understanding of the evolution of the practice of universal jurisdiction is essential, since the justifications for its current scope are rooted in the history of its development, largely by analogy to earlier applications.

I. Crimes under international law from the Middle Ages to the Second World War

Among the first crimes under international law over which international law recognized that states could exercise universal jurisdiction were brigandage, war crimes, piracy and the slave trade.

A. Brigands

[1] Henri Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* 135 (Paris: Librairie du Recueil Sirey 1928) (arguing that universal jurisdiction had its origin in the Code of Justinian, C. III, 15, *Ubi de criminibus agi oportet*, 1).

[2] The most comprehensive history of the evolution of the doctrine of universal jurisdiction in scholarly works is found in Marc Henzelin, *Le Principe de l'Universalité en Droit Pénal International: Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité* (Bâle/Genève/Munich: Helbing & Lichtenhahn and Bruxelles: Bruylant 2000).

During the Middle Ages, northern Italian city states exercised jurisdiction over brigands (also called *banniti, vagabundi, assassini*) who were suspected of crimes outside the limits of the city state.[3] A similar practice in German states in the 16th and 17th centuries, particularly in the aftermath of the Thirty Years' War, also existed.[4] Trials of persons suspected of war crimes can be traced back in part to these precedents.[5] As a leading authority on brigandage explained, one of the main rationales for exercising universal jurisdiction over brigands was the lack of effective state control over the area in which they operated and the resulting impunity from justice.[6] In addition, brigands were seen as outlaws whose crimes harmed the interests of all states.[7] Although, in contrast to piracy, there has been little discussion of brigandage under international law in the two centuries before the Second World War, in part because of the decline in the practice, it shaped the thinking of those who drafted the Nuremberg Charter and Allied Control Council Law No. 10.[8]

B. War crimes

[3] Donnedieu de Vabres, *supra,* n. 1, 136; *see also* M. Cherif Bassiouni, *Crimes against Humanity in International Law* 229 (The Hague/London/Boston: Kluwer Law International 2nd ed. 1999). Brigands have been defined as "men often travelling in quasi-military gangs, often veterans of a particular campaign, who rove the countryside plundering and disrupting the peace and security of the area". Thomas H. Sponsler, *The Universality Principle of Jurisdiction and the Threatened Trials of American Airmen,* 15 Loy. L. Rev. 43, 44 (1968-1969).

[4] Henzelin, *supra,* n. 2, 77-79.

[5] Sponsler, *supra*, n. 3, 44 ("The practice of trying individuals for the violation of the laws of war has been traced in part [to] the treatment historically afforded brigands and pirates.").

[6] He noted that

> "Both brigandism and piracy stem from the fundamental fact of the lack of governmental control in the areas of their operations. Often the area, in a real sense, is a 'place not subject to the sovereignty of any State.' As regards the probable impunity from punishment, the conditions under which both piracy and brigandage have grown and flourished are essentially the same. Like the brigand on land, the pirate operates along sea trade lanes; he is equipped for attack and escape; and the high seas, in and of themselves, are places where the enforcement of law is difficult. In times past, law enforcement on the high seas has been highly inefficient or completely lacking."

Willard Cowles, *Universality of Jurisdiction over War Crimes*, 33 Cal. L. Rev. 177, 193 (1945).

[7] *Ibid.*, 194 (noting that "brigands attack nationals of all States indiscriminately if they happen to come within the area of their operations; and that, as travel increased their practices were harmful to the interests of all States, inasmuch as the nationals of all States were potentially threatened.").

[8] Cowles, *supra*, n. 6, 193. As noted below, the Cowles article arguing for the exercise of universal jurisdiction in part because of the history of universal jurisdiction over brigandage, influenced the drafters of the Nuremberg Charter. Justice Jackson, the United States Prosecutor before the Nuremberg Tribunal, explained in his initial report to the President of the United States, the crimes which would be included within the Tribunal's jurisdiction had been "committed against us and against the whole society of civilized nations by a band of brigands who had seized the instrumentality of state". Justice Jackson's report to the President on Atrocities and War Crimes, 7 June 1945, 11 (available on http://www.yale.edu/lawweb/avalon/imt/jack01.htm).

Universal jurisdiction over war crimes in international armed conflict dates back at least to the 14th century, when the *jus militaire* (law of arms governing professional soldiers) became recognized as part of the *jus gentium* (international law).[9] It has been argued that it was both the violation of a universal code and the gravity of the crimes which justified universal jurisdiction.[10] Another rationale for permitting any state or jurisdiction to exercise universal jurisdiction over war crimes was that, like piracy, discussed below, there was no adequate judicial system where the crimes took place.[11] However, despite the precedents of universal jurisdiction over brigands in the Middle Ages, international recognition of universal jurisdiction over violations of the law of armed conflict in non-international armed conflict has occurred largely in the past decade (see Sections V and VI of this chapter).

C. Piracy

[9] G.I.A.D Draper, *The Modern Pattern of War Criminality*, 6 Israel Y.B. Hum. Rts 9, 10-14 (1976); Lyal S. Sunga, *Individual Responsibility in International Law for Serious Human Law for Serious Human Rights Violations* 103-104 (Dordrecht/Boston/London: Martinus Nijhoff Publishers 1992); *see also* M. H. Keen, *The Laws of War in the Late Middle Ages* 7-59 and, in particular, 2 (referring to evidence of "the existence in the middle ages of some sort of prototype of the Geneva convention, a branch of international law governing the conduct of war") (London: Routledge & K.Paul1965). Keen pointed out that in the Middle Ages:

> "[w]ar was fought by knights, and war the rules of honour applied universally, binding princes and men at arms equally. Offences against these rules could therefore be tried by anyone who had a right to try the offences of soldiers, whatever the offender's allegiance."

Ibid., 53.

[10] One writer has explained:

> "It was the nature of the crime, being an offence against the honour of a particular code widely recognized within the military profession, rather than the *locus delicti* [place of the crime] which constituted the essential element justifying universal jurisdiction in the case of war crimes. The concept of universal jurisdiction for breaches of the laws of war originated on grounds that the nature of the crime is so odious as to be the concern of the international community to ensure that offenders are caught and punished according to international law."

Sunga, *supra*, n. 10, 104.

[11] Cowles, *supra,* n. 6, 193, 194 ("Basically, war crimes are very similar to piratical acts, except that they take place usually on land rather than at sea. In both situations there is, broadly speaking, a lack of any adequate judicial system operating on the spot where the crime takes place - in the case of piracy it is because the acts are on the high seas and in the case of war crimes because of a chaotic condition or irresponsible leadership in time of war. As regards both piratical acts and war crimes there is often no well-organized police or judicial system at the place where the acts are committed, and both the pirate and the war criminal take advantage of this fact, hoping thereby to commit their crimes with impunity.").

A more obvious basis for the modern expansion of universal jurisdiction has been the exercise of such jurisdiction over piracy. States began exercising extraterritorial jurisdiction over pirates for piracy on the high seas in the 16th century.[12] A number of treaties adopted in the Americas between 1878 and 1940 expressly provided for universal jurisdiction over piracy, including the 1878 Lima Treaty to Establish Uniform Rules for Private International Law,[13] 1889 Montevideo Treaty on International Penal Law,[14] the 1928 Havana Bustamente Code[15] and the 1940 Montevideo Treaty of International Penal Law.[16]

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[12] Examples of early legislation in the United Kingdom providing for extraterritorial jurisdiction include Act of Henry VIII, cap. 15 of 1536; the Piracy Act of 1698, 1 & 2 Will. 3, ch. 7, and the Piracy Act of 1837, 1 Vict., ch. 88. Prior to 1536, the High Court of Admiralty exercised jurisdiction over pirates under international law, apparently without a statutory grant of jurisdiction. *See In re Piracy Jure Gentium,* [1934] AC 586, 589.

[13] Article 34 (3), in the Fifth Title (National Jurisdiction over Crimes Committed Abroad) of the 1878 Treaty to Establish Uniform Rules for Private International Law, Lima, 7 November 1878 (English translation in Harvard Research in International Law, 29 Am. J. Int'l L. Supp. 435, 636 (1935), provides:

> "Those who outside of the country commit the crimes of falsifying the national money, bank-notes having legal circulation, public bonds or other national documents, will be tried by the courts of the Republic according to its laws, when they are arrested on its territory or their extradition is obtained.
>
> The national courts are likewise competent to try:
>
> . . . .
>
> 3. Pirates."

[14] Treaty on International Penal Law, Montevideo, 18 Martens (2nd Ser.) 432, 23 January 1889 (English translation in 13, *supra,* n. 14, 638- 639), Art. 13. This article states:

> "Crimes considered as piracy by public international law fall within the jurisdiction of the State under whose power the criminals come."

The original text in Spanish of Article 13 reads:

> *"Los delitos considerados de piratería por el Derecho Internacional Público, quedarán sujetos a la jurisdicción del Estado bajo cuyo poder caigan los delincuentes."*

Tratado sobre Derecho Penal Internacional, firmado en Montevideo, el 23 de enero de 1889, en el Primer Congreso Sudamericano de Derecho Internacional Privado [*reprinted in* Alto Comissionado de las Naciones Unidas para los Refugiados, *Compilacion de Instrumentos Juridicos Interamericanos Relativos al Asilo Diplomatico, Asilo Territorial, Extradicion y Temas Conexos* (1992)], *Art. 13.* It was signed by Argentina, Bolivia, Paraguay, Peru and Uruguay, although it is not known if it ever came into force.

[15] Bustamente Code, annexed to the Convention on Private International Law, adopted in the Final Act of the Sixth International Conference of American States, Havana, 20 February 1928, *entered into force* 1 January 1935, Art. 308 (English translation of Code in 22 Am. J. Int'l L. 273 (1928)), provides for universal jurisdiction over piracy. Article 308 (English translation of Code in)provides:

> "Piracy, trade in Negroes and slave traffic, white slavery, the destruction or injury to submarine cables, and all other offences of a similar nature against international law committed on the high sea, in the open air, and on the territory not yet organized into a State, shall be punished by the captor in accordance with the penal laws of the latter."

Some authorities have argued that states were exercising universal jurisdiction over piracy as a crime under international law.[17] For centuries, however, there was no

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The original text in Spanish of Article 308 of the Bustamente Code reads:

> *"La piratería, la trata de negros y el comericio de esclavos, la trata de blancas, la destrucción o deterioro de cables submarinos y los demás delitos de las misma índole contra el derecho internacional, cometidos en alta mar, en el aire libre o en territorios no organizados aun en Estado, se castigarán por el captor, de acuerdo con sus leyes penales."*

Código de Derecho Internacional Privado, suscrito en La Habana el 13 de febrero de 1928, Convencion Derecho Internacional Privado [*reprinted in Compilacion de Instrumentos Juridicos Interamericanos, supra,* n. 15, 11, 60-61], *Art.308.* Article 307 of the Bustamente Code provides:

> "Moreover, those persons are subject to the penal laws of the foreign State in which they are apprehended and tried who have committed outside its territory an offence, such as white slavery, which said contracting State has bound itself by an international agreement to repress."

Article 307 may be more restrictive in scope than Article 308 since the term "those persons" in the English translation may refer to the persons identified in the immediately preceding paragraph: "Every national of a contracting State or every foreigner domiciled therein", although the original text does not seem to be so limited. The original text of Article 307 in Spanish of the Bustamente Code reads:

> *"También estarán sujetos a las leyes penales del Estado extranjero en que pueden ser aprehendidos y juzgados, los que cometan fera del territorio un delito, como la trata de blancas, que ese Estado contrante se haya obligado a reprimir por un acuerdo internacional."* (see discussion below in Section I.E.2 of this chapter).

The following states are parties to the Bustamente Code: Brazil, Bolivia, Costa Rica, Cuba, Dominican Republic, El Salvador, Chile, Ecuador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela. The application of Article 308 is limited to crimes committed on the high seas or in territory not yet organized into a state, but it is a self-executing provision and it does not impose other conditions on its exercise, such as the requirement that an extradition request have been made and refused. For a brief discussion of the jurisdictional provisions of the Bustamente Code, see Henzelin, *supra,* n. 2, 284-285.

[16] Montevideo Treaty of International Penal Law, Art. 14. That article provided for universal jurisdiction over piracy. The full text of the article provides:

> "International piracy, drug trafficking, white slavery and the destruction or damaging of submarine cables, shall be subject to the jurisdiction and the law of the State where the suspects are apprehended, independently of where the crimes have been committed. This shall not preclude the jurisdictional preference, inherent to the State where the criminal acts have been committed, of demanding by means of extradition the handing over of the suspect." (English translation by Amnesty International). The original text in Spanish reads:
>
> *"La piratería internacional, el tráfico de estupefacientes, la trata de blancas, la destrucción o deterioro de cables submarions, quedan sujetos a la jurisdicción y la ley del Estado bajo cuyo poder caigan los delincuentes, cualquiera sea el lugar endonde se cometen dichos delitos, sin perjuicio del derecho de preferencia que compete al Estado en el cual los hechos delictuosos sean consumados, de solicitar, por la via de extradición, la entrega de los delincuentes."*

Tratado Sobre de Dercho Penal Internacional de 1940, suscrito en Montevideo, Uruguay, el 19 de marzo de 1940, Art. 14 (*reprinted in Compilacion de Instrumentos Juridicos Interamericanos, supra,* n. 14, 105, 107). This treaty was signed by Brazil, Colombia, Bolivia, Argentina, Peru, Paraguay and Uruguay, but only Uruguay appears to have ratified it.

[17] The leading exponent of this view is Judge Moore, who explained in the *Lotus* case:

> ". . . in the case of what is known as piracy by the law of nations, there has been conceded a

generally accepted definition of the crime of piracy under international law. Thus, in many cases, states exercised universal jurisdiction over piracy as a crime of international concern defined differently by each state.[18] Piracy is now defined as a crime under international law in Article 15 of the High Seas Convention of 1958. Article 15 states:

> "Piracy consists of any of the following acts:
> (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
> (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
> (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
> (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

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universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come. I say 'piracy by law of nations', because the municipal laws of many States denominate and punish as 'piracy' numerous acts which do not constitute piracy by the law of nations, and which therefore are not of universal cognizance, so as to be punishable by all nations.

Piracy by law of nations, in its jurisdictional aspects, is *sui generis*. Though statutes may provide for its punishment, it is an offence against the law of nations; and as the scene of the pirate's operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind - *hostis humani generis* - whom any nation may in the interest of all capture and punish."

The Lotus (France v. Turkey), P.C.I.J., Ser. A., No. 9 (1927), 70 (Moore, J., dissenting).

[18] *In re Piracy Jure Gentium*, [1934] AC 586. For histories of piracy which discuss jurisdiction over the crime, see D.H. Johnson, *Piracy in Modern International Law*, 43 Transactions of the Grotius Society (1957), 63; G.E. White, *The Marshall Court and International Law: The Piracy Cases*, 83 Am. J. Int'l L. 727 (1989).

(3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article."[19]

[19] Convention on the High Seas of 1958, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82, Art. 15. According to the United States State Department publication, *Treaties in Force* (*obtainable from* <http://www.state.gov>), as of 1 January 2000, the following 62 states are parties to the Convention: Afghanistan, Albania, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Cambodia, Central African Republic, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Fiji, Finland, Germany, Guatemala, Haiti, Hungary, Indonesia, Israel, Italy, Jamaica, Japan, Kenya, Latvia, Lesotho, Madagascar, Malawi, Malaysia, Mauritius, Mexico, Mongolia, Nepal, Netherlands, Nigeria, Poland, Portugal, Romania, Russian Federation (as successor to the Union of Soviet Socialist Republics), Senegal, Sierra Leone, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Swaziland, Switzerland, Thailand, Tonga, Trinidad and Tobago, Uganda, Ukraine, United Kingdom, United States,Venezuela and Yugoslavia (Federal Republic of). The following 19 states had signed the Convention as of that date, but had not yet ratified it: Argentina, Bolivia, Canada, Colombia, Cuba, France, Ghana, Holy See, Iceland, Iran (Islamic Republic of), Ireland, Lebanon, Liberia, New Zealand, Pakistan, Panama, Sri Lanka, Tunisia and Uruguay.

This definition was repeated in Article 101 of the 1982 Convention on the Law of the Sea.[20] It is now thought that this definition reflects the customary international law definition of piracy.[21]

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[20] Convention on the Law of the Sea of 1982 (Montego Bay Convention), U.N. Doc. A/CONF. 62/122, *reprinted in* 31 Int'l Leg. Mat. 1261, Art. 101. Other relevant definitional provisions in this Convention are Art. 102 (Piracy by a warship, government ship or government aircraft whose crew has mutinied) (repeating the provisions in Article 16 of the 1958 Convention on the High Seas) and Art. 103 (Definition of a pirate ship or aircraft) (repeating the definition in Article 17 of the 1958 Convention on the High Seas).

As of 20 June 2001, the following 135 states are parties to the Montego Bay Convention: Algeria, Angola, Antigua and Barbuda, Argentina, Australia, Austria, Bahamas, Bahrain, Barbados, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Cameroon, Cape Verde, Chile, China, Comoros, Cook Islands, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Djibouti, Dominica, Egypt, Equatorial Guinea, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Iceland, India, Indonesia, Iraq, Ireland, Italy, Jamaica, Japan, Jordan, Kenya, Kuwait, Lao People's Democratic Republic, Lebanon, Luxembourg, Macedonia (The former Yugoslav Republic of), Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Monaco, Mongolia, Mozambique, Myanmar, Namibia, Nauru, Nepal, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Oman, Pakistan, Palau, Panama, Papua New Guinea, Paraguay, Philippines, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Sao Tome and Principe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Sweden, Togo, Tonga, Trinidad and Tobago, Tunisia, Uganda, Ukraine, United Kingdom, United Republic of Tanzania, Uruguay, Vanuatu, Viet Nam, Yemen, Yugoslavia, Zambia and Zimbabwe.

As of the same date, the following 31 states had signed, but not yet ratified, the Convention: Afghanistan, Bangladesh, Bhutan, Burkina Faso, Burundi, Canada, Central African Republic, Chad, Colombia, Congo, Democratic People's Republic of Korea, Denmark, Dominican Republic, El Salvador, Ethiopia, Hungary, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Madagascar, Malawi, Morocco, Niger, Niue, Rwanda, Swaziland, Switzerland, Thailand, Tuvalu and United Arab Emirates.

[21] Ian Brownlie, *Principles of Public International Law* 236 (Oxford: Oxford University Press 5th ed. 1998).

It is now widely accepted that states may exercise universal jurisdiction over piracy as a crime under international law.[22] The customary international law rule of universal jurisdiction on the high seas over piracy is now codified in the provisions of the 1982 Convention on the Law of the Sea and its predecessor, the 1958 High Seas Convention. Article 100 (Duty to co-operate in the repression of piracy) of the Convention on the Law of the Sea requires all states to cooperate to the fullest possible extent in the repression of piracy, as defined in Article 101 (Definition of piracy), on the high seas and in any other place outside the jurisdiction of any state.[23] Article 110 (Right of visit) permits the warship of any state to visit a pirate ship when there is a reasonable ground to believe that the ship is engaged in piracy.[24] Article 105 permits the seizure of pirate ships and aircraft on the high seas or other places outside the jurisdiction of any state and the arrest of individuals on board. It states:

> "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with

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[22] Michael Akehurst, *Jurisdiction in International Law*, 46 Brit. Y. B. Int'l L. 145, 160-166 (1972-1973; D.W. Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources* 1, 11-14 (1982); Brownlie, *supra*, n. 21, 235; Harvard Research, *supra*, n. 13, 563-592; Geoff Gilbert, *Crimes* Sans Frontières: *Jurisdictional Problems in English Law*, 63 Brit. Y.B. Int'l L. 415, 423 (1992); Harvard Research in International Law, *The Draft Convention on Jurisdiction with Respect to Crime,* Art. 9 (Universality - Piracy), 29 Am. J. Int'l L. Supp. 435, 440 (1935) ("A State has jurisdiction with respect to any crime committed outside its territory by an alien which constitutes piracy by international law."); Rosalyn Higgins, *Problems and Process: International Law and How We Use it* 58 (Oxford: Oxford University Press 1994); R.Y. Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 Brit. Y.B. Int'l L. 146, 156 (1957); Robert Jennings & Arthur Watts, 1 *Oppenheim's International Law* 469 (London and New York: Longman 9th ed. 1992) (paperback edition 1996); Kenneth C. Randall, *Universal Jurisdiction under International Law,* 66 Tex. L. Rev. 785 (1988); Malcolm N. Shaw, *International Law* 470 (4th ed. 1997); *Restatement (Third) on the Foreign Relations Law of the United States* (1987) § 404; and other authorities far too numerous to mention. For a dissenting view, see Alfred P. Rubin, *The Law of Piracy* (Newport: Naval War College Press 1988); ___ *Ethics and Authority in International Law* (Cambridge: Cambridge University Press 1997).

[23] Convention on the Law of the Sea, U.N. Doc. A/CONF. 62/122 (1983), Art. 100 (Duty to cooperate in the repression of piracy). Article 100 provides: "All States shall co-operate to the fullest extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State." This article repeats the obligation in Article 14 of the 1958 Convention on the High Seas.

