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UNIVERSAL JURISDICTION:
The duty of states to enact and enforce legislation - Chapter Four - Part B

II. COUNTRY BY COUNTRY REVIEW (CONTINUED - INDIA TO ZIMBABWE)

· ***India:*** Indian courts have been able since 1960 to exercise universal jurisdiction over grave breaches of the Geneva Conventions committed abroad. The legislative provisions are reinforced by the rule that, where possible, courts should interpret rules of national (municipal) law in a way that is consistent with international law.[1]

Section 3 (1) of the Indian Geneva Conventions Act, 1960 provides for universal jurisdiction over "any person within or without India [who] commits or attempts to commit, or abets or procures the commission by any other person of a grave breach of any of the [Geneva] Conventions".[2] Section 3 (2) states that "[s]ub-section (1) applies to persons regardless of their citizenship."

India is a party to the Geneva Conventions, but it has not signed either Protocol or the Rome Statute and had not ratified any of these treaties as of 1 September 2001. The Indian Army Act defines some war crimes as crimes under national law, but it is not known if that Act provides for universal jurisdiction over such crimes. India is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and statutes of limitation do not apply to grave breaches.[3] There is no requirement of double criminality in the Act.[4]

There are a number of restrictions on the scope of the Act. Superior orders are a defence in certain circumstances, contrary to the rule of law recognized in the Nuremberg Charter and other international instruments.[5] Indian law reportedly exempts from jurisdiction of the courts foreign sovereigns and ambassadors. The Supreme Court gave the Act a restrictive interpretation thirty years ago in what appears to be the only reported decision under the Act.[6]

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[1] *See Gramophone v. Birendra,* AIR 1984 SC 667.

[2] An Act to enable effect to be given to certain international Conventions done at Geneva on the twelfth day of August, 1949 to which India is a party, and for purposes connected therewith (The Geneva Conventions Act, 1960), Act 6 of 1960, 12 March 1960, § 3 (1).

[3] There is no limitation period in the Act. In addition, Section 468 of the Code of Criminal Procedure does not provide for periods of limitation for crimes, such as grave breaches, which carry penalties greater than three years of imprisonment.

[4] According to an expert on Indian law, although there is normally a requirement of double criminality in extradition cases, it is not a defence that a crime under Indian law is not an offence in the country of origin of the accused. *See Esop,* 7 C & P 456 (1836).

[5] According to an expert on Indian law, superior orders are not a defence if the order is manifestly illegal, but may be taken into account in mitigation of punishment. *See Chaman Lal,* 21 Lah. 521 (1940).

[6] The Supreme Court stated that the Act did not provide a cause of action for civil suits in a case by a resident of Goa challenging his deportation order as a violation of the Fourth Geneva Convention:

> "To begin with, the Geneva Conventions Act gives no specific right to anyone to approach the Court. The Act was passed under Art. 253 of the Indian Constitution read with entries 13 and 14 of the Union List in the Seventh Schedule to implement the agreement signed and merely provides for certain matters based on Geneva Conventions. What method an aggrieved party must adopt to move the Municipal court is not very clear but we need not consider the point because of our conclusions on the other parts of the case.
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> . . . .
>
> It will thus be seen that the Act by itself does not give any special remedy. It does give indirect protection

by providing for breaches of the Convention. The Conventions are not made enforceable by Government against itself nor does the Act give a cause of action to any party for the enforcement of Conventions. Thus there is only an obligation undertaken by the Government of India to respect the Conventions regarding the treatment of civilian population but there is no right created in favour of protected persons, which the Court has been asked to enforce. If there is no provision of law which the courts can enforce the court may be powerless and the court may have to leave the matter to what Westlake aptly described as indignation of mankind."

Rev. Mons. Sebastiao Franciso Xavier dos Remedios Monteiro v. The State of Goa, AIR 1970 SC 329 (*obtainable from* http://www.icrc.org/ihl-nat).

Political officials can prevent cases being investigated or prosecuted. Section 17 provides:

> "No court shall take cognizance of any offence under this Act except on complaint by the Government or of such officer of the Government as the Central Government may, by notification in the Official Gazette, specify."[7]

In addition, Section 6 provides that determinations concerning the applicability of the Act to a particular conflict can be determined by a political official, not the court.[8]

· ***Iran:*** Iranian courts can exercise universal jurisdiction over grave breaches of the Geneva Conventions and, possibly, some other war crimes.[9]

Article 8 of the Iranian Islamic Penal Code provides for universal custodial jurisdiction over crimes which are the subject of a special law or which the state is required by a treaty to prosecute when the suspect is found in the territory. Article 8 reads:

> "Regarding the offences which are the subject of a special law or international conventions according to which the offender will be prosecuted in the country where he or she is found, if the offender is found in Iran he or she will be prosecuted in accordance with the laws of the Islamic Republic of Iran."[10]

Iran is a party to the Geneva Conventions, but it has neither signed nor ratified Protocols I and II. It has signed the Rome Statute, but it had not yet ratified it as of 1 September 2001. Iran does not appear to have defined war crimes as crimes under national law, so prosecutions may have to be for

[7] Geneva Conventions Act, 1960, § 17.

[8] Section 6 (Proof of application of Convention) provides:
"If in any proceeding under this chapter in respect of a grave breach of any of the Conventions a question arises under Article 2 of that Convention (which relates to the circumstances in which the Convention applies), a certificate under the hand of a Secretary to the Government of India certifying to any matter relevant to that question shall be conclusive evidence of that matter so certified."
Common Article 2 provides that certain provisions of the Conventions apply in peacetime, others to international armed conflict and that the Conventions apply to occupied territory, so the crucial determination of the scope of application, which normally is a matter reserved for the court in a criminal trial, is surrendered to a political official under the Act. Common Article 2 states:

> "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."

[9] For further information on extraterritorial jurisdiction in Iran, see Ebrahim Beigzadeh and Ali-Hossein Nadjafi, *Rapport sur le droit iranien*, unpublished manuscript submitted for discussion at the *Etude comparé des critères de compétence juridictionnelles en matière de crimes internationaux (Crimes contre l'humanité, genocide, torutre, crimes de guerre, terrorisme), Paris, 2-4 juillet 2001*.

[10] Islamic Penal Code of Iran, Art. 8 (unofficial English translation, source unknown).

ordinary crimes, such as murder, abduction, assault and rape.

· ***Ireland:*** Irish courts may exercise universal jurisdiction over grave breaches of the Geneva Conventions and, possibly, other war crimes when the conduct is also a violation of national law.

Article 29 (8) of the Irish Constitution provides that "[t]he State may exercise extraterritorial jurisdiction in accordance with the generally recognized principles of international law."[11] In 1977, the Irish Supreme Court upheld the constitutionality of legislation providing for extraterritorial jurisdiction.[12] The Supreme Court held that there was ample authority in international law for such extraterritorial jurisdiction.[13]

[11] Constitution of Ireland, enacted by the People 1 July 1937, as amended 27 May 1999, Art. 29 (8). The text quoted is found in Gerard Hogan, *Ireland, in* Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. June 2000) (Release 2000-4).

[12] *Article 26 and the Criminal Law (Jurisdiction) Bill 1975*, [1977] IR 129, 110 ILTR 69 (the bill at issue was subsequently enacted into law as the Criminal Law (Jurisdiction) Act, 1975). In that case, the Attorney General argued that, under international law, states should not harbour persons suspected of committing crimes abroad, but were under an *aut dedere aut judicare* obligation:

> "It is a well-recognized principle of international law that a State ought not to retain within its jurisdiction persons who are suspected of having committed offences outside its jurisdiction, without securing either their extradition to the foreign State where the offence was committed or their prosecution within the State. It is also an accepted principle of such law that a State is free to extend its legislation to cover acts done outside its territory provided that, as in this bill, the exercise of that jurisdiction takes place within the territory of the State."