[24] *Ibid.,* Art. 110 (Right of visit). In particular, paragraph 1 (a) states:

> "Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
> (a) the ship is engaged in piracy[.]"

Article 110 repeats the provisions of Article 22 of the 1958 Convention on the High Seas.

regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith."[25]

[25] *Ibid.,* Art. 105 (Seizure of a pirate ship or aircraft) (repeating the text of Article 19 of the High Seas Convention). Other relevant articles include: Art. 106 (Liability for seizure without adequate grounds) (repeating the text of Article 20 of the 1958 High Seas Convention) and Art. 107 (Ships and aircraft which are entitled to seize on account of piracy) (repeating the text of Article 21 of the 1958 High Seas Convention).

Several, sometimes overlapping, rationales for universal jurisdiction over piracy have been advanced. Perhaps the earliest rationale was that the pirate was an outlaw who was an enemy of all humanity (*hostis humani*) threatening the international order - or, at least, international navigation and commerce - whom any state could capture and punish in the interest of all.[26] The concept of outlawry is no longer acceptable, in part because outlaws were rarely given the benefit of a fair trial or, sometimes, even a trial, but the perception of piracy as a threat to the international order is echoed in the rationales advanced today for universal jurisdiction over crimes under international law or of international concern. Universal jurisdiction over piracy is now more often based on both more pragmatic and idealistic reasons. It is has been argued that since the crime takes place on the high seas, outside the jurisdiction of any state, if states could not exercise universal jurisdiction over this crime, it would go unpunished.[27] Piracy attacks international commerce and, therefore, is an attack on the international community and the international legal order. Another ground for universal jurisdiction over piracy is based on the gravity of the crime.[28]

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[26] In addition to the dissent of Judge Moore in *The Lotus*, cited above in footnote 17, see also the comment of Blackstone:

> ". . . the crime of *piracy*, or robbery and depredation on the high seas, is an offence against the universal law of society; a pirate being, according to Sir Edward Coke, *hostis humani generis*. As therefore he has renounced all the benefits of society and government, and has reduced himself . . . to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self-defence, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or persons property.".

Sir William Blackstone, 4 *Commentaries on the Laws of England* 71 (1769) (Chicago/London: University of Chicago Press 1979) (facsimile of the first edition of 1765-1769) (emphasis in original, spelling modernized). Others advancing similar justifications include: *In re Charge to Grand Jury,* 30 F. Cas. 1049 (C.C.D. Mass. 1861) (No. 18,277) ("The ocean is the common highway of nations, over which every government has criminal jurisdiction. Pirates are highwaymen of the sea, and all civilized nations have a common interest, and are under a moral obligation, to arrest and suppress them.".).

[27] *See, for example, The Lotus (France v. Turkey)*, P.C.I.J., Ser. A., No. 9 (1927), 70 (Moore, J., dissenting); Cowles, *supra,* n. 6, 193, 194; Lyal S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* 103 (Dordrecht: Martinus Nijhoff Publishers 1992) (stating that the rationale for permitting states to exercise universal jurisdiction over piracy and slave-trading was primarily that they took place largely or exclusively on the high seas where no state could exercise territorial jurisdiction rather than that they were grave crimes, in contrast to war crimes and other crimes under international law which took place on the territory of states).

[28] *See Bonnet's Trial,* 15 *State Trials* (Howell) 1231, 1235 (Am. Vice Adm. 1718) ("As to the heinousness or wickedness of the offence, it needs no aggravation, it being evident to the reasons of all men.") (cited in Kenneth C. Randall, *Federal Courts and the International Human Rights Paradigm* 167 n. 29 (Durham and London: Duke University Press 1990). The same rationale, along with others, was advanced by Professor Edwin E. Dickinson in his article on the law of piracy in international and United States law. He explained:

> "So heinous is the offence considered, so difficult are such offenders to apprehend, and so universal is the interest in their prompt arrest and punishment, that they have long been regarded as outlaws and the enemies of all mankind. They are international criminals. It follows that they may be arrested by the authorized agents of any state and taken in for trial anywhere. The jurisdiction is universal."

Is the Law of Piracy Obsolete?, 23 Harv. L. Rev. 334, 338 (1924-1925).

D. Slavery and the slave trade

Similarly, states began to exercise extraterritorial jurisdiction in the middle of the 19th century, both by national legislation and pursuant to bilateral or multilateral treaties, over slave traders and, later, slave owners.[29] Much of the slave trade was like piracy, in that it took place largely on the high seas outside the jurisdiction of any state. Like piracy, both the slave trade and slavery were seen as particularly atrocious crimes, gradually attracting international condemnation.[30]

A number of authorities have concluded that states may exercise jurisdiction over both crimes as a matter of customary international law, either in their own right or as crimes against humanity.[31] Several states, including Greece, New Zealand, Nicaragua and Vanuatu, have enacted legislation providing for adjudicative universal jurisdiction over the slave trade, without protest by other states. Several states have recently enacted legislation providing universal jurisdiction over the crime against humanity of enslavement, as defined by the Rome Statute, including Canada and New Zealand (see discussion in Chapter Six, Section II).

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[29] *See, for example,* Slave Trade Act of 1834 (United Kingdom); Treaty for the Suppression of the African Slave Trade, 20 December 1841, 92 Parry's T.S. 437 (providing more severe penalties for subjects of Great Britain than for foreigners); Treaty for the Suppression of African Slave Trade, 7 April 1862, 12 Stat. 1225, T.S. No. 126. For a brief history of these developments, see M. Cherif Bassiouni & Ved Nanda, *Slavery and Slave Trade: Steps Toward its Eradication,* 12 Santa Clara Law. 424 (1972).

[30] *See, for example,* Sunga, *supra,* n. 10, 103 (stating that the rationale for permitting states to exercise universal jurisdiction over piracy and slave-trading was primarily that they took place largely or exclusively on the high seas where no state could exercise territorial jurisdiction rather than that they were grave crimes, in contrast to war crimes and other crimes under international law which took place on the territory of states), and Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* 221 (London: Allen Lane 1999).

[31] *Slavery:* Bassiouni, *supra*, 519 n. 145; Higgins, *supra*, n. 22, 58; *Slave trade:* M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* 519 n. 145 (Dordrecht/Boston/London: Martinus Nijhoff Publishers 1992); Randall, *Universal Jurisdiction, supra*, n. 22, 798-800; *Restatement (Third) of the Foreign Relations Law of the United States* (1987), § 404 ("A state has jurisdiction to define and prescribe punishment for certain offences recognized by the community of nations as of universal concern, such as . . . [the] slave trade. . ."). However, not all scholars are completely convinced that there is a specific rule concerning universal jurisdiction over the slave trade. *See* Roger Clark, *Stephen Speilberg's Amistad and Other Things I Have Thought About in the Past Forty Years: International (Criminal) Law, Conflict of Laws, Insurance and Slavery,* 30 Rutgers L.J. 371, 390 n. 55 (1999).

There is some evidence that states may exercise such universal jurisdiction over slavers and slave traders, not only to exercise adjudicative jurisdiction when suspects are found in territory subject to their jurisdiction, but also to exercise executive jurisdiction when their warships encounter slave traders on the high seas. However, the rights of states under treaty law to exercise such executive jurisdiction may well be less extensive than with respect to piracy on the high seas. In 1928, several American states adopted the Bustamente Code, which provided universal jurisdiction over slave trading and impliedly recognized that ships of states parties (captors) could stop ships of any state on the high seas to arrest persons suspected of engaging in the slave trade.[32] In 1940, several Latin American states adopted the 1940 Montevideo Treaty of International Penal Law, which provided for universal jurisdiction over the white slave trade (trafficking in women and children).[33]

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[32] Bustamente Code, annexed to the Convention on Private International Law, adopted in the Final Act of the Sixth International Conference of American States, Havana, 20 February 1928, *entered into force* 1 January 1935, Art. 308 (English translation of Code in 22 Am. J. Int'l L. 273 (1928)), provides for universal jurisdiction over piracy. Article 308 (English translation of Code in)provides:

> "Piracy, trade in Negroes and slave traffic, white slavery, the destruction or injury to submarine cables, and all other offences of a similar nature against international law committed on the high sea, in the open air, and on the territory not yet organized into a State, shall be punished by the captor in accordance with the penal laws of the latter."

The original text in Spanish of Article 308 of the Bustamente Code reads:

> *"La piratería, la trata de negros y el comericio de esclavos, la trata de blancas, la destrucción o deterioro de cables submarinos y los demás delitos de las misma índole contra el derecho internacional, cometidos en alta mar, en el aire libre o en territorios no organizados aun en Estado, se castigarán por el captor, de acuerdo con sus leyes penales."*

Código de Derecho Internacional Privado, suscrito en La Habana el 13 de febrero de 1928, Convencion Derecho Internacional Privado [*reprinted in Compilacion de Instrumentos Juridicos Interamericanos, supra,* n. 14, 11, 60-61], *Art.308.* Article 307 of the Bustamente Code provides:

> "Moreover, those persons are subject to the penal laws of the foreign State in which they are apprehended and tried who have committed outside its territory an offence, such as white slavery, which said contracting State has bound itself by an international agreement to repress."

Article 307 may be more restrictive in scope than Article 308 since the term "those persons" in the English translation may refer to the persons identified in the immediately preceding paragraph: "Every national of a contracting State or every foreigner domiciled therein", although the original text does not seem to be so limited. The original text of Article 307 in Spanish of the Bustamente Code reads:

> *"También estarán sujetos a las leyes penales del Estado extranjero en que pueden ser aprehendidos y juzgados, los que cometan fera del territorio un delito, como la trata de blancas, que ese Estado contrante se haya obligado a reprimir por un acuerdo internacional."* (see discussion below in Section I.E.2 of this chapter).

The following states are parties to the Bustamente Code: Brazil, Bolivia, Costa Rica, Cuba, Dominican Republic, El Salavador, Chile, Ecuador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela. The application of Article 308 is limited to crimes committed on the high seas or in territory not yet organized into a state, but it is a self-executing provision and it does not impose other conditions on its exercise, such as the requirement that an extradition request have been made and refused. For a brief discussion of the jurisdictional provisions of the Bustamente Code, see Henzelin, *supra,* n. 2, 284-285.

[33] Treaty of International Penal Law of 1940, Art. 14 The full text of the article provides:

> "International piracy, drug trafficking, white slavery and the destruction or damaging of submarine cables, shall be subject to the jurisdiction and the law of the State where the suspects are apprehended, independently of where the crimes have been committed. This shall not preclude the jurisdictional preference, inherent to the State where the criminal acts have been committed, of demanding by means of extradition the handing over of the suspect." (English translation by Amnesty International). The original text in Spanish reads:
> *"La piratería internacional, el tráfico de estupefacientes, la trata de blancas, la destrucción o deterioro de cables submarions, quedan sujetos a la jurisdicción y la ley del Estado bajo cuyo poder caigan los delincuentes, cualquiera sea el lugar endonde se cometen dichos delitos, sin perjuicio del derecho de preferencia que compete al Estado en el cual los hechos delictuosos sean consumados, de solicitar, por la via de extradición, la entrega de los delincuentes."*

Tratado Sobre de Dercho Penal Internacional de 1940, suscrito en Montevideo, Uruguay, el 19 de marzo de 1940, Alto Comissionado de las Naciones Unidas para los Refugiados, *Compilacion de Instrumentos Juridicos Interamericanos Relativos al Asilo Diplomatico, Asilo Territorial, Extradicion y Temas Conexos* (1992). This treaty was signed by Brazil, Colombia, Bolivia, Argentina, Peru, Paraguay and Uruguay, but only Uruguay appears to have signed it.

The 1982 Montego Bay Convention, like its predecessor, the 1958 High Seas Convention, authorizes the warships of states parties to stop and board ships not under their flag on the high seas which are engaged in the slave trade.[34] However, in contrast to the provisions in these two treaties concerning piracy, there is no expressly stated right under the treaties to arrest persons suspected of engaging in the slave trade on the ships visited. Article 99 (Prohibition of the transport of slaves)of the 1982 Montego Bay Convention (and Article 13 of the 1958 High Seas Convention) simply requires each state party to "adopt effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag, and to prevent the unlawful use of its flag for that purpose" and states that "[a]ny slave taking refuge on board any ship, whatever its flag, shall *ipso facto* be free".[35]

E. Expansion of universal jurisdiction to include other crimes under international law and identified in treaties

In addition to the above developments regarding brigands, war crimes, piracy and the slave trade, the period saw an important movement, both among international lawyers, between the First and Second World Wars to support extension of universal jurisdiction to include crimes under international law, ordinary crimes of international concern and, as described in the following section, even ordinary crimes under national law, although the latter were often subject to numerous conditions. These initiatives were paralleled by state practice, both in treaties providing for universal jurisdiction and in national

[34] 1982 Convention on the Law of the Sea, U.N. Doc. A/CONF. 62/122 (1983), Art. 110 (Right of visit). Article 110 provides in relevant part:

> "1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
> . . . .
> (b) the ship is engaged in the slave trade;
> . . . .
> 2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.
> 3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.
> 4. These provisions apply mutatis mutandis to military aircraft.
> 5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service."

[35] Article 99 (Prohibition of the transport of slaves) of the 1982 Montego Bay Convention states: "Every State shall take effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall *ipso facto* be free." Article 13 of the 1958 High Seas Convention is identical.

legislation. Since the primary focus of national legislation was on crimes under national law, although this would include crimes under international law codified in national law, this legislation is discussed in the following section. These developments are important because they shaped the approach of states to universal jurisdiction in treaties and in legislation for the rest of the 20th century.

1. Initiatives by international law associations

There were at least four important initiatives by non-governmental organizations of international lawyers between the First and Second World Wars to extend the scope of universal jurisdiction over crimes under international law and other crimes of international concern. These took place against the background of a 1926 report by an expert body appointed by the League of Nations to examine the question of extraterritorial jurisdiction which outlined the political and other obstacles to the drafting of a treaty on the subject.[36]

The following year in Warsaw, the 1927 Conference for the Unification of Penal Law called for enactment of national criminal laws to provide for universal jurisdiction over crimes under international law, as well as ordinary crimes under national law of international concern. Articles 6 and 7 of the draft legislation provided:

> “Article 6. Anyone who commits one of the following offences in a foreign country will also be punished according to the law of …. (x), irrespective of the law of the place where the offence was committed and of the nationality of the perpetrator:
> a) piracy;
> b) counterfeiting coins, other public papers or banknotes;
> c) slave trafficking;
> d) trafficking in women and children;
> e) intentional use of any means capable of exposing others to a common danger;
> f) drugs trafficking;
> g) trafficking in obscene publications;

[36] The 29 January 1926 report of the Committee of Experts for the Progressive Codification of International Law, *Criminal Competence of States in Regard to Offences Committed Outside their Territories*, is published in Brierly, J.L., *Report on Jurisdiction over Extraterritorial Crime, League of Nations Document, 1926,* 20 Am. J. Int’l L. 252-258 (Spec. Supp. 1926). Although the Committee of Experts had appointed a sub-committee consisting of two of the leading international lawyers of the day, J.L. Brierly and Charles de Visscher, the report was not based on an extensive survey of state practice, such as the one which was subsequently undertaken by the Research in International Law between 1927 and 1935 (discussed below in this sub-section), but instead appears to have relied on an incomplete review of national legislation in an article the previous year: W.E. Beckett, *The Exercise of Criminal Jurisdiction over Foreigners,* 1925 Brit. Y.B. Int’l L. 44. That author of that article cited only four states which had universal jurisdiction and concluded that the claim to universal jurisdiction “has not received international sanction” and that “[i]f general assent is necessary for the exercise of criminal jurisdiction over aliens [for crimes committed abroad], it can hardly be said as yet to be justified by international law”. *Ibid.,* 58-59. As indicated below, this conclusion was a distinctly minority view even at the time it was written.

other punishable offences provided for by international conventions to which the State is party … (x).
Art. 7. Any other crime or offence committed in a foreign country, by a foreign national, may be punished in the country …. (x) as provided for in the above articles ,where the perpetrator is present in the territory of the State …. (x) and where no application for extradition has been requested or granted and the Minister for Justice calls for a prosecution." [37]

In 1931, the Institute of International Law at its meeting in Cambridge recommended that states exercise universal jurisdiction over a non-exhaustive list of crimes under international law and ordinary crimes under national law of international concern:

"Article 5. Any State is entitled to punish acts committed in a foreign country by a foreign national discovered in its territory when such acts constitute an offence against the general interest protected by international law (such as piracy, black slave trade, white slave trade, propagation of contagious disease, attacks on international communications media, undersea cables and channels, counterfeiting money, credit instruments, etc.), on condition that no application has been made for extradition of the accused or that the offer to extradite has been refused by the State in whose territory the offence has been committed or of which the accused is a national."[38]

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[37] Resolution on International Penal Law, adopted by the Conference for the Unification of Penal Law, Warsaw, 5 November 1927 (English translation by Amnesty International), Arts 6 and 7 (*Délits du droit des gens*). Those articles provided in relevant part:

"Art. 6. Sera également punis d'après les lois . . . (x), independamment de la loi du lieu où l'infraction a été commise et de la nationalité de l'agent, quiconcque aura commis à l'étranger une des infractions suivantes:
a) piraterie;
b) falsification de monnaies métalliques, autres effets publics ou billets de banque;
c) traite des esclaves;
d) traite des femmes ou enfants;
e) emploi intentionnel de tous moyens capables de faire courir un danger commun;
f) trafic de stupéfiants;
g) trafic de publications obscènes;
autres infractions punissables, prévues par les conventions internationales conclues par l'Etat . . . (x).
Art. 7 Tout autre crime ou délit commis à l'étranger, par un étranger, pourra être puni dans le pays . . . (x) dans les conditions prévues aux articles précédents, si l'agent se trouve sur le territoire de l'Etat . . . (x) et si l'extradition n'a pas été demandée ou n'a pu être accordée et si le ministre de la Justice requiert la poursuite."

Text reproduced in Harvard Research, *supra,* n. 13, 642.

[38] Resolution on the Conflict of Penal Laws with Respect to Competence, adopted by the Institute of International Law at Cambridge, 31 July 1931 (English translation by Amnesty International), Art. 5. It provided:

"Tout Etat a le droit de punir des actes commis à l'étranger par un étranger découvert sur son territoire lorsque ces actes constituent une infraction contres des intérêts généraux protégés par le droit international (tels que la piraterie, la traite des noirs, la traite des blanches, la propagation de maladies contagieuses, l'atteinte à des moyens de communication internationaux,

canaux, câbles sous-marins, la falsification des monnaies, instruments de crédit, etc.), à condition que l'extradition del'inculppé ne soit pas demandée ou que l'offre en soit refusée par l'Etat sur le territoire duquel le délit a été commis ou don't l'inculppé est ressortissant."

Text reproduced in Harvard Research, *supra,* n. 13, 644. In a previous resolution adopted in 1883, the Institute had recommended universal jurisdiction over any serious crime (see following sub-section).

In 1932, the Fourth Section of the International Congress of Comparative Law at The Hague adopted a similarly broad recommendation:

> "Article 4: Any State is entitled to punish acts committed outside its territory by a foreign national, including any against a foreign national, when, under its criminal law, such acts constitute a punishable offence if the accused is present in its territory and cannot be extradited. The exercise of this right must be limited to the prosecution of serious offences against the general interests of humanity, which include:
> A. Piracy.
> B. Slave trafficking.
> C. Trafficking in women and children.
> D. Drugs trafficking.
> E. Trafficking in obscene publications.
> F. Counterfeiting coins and banknotes and other securities and credit instruments.
> G. Propagation of contagious disease.
> H. Attacks against communication media, undersea cables and channels.
> I. Or other offences provided for by international conventions.
> For all other offences, exercise of the right must be conditional upon the request of the injured party or a complaint on the part of the foreign authorities, and on the initiative of the national authorities."[39]

Between 1927 and 1935, the Research in International Law (Harvard Research), which was organized under the auspices of the Harvard Law School, prepared a series of draft conventions codifying international law on a number of subjects. In 1935, after a comprehensive survey of state practice and legal scholarship, the Harvard Research published its Draft Convention with Respect to Crime (Draft Convention), with an extensive summary of its research and explanation for its recommendations. Article 9 of

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[39] Resolution on International Penal Law, adopted by the Fourth Section of the International Congress of Comparative Law, The Hague, 2-6 August 1932, Art. 4. That article stated:

> *"Tout Etat a le droit de punir les actes commis en dehors de son territoire par un étranger, même contre un étranger, lorsque les faits constituent, d'après sa loi pénale, un acte délictueux, si l'inculpé se trouve sur son territoire, et s'il ne peut être extradé. L'exercise de ce droit doit être limité à la poursuite d'infractions graves, dirigées contre les intérêts généraux de l'humanité; ce sont notamment:*
> *A. La piraterie.*
> *B. La traite des esclaves.*
> *C. La traite des femmes et des enfants.*
> *D. Le trafic des stupéfiants.*
> *E. Le trafic des publications obscènes.*
> *F. Le faux monnayage, la falsification des papiers de valeur et des instruments de crédit.*
> *G. La propagation des maladies contagieuses.*
> *H. L'attentat à des moyens de communication, canaux et câbles sous-marins.*
> *I. Ou d'autres infractions prévues par les conventions internationales.*
> *Pour tous d'autres délits, l'exercice de le droit doit être subordonné à la requête de la personne lésée ou à la dénonciation de l'autorité étrangère, ainsi qu'à l'initiative de l'autorité nationale."*

Text reproduced in Harvard Research, *supra,* n. 13, 645.

the Draft Convention provided for universal jurisdiction over piracy and Article 10 provided universal jurisdiction over all crimes - whether crimes under international law, ordinary crimes of international concern or ordinary crimes under national law. Article 10 (a) recognized universal jurisdiction over crimes which were committed in a place subject to the authority of a state:

> "A State has jurisdiction with respect to any crime committed outside its territory by an alien, other than the crimes mentioned in Articles 6 [subject to nationality jurisdiction], 7 [security offences subject to protective jurisdiction], 8 [counterfeiting offences subject to protective jurisdiction] and 9 [piracy subject to universal jurisdiction], as follows:
>
> (a) When committed in a place not subject to its authority but subject to the authority of another State, if the act or omission which constitutes the crime is also an offence by the law of the place where it was committed, if surrender of the alien for prosecution has been offered to such other State or States and the offer remains unaccepted, and if prosecution is not barred by lapse of time under the law of the place where the crime was committed. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of the place where the crime was committed."[40]

2. Treaties providing for universal jurisdiction

Several treaties, starting before the First World War, mirroring these initiatives among international lawyers were adopted concerning piracy, slave trade, trafficking in persons, destruction or injury to submarine cables, "terrorism" and war crimes.