Ibid., [1977] IR, 129, 139 (citing O'Connell, *International Law* 601-603 (2nd ed.) (reporter's summary). The Supreme Court, in a unanimous opinion by Chief Justice O'Higgins, held that the Dáil (Parliament) could enact legislation making murder, manslaughter, arson, kidnapping, robbery and offences connected with the manufacture, possession and use of explosives outside the borders of the Republic crimes under national law. The Supreme Court explained:

> "It is established in international law by the decision of the Permanent Court of International Justice in the *Lotus Case* that every sovereign State has a power to legislate with extra-territorial effect in the sense that it may enact that acts or omissions done outside its borders are criminal offences which may be successfully prosecuted with its borders - this is sometimes called the jurisdiction to prescribe - provided that the events, acts or persons to which its enactment applies bear upon the peace, order and good government of the legislating State: see O'Connell on International Law (2nd ed., vol. 2, p. 602)."

Ibid., [1977] IR, 129 149 (footnote omitted).

The Supreme Court thus adopted the views of FitzGibbon, J. in *R (Alexander) v. Circuit Judge for Cork*, [1925] IR 165, 192, half a century before, who in a minority opinion, stated that under the constitutional usage and comity of nations and international law, the courts of one state did not, as a rule, exercise jurisdiction over the subjects or citizens of another. However, he was prepared to hold that an act of the *Oireachtas* (Parliament) which conferred on the courts of *Saorstát Éireann* (the Irish state) jurisdiction over non-nationals would be valid provided that it was essential for the peace, order and good government of the state. The majority in the *Alexander* case, in an opinion by Kennedy, C.J., stated that legislation authorizing extraterritorial jurisdiction was *prima facie* contrary to international law if the legislature of the territorial state did not authorize such jurisdiction because it impinged on the exclusive sovereignty and jurisdiction of the territorial state. *Ibid.*, 185. *See also* Brian Doolan, *Constitutional Law and Constitutional Rights in Ireland* 20-21 (Dublin: Gill and Macmillan 3rd ed. 1994).

[13] *Article 26 and the Criminal Law (Jurisdiction) Bill 1975*, [1977] IR 129, 148. The Supreme Court also stated that Article 3 of the Constitution did not prohibit the *Oireachtas* from legislating with extraterritorial effect, provided that it had the same power that the Supreme Court said that it had.

Section 3 of the Irish Geneva Conventions (Amendment) Act 1998 provides for universal jurisdiction over grave breaches of the Geneva Conventions and of Protocol I.[14] Ireland is a party to the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but had not yet ratified it by 1 September 2001. It was expected to do so in 2001.

· ***Israel:*** There appear to be at least five legislative provisions permitting Israeli courts to exercise universal jurisdiction over war crimes committed abroad: a 1950 law concerning Nazi war crimes during the Second World War; three provisions of the Penal Law as amended in 1995/1996; and the Military Justice Law. Israeli courts have also exercised universal jurisdiction in two cases over war crimes committed during the Second World War.

Nazi war crimes. Courts may exercise universal jurisdiction over war crimes committed during the Second World War by Germans and persons who collaborated with Germany. Section 1 (a) (1) of the Israeli Nazi and Nazi Collaborators (Punishment) Law, 5710/1950, which prohibits certain war crimes by Germans and collaborators during the Second World War, has been interpreted as applying to acts committed outside Israel by non-Israeli citizens.[15] Section 1 (b) lists the same war crimes which are found in Article 6 (b) of the Nuremberg Charter, but, in contrast to the Nuremberg Charter, the list is an exclusive, rather than an inclusive, one.[16]

Section 16 of the Penal Law. Second, since 1995, under Section 16 of the Penal Law of Israel, Israeli courts have been able to exercise universal jurisdiction over foreign offences which Israel has undertaken to punish even if committed by non-nationals or non-residents, which would include grave breaches of the Geneva Conventions when ever they have been codified in the law of the territorial state, but probably also would include conduct amounting to grave breaches when such conduct violated an ordinary criminal law in the territorial state, such as murder. There does not appear to be any jurisprudence or authoritative commentary on this point. Section 16 provides:

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[14] Section 3 (1) of the Geneva Conventions Act 1962, No. 11, as amended by the Geneva Conventions (Amendment) Act 1998, now provides:

> "(1) Any person, whatever his or her nationality, who, whether in or outside the State, commits or aids, abets or procures the commission by any other person of a grave breach of any of the Scheduled Conventions or Protocol I shall be guilty of an offence and on conviction on indictment -
> (a) in the case of a grave breach involving the wilful killing of a person protected by the Convention or Protocol in question, shall be liable to imprisonment for life or any less term.
> (b) in the case of any other grave breach, shall be liable to imprisonment for a term not exceeding 14 years.
> (1A) Any person, whatever his or her nationality, who, whether in or outside the State, fails to act, when under a duty to do so, to prevent the commission by another person of a grave breach of any of the Scheduled Conventions or Protocol I shall be guilty of an offence and on conviction on indictment shall be liable to imprisonment for a term not exceeding 10 years."

Section 3 (1B) identifies the grave breaches.

[15] Section 1 (a) (1) of this law provides:

> "A person who has committed one of the following offences - 1. Done, during the period of the Nazi régime, in an enemy country, an act constituting a war crime . . . is liable to the death penalty."

[16] Article 1 (b) of the Nazi and Nazi Collaborators (Punishment) Law, 5710/1950 defines as

> "murder, ill-treatment or deportation to forced labour or for any other purpose, of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity."

4 Laws of the State of Israel (5710-1949/50) (Authorized Translation from the Hebrew, Prepared at the Ministry of Justice). Article 1 of Penal Law (Offences Committed Abroad) (Consolidated Version), 5733-1973, provides in part: "The courts in Israel are competent to try a person who committed abroad an offence under any of the following: . . .(2) the Nazi and Nazi Collaborators (Punishment) Law, 5710-1950)[.]" 27 Laws of the State of Israel (5733-1972/73) (Authorized Translation from the Hebrew Prepared at the Ministry of Justice).

> "(a) Israeli penal law shall apply to foreign offences which Israel, by multilateral international conventions, has undertaken to punish even if they are committed by a person who is not an Israeli national or resident of Israel regardless of where they were committed.
> (b) The restrictions imposed by section 14 (b) (2) and [(3)] shall regulate the incidence of Israeli penal law also under this section."[17]

Section 14 (b) (2) provides that Israeli law shall apply to the foreign offence only if "under the law of [the territorial] state there is no defence to criminal liability for that offence[.]"[18] Section 14 (b) (3) provides that Israeli law shall apply to that offence only if "the person concerned has not already been acquitted of it in that state and, if he has been convicted of it there, has not served the penalty imposed on him therefor."[19]

Section 15 of the Penal Law. Under Section 15 of the Penal Law, Israeli courts can exercise universal jurisdiction over felonies and misdemeanours committed abroad by residents of Israel, before or after they became residents, subject to a number of conditions.[20]

Section 17 of the Penal Law. Section 17 of the Penal Law permits Israeli courts to exercise universal jurisdiction over certain conduct, pursuant to an international treaty, when requested to act by another state and on the basis of reciprocity. Although this provision appears to be aimed at ordinary crimes, it could possibly be used as a basis for exercising universal jurisdiction over grave breaches in certain, limited cases.[21]

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[17] Penal Law of Israel, 626/1996, Sec. 16. An unofficial English translation of this section appeared in *Penal Law-Draft Proposal and New Code,* 30 Israel L. Rev. 5-27 (1996). It is also *obtainable from* http://wings.buffalo.edu/law/bclc/israeli.htm.

[18] *Ibid.,* Sec. 14 (b) (2).

[19] *Ibid.,* Sec. 14 (b) (3). The provision cited in the English translation of Section 16 (b) - Section 14 (c) - appears to be an misprint.

[20] *Ibid.,* Sec. 15. That section states:
"(a) Israeli penal law shall apply to a foreign offence of the category of felony or misdemeanour committed by a person while being - either at the time of or after committing the offence - an Israeli national or resident of Israel; once extradited from Israel for that offence to another state and tried for it, Israeli penal law shall no longer apply for that offence.
(b) The restrictions imposed by section 14 (b) and (c) shall regulate the application of Israeli penal law also under this section: Provided that the restriction imposed by section 14 (b) (1) shall not apply if the offence is bigamy."
In addition to the restrictions in footnotes 18 and 19, Section 14 (b) (1) requires that the offence be an offence in the territorial state and Section 14 (c) provides that the penalty imposed may not be greater than the penalty in the territorial state.