In 1910, the first of a series of treaties designed to suppress trafficking in women and girls, including for the purpose of forced prostitution, now recognized as a crime against humanity, was adopted. The International Convention for the Suppression of the White Slave Traffic authorized states parties to punish the crime when a person suspected of trafficking was found in their territories, even when the elements of the offence occurred in different countries.[41] A similar provision was included in a 1921 treaty on the subject.[42]

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[40] Research in International Law (Harvard Research), Draft Convention on Jurisdiction with Respect to Crime (Draft Convention), Art. 10, 29 Am. J. Int'l L. 439, 573 (Supp. 1935). Paragraphs b to d dealt with universal jurisdiction over crimes in places not subject to the authority of any state, such as the high seas.

[41] Convention for the Suppression of the White Slave Traffic, 7 *Martens Nouveau Recueil* (3d) 252, 211 Parry's T.S. 46, Gr. Brit. T. S. No. 20, 4 May 1910, Art. 1 (English translations of treaty provisions in U.N.T.S., Registration No. 1358). That article provides:

> "Any person who, to gratify the passions of others, has hired, abducted or enticed, even with her consent, a woman or girl who is a minor, for immoral purposes, even when the various acts which together constitute the offence were committed in different countries, shall be punished."

The original text in French reads:

> *"Doit être puni quiconque, pour satisfaire les passions d'autrui, a embauché, entraîné ou détourné, même avec son consentement, une femme ou fille mineure, en vue de la débauche,*

alors même que les divers actes qui sont les éléments constituifs de l'infraction auraient été accomplis dans des pays différents."

In addition, Article 2 provides:

"Any person who, to gratify the passions of others, has by fraud or by the use of violence, threats, abuse of authority or any other means of constraint, hired, abducted or enticed a woman or girl of full age [defined in the Final Protocol as a girl who has reached the age of 20 years] for immoral purposes, even when the various acts which together constitute the offence were committed in different countries, shall be punished."

The original text in French reads:

"Doit être aussi puni quiconque, pour satisfaire les passions d'autrui, a par fraude ou à l'aide de violences, menaces, abus d'autorité, ou toute autre moyen de contrainte, embauché, entraîné ou détourné une femme ou fille majeure, en vue de la débauche, alors même que les divers actes qui sont les éléments constituifs de l'infraction auraient été accomplis dans des pays différents."

Articles 1 and 2 define the crimes, Article 3 requires states to take steps to amend or enact legislation punishing the offences in accordance with their gravity and Article 5 provided for extradition of offenders. One authority on universal jurisdiction claims that it only provided for jurisdiction over trafficking when some, but not all, elements of the crime occurred outside the territorial state. Henzelin, *supra,* n. 2, 280. However, it is difficult to see anything in the text requiring such a restrictive reading, when the article could have stated instead: "even when some of the acts which constitute the offence were committed outside the state where the court is located".

[42] Convention for the Suppression of the Traffic in Women and Children, 9 L.N.T.S. 415, 30 September 1921, *reprinted in* 18 Am. J. Int'l L. 130 (1924), Art. 1. That article provided in part:

"Whoever, in order to gratify the passions of another person, has procured, enticed or led away even with her consent, for immoral purposes to be carried out in another country, shall be punished, not withstanding that the various acts constituting the offence may have been committed in different countries."

Article 2 requires states to take steps to amend or enact legislation punishing the offences in accordance with their gravity. *See* Henzelin, *supra,* n. 2, 282 (expressing the view that the scope of jurisdiction under the 1921 treaty was not clearly expressed). However, a leading authority several years after the Convention was adopted appeared to treat it as an expression of the principle of universality. Donndieu de Vabres, *supra,* n. 1, 146-147. In addition, various delegates during the drafting of the Genocide Convention in 1948 often cited universal jurisdiction over trafficking in women and children as well established.

In 1922, the Treaty of Washington relative to the use of submarines and asphyxiating gases during time of war was adopted, providing that violators would be treated as pirates, thus permitting any state party to exercise universal jurisdiction over suspects. Article III provided:

> *"Les Puissances signataires . . . déclarent . . . que tout individu au service de quelque puissance que ce soit, agissant ou non sur l'ordre d'un supérieur hiérarchique, qui violera l'une ou l'autre des dites règles, sera réputé avoir violé les lois de la guerre et sera susceptible d'être jugé comme s'il avait commis un acte de piraterie. Il pourra être mis en jugement devant les autorités civiles et militaires de toute Puissance dans le ressort de l'autorité de laquelle il sera trouvé."*[43]

However, the treaty did not receive sufficient ratifications to enter into force.[44]

As stated above, in 1928, the Sixth International Conference of American States adopted the Bustamente Code, providing universal jurisdiction over a non-exhaustive list of crimes under international law, including slave trafficking, which is now recognized as a crime against humanity, committed outside the territory of any state. Article 308 (Offenses Committed Outside the National Territory) provided:

> "Piracy, trade in negroes and slave traffic, white slavery, the destruction or injury of submarine cables, and all other offences of a similar nature against international law committed on the high sea, in the open air, and on territory not yet organized into a State, shall be punished by the captor in accordance with the penal law of the latter."[45]

At least 15 states ratified this treaty.[46]

In 1929 a treaty was adopted treating counterfeiting of currency abroad by foreigners as a matter of international concern over which states parties were obliged to exercise universal jurisdiction if their national legislation recognized this principle as a general rule.[47]

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[43] *Le Traité de Washington du 6 février 1922 relatif à l'emploi des sous-marins et des gaz asphyxiants en temps de guerre,* 25 RTSN 202, Art. III.

[44] For a brief discussion of jurisdiction under this treaty, see Henzelin, *supra,* n. 2, 277.

[45] Bustamente Code, annexed to the Convention on Private International Law, adopted in the Final Act of the Sixth International Conference of American States, Havana, 20 February 1928, Arts 307-308 (original text in Spanish and English translation quoted above in Section I.C and D).

[46] As of 1 January 1935, these states were: Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela. Harvard Research, *supra,* n. 13, 642.

[47] International Convention for the Suppression of Counterfeiting Currency, 20 April 1929, 112 L.N.T.S. 371, Art. 9. That article imposes an *aut dedere aut judicare* obligation, if extradition has been requested and refused:

"Foreigners who have committed abroad any offence referred to in Article 3 [listing counterfeiting offences], and who are in the territory of a country whose internal legislation recognizes as a general rule the principle of the prosecution of offences committed abroad, should be punishable in the same way as if the offence had been committed in the territory of that country.

The obligation to take proceedings is subject to the condition that extradition has been requested and that the country to which application is made cannot hand over the person accused for some reason which has no connection with the offence."

For further information on the jurisdictional provisions of this treaty, see Henzelin, *supra,* n. 2, 285-286.

The 1937 Convention on the Prevention and Punishment of Terrorism followed a similar approach to jurisdiction as the 1929 Counterfeiting Convention, but it was subject to a number of conditions that would have limited its effectiveness. Article 10 required the state party where a foreigner suspected of committing a "terrorist" offence was found to be prosecuted and punished as if the offence had been committed in the forum state. Three conditions had to be satisfied before the forum state could exercise universal jurisdiction: extradition had been demanded and refused and universal jurisdiction was recognized in the national law of the forum state and the state of the suspect's nationality.[48]

During the first year of the Second World War, several states in Latin America adopted the1940 Montevideo Treaty of International Penal Law. Similarly, Article 14 of that treaty stated:

> ""International piracy, drug trafficking, white slavery and the destruction or damaging of submarine cables, shall be subject to the jurisdiction and the law of the State where the suspects are apprehended, independently of where the crimes have been committed. This shall not preclude the jurisdictional preference, inherent to the State where the criminal acts have been committed, of demanding by means of extradition the handing over of the suspect.".[49]

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[48] Convention on the Prevention and Punishment of Terrorism, 16 November 1937, League of Nations O.J. 23 (1938), *reprinted in* Manley O. Hudson, 7 *International Legislation* 862 (1935-1937), Art. 10. That article provided:

> "Foreigners who are on the territory of a High Contracting Party and who have committed abroad any of the offences set out in articles 2 and 3 shall be prosecuted and punished as though the offence had been committed in the territory of that High Contracting Party, if the following conditions are fulfilled - namely, that:
>
> (a) Extradition has been demanded and could not be granted for a reason not connected with the offence itself;
>
> (b) The law of the country of refuge recognizes the jurisdiction of its own courts in respect of offences committed abroad by foreigners;
>
> (c) The foreigner is a national of a country which recognizes the jurisdiction of its own courts in respect of foreigners."

Articles 2 and 3 included a detailed list of substantive "terrorist" crimes and ancillary offences. The 1937 Convention, which was signed by 24 states (Albania (*ad referendum*), Argentina, Belgium (*ad referendum*), India, Bulgaria, Cuba, Dominican Republic, Egypt, Ecuador, Spain, Estonia, France, Greece, Haiti, Monaco, Norway (*ad referendum*), Netherlands, Peru, Roumania, Czechoslovakia, Turkey, Union of Soviet Socialist Republics, Venezuela and Yugoslavia) and ratified only by India, in 1941 before independence, was a companion to the Convention of an International Criminal Court, *opened for signature*, Geneva, 16 November 1937, *reprinted in* Hudson, *supra,* 878. The latter treaty was signed by states (Belgium (*ad referendum*), Bulgaria, Cuba, Spain, France, Greece, Monaco, Netherlands, Roumania, Czechoslovakia, Turkey, Union of Soviet Socialist Republics and Yugoslavia), but not ratified by any state. It is not known if any of the states which signed *ad referendum* ever perfected their signatures.

[49] Treaty of International Penal Law of 1940, Art. 14 (English translation by Amnesty International)(Original text in Spanish quoted above in Section I.C.) This treaty was signed by Brazil, Colombia, Bolivia, Argentina, Peru, Paraguay and Uruguay, but only Uruguay appears to have signed it.

II. Universal jurisdiction over ordinary crimes before the Second World War

Linked to these developments, starting nearly two centuries ago with Austria in 1803, states began to enact legislation providing for universal jurisdiction over ordinary crimes under national law and international law associations began as early as 1883 pressing for states to provide for such jurisdiction. These efforts took place against a background of some resistance, particularly by the United States, the United Kingdom and France, to extraterritorial jurisdiction over ordinary crimes, particularly, passive jurisdiction.[50]

A. Legislation and proposed legislation

By the eve of the Second World War, at least 26 states (approximately half the independent states at the time) had legislation (or had considered draft legislative provisions which were subsequently enacted without major changes) providing for universal jurisdiction over ordinary crimes, and, in some cases, over crimes under international law (or crimes that are now considered crimes under international law). Much of this legislation and proposed legislation was subject to certain conditions, such as requirements that the crime have been a crime under the law of the territorial state or territory (if it took place in a state or territory), that extradition be offered and not accepted, that prosecution not be barred by a statute of limitations or that any penalty imposed be no more severe than in the place where it occurred.[51] In other states, no such conditions were imposed.

[50] For a description of some of these positions, see *The Lotus (France v. Turkey),* 1927 P.C.I.J. (Ser. A), No. 9, 4; W.E. Beckett, *The Exercise of Criminal Jurisdiction over Foreigners,* 1925 Brit. Y.B. Int'l L. 44 48.

[51] Beckett, *supra,* n. 50, 48.

The earliest state known to have provided for universal jurisdiction over ordinary crimes under national law was ***Austria*** in 1803.[52] A number of other states subsequently enacted legislation providing universal jurisdiction over ordinary crimes. These states included ***San Marino*** in 1868,[53] ***Hungary*** in 1878,[54] ***Argentina*** in 1885,[55] ***Italy*** in

[52] The Austrian Criminal Code of 1803 provided that the jurisdiction of the Austrian judge extended to all crimes (*Verbrechen*) committed by foreigners abroad. Donnedieu de Vabres, *supra,* n. 1, 153-154. Although it has not been possible to locate the original text, with several modifications in form, this provision was included in the 1852 Criminal Code. *Ibid.* The relevant articles are set forth below:

Austrian Criminal Code, 1852, Art. 39 ("Again, if a foreigner has committed abroad an offence other than those indicated in the preceding paragraph, he shall always be arrested upon entering the country; arrangement shall be made forthwith for his extradition to the state where the offence was committed.") (*"L'étranger qui a commis à l'étranger un crime autre que ceux désignés dans les articles précédents [i.e. contre la sûreté et le crédit de l'État] doit toujours être arrêté lors de son arrivée en Autriche et l'on doit s'entendre immédiatement pour son extradition avec l'État où le crime a été commis."*); Art. 40 ("Should the foreign state refuse to receive him, the foreign offender will generally be prosecuted in accordance with the provisions of the present penal code. If, however, more lenient treatment is prescribed by the criminal law of the place where he committed the act, he shall be treated according to this more lenient law. Expulsion shall also be included in the penal sentence in addition to the infliction of the usual penalty.") (*"Si l'État étranger vient à refuser de s'en charger, il doit être procédé contre le criminel étranger en principe d'après les prescriptions du présent code pénal. . . . "*) (The English translation of these articles of the 1852 legislation is in the Research in International Law (Harvard Research), Draft Convention on Jurisdiction with Respect to Crime (Draft Convention), 29 Am. J. Int'l L. 439, 574-575 (1935) (Supp.); the partial French translations are in Beckett, *supra,* n. 50, 48). A slightly different French translation is in Donnedieu de Vabres, *supra,* 154.

[53] Penal Code of San Marino (*Codice Penale*) (English translation by Amnesty International), Art. 8. This provision, which is still believed to be in effect, states:

> "When, apart from the cases contemplated in Article 3 (2) and (3), a citizen of San Marino or a foreigner commits a crime outside the territory of the Republic, and enters its territory, the provisions to be adopted depend entirely on international conventions founded on the principle of reciprocity and provided for in public Treaties between the Republic and other States."

The original text reads:

> *"Allorchè, fuori dei casi comntemplati nei N. 2 e 3 dell'Art. 3, un sammarinese od un forastiero commetta reato fuori del trritorio della Repubblica, ed entri nel territorio della medesima, i provvedimenti da adotarsi dipendono interamente dalle convenzioni internazionali fondate sul principio della reciprocanza e stipulate nei pubblici Trattati tra la Repubblica e gli altri Stati."*

[54] Hungarian Criminal Code, Arts 9 and 16 (*cited in* Beckett, *supra,* n. 50, 48). Article 9 read: *"Sera aussi puni d'après les dispositions du présent Code l'étranger qui commet à l'étranger un crime ou un délit non mentionné au paragraphe 2 de l'article 7, dans le cas où son extradition n'est pas autorisé par les traités ou l'usage en vigueur, et si le Ministre de la Justice donne l'ordre de poursuivre."*) (French translation in Harvard Research, *supra,* n. 13, 575).

[55] Extradition Law of 25 August 1885, Art. 5 (English translation by Amnesty International). That article stated:

> "In cases in which, under the provisions of this law, the government of the Republic [decides] not to hand over the offenders requested, they should be tried by the courts of the country, with the appropriate penalties established by law for the crimes or offences committed in the territory of the Republic being applied to them.
>
> The requesting Government should be informed of the final sentence or outcome."

The Spanish original reads as follows:

> *"En los casos en que con arreglo a las disposiciones de esta ley el Gobierno de la República*

1889 and amended in 1930,[56] ***Bulgaria*** of 1896,[57] ***Norway*** in 1902,[58] ***Russia*** in 1903,[59] ***Turkey*** in 1926[60] ***Albania*** in 1927,[61] ***Yugoslavia*** in 1929[62] and ***Poland*** in 1932.[63] All

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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. 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. Therefore, 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. *See also* Beckett, *supra,* n. 50, 48-49; Donnedieu de Vabres, *supra,* n. 1, 155, 162 (Paris: Libraire du Recueil Sirey 1928); Harvard Research, *supra,* n. 13, 576.

[56] Italian Criminal Code of 1889, Art. 6, para. 3 (*cited in* Beckett, *supra,* n. 50, 48). Article 10 of the Italian Penal Code of 1930, which remains in effect essentially unchanged today, apart from the elimination of the death penalty, provided:

> "A foreigner who, apart from the crimes specified in Articles 7 and 8, commits in foreign territory to the prejudice of the State or of a national a crime . . .
>
> If the crime is committed to the prejudice of a foreign State or of an alien, the guilty party shall be punished under Italian law, at the demand of the Minister of Justice, always provided -
>
> (1) That he is in the territory of the State.
>
> (2) That the crime is one for which the penalty of death, penal servitude for life, or penal servitude for a minimum period of not less than 3 years is prescribed.
>
> (3) That his extradition has not been granted or agreed to by the Government of the State in which he committed the crime, or by that of the State in which he committed the crime, or by that of the State to which he belongs." (English translation in Harvard Research, *supra,* n. 13, 575).

[57] Bulgarian Penal Code of 1896, Art. 6 (*cited in* Harvard Research, *supra,* n. 13, 576).

[58] Penal Code of Norway of 1902, Secs 12 and 13. Those sections provided:

> *"A moins de dispositions contraires, le Code pénal norwégien est applicable aux actes condamnables commis . . .*
>
> *(A) tombe sous le coup des articles 83, 88, 89, 90 (dernier alinéa), 93, 98 à 104, 110 à 132, 148, 152 (1, 2, 3 alinéas), 153, 154 (1 alinéa), 159, 160, 169, 174 à 178, 182 à 185, 187, 189, 190, 191 à 195, 202, 217, 220, 221, 223 à 225, 231 à 235, 243, 244, 264, 267 à 269, 277, 292, 327, 328, 331, et 423 de la présente loi, ou bien . . .*
>
> *Sec. 13. Dans les cas de l'article 12 (no, 4), les pursuites pénales ne peuvent être commencées que sur l'ordre du roi."* (English translation in Harvard Research, *supra,* n. 13, 576)

[59] Russian Penal Code, 1903. It has not been possible to locate the relevant article of the Code, but it is reported that its provisions extended

> "to crimes committed by foreigners outside Russia (not including Boukhara), when . . . 2. the punishment of the crime committed in a foreign state and in general outside the borders of Russia is envisaged by an international treaty concluded by Russia."

The English translation by Amnesty International is based on a French translation found in Donnedieu de Vabres, *supra,* n. 1, 156 ("*Le Code pénal russe de 1903 déclare étendre ses dispositions 'aux infractions commises par des étrangers hors de la Russie, Boukhara excepté, lorsque . . . 2º la sanction de l'infraction commise dans un Etat étranger et en général hors des limites de la Russie est prévue par un traité international conclu par la Russie'.").*

[60] Turkish Penal Code, Law No. 765 of 1 March 1926, Official Gazette No. 320 of 13 March 1926. It provided:

of these provisions remain in effect, although most have been amended in some respects, as described in Chapters Four, Six, Eight and Ten. In addition, other countries had prepared draft legislation providing for universal jurisdiction over ordinary crimes, including ***Switzerland*** in 1915,[64] ***Sweden*** in 1923,[65] ***Cuba*** in 1926,[66] ***Czechoslovakia*** in 1926,[67] ***Germany*** in 1927[68] ***Roumania*** in 1928.[69] As described in Chapters Four, Six, Eight and Ten, each of these states subsequently incorporated universal jurisdiction in their penal codes. In addition, some of these states provided for universal jurisdiction over ordinary crimes of international concern and over conduct now considered to be crimes under international law. In addition to the states listed above with legislation,

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"Any foreigner who, apart from the cases contemplated by Article 4, commits an offence abroad to the prejudice of Turkey or of a Turkish subject, for which offence Turkish law prescribes a penalty involving loss of freedom for a minimum period of not less than one year, shall be punished in accordance with the Turkish Penal Code provided that he is arrested in Turkey. The penalty shall however be reduced by one third and instead of the death penalty, twenty years of penal servitude shall be awarded.