[21] *Ibid.,* Sec. 17. Section 17 provides:
"(a) The State of Israel may by international convention, at the request of a foreign state and on the basis of reciprocity, undertake to apply its penal law to foreign offences, or to apply the provisions of section 10, also in cases other than those mentioned in sections 13 to 16; Provided that all the following conditions are met:
(1) the penal law of the requesting state applies to the offence;
(2) the offence is committed by a person who is within the territory of Israel and is a resident of Israel, whether or not he is an Israeli national;
(3) subject to the full enforcement of the law being applied in Israel to the person in question, the requesting state, in its request, forgoes the incidence of its own laws in the matter at hand.
(b) There shall not be imposed in Israel, for the offence, a heavier penalty than it would have been possible to impose according to the laws of the requesting state.
(c) All the other conditions shall be prescribed by convention."

Restrictions on the exercise of universal jurisdiction under the Penal Law. There are a number of restrictions on the exercise of universal jurisdiction under the Penal Law. Prosecutions must be approved by the Attorney-General, a political official; the only guideline for the exercise of this discretionary decision is that it be "in the public interest".[22] In case of differences between the law of the territorial state and of Israel, the accused benefits from the most lenient provision.[23] Any period of detention or imprisonment served abroad is to be deducted from any sentence in Israel.[24]

Military Justice Law. Although the Military Justice Law is primarily designed to regulate the behaviour of Israeli soldiers, it also provides for universal jurisdiction over persons in army custody and prisoners of war.[25] A court martial has jurisdiction to try Israeli soldiers for acts constituting military offences inside Israel or abroad and other persons subject to the Military Justice Law are to be treated as if they were soldiers, so it would appear that a court martial would have jurisdiction to try such other persons for military offences committed abroad.[26] In addition to military disciplinary offences, some conduct which may amount to war crimes in certain circumstances falls within the jurisdiction of military courts under the Military Justice Law.[27]

Israel is a party to the Geneva Conventions, but as of 1 September 2001 it had not yet ratified Protocols I and II. It has signed the Rome Statute, but it had not ratified it as of 1 September 2001. Statutes of limitations do not apply to war crimes defined in the Nazis and Nazi Collaborators (Punishment) Law.[28]

Israeli courts have exercised universal jurisdiction over war crimes in two cases, *Eichmann* in 1961 and *Demjanjuk* in 1986 (see discussion below in Chapter Eight, Section II).

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[22] *Ibid.*, Sec. 9 (b). That provision states that "[t]here shall be no prosecution for a foreign offence save by the Attorney-General or with his written consent, upon his determination that it is in the public interest."

[23] *Ibid.*, Sec. 9 (d).

[24] *Ibid.*, Sec. 11.

[25] Military Justice Law, 9 Laws of the State of Israel (5715-1954/55) (Authorized Translation from the Hebrew, Prepared at the Ministry of Justice), Art. 8 ("This law shall apply to the following persons, even though they may not be soldiers as defined in section 1: (1) a person in the lawful custody of the Army . . . ."); Art. 10 ("This Law shall apply to a prisoner of war, subject to any provision enacted by regulations made by the Minister of Defence, with the consent of the Minister of Justice, for the purpose of adapting the provisions of this Law to the international conventions to which Israel is a party."). It is not known if the Ministry of Defence has issued any regulations pursuant to Art. 10.

[26] Section 13 (a) provides:

"A court martial is competent to try a soldier who has committed an act constituting a military offence, whether he committed it in the State or outside it; this provision shall not derogate from the power of any other court in the State to try the soldier for that act if it constitutes an offence under another law."

Section 16 states:

"Save as otherwise provided, where this Law applies to a person who is not a soldier as defined in section 1 [a member of the Israeli armed forces], such a person shall, for the purpose of this Law, be treated as a soldier, and, save as otherwise provided, wherever this Law refers to a soldier, it shall be deemed to refer also to such a person."

[27] *Ibid.*, Art. 65 (maltreatment of a person in custody); Art. 72 (excess of authority to the extent of endangering life or health); Art. 74 (looting); Art. 75 (rape).

[28] Crimes against Humanity (Abolition of Prescription) Law, 5726-1966, adopted by the Knesset on 14 February 1966 and published on 23 February 1966.