Nevertheless, in such cases, the prosecution will only be instituted at the request of the Minister of Justice or on the complaint of the injured Party.

If the offence committed injures another foreigner, the guilty person shall be punished at the request of the Minister of Justice, in accordance with the provisions set out in the first paragraph of this article, provided however that:

(1) the article in question is one for which Turkish law prescribes a penalty involving loss of freedom for a minimum period of three years;

(2) there is no extradition treaty or that extradition has not been accepted either by the government of the locality where the guilty person has committed the offence or by the government of his own country."

The English translation is found in *The Lotus (France v. Turkey),* 1927 P.C.I.J. (Ser. A), No. 9, 15.

[61] Albanian Penal Code of 1927, Art. 6 (*cited in* Harvard Research, *supra,* n. 13, 576).

[62] Penal Code of Yugoslavia of 1929, Art. 7 (*cited in* Harvard Research, *supra,* n. 13, 576).

[63] Polish Penal Code of 1932, Art. 10 (1) (*"La loi pénale polonaise est applicable à un étranger qui a commis à l'étranger une infraction non énoncée aux articles 5, 8 et 9, si l'auteur de l'infraction se trouve sur le territoire de l'Etat Polonais et si son extradition n'a pas été accordée, les conditions des Articles 6 ou 7 étant remplies."*) (French translation in Harvard Ressearch, *supra,* n. 13, 575.

[64] Proposal for the Swiss Penal Code, 1915, Art. 7 (cited in Donnedieu de Vabres, *supra,* n. 1, 137 n. 47). This draft article included crimes under international law, as well as ordinary crimes. This particular proposal was not pursued after 1918, but subsequently Switzerland provided for universal jurisdiction over war crimes.

[65] Project of Penal Code for Sweden, Ch. 1, Sec. 9 (*cited in* Harvard Research, *supra,* n. 13, 576).

[66] Project of Penal Code for Cuba by Ortiz of 1926, Art. 37 (*cited in* Harvard Research, *supra,* n. 13, 576).

[67] Project of Penal Code for Czechoslovakia (modelled on Austrian Penal Code of 1852) of 1926, Sec. 7 (*cited in* Harvard Research, *supra,* n. 13, 576).

[68] Project of Penal Code for Germany of 1927, Sec. 7 (*cited in* Harvard Research, *supra,* n. 13, 575).

[69] Project of Penal Code for Rumania of 1928, Art. 8 (*cited in* Harvard Research, *supra,* n. 13, 575).

these states ***included: Greece*** in 1887,[70] ***Germany*** in 1895,[71] ***Siam*** in 1908,[72] ***Panama*** in 1916,[73] ***Costa Rica*** in 1924,[74] ***Venezuela*** in 1926,[75] ***Spain*** in 1928,[76] ***Mexico*** in 1931[77] and ***Belgium*** in 1932.[78] The Harvard Research has a comprehensive review of national legislation providing for universal jurisdiction and proposals for such legislation.[79]

B. Recommendations by international law associations

[70] Greece, Code of Penal Code, as modified by Law of 22 December, Art. 2 (cited in Harvard Research, *supra,* n. 13, 570) (brigandage in neighbouring states).

[71] Law of 18 July 1895 (cited in Harvard Research, *supra,* n. 13, 569) (slave trade).

[72] Siam, Penal Code of 1908, Art. 10 (2) (counterfeiting of foreign money) (cited in Harvard Research, *supra,* n. 13, 570).

[73] Panama, Penal Code of 1916, Art. 1 (1) (cited in Harvard Research, *supra,* n. 13, 569, 571) (crimes against international law).

[74] Costa Rican Penal Code of 1924, Art. 219 (cited in Harvard Research, *supra,* n. 13, 569, 571) (slave trade and crimes against humanity).

[75] Venezuela, Penal Code of 1926, Art. 4 (9) (cited in Harvard Research, *supra,* n. 13, 571)(crimes against humanity)

[76] Spain, Penal Code, Art.11 (3) (cited in Harvard Research, *supra,* n. 13, 569) (slave trade).(trafficking in women and children).

[77] Mexican Federal Penal Code, Art. 236 (counterfeiting of foreign money or securities) (cited in Harvard Research, *supra,* n. 13, 570) .

[78] Belgium, Law of 12 July 1932, Art. 2 (cited in Harvard Research, *supra,* n. 13, 570) (counterfeiting of foreign money or securities).

[79] Harvard Research, *supra,* n. 13, 569-571.

In addition, starting in the last quarter of the 19th century, some of the leading non-governmental organizations of international lawyers repeatedly recommended that national law provide for universal jurisdiction over ordinary crimes, as well as in some cases recommending universal jurisdiction over crimes under international law (see Section I.E.1 of this chapter). These initiatives included the Institute of International Law in Munich in 1883,[80] the International Conference for the Unification of Penal Law at its Conference in Warsaw in 1927,[81] the Draft Code of International Law adopted by the International Law Association (Japanese Branch) in 1926,[82] the Resolution of the International Congress of Comparative Law in The Hague in 1932,[83] Resolution of the Third International Conference of Penal Law in Palermo in 1933[84] and the Harvard

[80] Resolution Relative to Conflicts of Penal Laws with Respect to Competences, adopted by the Institute of International Law at Munich, 2 *Annuaire de l'Institut de Droit International,* VIIième année 156 (1883-1885), 7 September 1883 (English translation by Amnesty International), Art. 10. Article 10, although couched in a language reflecting a narrow world view of the time, was otherwise an important statement of the principle of universal jurisdiction:

> "Any Christian State (or State recognising the principles of law of Christian countries) holding a guilty party may try and punish him when, despite prima facie evidence of a serious crime and of culpability, the location of the activity cannot be ascertained or the extradition of the guilty party, even to his national justice, is not permitted or is considered to be dangerous.
>
> In such cases, the court will try him under the terms of the law that is most favourable to the accused person, taking account of the probable location of the crime, the nationality of the guilty party and the criminal law of the court itself."

The principle articulated applied to all crimes, whether crimes under international or national law. At its meeting in Cambridge in 1931, however, its recommendation expressly mentioned only crimes under international law and ordinary crimes under national law of international concern (see Section I.E.1 in this chapter). The original French text read:

> *"Chaque Etat chrétien (ou reconnaissant les principes du droit des pays chrétiens), ayant sous sa main le coupable, pourra juger et punir ce dernier, lorsque, nonobstant des preuves certaines de prime abord d'un crime grave et de la culpabilité, le lieu de l'activité ne peut être constaté ou que l'extradition du coupable, même à sa justice nationale, n'est pas admise ou est réputée dangereuse.*
>
> *Dans ces cas, le tribunal jugera d'après la loi la plus favorable à l'accusé, eu égard à la probabilité du lieu du crime, à la nationalité du coupable et à la loi pénale du tribunal même."*

[81] For the text, see Section I.E.1 of this chapter.

[82] Draft Code of International Law, adopted by the International Law Association, Japanese Branch, and Kokusaiho Gakkwai, *Rules Concerning the Jurisdiction of Offences Committed Abroad and Concerning Extradition, in* International Law Association, *Report of the 34th Conference* 378, 383-384 (1926), Art. 2. Article 2 provided in relevant part: "If an alleged or convicted criminal is found within the territory of a State other than that in whose territory the offence was, or is alleged to have been, committed either in whole or in part, the former State may, if it pleases, proceed to try and, if he is found guilty, punish the alleged or convicted criminal."

[83] For the text, see Section I.E.1 of this chapter.

[84] Resolution of the Third International Congress of Penal Law, Palermo (1930), *in* 10 *Revue Internationale de Droit Pénal* 144, 157 (1933) (English translation by Amnesty International). It stated

> "[t]hat it is highly desirable that the courts of the country where the accused is arrested be accorded jurisdiction, even if the offence is a contravention of ordinary law and when the

Research study in 1935.[85]

III. Prosecutions for crimes committed during the Second World War

A. Prosecutions based on universal jurisdiction

Although jurisdiction of the Nuremberg Tribunal over crimes under international law that had no particular geographic location has usually been justified on principles other than universal jurisdiction, the Tribunal implicitly recognized the existence of universal jurisdiction over crimes against peace, war crimes and crimes against humanity. In addition to the ground that the parties to the London Agreement could legislate for Germany as occupying powers, the Tribunal explained:

extradition of the guilty party has not been requested either by the State on whose territory the offence has been committed, or whose interests are directly harmed by such contravention, or by the State to whom the delinquent belongs by way of nationality."

The original French text states:

"Que l'attribution de la compétence aux tribunaux du pays où le délinquant est arrêté est hautement désirable, même lorsqu'il s'agit d'infractions de droit commun et lorsque l'extradition du coupable n'a été demandée ni par l'Etat, sur le territoire duquel l'infraction a été commise, ou don't elle lèse directement les intérêts, ni par l'Etat don't le délinquant relève par sa nationalité."

[85] For the history of these recommendations, see Harvard Research, *supra,* n. 13, 576-577.

"The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law."[86]

It was envisaged by the Allies during the Second World War that, in addition to the trial of the major war criminals by the Nuremberg Tribunal, national courts would try lower level suspects. Although in most cases these trials were to take place in the places where the crimes had occurred, the United Nations War Crimes Commission endorsed the position of Willard Cowles in an article for the California Law Review that national courts could try persons suspected of war crimes, as crimes under international law, on the basis of universal jurisdiction. He argued that "while the state whose nationals were directly affected has a primary interest, all civilized states have a very real interest in the punishment of war crimes", and that "an offence against the laws of war, as a violation of the laws of nations, is a matter of general interest and concern".[87]

Indeed, some of the more than 1,000 trials conducted by Allied national tribunals after the Second World War under the authority of the ***Allied Control Council Law No. 10*** of persons accused of crimes against peace, war crimes or crimes against humanity in Europe, were based, at least in part, on universal jurisdiction.[88] There were also many trials by national military courts and commissions for such crimes committed in Asia during that war. Indeed, several of these national tribunals expressly stated that they were asserting universal jurisdiction in cases where the accused were convicted of crimes against humanity or war crimes. As explained above in Chapter One, Sections II.C and D, in the cases where national courts tried persons for crimes under international law committed against non-nationals of Allied states, citing the concept of belligerent jurisdiction, they were really exercising universal jurisdiction, rather than passive personality or protective jurisdiction, as contended by some commentators.

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[86] Judgment of the International Military Tribunal for the Trial of German Major War Criminals (With the dissenting opinion of the Soviet Member), Nuremberg, 30th September and 1st October, 1946, 38 (London: H.M.S.O. Cmd. 6964, 1946). *See also* Secretary-General of the United Nations: The Charter and Judgment of the Nuremberg Tribunal: History and Analysis, U.N. Doc. A/CN.4/5, U.N. Sales No. 1949V.7 (1949), 80.

[87] Willard Cowles, *Universality of Jurisdiction over War Crimes*, 33 Cal. L. Rev. 177 (1945). For approval by the United Nations War Crimes Commission, see United Nations War Crimes Commission, *Introduction*, 10 *Law Reports of Trials of War Criminals* 26 (London: H.M.S.O. 1949).

[88] United Nations War Crimes Commission, *supra*, n. 87, 26-27,43-48; *see also* Myres S. McDougal & Florentino P. Feliciano, *The International Law of War: Transnational Coercion and World Public Order* 706-721 (New Haven: New Haven Press (1994); Randall, *supra*, n. 22, 804-810; Stephen R. Ratner & Jason Abrams, *Accountability for Human Rights Atrocities in International Law* 143 (Oxford: Oxford University Press); Sponsler, *supra*, n. 3, 53; *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985) ("it is generally agreed that the establishment of these tribunals and their proceedings were based on universal jurisdiction"), *cert. denied*, 475 U.S. 1016 (1986)).

According to the United Nations War Crimes Commission, ***United States*** military courts conducted “many” trials involving crimes committed against non-nationals of Allied countries.[89] In some of the cases, United States military courts tried persons accused of war crimes against non-nationals committed before the United States had even entered the war.[90] Indeed, a number of United States military courts and commissions sitting in Europe and Asia indicated that they were exercising universal jurisdiction over war crimes. For example, in the *List* case, in which the accused were convicted of both crimes against humanity and war crimes, the United States court in Nuremberg stated:

> “An international crime is such an act universally recognised as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances.”[91]

It declared that a state which captures a person responsible for war crimes either may “surrender the alleged criminal to the state where the offence was committed, or . . . retain the alleged criminal for trial under its own legal processes.”[92] In that case, the United States prosecutor argued that the court had jurisdiction because the accused had committed crimes that were “universally recognized” under existing customary and conventional law.[93] Similarly, in the *German High Command* Case, the United States Military Tribunal cited in its discussion of the question whether the prosecution violated the principle of *nullum crimen sine lege* the conclusion by Grotius that any state could exercise universal jurisdiction over gross violations of the law of nations committed against foreign states and subjects.[94]

In the *Hadamar* trial, a United States military commission exercised jurisdiction

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[89] *Introduction*, 10 *Law Reports of Trials of War Criminals, supra*, n. 85, 43-44 (listing some of the cases).

[90] *Id.*, 44. *See, for example, United States v. Remmele*, 15 *Law Reports of Trials of War Criminals*, *supra*, n. 85, 44.

[91] *In re List* (*Hostages* Case), Judgment, Case No. 47, U.S. Mil. Trib. Nuremberg 19 February 1948, 8 *Law Reports of Trials of War Criminals*, *supra,* n. 85, 35, 54.

[92] *Ibid.*, 55.

[93] *Ibid.*, 2 *Trials of War Criminals before the Nuernberg Military Tribunal* 1230, 1235 (Washington, D.C.: U.S. Government Printing Office 1950), *see also ibid.*, 1241.

[94] *Trial of Wilhelm von Leeb and Thirteen Others (German High Command Case*), Judgment, U.S. Mil. Trib. Nuremberg 28 October 1948, 12 *Law Reports of Trials of War Criminals*, *supra,* n. 85, 61. It quoted the following statement approvingly:

> “It is proper also to observe that Kings and those who are possessed of sovereign power have a right to exact punishments not only for injuries affecting themselves or their own subjects, but also for gross violations of the law of nature and of nations done to other states and subjects.”

Hugo Grotius, *The Rights of War and Peace,* ch. XX, 247 (Washington, D.C./London: M. Walter Dume 1901) (A.C. Campbell, A.M., trans.).

over Germans charged with killing almost 500 Russian and Polish civilians at a sanatorium in Hadamar in Germany. The military commission expressly decided that it could assume jurisdiction over war crimes committed outside the United States, by non-nationals against non-nationals, citing universal jurisdiction as one of the alternative bases of jurisdiction. The law report of the military commission's judgment explained the basis of its jurisdiction as follows:

> "the general doctrine recently expounded and called 'universality of jurisdiction over war crimes,' which has the support of the United Nations War Crimes Commission and according to which every independent State has, under International Law, jurisdiction to punish not only pirates but also war criminals in its custody, regardless of the nationality of the victim or of the place where the offence was committed, particularly where, for some reason, the criminal would otherwise go unpunished".[95]

Similarly, another United States military commission, sitting in Shanghai exercised jurisdiction over Germans in China who were charged with the war crime of continuing to fight the Allies after the German surrender on 8 May 1945. According to the law report of the decision in the *Eisentrager* case, the military commission reasoned in rejecting a defence claim that it had no extraterritorial jurisdiction:

> "A war crime . . . is not a crime against the law or criminal code of any individual nation, but a crime against the *ius gentium* [international law]. The laws and usages of war are of universal application, and do not depend for their existence upon national laws and frontiers. Arguments to the effect that only a sovereign of the *locus criminis* [place of the crime] has jurisdiction and that only the *lex loci* [law of the place] can be applied, are therefore without any foundation."[96]

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[95] *The Hadamar Trial*, Judgment, Case No. 4, U.S. Mil. Comm'n - Weisbaden, 8-15 October 1945, 9 *Law Reports of Trials of War Criminals*, *supra,* n. 85, 46, 53.

[96] *In re Eisentrager*, Judgement, Case No. 84, U.S. Mil. Comm'n - Shanghai, 3 October 1946 to 1947, 14 *Law Reports of Trials of War Criminals*, *supra,* n. 85, 8, 15.

British military courts acting under the Royal Warrant of 14 June 1945, which is still in effect, also cited universal jurisdiction as one of the bases for jurisdiction over Germans charged with crimes against non-British nationals.[97] In the *Almelo* case, a British military court sitting in the Netherlands based its jurisdiction over German defendants accused of killing a Dutch civilian in part on universal jurisdiction. According to the law report of the case, the military court explained that "under the general doctrine called Universality of Jurisdiction over War Crimes, every independent state has in International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victim or the place where the offence was committed".[98] In the *Zyklon B* case, another British military court, sitting in Hamburg, exercised jurisdiction over German industrialists on charges that they knowingly supplied poison gas to kill Allied nationals who were not nationals of Great Britain. The law report of the case explained that the military court could exercise universal jurisdiction on the facts of this case.[99] A British military court at Maymyo in 1947, without expressly citing universal jurisdiction, convicted two Japanese of offences committed against Chinese and Indian inhabitants of areas occupied by Japan.[100] Another British military court, in Singapore, sentenced Tomono Shimio to death for killing US prisoners of war in Saigon.[101] Similarly, "a considerable number" of ***Australian*** war crimes trials involved crimes against non-nationals of Allied states, the ***Norwegian*** Law of 13 December 1946 provided for trials for acts contrary to Allied interests and a ***Chinese*** law provided that Chinese courts had jurisdiction over war crimes committed against Allied nationals or aliens under Chinese protection.[102]

B. The political decisions to prevent further prosecutions

Despite these important precedents, many governments in ***Western Europe***, with the notable exceptions of such countries as ***Germany*** and ***Israel***, soon decided to prevent

[97] Royal Warrant of 14 June 1945, promulgated on 18 June 1945 in Army Order 81/1945. The text of the Royal Warrant is in the United Kingdom's *Manual of Military Law*, Part III, 347 (1958). It was the primary authority for over 500 trials in Europe and the Far East of persons charged with war crimes between 1945 and 1949. A.P.V. Rogers, *War Crimes Trials under the Royal Warrant: British Practice 1945-1949*, 39 Int'l & Comp. L. Q. 780, 795 (1990). Allied Control Council Law No. 10 of 20 December 1945 reaffirmed the authority of the British military courts established in occupied Germany under the Royal Warrant to conduct trials and defined war crimes and crimes against humanity for such courts. In addition, a number of British military government courts, which also had jurisdiction over war crimes, were established pursuant to Allied Control Council Law No. 10 and conducted several trials of persons charged with war crimes. *Ibid.*, 795 n. 43.

[98] *Sandrock and three others* (*The Almelo Trial*), Judgment, Case No. 3, Brit. Mil. Ct. - Almelo 24-26 November 1945, 1 *Law Reports of Trials of War Criminals*, *supra,* n. 85, 35, 42 (1949).

[99] *Tesch and two others* (*The Zyklon B* Case), Judgment, Case No. 9, Brit. Mil. Ct. - Hamburg 1946, 1 *Law Reports of Trials of War Criminals, supra,* n. 85, 93, 103 (1949).

[100] *Introduction*, 10 *Law Reports of Trials of War Criminals*, *supra*, n. 85, 43.

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

[102] *Ibid*.

further prosecutions for war crimes and crimes against humanity committed during the Second World War (whether based upon universal or other forms of jurisdiction) or quickly lost the political will to do so with the onset of the Cold War. In some cases, certain governments in both ***Eastern*** and ***Western Europe***, as well as in ***Latin America*** (many of which had universal jurisdiction legislation) and the ***Middle East***, even assisted those responsible for such crimes to escape prosecution, provided them with new identities or recruited them for scientific or intelligence posts.[103]

[103] Christine van den Wyngaert, *The Suppression of War Crimes under Additional Protocol I, in* Delissen, A. & A. Tanja, eds, *Humanitarian Law of Armed Conflicts: Challenges Ahead - Essays in Hoour of Fritz Kalshoven* 197, 204 (Dordrecht: Martinus Nijhoff 1991) (noting that after the Second World War "while States were playing lip-service to the principle that war criminals should be brought to justice, many Nazi war-criminals were recruited by the intelligence services of 'western' States and deliberately sheltered from prosecution and punishment."); Paola Gaeta, *War Crimes Trials Before Italian Criminal Courts: New Trends, in* Horst Fischer, Klaus Kreß & Sascha Rolf Lüder, *International and National Prosecution of Crimes under International Law: Current Developments* 751, 751-752 (Berlin: Arno Spitz GmbH 2001) (describing concealment of files to protect suspects). *See also* George Lardner, Jr., *CIA Files Confirm U.S. Used Nazis After WWII,* Washington *Post,* 28 April 2001.

Surprisingly, the ***United States*** General, Douglas MacArthur, Supreme Commander for the Allied Powers in the Far East, as a result of popular opposition in Japan to war crimes trials of Japanese, took the initiative in mid-1947 to urge Allied governments not to hold further war crimes trials.[104] In response to MacArthur's request, the ***United Kingdom*** took the lead to stop further trials. On 12 April 1948, the Overseas Reconstruction Committee of the British Cabinet decided that "no further trials of war criminals should be started after 31 August, 1948".[105] Three months later, the British Commonwealth Relations Office sent a secret telegram to Australia, Canada, Ceylon, India, New Zealand, Pakistan and South Africa suggesting that no new trials should be started after 31 August 1948, partly on political grounds:

> "In our view, punishment of war criminals is more a matter of discouraging future generations than of meting out retribution to every guilty individual. Moreover, in view of future political developments in Germany envisaged by recent tripartite talks, we are convinced that it is now necessary to dispose of the past as soon as possible.[106]

Canada sent a secret cable in response on 22 July 1948 saying that it had no comment to make and the British government sent a subsequent note on 13 August 1948 warning that "no public announcement is likely to be made about this".[107]

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[104] R. John Pritchard, *The Gift of Clemency following British War Crimes Trials in the Far East, 1946-1947*, 7 Crim. L. F. 15, 17-18 (1996).

[105] Statement quoted in Sharon A. Williams, *The Prosecution of War Criminals in Canada*, in Timothy L.H. McCormack & Gerry J. Simpson, eds, *The Law of War Crimes: National and International Approaches* 151, 152 (The Hague/London/Boston: Kluwer Law International 1997).

[106] Telegram quoted in the Canadian Commission of Inquiry into War Criminals Report, Part I: Public 27 (Ottawa: Minister of Supply and Services 1986) (Deschênes Report).

[107] *Ibid.*

A series of similar political decisions were taken by Japanese and American officials to bring to an end trials of Japanese accused of war crimes and to release those convicted, commute their sentences or pardon them. At the same time that the trial of senior Japanese civilian and military was taking place before the Tokyo Tribunal, ***Japanese*** Emperor Hirohito promulgated a secret imperial rescript pardoning under Japanese law all members of the Japanese armed forces who might have committed crimes during the war, which was later tacitly approved by ***United States*** General MacArthur, as Supreme Commander for the Allied Powers.[108] As a result, there never were any prosecutions in Japanese courts of Japanese for war crimes.[109] The Far Eastern Commission (FEC) issued a formal advisory in 1949 to the 19 Allies in the Far East that trials of Japanese for war crimes should take place no later than 30 September 1949.[110] Two years later, the Treaty of Peace with Japan provided in Article II that all Japanese who had been convicted of war crimes would be returned to Japan to serve the rest of their sentences under the authority of the Supreme Commander for the Allied Powers, with the aim, as it later became known, to ensure early release on parole or commutation of sentences.[111]

Great Britain and the ***United States*** had also quickly lost the political will to press for investigations and prosecutions of Italians suspected of war crimes, crimes against humanity and crimes against peace in Italy and overseas. The United Nations War Crimes Commission identified more than 1200 Italians suspected of war crimes in Italy and other countries, including Abyssinia (now Ethiopia and Eritrea), Greece, Libya and Yugoslavia.[112] The surrender agreement provided for trials of persons suspected of war crimes.[113] However, there were only a limited number of trials of Italians alleged to have committed war crimes in Italy or abroad, and the British and American authorities declined to act on extradition requests and in 1946 the ***Italian*** government refused requests for extradition of nationals accused of war crimes.[114]

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[108] Pritchard, *The Gift of Clemency, supra*, n. 104, 22-23; M. Cherif Bassiouni, *International Criminal Investigations and Prosecutions: From Versailles to Rwanda, in* M. Cherif Bassiouni, 3 *International Criminal Law* 49 (Ardsley, New York: Transnational Publishers, Inc. 1999).

[109] Pritchard, *The Gift of Clemency*, *supra*, n. 104, 23.

[110] *Ibid.*, 18; R. John Pritchard, *International Military Tribunal for the Far East and the Allied National War Crimes Trials in Asia*, *in* Bassiouni, 3 *International Criminal Law, supra,* n. 108, 109.

[111] Pritchard, *The Gift of Clemency*, *supra*, n. 104, 37-49.

[112] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* 511 (1948).

[113] The Instrument of Surrender of Italy, 29 September 1943, Art. 29, 61 Stat. 2742, 3 Bevans 775.

[114] For the history of this sorry episode, which illustrates the danger of politically control of prosecutions, see M. Cherif Bassiouni, *Crimes against Humanity in International Law* 228 (Dordrecht/Boston/London: Marinus Nijhoff Publishers 1992); R. John Pritchard & Jane L. Garwood-Cutler, *The Allied War Crimes Trials of Suspected War Criminals, 1945-1949: A Forgotten Legacy with Vital Lessons to the Present Day* (forthcoming).

C. Exceptions to the general trend to stop prosecutions

In contrast to the attitude of Western governments regarding prosecutions, prosecutors in the ***USSR*** and in ***Eastern Europe*** continued to prosecute some persons suspected of war crimes and crimes against humanity committed during the Second World War. However, in most cases these prosecutions were based on territorial rather than extraterritorial jurisdiction.[115] Moreover, this generally aggressive policy of prosecutions of some suspects was offset, to a large degree, by a parallel policy of these governments to shelter many other suspects when they could provide useful scientific or intelligence assistance.

[115] The proceedings in many of these cases have been criticized as unfair. *See, for example,* István Deák, *Postworld War II Justice in a Historical Perspective*, 149 Mil. L. Rev. 137 (1995).

Also in contrast to the efforts of certain countries to prevent trials or shelter suspects, in 1961, ***Israel*** tried and convicted Adolf Eichmann, who had been living in Argentina, of war crimes, crimes against humanity and conduct amounting to genocide committed in Germany and other countries during the Second World War based in part on universal jurisdiction (for further information concerning this case, see Chapter Four, Six and Seven). A quarter century later, Israel prosecuted Ivan Demjanjuk for such crimes committed in Poland, although his conviction was reversed on appeal on evidentiary - not jurisdictional - grounds. Although the dramatic example of the trial of Eichmann was an important factor in encouraging prosecutions by ***Germany*** of its own nationals, there were few criminal investigations or prosecutions of persons in other Western countries for war crimes (or crimes against humanity), whether based on territorial or extraterritorial jurisdiction, until the 1980s.[116]

D. The revival of prosecutions

In the 1980s, there was increasingly widespread public revulsion as large numbers of persons suspected of genocide, crimes against humanity and war crimes committed in Europe during the Second World War living in Australia, Canada, the United Kingdom, the United States and other Western countries began being discovered and the role of Allied governments in helping Nazis and Nazi collaborators to escape prosecution began to be revealed. The public outcry led to a resumption of criminal investigations and some prosecutions based on universal jurisdiction in ***Australia*** (*Polyukhovich*, *Berezowsky*, *Wagner*), ***Canada*** (*Finta*) and the ***United Kingdom*** (*Serafinowicz* and *Sawoniuk*) and based on territorial jurisdiction in ***France*** (*Barbie*, *Bousquet*, *Touvier*, *Papon*) and ***Italy*** (*Pribke*). It also led to the deportation or extradition of suspects in ***Canada*** and the ***United States***.[117] In ***Australia***, ***Canada*** and the ***United Kingdom***, reform of legislation was necessary to give courts universal jurisdiction over these crimes or immigration authorities the authority to deport or extradite suspects. In some countries, such as ***France***, statutes of limitations in legislation prevented courts from exercising even territorial jurisdiction over war crimes.

IV. Post-war treaties providing for universal jurisdiction over crimes of international concern

[116] The lack of an aggressive investigation and prosecution policy in Germany and the restrictive jurisprudence of German courts, many of which were staffed by judges appointed or educated during the Nazi era, have been severely criticized. *See* Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* (1991).

[117] Some of the cases mentioned in this paragraph are discussed in Chapters Four and Six.

In a separate development, there was increasing concern in the 1970s and 1980s about politically motivated attacks on civilians and civilian objects (or “terrorist” offences). These attacks involved crimes of international concern, which are defined differently in each state and are not generally recognized as crimes under customary international law (such as hostage-taking in peacetime, aircraft hijacking and sabotage, attacks on internationally protected persons, including diplomats, drug trafficking, attacks on ships and navigation, theft of nuclear materials, use of mercenaries and attacks on peace-keepers). As a result of such concern, states began to adopt treaties imposing an *aut dedere aut judicare* duty on states parties to extradite or exercise universal and other forms of extraterritorial jurisdiction.[118] These treaties are important partly because they are an express recognition by states that international law permits the exercise of universal jurisdiction with respect to ordinary crimes which are matters of international concern, thus making the concept of universal jurisdiction over crimes under international law acceptable. They are also significant because the structure of their virtually identical universal jurisdiction provisions, including the obligation to try or extradite (*aut dedere aut judicare*) suspects, was adopted by the Convention against Torture, adopted in 1984. In addition, they are important because some of these treaties can be used to bring to justice government officials responsible for grave human rights violations. These treaties are discussed below in Chapter Thirteen.[119]

[118] These treaties include international conventions, such as: *hijacking:* Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, 860 U.N.T.S. 105, 22 U.S.T. 1641, T.S. 39, *reprinted in* 10 Int’l Leg. Mat. 133 (1971), Art. 4; *attacks on aircraft:* Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971, 974 U.N.T.S. 177, 24 U.S.T. 565, *reprinted in* 10 Int. Leg. Mat. 1151 (1971), Art. 7; *attacks on internationally protected persons:* Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents, 14 December 1973, U.N. G.A. Res. 3166, 27 U.N. G.A.O.R. Supp. (No. 10), U.N. Doc. A/Res/3166, 1035 U.N.T.S. 167, 28 U.S.T. 1975, Art. 7; *drug-trafficking:* Protocol Amending the Single Convention on Narcotic Drugs, 25 March 1972, 26 U.S.T. 1439, 976 U.N.T.S. 3; Convention on Psychotropic Substances, 21 February 1971, T.I.A.S. No. 9725, 1019 U.N.T.S. 175; *attacks on ships and navigation:* Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 27 Int’l Leg. Mat. 668, 10 March 1988, Art. 10 (1); *theft of nuclear materials:* Convention on the Physical Protection of Nuclear Material, 3 March 1980, 18 Int’l Leg. Mat. 1422 (1979), Art. 9; *use of mercenaries:* International Convention against the Recruitment, Use, Financing and Training of Mercenaries, Art. 12, 4 December 1989, 29 Int’l Leg. Mat. 91 (1990); *attacks on peace-keepers:* Convention on the Safety of United Nations and Associated Personnel, U.N. G.A. Res. 49/59 of 9 Dec. 1994, Art. 14 (certain types of attacks on peace-keepers are war crimes under Article 8 (2) (b) (iii) and (e) of the Rome Statute and are now widely considered to be crimes under customary international law). They also include regional treaties, such as: *Organization of the American States:* Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, adopted 27 February 1971, 27 U.S.T. 3949, 10 Int’l Leg. Mat. 255 (1971), Art. 5; *Council of Europe:* European Convention on the Suppression of Terrorism, E.T.S. No. 90, 27 January 1977, Art. 7. As explained below in Chapter Thirteen, the precedents for these *aut dedere aut judicare* treaty provisions date back further - in some cases as far as the 1920s. *See, for example,* International Convention for the Suppression of Counterfeiting Currency, 20 April 1929, 112 L.N.T.S. 371, Art. 9; Single Convention on Narcotic Drugs, 30 March 1961,18 U.S.T. 1407, 520, U.N.T.S. 204, Art. 2 (a) (iv).

[119] Some of these developments are described in Bin Cheng, *Aviation, Criminal Jurisdiction and*

V. Investigations and prosecutions for crimes committed since the Second World War

Terrorism: The Hague Extradition/Prosecution Formula and Attacks at Airports, B. Cheng & E.D. Brown, eds, *Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger* 25 (1988).

Despite the millions of crimes under international law committed since the guns fell silent in 1945, there were few criminal investigations or prosecutions - either in the states where the crimes occurred or abroad - for nearly four decades.[120] Indeed, with respect to the obligation of states parties to the 1949 Geneva Conventions to try or extradite persons suspected of grave breaches, the Director of Doctrine and Law of the International Committee of the Red Cross stated in 1986 that "this jurisdiction has not, to our knowledge, been used" and, added, in despair, that "universal jurisdiction for war crimes is, as experience has shown, of no practical value."[121] As recently as 1995, he noted that there had been few prosecutions for grave breaches.[122]

Nevertheless, the attitude of states to prosecution for war crimes, crimes against humanity and other crimes under international law both based on territorial and universal or other forms of extraterritorial jurisdiction, had already begun to change. Beginning in the 1980s, there has been a renaissance in the exercise of extraterritorial jurisdiction over crimes under international law, as a result of a number of factors. First, the renewed interest in pursuing prosecutions of crimes committed during the Second World War, both on grounds of territorial and extraterritorial jurisdiction (as described in the previous section of this Chapter), raised questions among the general public about why there had not been similar prosecutions with respect to contemporary crimes under international law. The determination of some new democratic or transitional governments (such as those in ***Argentina, Bolivia, Germany, Hungary, the Central African Republic, Mali*** and ***Poland***) to bring to justice persons responsible for human rights violations in their own countries committed during previous governments was also a reason. Perhaps the most decisive factor was pressure from victims or their families in exile on prosecuting authorities in their state of refuge to open criminal investigations. In some countries, victims or their families instituted the prosecutions themselves as *parties civiles.*

A. Crimes committed in Argentina in the 1970s and 1980s

During the 1970s and early 1980s, the Argentina junta was responsible for widespread "disappearances", extrajudicial executions and torture. These crimes have led over the past two decades to a series of mutually reinforcing domestic and foreign investigations and prosecutions.

[120] However, as explained below, the contention of some observers that court decisions prior to the *Pinochet* case in 1998 "were confined to cases involving old Nazis extradited (or in Eichmann's case, brought forcibly) to jurisdictions anxious to try them", Robertson, *supra*, n. 30, 222, is not accurate.

[121] Yves Sandoz, *Penal Aspects of International Humanitarian Law*, in M. Cherif Bassiouni, ed., 1 *International Criminal Law* 209, 230 (Dobbs Ferry, New York: Transnational Publishers, Inc. 1986).

[122] Yves Sandoz, *Rapport général, in Les Nations Unies et le Droit international humanitaire*, *Colloque international* 55, 76(Geneva 19-21 October 1995) .

Initial investigations in Italy. In December 1983, a court in Rome, ***Italy*** opened criminal investigations of members of the junta and military officers for murders and "disappearances" of Italian citizens based on legislation providing for protective and passive personality jurisdiction. After the junta fell from power, the ***Argentine*** civilian government which followed undertook ground-breaking prosecutions of senior military officers for these crimes, leading to convictions in 1985 of General Jorge Rafael Videla, Admiral Emilio Eduardo Massera and three other members of the former military junta Brigadier Orlando Agosti, Lieutenant-General Roberto Viola, Admiral Armando Labruschini.[123] The ***Italian*** investigations suffered numerous delays.

The granting of impunity by the Argentine civilian government. The dramatic step of ***Argentina*** to bring to justice those responsible was quickly followed by disillusionment when, at President Raúl Alfonsin's initiative, it adopted the *punto final* (full stop) law requiring all prosecutions for crimes under international law committed during the military government to be brought within 60 days, enacted the *Ley de Obediencia* (due obedience law) exempting a large class of military officers and soldiers who followed orders and President Carlos Saúl Menem finally issued pardons on 6 October 1989 and 29 December 1990 for those convicted.[124] The ***Italian*** investigations continued to encounter delays and setbacks, in both countries. In 1994, the ***Argentine*** *Cámara Federal de Apelaciones* (Federal Appeals Court) upheld an injunction preventing Italian judges from interviewing witnesses in Argentina. In 1995, the ***Italian*** court was considering ending the investigations. Relatives of the "disappeared" and civil rights groups in Argentina and Italy, as well as Amnesty International, urged the authorities to keep the investigations open.[125] The investigations were kept open.

Early French and Swedish criminal investigations in the Astiz case. Independently of these efforts, prosecutors and investigating judges in other states,

[123] *Conviction of Former Military Commanders (Federal Criminal and Correctional Court of Appeals; Buenos Aires)* [*Cámara Nacional de Apelaciones en lo Criminal y Correccional de la Capital Federal*], 8 Hum. Rts L. J. 368 (1987). The Federal Court conducted a number of prosecutions of former military officers. One such was the case against retired General Ramón Camps and six former members of the police and army. In December 1986, General Camps was found guilty and sentenced to 25 years' imprisonment, General Ovidio Riccheri was sentenced to 14 years and two junior officers received prison sentences of six and four years respectively. Two of the accused were acquitted.(See: *Amnesty International Report 1987*,AI Index: POL 01/02/87, ISBN 0 86210 1255).

[124] Kai Ambos, *Impunity and International Criminal Law*, 18 Hum. Rts L.J. 1 (1997); Jaime Malamud-Goti, *Punishing Human Rights Abuses in Fledgling Democracies: The Case of Argentina*, in Naomi Roht-Arriaz, ed., *Impunity and Human Rights in International Law and Practice* 160, 162 (New York/Oxford: Oxford University Press 1995).

[125] They argued that to close the investigations would deny the families access to information about the fate of their relatives and the possibility of bringing those responsible for the human rights violations to justice and that international standards had established universal jurisdiction for certain human rights crimes which could be tried in any country, not only in the country where they were perpetrated (*archivarlas significaría negar a los familiares el acceso a la información sobre la suerte de sus seres queridos y la posibilidad de procesar a los responsables de violaciones a los derechos humanos .... las normas internacionales establecen jurisdicción universal para ciertos crímenes contra los derechos humanos, que pueden ser juzgados en cualquier país, no sólo en el territorio donde fueron perpetrados*).

invoking either universal jurisdiction or passive personality jurisdiction, conducted criminal investigations and prosecutions of these crimes. After Navy Lt. Alfredo Astiz (subsequently promoted to Captain) was captured during the war between Argentina and the United Kingdom, ***Sweden*** reportedly sought to question him in connection with the "disappearance", torture and murder of a Swedish citizen, Dagmar Hagelin.

France also sought to question him in connection with the "disappearance", torture and murder of two French nuns, Alice Domon and Léonie Duquet in 1977 in Buenos Aires. He refused to answer questions contained in a *commission rogatoire* (letter rogatory) sent to the United Kingdom authorities on the ground that it would be contrary to Article 17 of the Third Geneva Convention of 1949 and he was released on 10 June 1982 and returned to Argentina. The father of one of the victims and the brother of the other constituted themselves as *parties civiles* on 30 June 1982. A *commission rogatoire* sent to the Argentine authorities on 7 January 1985 was not answered. In March 1985, France issued an international arrest warrant, but no action was taken by Argentina on the French request. On 20 October 1989, the *Cour d'appel de Paris* (Court of Appeal of Paris), approved the indictment (*mise en accusation*) on charges of illegal arrest and physical torture and abduction and torture (*inculpé d'arrestations illégales avec tortures coporelles; séquestration des personnes avec tortures corporelles*) and sent the case to the *Cour d'assises de Paris* (Court of Assizes of Paris).[126] He was tried and convicted *in absentia* for the unlawful arrest and torture by a French court on 16 March 1990 and sentenced to life in prison (*la reclusion criminelle à perpétuité*).[127] No further action took place on the French case until 2001 (see below).

The Spanish criminal investigation. Inspired in part by the Italian investigations in the 1980s, there have been a series of wide-ranging investigations in ***Spain*** of crimes committed during the Argentine junta by Judge Baltazar Garzón. In November 1999 Judge Garzón had issued arrest warrants for 97 Argentine military officers and one Argentine judge on the basis of charges of genocide, terrorism and torture; by January 2001, he had over 150 Argentine military officers under investigation.[128] In late 1997, retired Argentinian Navy Captain Adolfo Scilingo, who had spoken publicly in 1995 about his involvement in crimes committed during the junta, including throwing drugged prisoners into the River Plate from helicopters, fled to Spain. There he testified *in camera* before Judge Garzón, who ordered his arrest in October

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[126] The history of the preliminary stages of these proceedings is set forth in *Astiz, Arrêt, Nº 1, 893.89, Cour d'appel de Paris, 2ème Chambre d'accusation, 20 octobre 1989.*

[127] *Astiz, Arrêt, Nº 1893/89, Cour d'assises de Paris, 16 mars 1990.* For an analysis of this case, see Antonio Cassese, *Violence et droit dans un monde divisé* 133-134 (Paris: Presses Universitaires de France 1990).

[128] *Arg - On the arrest warrants against 97 high commanders and 1 judge*, Nizkor English Service <nzkspain@teleline.es>, 13 November 1999 (concerning decision based on a bill of indictment in Case No. 19/97, 2 November 1999, issued by the *Juzgado Central de Instrucción No. 5, Audiencia Nacional*, reported at: http://www.derechos.org/nizkor/arg/espana/gar.html). For further background on this litigation, see Richard J. Wilson, *Prosecuting Pinochet: International Crimes in Spanish Domestic Law*, 21 Hum. Rts Q. 927, 940 (1999).

1997. In January 1998, he was released on condition that he remained in Spain and appeared weekly before the court. In August 2001, Judge Garzón revoked his provisional freedom and ordered his arrest. As of 1 September 2001, Adolfo Scilingo was awaiting trial on charges of genocide, terrorism and torture.[129]

[129] Wilson, *supra*, n. 128, 939; Marguerite Feitlowitz, *A Lexicon of Terror: Argentina and the Legacies of Torture* 197, 254 (1998); Marcela Valente, Rights - Argentina: Justice Nabs Another Dictatorship Official, International Press Service, 8 August 2000, LEXIS News Library.

The arrest by Mexico in the Cavallo case. In addition, Ricardo Angel Cavallo, alleged to be Miguel Angel Cavallo, a former Argentine military officer accused of torture and murder of persons detained at the Argentine Navy School of Mechanics during the 1976-1983 military government was arrested on 24 August 2000 in Cancun, ***Mexico*** as he was about to fly out of the country. He was being sought both by Spanish Judge Garzón and, reportedly, by a ***French*** judge.[130] On 12 January 2001, a Mexican court recommended to the Ministry of Foreign Affairs that the suspect be extradited to Spain.[131] For further information about subsequent legal steps in this case, see Chapter Ten, Section II).

The revival of investigations in Italy. In turn, the interest of ***Italian*** investigating magistrates in pursuing investigations of crimes committed by the junta was renewed in 1997, apparently in part by the Spanish investigations. In May 1999, seven former members of the Argentine military forces in connection with crimes committed during the military government between 1976 and 1983 against Italian citizens in Argentina. In March 2000, the Rome Court of Assizes, *II Corte di assise di Roma*, began a trial (the *dibattimento* stage of the proceedings) *in absentia* of the seven former military officers. The Italian government filed for civil damages along with relatives of the victims.[132] The six other military officers in the case were charged with the murder of two other Italian citizens. On 6 December 2000, General Carlos Guillermo Suárez Mason was sentenced to life, plus three years, in prison; General Santiago Omar Riveros to life, plus one year, in prison; the other military officers were each sentenced to 24 years in prison; and all were ordered to pay substantial monetary damages.[133]

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[130] *International warrant issued against Argentine held in Mexico*, AFP, 25 August 2000; *Spain seeks to extradite alleged Argentine torturer from Mexico*, AFP, 25 August 2000; *Mexico to hold Argentine 60 days pending petition*, 26 August 2000; *Mexico prepares to extradite alleged Argentine torturer to Spain*, 26 August 2000; Morris Thompson, *Argentine detained in Mexico*, Miami *Herald*, 27 August 2000; *L'Argentin Cavallo dispose de 20 jours pour préparer sa défense et éviter son extradition*, AFP, 27 August 2000; *Alleged torturer defence to center on 'wrong' name*, Reuters, 28 August 2000; *Garzón pedira extradición de Cavallo antes que acabe el plazo*, EFE, 28 August 2000. In contrast to the response of the Minister of Justice in the Olivera case (see discussion below in this sub-section), Argentine President Fernando de la Rua indicated that he was not in favour of the extradition of the man believed to be Miguel Angel Cavallo, noting that the suspect had contested the identification and that "[i]t is well known that we defend the principle of territoriality". *Argentina cautious on Mexican 'Dirty War' arrest*, Reuters, 28 August 2000.

[131] *AFP, Le Mexique accepte d'extrader un ex-militaire argentin, Le Monde, 13 janvier 2001.*

[132] The trial had been scheduled to open in October 1999, but was postponed until 23 December 1999 and then postponed again until March 2000. At the 23 December session, former General Suárez Mason's lawyers stated that their client wished to attend, but that, because he was under house arrest on charges of kidnapping children of "disappeared" persons and concealing the identities of the kidnapped children, he had a legitimate reason for not attending and should not be tried *in absentia.*

[133] *Sentencia condenatoriaoa del Gral (R) Carlos Guillermo Suárez Masón, Gral (R) Santiago Omar Riveros y otros por crímenes contra ciudadanos italianos en la República Argentina, La II Corte di assise di Roma, Redatta scheda pel casellario N. 3402/92 R.G.N.R. N. 21/99 e 3/2000 del Reg. Gen addì N. 1402/93 R.G.G.I.P. N. 40/2000 del Registro, 6 dicembre 2000*; *Fallo condenatoriaoa del Gral (R) Carlos Guillermo Suárez Masón, Gral (R) Santiago Omar Riveros y otros por crímenes contra ciudadanos italianos en la República Argentina, IIº Tribunal Penal di Roma, 6 dicembre 2000*; *Desaparecidos,*

ergastolo ai generali argentini, La Repubblica, 7 December 2000, *Condanati i torturatori argentini, Corriere della Sera*, 7 December 2000, *Per gli 8 desaparecidos Italiani ergastolo ai generali argentini, La Stampa*, 7 December 2000; *Correspondents' Reports,* 3 Y.B. Int'l Hum. L. (2000) (forthcoming).

Several other criminal investigations, at various stages, are under way into complaints of other crimes committed by Argentine military forces against Italian citizens. A criminal investigation is being pursued against five more Argentine military officers accused of the murder of three Italian citizens in a secret detention centre at the *Escuela de Mecánica de la Armada* (ESMA), Navy Mechanic's School, near Buenos Aires. In addition, a complaint was filed in June 1999 by relatives of more than half a dozen victims of dual Italian-Uruguayan or Italian-Argentine nationality who "disappeared" as part of Operation Condor.

The Italian arrest of Lieutenant-Colonel Olivera. In a related development, ***Italian*** authorities arrested former Argentine Lieutenant-Colonel Jorge Olivera on 6 August 2000 based on an international arrest warrant issued by a ***French*** *juge d'instruction* (investigating judge) in Paris, Roger Le Loire. Jorge Olivera was accused of being one of the leaders of a unit which seized a 24-year-old French woman, Anne-Marie Erize Tisseau in San Juan in northwest Argentina on 15 October 1976 and subsequently caused her to "disappear". Judge Le Loire, who opened an investigation in November 1998 into illegal confinement followed by torture (*séquestrations suivies de tortures*) of French citizens in Argentina, had issued an international *commission rogatoire* in May 2000 requesting interviews in Argentina with approximately 150 people.[134] The French statute of limitations did not apply because the unresolved "disappearance" was seen as a continuing crime. The Argentine Minister of Justice is reported to have stated that Argentina would not oppose the French extradition request because, as there were no proceedings against Jorge Olivera in Argentina, the principle of territoriality was not applicable.[135]

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[134] *Un militaire argentin est arrêté en Italie à la demande de la France, Le Monde,* 10 August 2000; *Paris demande à l'Italie l'extradition d'un ex-officier argentin, Agence France Presse,* 11 August 2000.

[135] Claude Mary, *Un ex-tortionaire argentin en attente d'extradition, Liberation,* 10 August 2000. On 15 September 2000, there was a hearing before the *La Corte di Appello di Roma* (Rome Appeal Court) of an application by Olivera for provisional release or house arrest (*arresti domiciliari*) at a local monastery. On 18 September 2000, the court ordered Olivera's release, over the objections of the prosecutor (*Procuratore Generale*), on the grounds that a purported death certificate indicated that she had died on 11 November 1976, a month after her "disappearance" and that a prosecution would be barred under the 15-year Italian statute of limitations for kidnapping. In any event, the court considered that it was unthinkable that under the circumstances of the crime and its historical context that the kidnapping was continuing. Olivera immediately returned to Argentina. The prosecutor appealed the decision on 20 September 2000. Shortly after Olivera's release, the City Clerk of Buenos Aires, Raúl Fernández, and other officials stated that the document had been modified after its issuance. The Clerk stated that the document "was not a public document, but a modification of a simple search for information. This shows that Olivera's defence was unlawful." *Argentina says Italy freed major on forged document,* Reuters, 22 September 2000.

However, on 22 September 2000, the Court of Appeals *(La Corte di Appello di Roma)* ordered that the suspect be released, based on a document purporting to be a death certificate of the victim indicating that she had died in 1976. Shortly after Jorge Olivera's release, officials at the City Hall in Buenos Aires stated that the document, issued by the civil registry office in September 2000, had been modified after it was issued to state that the victim was dead.[136] By that time, however, the suspect was back in Argentina. Reportedly, in February 2001, a complaint was filed against Jorge Olivera by an Argentine lawyer in Argentina alleging that he had committed forgery.

The Procurator General appealed the September 2000 ruling of the Rome Appeals Court and the Minister of Justice announce an internal disciplinary investigation into the conduct of the appeal court judges and the Public Prosecutor opened an investigation of the apparently false death certificate. In February 2001, the Supreme Court of Cassation annulled the September 2000 ruling of the Rome Appeal Court ordering his release. It ruled not only that the appeal court had released Jorge Olivera on the basis of a false death certificate, but that, given the Argentine context, it should have considered the alleged abduction as one aimed at subverting the democratic order, a discrete crime aimed at subverting the democratic order, to which the statute of limitations did not yet apply. It returned the dossier to the Rome for examination of the extradition request.

[136] *Correspondents' Reports - Italy,* 3 Y.B. Int'l Hum. L. (2000) (forthcoming).

Criminal investigations in other countries. Criminal investigations have reportedly been opened, or attempted, in ***Germany, France*** and ***Italy*** concerning crimes committed during the military government committed against nationals of those countries and in ***Spain*** concerning crimes committed against nationals of various countries.[137] For example, on 12 July 2001, the Nuremberg prosecutor in ***Germany*** issued an international arrest warrant for former General Suárez Mason for the suspected murder of Elisabeth Kasemann, a German national, who had been kidnapped and "disappeared" in Buenos Aires in March 1977.[138] The office of the prosecutor in Nuremberg is investigating another 10 cases of victims with dual German-Argentine nationality based on complaints by the families of the victims. The suspects in these investigations include: former Generals Jorge Rafael Videla, Leopoldo Fortunato Galtieri and Emilio Eduardo Masera, as well as former Navy Captain Alfredo Astiz. ***French*** Judge Le Loire is reported to be investigating the "disappearance" in Chile and Argentina of five French nationals, including Jean-Yves Claudet-Fernández, whose "disappearance" in November 1975 took place in Argentina at the start of Operation Condor.[139] More recently, an Israeli government commission began an investigation in Argentina on 5 September 2001 into the "disappearances" of approximately 3,000 Jews in Argentina during the military government, although the aim of the commission itself is not to bring to justice those responsible, but to ensure a proper religious burial to those believed to have been murdered whose bodies have not yet been discovered.[140]

Refusals to cooperate by Argentine executive officials. Requests by Spanish Judge Garzón for the extradition of former Argentine military officers have been refused. On 26 January 1998, then President Carlos Menem issued Presidential Decree No. 111 refusing to cooperate with Spanish investigations.

Renewed criminal investigations in Argentina. For a variety of reasons, criminal investigations by Argentine authorities of crimes committed during the military government have been initiated or renewed. In large part, of course, the reasons were domestic: the perseverence of victims and their families, the deliberate exclusion as the

[137] Wilson, *supra*, n. 128, 942.

[138] For background on other criminal investigations in Germany concerning crimes committed during the Argentine military government against German nationals, see Amnesty International, *Argentina: Cases of "disappeared" facing judicial closure in Germany,* AI Index: AMR 13/03/00, April 2000.

[139] Judge Le Loire sought to question former United States Secretary of State Henry Kissinger as part of his investigation when he visited Paris in May 2001, but he declined to cooperate. The USA embassy informed Judge Le Loire that other obligations had prevented Mr. Kissinger from replying to his request and that his questions should be directed to Washington through official channels. *Kissinger shuns summons*, by Patrick Bishop in Paris, The Daily Telegraph, Issue 2197, 31 May 2001. Reportedly, Judge Le Loire has sent a *commission rogatoire* (letters rogatory) to EEUU with copy to the U.S. State Department on 22 June 2001 seeking an answer by the former Secretary of State in Washington on a number of questions formulated in relation to the activities of the USA Central Intelligence Agency in the Plan Condor. *Juez francés ha pedido escuchar a Kissinger en EEUU sobre Cóndor,* EFE, *22 junio 2001; French Judge repeats request for Kissinger testimony,* Santiago Times, 26 June 2001.

[140] Reuters, *Israel probes Argentina Jewish "Dirty War" victims,* 5 September 2001.

result of lobbying by families of victims of the crime of kidnapping of children from the amnesty and disgust at admissions by former military officers of their crimes. However, the impact of requests for extradition in the context of foreign criminal investigations in ***France***, ***Germany*** and ***Italy,*** and requests for investigation by ***Sweden***, of "disappearances" and murders of their nationals by Argentine military officers, as well as the more extensive investigations in ***Spain*** of these crimes committed against their own nationals and nationals of other countries, including Argentine nationals, should not be overlooked. The repeated refusals of the executive to honour requests for extradition are likely to have been seen in Argentina as an embarrassment and to have put pressure on the authorities to investigate. In addition, as in other countries, the arrest of the former President of Chile on 16 October 1998 is likely to have inspired the authorities to act, particularly since he was being investigated for crimes in Argentina, as well as in Chile. Indeed, in the nearly three years since his arrest in London, there has been a dramatic increase in domestic criminal investigations in Argentina, in particular, a number of related cases concerning kidnapping of children and a series of investigations related to Operation Condor in Argentina and abroad.

Criminal investigations of kidnapping of children. As a result of intensive lobbying by Argentine non-governmental organizations, the amnesty law (Due Obedience and Final Stop) excluded the crime of kidnapping children. Nevertheless, for many years there were almost no steps to investigate the widespread kidnapping of children of the "disappeared", often babies who were born to pregnant women who had been "disappeared" and who have not "reappeared" or who were murdered in detention by members of the armed forces.

However, in 1996, the Argentine group of relatives *Abuelas de Plaza de Mayo* (Grandmothers of Plaza de Mayo) submitted approximately 200 cases of kidnapped children of "disappeared" persons. Federal Judge Adolfo Bagnasco initiated an investigation of these cases the same year. Following Alfredo Astiz's statements widely publicized in the Argentine media in January 1998,[141] admitting to having participated in operations by units of the ESMA aimed at abducting, "disappearing" or killing people considered "enemies" of the military government, Judge Bagnasco interviewed him about his activities at the ESMA secret detention centre, where several pregnant women gave birth while held in captivity and whose children were kidnapped and illegally adopted.

As a result of Judge Bagnasco's investigations, a number of former military officers have been arrested and charged with *sustracción* (illegally taking children), *cambio de identidad* (suppressing the children's true identity) and *ocultamiento de menores* (concealment). Among those placed under house arrest are the former members of the military government Jorge Rafael Videla, Emilio Eduardo Massera, Oscar Rubén Franco, Cristino Nicolaides, Benito Reynaldo Bignone and Carlos Guillermo Suárez Mason. In March 2001, Judge Bagnasco resigned, and Judge Rodolfo Canicoba Corral assumed responsibility for the case.

[141] *El asesino está entre nosotros*, Semanario Trespuntos, año 1, N.28, 14 January 1998.

Over 12 former Argentine members of the armed forces have been arrested and charged with kidnapping of children.[142] Former General Jorge Rafael Videla and former Admiral Emilio Massera challenged the order placing them in preventive detention. In a landmark decision in September 1999, the Argentine Federal Court (*Cámara Federal*) confirmed the preventive detention of the two former junta members. In that decision, the court rejected the applicability of the *ne bis in idem* principle to the case, held that the kidnapping of children was a continuous crime and declared that the national statute of limitations does not begin to run as long as the whereabouts of the victim remain unknown.[143] It also confirmed that "disappearances" are crimes against humanity and that under Article 118 of the Argentine Constitution, international criminal law concerning crimes against humanity applied.[144]

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[142] *Retired general held in baby theft probe,* Reuters, 10 August 2000. Former members of the armed forces arrested: Jorge Rafael Videla, June 1998; Emilio Eduardo Massera, November 1998, Jorge Antonio Acosta December 1998; Antonio Vañek, December 1998; Héctor Antonio Febres, December 1998; Oscar Rubén Franco, December 1998; José Suppich December 1998, Reynaldo Benito Bignone, January 1999; Cristino Nicolaides, January 1999; Policarpo Vázquez, March 1999; Carlos Guillermo Suárez Mason, December 1999; Juan Bautista Sasiaiñ, March 2000; Santiago Omar Riveros, August 2000; Miguel Osvaldo Etchecolatz, April 2001; Jorge Antonio Bergés, April 2001.

[143] *Expdte.30311, "Videla, J.R. s., Excepciones", J7 S.13,* 9 September 1999 and *Expdte.30514, "Massera,s., Excepciones", J7 S.13, 9 September 1999*.

[144] *Expdte.30514, "Massera, s., Excepciones", J7 S.13, 9 September 1999*.

Argentine investigations of Operation Condor. The second major focus of Argentine criminal investigations has been into the secret Operation Condor conspiracy by military governments of the Southern Cone countries (in Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay) to seize exiles in these countries and return them to the countries from which they had fled to be tortured, "disappeared" and, often, murdered. In November 1999, a little over a year after former President Augusto Pinochet was arrested in London, six relatives of persons who were "disappeared" in Argentina filed a *querella criminal* (complaint) against former Argentine General Jorge Rafael Videla and former Army Commander Carlos Guillermo Suárez Mason; former Chilean President Augusto Pinochet and two heads of the intelligence services; former Paraguayan President Alfredo Stroessner and two heads of police and seven members of the Uruguayan armed forces, alleging that they were responsible for the "disappearances" as part of Operation Condor.[145]

On 21 June 2001, Judge Canicoba Corral issued an *exhorto* (decision) indicting three former Uruguayan military officers, José Nino Gavazzo, Jorge Silveira and Manuel Cordero, as well as a police officer, Hugo Campos Hermida, for membership to a criminal plan dedicated to illicit acts with the systematic characteristic of enforced disappearance of people.[146] The *exhorto* named also two Argentine military officers, former Argentine president General Jorge Rafael Videla, and former Army Commander Carlos Guillermo Suárez Mason; three former Chilean military officers, former Chilean president General Augusto Pinochet, former head of Chilean intelligence Manuel Contreras and former Coronel Pedro Espinoza; three Paraguayans, former president General Alfredo Stroessner; former Head of Police General Francisco Brites and former head of the police Investigations Department Néstor Milcíades Coronel as well as Uruguayan former Army Commander Julio Vapora, Colonel Guillermo Ramírez and Major Enrique Martínez. and Major .

On 10 July 2001, former General Jorge Rafael Videla was indicted in the same case and placed in preventive detention by Judge Rodolfo Canicoba Corral on charges of aggravated participation in an illegal association, punishable by five to ten years in prison. One million dollars of former General Videla's assets were frozen to cover court costs and any future damage awards. The accused was already in preventive detention, under house arrest in the case involving kidnapping of children whose mothers remain "disappeared". The judge indicated that he wished to question former United States Secretary of State Henry Kissinger and the former Chilean security chief Manuel

[145] The following relatives filed the complaint: Dora Gladys Carreño Araya (on behalf of her sister, Cristina CarreñoAraya, who was "disappeared" in Argentina in 1978), Idalina Wilfrida Radice Arriola de Tatter (on behalf of her husband, Federico Tatter, who was "disappeared" in Argentina in 1976), Sara Rita Mendez (on behalf of her son Juan Simón Antonio Riquelo, kidnapped in Buenos Aires in 1976 and transferred to Uruguay), Elsa Pavón de Grinspon (on behalf of her daughter, Monica Sofia Grinspon; her son-in-law, Claudio Ernesto Logares; and her grand-daughter, Paula; all of whom were "disappeared" in Montevideo, Uruguay in 1978), and Claudia Mabel Careaga and Ana Maria Careaga (on behalf of their mother, Maria Esther Ballestrino de Careaga, who was "disappeared" in Buenos Aires in 1977).

[146] The original text in Spanish reads: *"Miembros de un Plan Criminal, destinado y dedicado a la comisión de ilícitos con la característica sistemática -los mismos- de desaparición forzada de personas".*

Contreras.[147]

[147] The account of this case is based in part on *Jorge Videla, premier ex-dictateur poursuivi pour le plan Condor, Le Monde*, 11 July 2001.

On 20 July 2001, Judge Canicoba Corral issued a decision requesting Chile and Uruguay the preventive detention pending a request for extradition, of former President Augusto Pinochet and former Army Commander in Chief Julio **Vadora** respectively, in the framework of the judicial investigation on Plan Condor [148].

The Pratts investigations. In May 2001, as the result of an investigation requested by the daughters of Chilean General Carlos Pratts and his wife, who were murdered in Buenos Aires in 1974, Judge María Romilda Servini de Cubría requested Chile to extradite former President Pinochet for ~~his~~ their murder. After Chile refused the request, Judge María Romilda Servini de Cubría requested permission of the Chilean Supreme Court at the beginning of July 2001 to interview former President Pinochet concerning the murders. Judge Canicoba Corral is also investigating this murder in connection with the complaint filed in November 1999 in the Operation Condor case.

Decision that Law of Due Obedience and Full Stop Law were unconstitutional. In addition, in an historic decision on 6 March 2001, Argentine Judge Gabriel Cavallo held that the *Ley de Obediencia Debida* (Law of Due Obedience) and the *Punto Final* (Full Stop Law) were void and unconstitutional and in violation of Argentina's obligations under international law.[149]

[148] *Actuaciones Sumariales registradas bajo el Nro. 13.445/1999, caratuladas: "Videla Jorge Rafael y otros s/Privación Ilegal de la Libertad Personal" del registro de ésta Secretaria Nro.14, pertenecientes al Juzgado Nacional en lo Criminal y Correccional Federal No.7,* dated 20 July 2001.

[149] *Causa Nro. 8686/2000 caratulada "Simón, Julio, Del Cerro, Juan Antonio s/sustracción de menores de 10 años" del registro de la Secretaría Nro. 7 de este Juzgado Nacional en lo Criminal y Correccional Federal Nro. 4,* 6 March 2001(copy provided by the Max-Planck-Institute for Foreign and International Criminal Law -Freiburg, Germany). The decision has been published in full in the Argentine newspaper, *Diario Judicial,* on 6 March 2001 (*obtainable from* http://www.DiarioJudicial.com). The ruling of 6 March 2001 by Judge Cavallo was in response to the criminal complaint filed in October 2000 by the Argentine NGO Centro de Estudios Legales y Sociales (CELS), Centre for Legal and Social Studies, on the "disappearance" of the couple José Liborio Poblete Roa and his wife Gertrudis Marta Hlaczik and their daughter Claudia Victoria in 1978. Claudia Victoria has been found but her parents remain "disappeared". *See* Amnesty International Press Release, *Argentina: No Full Stop in the Quest for Justice,* AI Index: AMR 13/004/2001, 7 March 2001.

Arrest of former Navy Captain Astiz on Italian international arrest warrant. On 27 June 2001, the Public Prosecutor of Rome, Francesco Caporale, made a request, endorsed by an Italian Judge, Caudio Tortora, for the arrest of former Navy Captain Alfredo Astiz. On 29 June 2001, Alfredo Astiz gave himself up to police in Buenos Aires after an ***Italian*** judge issued an international arrest warrant. The arrest warrant was relayed on 30 June 2001 to Argentine Federal Judge María Romilda Servini de Cubría, naming also four other persons; former Navy Captain Alfredo Vildoza (who could not be found) and three military officers already under house arrest in connection with charges of kidnapping children: Jorge Eduardo Acosta, Héctor Antonio Febres and Antonio Vañek. The former Navy Captain was formally arrested on 1 July 2001. They all were being sought by the Italian authorities for their alleged role in the "disappearance" of three Italian nationals, Angela María Aieta, Juan Pegoraro and his daughter, Susana Pegoraro. Former Navy Captain Astiz was held at the Buenos Aires police headquarters and then transferred to a holding cell at a naval facility. The initial reaction of executive officials was negative.[150]

In addition to the Italian request and the outstanding French extradition request, there are reports that former Navy Captain Astiz was also being sought by Spanish Judge Baltasar Garzón along with 97 other Argentine military officers. The government has refused to honour the new extradition requests. On 3 July 2001, the Argentine Minister of Defence, Horacio Jaunarena, reportedly declared: "The crimes which have been committed in Argentina, whoever is the perpetrator, must be judged by Argentine judges." However, it is not clear whether Captain Astiz will be tried on any of these charges in an Argentine court.[151] On 14 August, after the extradition request was rejected Alfredo Astiz was released.

Sweden has renewed pressure on the Argentine government to investigate the "disappearance" of Dagmar Hagelin and there is a possibility that a criminal investigation in Sweden may be opened, which could lead to an extradition request. In the context of domestic pressure in 1997, the Swedish Foreign Minister met the Argentine Ambassador and later stated that he had informed him that the "Swedish government will not give up until the case has been clarified."[152] In June 1998, during a visit to Sweden by Argentine President Menem, Prime Minister Goran Persson raised the case again and in March 2000

[150] According to an AFP report on 3 July 2001, Argentine Minister of Defence Horacio Juanarena stated that "[c]rimes that were committed in Argentina, whoever committed them, should be before Argentine judges". Argentine Minister of the Economy Domingo Cavallo was reported on 6 July 2001by EFE to have said during a visit to Italy that alleged crimes committed by Argentine military officials should be tried before Argentine courts.

[151] The account of the arrest and subsequent proceedings is based in part on AFP, *'L'ange blond de la mort' Alfredo Astiz s'est livré à la justice argentine, Le Monde,* 2 July 2001; Christine Legrand, *L'Argentine refusera d'extraded Alfredo Astiz, Le Monde,* 4 July 2001.

[152] In 1997, members of the Swedish Parliamentary Human Rights Group made an appeal to the Argentine Chamber of Deputies to help clarify the "disappearance" and in the same year Dagmar Hagelin's father wrote an article criticizing the Swedish government for not putting enough pressure on the Argentine authorities to clarify the case.

the Argentine government paid compensation to Dagmar Hagelin's father, Ragnar Hagelin, for the "moral damage" caused, but did not clarify the circumstances of the "disappearance" or open a criminal investigation. A complaint was filed in March 2001 by Ragnar Hagelin with the Stockholm police concerning his daughter's "disappearance". On 3 July 2001, the Chief Prosecutor in ***Sweden,*** Tomas Lindstrand, said that he was working on a preliminary investigation of the Dagmar Hagelin case and that "it is still too soon" to know if there will be a request by Sweden for the arrest or extradition of former Captain Astiz. The 25-year statute of limitations in Sweden for the crime of kidnapping expires in January 2002.

B. Crimes committed in the former Yugoslavia since 1991

The establishment of the International Criminal Tribunal for the former Yugoslavia (Yugoslavia Tribunal) in May 1993 acted as a catalyst to prosecutors and investigating judges to open criminal investigations and prosecutions based on universal jurisdiction of persons suspected of crimes in the former Yugoslavia who were now living in their countries, as well as to some investigations and trials in the territorial states. As discussed below in Chapters Four, Six, Eight and Ten, since 1993, there have been a series of criminal investigations and prosecutions of such persons based on universal jurisdiction in ***Austria***, ***Belgium***, ***Denmark***, ***Germany***, the ***Netherlands*** and ***Switzerland***. In some of these cases, the courts concerned have transferred the suspects to the Yugoslavia Tribunal in response to requests to do so.

C. Crimes committed in Rwanda in 1994

As discussed in Chapters Four, Six, Eight and Ten, the establishment in November1994 of the International Criminal Tribunal for Rwanda (Rwanda Tribunal) inspired prosecutors and investigating judges in several countries to open their own criminal investigations and prosecutions of crimes in Rwanda during 1994 and later. Several investigations and prosecutions were opened in ***Belgium.*** On 16 April 2001, the trial of four Rwandan citizens, Vincent Ntezimana, Alphonse Higaniro, Sister Gertrude Mukangango and Sister Julienne Kizito, on charges of war crimes opened. Three were convicted on all charges on 8 June 2001; Vincent Ntezimana was convicted on some, but not all, charges. An investigation in ***France*** has led to the prosecution of Wenceslas Munyeshaka, a Rwandan priest on charges of genocide, complicity in genocide and torture (see Chapter Ten, Section II). In ***Switzerland,*** one person suspected of crimes in Rwanda fled before he could be charged (see Chapter Fourteen, Section III.B); one person has been convicted of war crimes and another was acquitted; one person, Alfred Musema, who had been arrested on suspicion of war crimes was been transferred to the Rwanda Tribunal (see Chapter Four, Section II).

D. Crimes committed in other countries before October 1998

In marked contrast to these developments, attempts by victims or their families in the 1980s and 1990s to persuade states to seek the extradition or investigation and prosecution on the basis of universal jurisdiction of persons suspected of human rights violations or abuses committed in countries other than Argentina, Chile, Rwanda and the

former Yugoslavia who were still in their own countries or who had been given refuge in third states, largely failed before the March 1999 judgment in the *Pinochet* case. For example, there were well-publicized allegations that former senior government officials in exile from Chad in ***Senegal,*** from Cambodia in ***Thailand***, and from Uganda in ***Saudi Arabia*** were responsible for grave human rights violations, such as torture. However, no government is known to have formally requested that they be extradited from the states where they have been given refuge to face trial and prosecutors and investigating judges in the host states have failed to act, until the recent arrest and indictment of former President Hissène Habré of Chad in ***Senegal*** in 2000 (for the history of this case, see Chapter Ten, Section II).

In some cases, there are no extradition agreements. In others, there was simply no political will to make such a request. For example, senior ***United States*** officials sought to persuade ***Canada, Denmark, Israel, Spain*** and, reportedly, ***Germany,*** all of which have universal jurisdiction legislation, to accept Pol Pot for trial after he had been captured, without success.[153] Similarly, the ***United States*** is reported to have urged ***Austria*** to arrest Izzat Ibrahim Khahil Al Duri, the Deputy Chair of the Iraqi Revolutionary Council, when he was in Vienna in 1999. In many countries, there is no adequate legislation or even *any* legislation which would permit prosecutors or investigating judges to act. An attempt to initiate a prosecution in the ***United Kingdom*** of a Sudanese doctor on charges of torture failed in May 1999 when the Scottish Crown Office dropped the charges. London Metropolitan Police in the ***United Kingdom*** declined to initiate an investigation of a former Rwandan colonel alleged to be responsible for genocide, crimes against humanity, war crimes and torture in 1994 pending the outcome of their request for a legal opinion concerning whether they had jurisdiction; a request for surrender from the Rwandan Tribunal arrived first. London Metropolitan Police are also not known to have investigated allegations that a former head of state of Sierra Leone and an Afghan military commander, both living in London, were responsible for torture in their countries.

Even when territorial states, such as Ethiopia, have made formal requests for the extradition of former leaders and officials charged with crimes where treaties to which the state of refuge, such as ***South Africa*** and ***Zimbabwe***, are parties impose a prosecute or extradite obligation, such states have declined to do either (for information about the Mengistu Haile Mariam case, see entry on South Africa in Chapter Six, Section II). Similarly, Paraguay's request for the extradition of its former President, now in ***Brazil***, has yet to be honoured. Haiti's requests to ***Panama***, which is not only a party to the Convention against Torture, but has legislation permitting its courts to exercise universal jurisdiction, to extradite a former senior government official, have failed. A related problem has been the refusal of states to provide mutual legal assistance. For example, the ***United States*** has declined to return intact approximately 160,000 pages of Haitian

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[153] *See* David Scheffer, *Opening Address* at the Conference on Universal Jurisdiction, New England School of Law, 35 New Eng. L. Rev. 233, 234-235 (2001); Heather Scoffield, Glasgow *Herald,* 25 June 1997; Stephen Marks, *Elusive Justice for the Victims of the Khmer Rouge,* 52 J. Int'l Aff. 691, 701-703 (1999).

government documents, some of which are believed to document crimes by former Haitian and United States government officials.

VI. Investigations and prosecutions since the arrest of Pinochet

A. Extraterritorial action concerning crimes committed in Chile between 1973 and 1990

The criminal investigation in ***Spain*** by Judge Garzón of the role of Argentine military officers in Operation Condor expanded to include the role of military officers from other countries, such as former President Pinochet of Chile. The initial provisional request for extradition directed by Spain in October 1998 to the United Kingdom encouraged or facilitated other extradition requests by: ***Belgium***, ***France*** and ***Switzerland***, criminal investigations or prosecutions in ***Germany*** and unsuccessful calls for similar steps to be taken in ***Denmark***, ***Italy*****,** ***Luxembourg, Norway***, ***Sweden*** and the ***United Kingdom***.[154]

B. Impact of the *Pinochet* case on investigations and prosecutions in Chile

The arrest of former President Pinochet in 1998 helped to strengthen the effectiveness of efforts in Chile begun before the arrest by the investigating judge, Juan Guzmán Tapia, to investigate the alleged role of the former President in the Caravan of Death in 1973, which involved the "disappearance" and probable murder of at least 72 people, as well as other investigations.

[154] Most of the initiatives appear to have been based on universal jurisdiction, but the request by France and initiative in Italy both appear to have been based on passive personality jurisdiction. Brigitte Stern, *International Decisions:* In re *Pinochet - French Tribunal de grande instance,* 93 Am. J. Int'l L. 695 (1999); Philip Wilan, *Italians may try absent Pinochet,* 11 June 1999 (investigation of "disappearance" of Italian citizens in Chile).

Pinochet case. The former President returned to Chile on 2 March 2000 –with the 1978 amnesty decree in place and with his immunity as Senator for Life. However, on 5 June 2000, the Court of Appeal of Santiago, *Corte de Apelaciones de Santiago,* voted 13 to 9 to lift the Senatorial immunity of former President Pinochet, following a legal complaint filed by seven human rights lawyers. The Chilean Council for Defence of the State, *Consejo de Defensa del Estado*, which represents the legal interests of the state, joined the complaint.[155] On 8 August 2000, the Supreme Court confirmed the decision to lift the former President's immunity and, apparently, his immunity as a former head of state in a 14 to 6 vote.[156] He was placed under house arrest on 2 December 2000.[157] After several postponements, Judge Juan Guzmán was able to question the former President on 23 January 2001.[158] On 29 January 2001, the former President was indicted as the person allegedly responsible for abduction and/or murder of 75 victims in the October 1973 Caravan of Death.[159] He was ordered to submit to medical examination and subsequently was examined at Santiago's Military Hospital by a team of eight physicians, two acting as observers. military doctors. The results of medical examination showed that he suffered from moderate dementia, diabetes and heart condition. However, a medical report by forensic doctors at the University of Chile issued at the end of June 2001, which had been requested by Judge Juan Guzman at the beginning of January 2001, concluded that the procedure for identification of the accused did not pose any life-threatening risk, but only an emotional risk, and that the accused suffered from a light to moderate form of dementia.[160]

The Court of Appeal on 8 March 2001 rejected an appeal to dismiss the indictment and end the house arrest, but decided that the former President was not the author, but only an accomplice, of the crimes committed by the Caravan of Death, a significantly reduced charge that made him eligible for conditional liberty.[161] The Sixth Chamber of the Court of Appeal of Santiago decided by two votes to one on 9 July 2001 to suspend temporarily criminal proceedings against the former President on the ground

[155] Jonathan Franklin, *Pinochet immunity revoked by Chile*, *Guardian*, 25 May 2000.

[156] Clifford Krauss, *Pinochet Ruled No Longer Immune From Prosecution,* New York *Times,* 9 August 2000; *Pinochet face à la justice de son pays, Le Monde,* 10 August 2000. Excerpts of the Supreme Court decision are available in French in *Le Monde,* 10 August 2000.

[157] Clifford Krauss, *Chile Places Pinochet Under House Arrest,* New York *Times,* 2 December 2000.

[158] Christine Legrand, *Le juge Guzman ira interoger le général Pinochet dans sa résidence, Le Monde, 9 janvier 2001; Le général Pinochet subit des examens à l'hôpital militaire de Santiago, Le Monde, 10 janvier 2001; AFP, L'interrogatoire de Pinochet à été reporté au 23 janvier, Le Monde, 13 janvier 2001; Le général Pinochet a été interrogé chez lui par le guge Juan Guzman, Le Monde, 24 janvier 2001.*

[159] Alain Abellard, *Le général Pinochet inculpé, Le Monde, 29 janvier 2001*; Clifford Krauss, *Judge Reinstates Pinochet Case With New Order for House Arrest,* New York *Times,* 30 January 2001.

[160] AFP, *L'examen de l'affaire Pinochet reporté, Le Monde,* 3 July 2001; AFP, *La cour d'appel suspend "temorairement" les poursuites judiciares contre Pinochet, Le Monde,* 9 July 2001.

[161] *Augusto Pinochet pourrait obtenir une liberté conditionnelle, Le Monde, 9 mars 2001.*

that his health had deteriorated.[162] On 21 August the Supreme Court decided to consider the legal action filed by the prosecution lawyers on the fact that judges had reached their decision invoking articles of the New Code of Penal Procedure (*Código Procesal Penal*) which is not in force in the Santiago Metropolitan area.

In related developments, an Army general was charged in November 2000 for the 1982 murder of a union leader, following the conviction of two junior officers for that killing.[163]

C. Impact of the *Pinochet* case on investigations and prosecutions concerning Operation Condor in states outside Chile

The impact of the arrest of former President Pinochet in October 1998 and the House of Lords judgment in March 1999 on governments, prosecutors and investigating judges has also been felt in territorial states. In particular, it has had an enormous impact on other states where Operation Condor operated.

Investigations in territorial states of Operation Condor. The arrest of the former President of Chile has also led to calls by members of the public in the other countries where Operation Condor operated for legislative repeals or abrogations of amnesties and similar measures of impunity, as in ***Argentina*** - so far without success. In addition, it has helped to strengthen the resolve of prosecutors and judges in ***Argentina*** to investigate and prosecute cases which were excluded from the amnesty, such as the kidnapping of children and to arrest suspects, to seek extradition of persons suspected of crimes as part of Operation Condor, to declare that the amnesty and impunity measures were unconstitutional and to arrest Argentine nationals at the request of states seeking their extradition (see discussion in Section V.A of this chapter).

[162] AFP, *La cour d'appel suspend "temorairement" les poursuites judiciares contre Pinochet, Le Monde,* 9 July 2001. He had been hospitalized for six days during the previous week because of signs of weakness and illness, accompanied by metabolic problems and marked variations in pressure in his arteries, and underwent facial surgery; he was permitted to return home on 7 July 2001. *Ibid.*

[163] Clifford Krauss, *The Chileans v. Pinochet,* New York *Times,*13 December 2000.

Members of the public have called for investigations and prosecutions by the authorities of other territorial states, as in ***Bolivia, Brazil, Paraguay, United States*** and ***Uruguay***. The investigations by Judge Garzón in Spain concerning Operation Condor has, along with renewed investigations of this criminal network in Argentina and Chile mentioned above, helped to spark calls for criminal investigations in ***Brazil*** of the role of the National Information Service and military forces in "disappearances", extrajudicial executions and torture and to encourage judicial cooperation with an Argentine investigation.[164]

The ***United States*** Department of Justice has reopened its investigation of the murder of the former Foreign Minister of Chile, Orlando Letelier, and his American assistant, Ronni Moffit, in Washington, D.C. and sent a team of Federal Bureau of Investigation investigators to Chile to interview witnesses.[165] The arrest of the former president of Chile appears to have been an important factor in the decision by President Clinton in February 1999 to establish the Chile Declassification Project which has led to the release of thousands of files concerning human rights violations during the military government, in particular concerning the abduction, torture and murder of two Americans, Charles Horman and Frank Teruggi, and the "disappearance" of a third, Boris Weisfiler.[166] On 9 August 2000, ***Uruguayan*** President Jorge Batlle established a commission to investigate the "disappearance" of 160 people during the military government from 1973 to 1985. Its mandate includes "receiving, analyzing, classifying and compiling information regarding the forced disappearance during the de facto regime" and it is to file its report in December 2000.[167]

Extraterritorial investigations of Operation Condor. In addition, courts in at least one case after the *Pinochet* case opened investigations based on extraterritorial jurisdiction into Operation Condor. A ***French*** *juge d'instruction* (investigating judge) has requested ***Paraguay*** to permit him to question nine former government and military officials concerning allegations that five French nationals were illegally deported to Chile in the 1970s as part of Operation Condor.[168]

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[164] Jean-Jacques Sévilla, *Premières enquêtes au Brésil sur l'"operation Condor", Le Monde*, 12 May 2000. On 13 June 2000, Marcos Rolim, the President of the *Comissão de Direitos Humanos da Câmara dos Deputados* (Commission of Human Rights of the Chamber of Deputies), and Tarciso dal Maso Jardim, Director of the *Centro de Proteção Internacional de Direitos Humanos* (Centre for the International Protection of Human Rights), filed a request with the prosecutor requesting the investigation and extradition of former President Alfredo Stroessner from Brazil.

[165] Steve Bradshaw, *FBI renews Pinochet probe,* BBC News, 9 December 1999, *obtainable from* http://www.bbc.co.uk. Martin Kettle, *US considers trying Pinochet for car bombing, Guardian,* 9 January 1999; *Affaire Letelier: M. Pinochet pourrait être poursuivi aux Etats-Unis, Le Monde,* 30 May 2000.

[166] Peter Kornbluh, *The U.S. Secrecy System: As Much as Has Been Declassified on Chile, Much More Remains, obtainable from* http://www.oikos.org.

[167] *Uruguay sets up panel to probe dictatorship abuses*, Reuters, 9 August 2000.

[168] *French judge wants to question Stroessner officials on missing Frenchmen*, Agence France Presse, 11 August 2000.

D. Post-*Pinochet* investigations and prosecutions for crimes outside Chile not part of Operation Condor

The arrest of former President Pinochet in October 1998 and the House of Lords judgment in March 1999 on governments, prosecutors and investigating judges appears to have had a significant impact on the exercise of universal jurisdiction - as well as other forms of jurisdiction - with respect to crimes committed outside Chile which were not directly part of Operation Condor. It is, of course, not always possible to trace a direct link to the *Pinochet* case. In addition, the impact of the adoption of the Rome Statute three months earlier should not be underestimated. Both events have led to a sea change in international law and relations. No longer are war crimes, crimes against humanity, genocide and torture seen to be matters for politicians and diplomats to resolve, but ordinary crimes, like murder, abduction, assault and rape, to be investigated and prosecuted by independent prosecutors and investigating judges.

1. Investigations based on extraterritorial jurisdiction

There have been both successful and unsuccessful attempts to exercise universal jurisdiction since October 1998 with respect to crimes committed outside Chile that were not part of Operation Condor (for further information about some of these cases, see relevant country entries in Chapters Four, Six, Eight and Ten).

Victims have filed a number of complaints or instituted actions as *parties civiles* in **Belgium** against high-level officials, including current or former heads of state, since the *Pinochet* case seeking criminal investigations based on universal jurisdiction, although the crimes alleged are not always known in all cases, since the preliminary stages of the inquiry are confidential. The officials in the complaints or actions *parties civiles* pending declarations of admissibility or declared admissible as of 1 September 2001 have included:

· former head of state Khieu Samphan of the 1975-1979 Democratic Khampuchea (Khmer Rouge) government of Cambodia, that government's former Prime Minister Nuon Chea and its former

Foreign Minister Ieng Sary;[169]

· former Speaker of Parliament and President of the Islamic Republic of Iran Hojjatoleslam Ali Akbar Rafsanjani;[170]

[169] A *plainte avec constitution de partie civile* (criminal complaint on the basis of a private prosecution) was filed in Brussels on 17 February 1999 by a number of Cambodians or persons of Cambodian origin in Belgium and a second criminal complaint is reported to have been filed in Brussels on 15 April 1999 by one or more Cambodians in France. The *juge d'instruction* (investigating judge), Damien Vandermeersch, has been assigned the case, but the current status of this case and the crimes alleged are not known.

[170] On 2 March 2000, the *Tribunal de grande instance de Bruxelles* declared admissible a complaint (*plainte*) by a Belgian national, apparently based on passive personality jurisdiction, against the former Iranian President on charges of illegal confinement, torture and physical and psychological abuse in Iran from April 1983 to February 1989. *Correspondents' Reports - Iran,* 3 Y.B. Int'l Hum. L. (2000) (forthcoming).

· President Paul Kagame of Rwanda;[171]

· former Moroccan Minister of Interior Driss BaSri;[172]

· President Laurent Kabila, acting Foreign Minister Abdoulaye Yerodia Ndombasi and several other government ministers of the Democratic Republic of the Congo;[173]

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[171] *Belgium can hear cases against Iraqi, Ivorian leaders: prosecutor,* AFP, 1 August 2001(prosecutor's office states that case against Saddam Hussein is admissible); *Complaint filed in Belgian courts against Rwandan strongman,* AFP, 30 March 2000 (complaint filed by Luc de Temmerman, lawyer for Bernard Ntuyahaga, then in jail in Tanzania pending determination of an extradition request by Rwanda in connection with the killing of ten Belgian peace-keepers in 1994, against President Paul Kagame on 30 March 2000 alleging that he was responsible for crimes against humanity and war crimes).

[172] In November 1999, a *plainte* (criminal complaint) was filed by an engineer now resident in Brussels, believed to be Mohamed el-Battiui, but the current status and the crimes alleged are not known.

[173] Reportedly, there have been at least three *plaintes* (criminal complaints) filed against officials of the DRC: one filed on 23 November 1998 by six DRC nationals of Tutsi origin living in Brussels against President Kabila; a criminal complaint filed on the same date against President Kabila and several government ministers by members of a DRC opposition group and a separate complaint filed on 20 November 1998 against DRC officials. President Kabila was subsequently assassinated. In the first case, the *juge d'instruction* (investigating judge), Damien Vandermeesch, issued an international arrest warrant for the Foreign Minister of the Democratic Republic of the Congo and for other officials, including President Laurent Kabila), based on a complaint filed by Congolese of Tutsi origin alleging that they had incited serious international humanitarian law.

· President Laurent Gbagbo, former President General Robert Gueï, Defence Minister Moïse Lida and Minister of the Interior Emile Goga Doudou of the Côte d'Ivoire;[174]

· Two former Guatemalan government ministers [175],

· President Saddam Hussein of Iraq,[176] and

[174] *La Côte d'Ivoire n'est pas un "pays génocidaire", selon une ONG belge*, AFP, 17 June 2001 (stating that 150 people had filed a criminal complaint alleging that the current and former President and the current Minister of Interior were responsible for torture, rapes and assassinations, all of which amounted to crimes against humanity).

[175] A complaint was filed on 25 January 2001 against two former Guatemalan government ministers in connection with the "disappearance" of Serge Berten on 19 January 1981 and the murder on 12 May 1980. The names of the accused were not immediately released.

[176] Bart Crols, *Belgian magistrate launches probe against Saddam*, Reuters, 29 June 2001 (reporting that a complaint by six people, four of whom were living in Belgium and one in the Netherlands, concerning attacks against Iraqi Kurds at the end of the Gulf War in 1991 had been found admissible and that it was being investigated by a *juge d'instruction* (investigating judge) in Brussels, Damien Vandermeersch). Reportedly, it is alleged that the attacks constituted crimes against humanity. BELGA, *Après Ariel Sharon, Saddam Hussein!, La Libre, 29 juin 2001.*

· Prime Minister Ariel Sharon of Israel.[177]

On 5 July 2001, Haim Asulin, an Israeli who was seriously injured at the age of 17 in an attack on Maalot in northern Israel in 1974 by armed group of the Democratic Front for the Liberation of Palestine, a dissident faction of the Palestine Liberation Front (PLO), which killed 20 children, three other civilians and an Israeli soldier, was reported to have announced that he would file a complaint against Yasir Arafat in Belgium.[178] As of 1 September 2001, however, no such complaint was known to have been filed.

A Congressional commission in ***Brazil*** investigated allegations that former Paraguayan President Stoessner, who had taken refuge in Brasilia, had been responsible for extrajudicial executions, "disappearances" and torture in Paraguay. The inquiry interviewed witnesses and collected documents in Paraguay and the commission then filed a complaint seeking a criminal investigation in Brazil based on universal jurisdiction of the former President.[179]

A criminal complaint has been filed in ***Denmark*** against Carmi Gillon, the former

[177] 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.* 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. *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. For further discussion of this case, see Chapter Four, Section II.

[178] BBC, *Israeli citizen to file suit against Arafat in Belgium,* 5 July 2001 [source: *Aanklacht tegen Arafat in België, De Standaard,* 5 July 2001].

[179] Anthony Faiola, *Pinochet Effect Spreading,* Washington *Post,* 5 August 2000. Reportedly, the government of Paraguay has sought his extradition.

head of Shin Beit, the Israeli security service, alleging that he was responsible for torture. After the Danish government had been informed that he was alleged to be responsible for torture, it decided to accept his credentials as ambassador (for a description of this case, see Chapter Ten, Section II).

In June 1999, an investigation was opened in ***France*** based on universal jurisdiction concerning allegations that a Mauritanian government official studying in that country was responsible for torture.[180] The suspect was released on conditional liberty and fled France. In September 1999, a complaint was filed against Jean-Claude (Baby Doc) Duvalier, the former President of Haiti, reportedly alleging that he was responsible for crimes against humanity, but that complaint was dismissed.[181] A Paris prosecutor opened a preliminary investigation on the afternoon of 25 April 2001 of a former Algerian defence minister and member of the High Committee of State (*Haut Comité d'Etat*) concerning allegations of torture, but he left on a specially chartered plane that evening, several hours after the complaint was filed and a preliminary investigation opened.[182] The former defence minister was in Paris on a short visit to promote his new book, *Algérie : échec à une régression programmé,* a defence of the Algerian army against allegations that it was responsible for human rights violations (see Chapter Ten, Section II).

In ***Kosovo, Federal Republic of Yugoslavia,*** a Rwandan citizen was arrested in April 2000 on suspicion of responsibility for crimes against humanity in Rwanda during 1994.

On 24 August 2000, a former high-level Argentine military officer suspected of responsibility for torture in Argentina in the 1970s and 1980s was arrested in ***Mexico*** (see discussion above of investigations of crimes in Argentina). On 12 January 2001, a court in ***Mexico*** recommended to the Ministry of Foreign Affairs that the suspect be extradited to Spain and a decision by the Supreme Court on his appeal of this judgment was expected in 2001. For further information about this case, see entry on Mexico in Chapter Ten, Section II.

In the ***Netherlands,*** a court held on 20 November 2001 in the *Bouterse* case that it could exercise universal jurisdiction over the former President of Surinam on charges that he had been responsible for killings.[183] In the same country, a complaint based on universal jurisdiction has been filed against the former Argentine Minister of Agriculture for his alleged responsibility as a member of the military government in Argentina for crimes against humanity and torture in the 1970s and 1980s (for further information about this case, see entry on the Netherlands in Chapter Ten, Section II).

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[180] Peter Ford, *Answering for Rights Crimes, Christian Science Monitor,* 8 October 1999.

[181] Associated Press, Four File Complaints in France Against Former Haitian Dictator, 10 September 1999; *Plaintes pour "crimes contre l'humanité" contre Jean-Claude Duvalier, Le Monde, 13 septembre 1999; Quatre plaintes pour "crimes contre l'humanité" visant Jean-Claude Duvalier classées sans suite, Le Monde, 19 novembre 1999*.

[182] Florence Beaugé, *Le départ précipité du général Nezzar provoque les protestations des défenseurs des droits de l'homme, Le Monde, 28 avril 2001.*

[183] *Bouterse* case, Decision (*beschikking*), Petition numbers R 97/163/12 Sv and R 97/176/12 Sv, Court of Appeal (*Gerechtshof Amsterdam*), 5th Chamber, 20 November 2000 (unofficial English translation *obtainable from* <http://www.icj.org/objectives/decision/htm.>).

Paraguayan Judge Rubén Dario Frutos issued an order calling for the extradition of former President Alfredo Stroessner from Brazil and former Interior Minister Sabino Augusto Montanaro from Honduras on 9 December 2000. They were sought for their alleged role in the "disappearance" of a Paraguayan doctor, Agustín Goiburú, in 1977 who had refused to falsify the medical records of prisoners tortured to death. On 14 December 2000, a Paraguayan member of Congress, Marcos Rolim, sent a petition to Brazilian President Fernando Henrique Cardoso asking that Alfredo Stroessner's asylum status be revoked and that he be put on trial in Brazil in accordance with its legislation permitting the exercise of universal jurisdiction. On 15 December 2000, the Brazilian President is reported to have said that the decision on the case was for the Supreme Court, which had ruled against such requests in the past. As of 1 September 2000, the request for extradition of the former President had not been granted.

Legal developments such as the arrest of former President Pinochet have inspired victims in Chad to press successfully in ***Senegal*** for the arrest and indictment on charges of torture and crimes against humanity of Hissène Habré, the former President of Chad, based on universal jurisdiction, although they received a partial setback on 20 March 2001 when the *Cour de cassation* held that Senegal did not have universal jurisdiction over the torture charges (for details of this case, see Chapter Ten, Section II).[184] However, the initial success in that case has emboldened victims and their families to file criminal complaints as part of private prosecutions (*plaintes avec constitution de parties civiles*) in Chad against Hissène Habré based on territorial jurisdiction.[185]

Judge Guillermo Ruiz Polanco opened a criminal investigation in ***Spain*** based on universal jurisdiction concerning former President Rios Mont and other senior military officers in Guatemala (for the history of this case, see Chapter Eight, Section II). There have also been continuing efforts to seek the extradition of persons suspected of crimes in Argentina who were outside that country, including the arrest in Mexico of a person suspected of responsibility for torture.

After considering a complaint by a Tunisian victim of torture and consulting the Geneva prosecutor (*procureur général*), Bernard Bertossa, the prosecutor for the canton of Geneva asked local police opened a preliminary investigation (*pré-enquête*) in February 2001concerning allegations that the former Tunisian Minister of Interior, a patient at a hospital in Geneva, ***Switzerland***, was responsible for torture. However, the suspect disappeared before he could be located.[186] As of 1 September 2001 the warrant was still outstanding and the suspect's whereabouts were unknown.

There have been some recent unsuccessful attempts to persuade prosecutors or investigating judges to open investigations based on universal jurisdiction. These

[184] Douglas Farah, *Chad's Torture Victims Pursue Habré in Court: Pinochet Case Leaves Ex-Dictator Vulnerable,* Washington *Post*, 27 November 2000.

[185] *See, for example, Plainte avec constitution de partie civile contre Toukha Haliki, Abaya, Daïkreo, Abakar Torbo, Abba Moussa et Mahamat Djibrine,* filed by Ismael Hachim in the *Tribunal de Première Instance deDjaména* (no date indicated) (*obtainable from* http://hrw.org).

[186] Swiss Radio International website, *Et si l'affaire Pinochet avait ouvert la brèche?, 21 fèvrier 2001*; *Pierre Hazan, Comment l'ex-ministre de l'Interieur tunisien a échappé à la justice genevoise, Le Temps, 21 fèvrier 2001.*

unsuccessful efforts have included attempts to persuade prosecution authorities in ***Austria*** to arrest a senior Iraqi official alleged to be responsible for torture; complaints concerning a Rwandese colonel alleged to be responsible for crimes against humanity, genocide and torture, who was granted asylum in the ***United Kingdom*** (the Rwanda Tribunal requested his surrender before the authorities opened an investigation); calls for a Rwandese priest now living in ***Italy*** to be investigated; and renewed attempts by victims in ***France*** to open a criminal investigation of the former President of Haiti Duvalier (Baby Doc) for crimes against humanity. The arrest of Augusto Pinochet has also been a catalyst for a series of attempts to open criminal investigations of, or to arrest, current heads of state, such as the Presidents of Burundi and Rwanda in ***Canada*** at the Francophone Summit; President Laurent Kabila of the Democratic Republic of the Congo during a visit to ***France*** and in an international arrest warrant reportedly issued by an investigating judge in ***Belgium***; and President Fidel Castro of Cuba at a meeting in ***Spain***. Attempts in 1998 and1999 by victims and their families to persuade prosecuting authorities in ***Italy, Germany*** and ***Russia*** to open criminal investigations of the Kurdish leader, Ocalan, for alleged responsibility for human rights abuses and violations of international humanitarian law in Turkey failed, apparently largely because of a lack of political will.

2. Investigations in territorial states not connected to Operation Condor

Since October 1998, criminal investigations and also calls by the public for such investigations in territorial states concerning crimes not connected to Operation Condor have increased around the world.

There have been widespread calls in ***France*** for a criminal investigation of a former French general who was quoted in press interviews and in a book that he was responsible for extrajudicial executions and torture in Algeria at a time when the government considered it part of Metropolitan France.[187]

On 10 November 2000, a ***Haitian*** court convicted 16 of 22 soldiers and paramilitary troops for murder, being accomplices to murder and other crimes in connection with the 1994 Raboteau massacre, the first trial of members of the Haitian armed forces and paramilitary forces in the 1991-1994 military government. A week later, 37 other persons, including Lt. Gen. Raoul Cédras, now believed to be living in Panama, were convicted *in absentia* of crimes connected with the massacre.[188] On 26 May 2001, the former head of the military

[187] For some of the recent accounts of this case and its unexpected ramifications in both France and Algeria, *see Armelle Thoraval, Aussaresse aux portes du palais,Libération, 8 mai 2001; Renaud Lecadre, La piste du crime contre l'humanité, Libération, 7 mai 2001; Armelle Thoraval, Didier Hassoux et Jean-Dominique Mechet, Torture en Algérie : l'indignation et après?, Libération, 5 et 6 mai 2001; Jean-Pierre Thibaudat, Des archives pas si ouvertes, Libération, 5 et 6 mai 2001; La tâche énigmatique du juge Bérard à Alger, Libération, 5 et 6 mai 2001; Didier Hassoux, "Les politiques ne pouvaient pas ne pas savoir", Libération, 5 et 6 mai 2001; José Garçon, En Algérie, le retour de l'histoire embarrasse les "décideurs", Libération, 5 et 6 mai 2001;*

[188] *Correspondents' Reports - Haiti,* 3 Y.B. Int'l Hum. L. (2000) (forthcoming); *Raboteau Verdict "A Landmark" But Case Not Yet Finished Says United Nations Expert,* UN press release, 20 November 2000; Report on the situation of human rights prepared by Mr. Adama Dieng, independent expert, in accordance with Commission resolution 2000/78, para. 21, U.N. Doc. E/CN.4/2001/106, paras

government of Haiti from September 1988 to March 1990, Prosper Avril, was arrested based on an outstanding warrant issued on 27 March 1996 containing charges of torture and on 28 May 2001, the lawfulness of the arrest was confirmed by Lise Pierre-Pierre, the Chief Judge of the Port-au-Prince court.[189]

On 10 August 2000, the President of ***Guatemala***, Alfonso Portillo, admitted government responsibility for crimes committed over several decades and pledged to investigate massacres, prosecute those suspected of responsibility and compensate the families of the victims.[190]

41-43..

[189] Nizkor English Service, 7 June 2001 (*obtainable from* http://www.equiponizkor.org).

[190] Jan McGirk, *Guatemalan leader admits civil war atrocities, Independent*, 11 August 2000; *Correspondents' Reports - Guatemala,* 3 Y.B. Int'l Hum. L. (2000).

In the ***Republic of Korea,*** the a law was enacted by Parliament in 2000 providing for an investigation the cases of thousands of persons killed, including demonstrators on the island of Jeju shot by police in March 1947 and others in the crackdown that followed in after President Rhee, who was inaugurated in August 1948, against opponents and armed opposition groups on the island. The commission is now conducting a review of these cases.[191]

Since the departure of former President Alberto Fujimori of ***Peru*** to Japan and his subsequent resignation, the authorities have been investigating allegations that he was responsible for widespread and systematic human rights violations amounting to crimes against humanity. On the night of 27-28 August 2001, Congress voted 75 to 0 to lift Alberto Fujimori's immunity.[192] On 6 September 2001, Nelly Calderon, a Peruvian prosecutor, announced that she had filed charges in the Supreme Court the previous day alleging that the former President was responsible for homicide, kidnapping and serious injury with respect to two incidents, one in 1991 and the other in 1992, carried out by a 35-person paramilitary unit, the Colina Group, and a "disappearance" and torture in 1997. In the first incident, 15 people, including a child, were shot dead at a house party in the Barrios Altos district of Lima. In the second incident, a professor and nine students were shot dead at La Cantuta University. He was also charged with responsibility for kidnapping in the "disappearance", torture and subsequent murder of Mariela Barreto, an intelligence agent who reportedly disclosed information to reporters concerning human rights violations.[193] It is reliably reported that Peru intends to seek Alberto Fujimori's extradition to face these charges. However, on 6 September 2001, Takeshi Seto, a lawyer in the international affairs division of the Ministry of Justice's Criminal Affairs Bureau, stated that "[u]nder Japanese law, Japanese citizens cannot be extradited", and Prime Minister Junichiro Koizumi stated that "[t]he Japanese government will respond in accordance with Japanese law."[194] has, however, stated that since Alberto Fujimori is a Japanese citizen, he cannot be extradited and it is not clear if it will open a criminal investigation of the charges if it receives a request for extradition.

In the ***Russian Federation,*** as of December 2000, military prosecutors were known to have brought only 35 cases, 11 of them minor, against Russian soldiers for alleged crimes against civilians in Chechnya. However, on 30 March 2000, Army Colonel Yuri D. Budanov, was arrested and charged with killing a civilian woman, the first time such a high-level military official has been charged with such a crime.[195] The arrest and charge appear to have led to a greater willingness by military officials to acknowledge that war crimes were being committed in Chechnya.[196]

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[191] *South Korea Reviews 1948 Killings,* 28 August 2001.

[192] *Peru Congress Oks Charges vs. Fujimori,* Associated Press, 28 August 2001; *Une procédure parlementaire engagée au Pérou contre Alberto Fujimori, Le Monde,* 28 August 2001.

[193] Ricardo Uztarroz, *Peruvian prosecutor charges Fujimori with murder,* AFP, 6 September 2001.

[194] *Ibid.,* AFP, 6 September 2001.

[195] Michael Wines, *Colonel's Trial Puts Russian Justice to the Test,* New York *Times,* 18 March 2001.

[196] AFP & Reuters, *Tchétchénie: un général russe accuse - Il évoque des "crimes à grande échelle", Libération,* 14-15 July 2001.

In the ***United States,*** a statement by a former soldier that he had killed civilian refugees hiding under a bridge at No Gun Ri during the Korean War led to a report in January 2001 by a commission of inquiry, but not a criminal investigation.[197] After a member of a Navy SEALS unit Gerhard Klann, and a Vietnamese woman, Pham Tri Lanh, told the CBS Television program, *60 Minutes II*, and the New York *Times* that the unit had deliberately killed civilians at the village of Than Phu in a "free-fire zone", the commander, then Lieutenant Bob Kerrey, who was decorated for the incident and subsequently became a Nebraska Governor and Senator, there were calls for a criminal investigation.[198] As of 1 August 2001, however, no decision had been taken to open such an investigation.[199]

[197] Denis Warner, *Probing a Korean War Massacre, International Herald Tribune,* 4 January 2001.

[198] For some of the widely varying accounts of this episode, see Ben Fenton, *White House contender 'shamed' by massacre, Daily Telegraph*, 27 April 2001; C. David Kotok, *Kerrey Denies Killings Were Deliberate,* Omaha *World-Herald*, 26 April 2001; Richard Pyle, *Kerrey Says He's Ashamed of Leading Raid in Vietnam,* Washington *Post,* 26 April 2001.

[199] Human Rights Watch, *U.S. Must Investigate Alleged War Crimes: Kerrey Revelations Raise Bigger Issues, Says Rights Group,* 8 May 2001; _____, *U.S.: Urgent Need for Vietnam Investigation - Human Rights Watch Letter to U.S. Secretary of Defense Donald H. Rumsfeld,* 7 May 2001; Pyle, *supra,* n. 199. (Pentagon spokesperson said he knew of no plans to investigate, but did not rule out an investigation).