· ***Italy:*** Italian courts have been able to exercise universal jurisdiction over ordinary crimes since 1889 (see Chapter Two, Section II.A). It is possible that Italian courts may be able to exercise universal jurisdiction certain conduct amounting to war crimes that are also crimes under ordinary law, but critics have suggested that universal jurisdiction legislation is flawed and requires amendment to be effectively enforced by courts. The relevant legislative provisions are supplemented by Article 10 of the Constitution, which provides that "[t]he Italian juridical order conforms to the generally recognized norms of international law."[29]

Recognition of the principle. In 1950, the Supreme Military Tribunal of Italy recognized the principle of universal jurisdiction over violations of the laws and customs of war in the *Wagener* case. It stated that such crimes "concern all civilized States, and are to be opposed and punished, in the same way as the crime of piracy, trade of women and minors, and enslavement are to be opposed and punished, wherever they may have been committed".[30] There are two separate provisions in the Italian Penal Code and three in the Military Penal Codes which would appear to permit national courts to exercise universal jurisdiction over one or more war crimes. However, although Italy has recognized the principle of universal jurisdiction in its jurisprudence and its national law, there may be difficulties in implementing some of this legislation with respect to war crimes.

Italian Penal Code. First, Article 10 of the Italian Penal Code expressly provides for custodial universal jurisdiction over common crimes committed abroad against foreigners or citizens or against foreign states or the Italian state if the crime is one for which the penalty is not less than three years. In addition, extradition must not have been granted or accepted by the territorial state or the state of the accused's nationality. Article 10 (Common Crimes by Aliens Abroad) provides:

> "An alien who, apart from the cases specified in Articles 7 and 8, commits in foreign territory, to the detriment of the State or a citizen, a crime for which Italian law prescribes the punishment of life imprisonment, or imprisonment for a minimum of not less than one year, shall be punished according to the law, provided he is within the territory of the State and there is a demand by the Minister of Justice, or a petition or complaint by the victim.
>
> If the crime was committed to the detriment of a foreign State or an alien, the offender shall be punished according to Italian law, on demand of the Minister of Justice, provided:
>
> 1) he is within the territory of the State;
>
> 2) the crime is one for which the punishment prescribed is life imprisonment for a minimum of not less than three years;
>
> 3) his extradition has not been granted, or has not been accepted by the Government of the State in which he committed the crime, or by that of the State to which he belongs."[31]

[29] The Constitution of the Italian Republic, 27 December 1947, as amended to 23 January 2000, Art. 10 (English translation in Gisbert H. Flanz, *Italy, in* Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. February 2001) (Release 2001-1 Inter-University Associates, Inc. trans.).

[30] *General Wagener* case, *Rivista Penale* 753, 757 (Sup. Mil. Trib. Italy 13 March 1950) (English translation in *Prosecutor v. Tadi_*, Judgment on jurisdiction, Case No. IT-94-1-AR72 (Appeals Chamber, 2 October 1995), para. 57). See also the discussion of this case in Part One, Introduction, Sub-Section C.

[31] Italian Penal Code, Art. 10 (unofficial English translation). The death penalty originally in Article 10 (3) was abolished by Decree No. 224, Art. 1 on 10 August 1944, supplemented by Decree No. 21, Art. 1 on 22 January 1948. The original text of Article 10 in Italian reads:

> *"10 Delitto comune dello staniero all'estero. Lo straniero che, fuori dei casi indicati negli articoli 7 e 8, commette in territorio estero, a danno dello Stato o di un cittadino, un delitto per il quale la legge italiana stabilisce la pena o l'ergastolo, o la reclusione non inferiore nel minimo a un anno, è punito secondo la legge medesima, sempre che si trovi nel territorio dello Stato, e vi sia richiesta del Ministro di grazia e*

giustizia, ovvero istanza o querela della persona offesa.

Se il delitto è commesso a danno di uno Stato estero o di uno straniero, il colpevole è punito secondo la legge italiana, a richiesta del Ministro di grazia e giustizia, sempre che:

1) si trovi nel territorio dello Stato;

2) si tratti di delitto per il quale è stabilita la pena [di morte o] *dell'ergastolo, ovvero della reclusione non inferiore nel minimo a tre anni;*

3) l'estradizione di lui non sia stata conceduta, ovvero non sia stata accettata dal Governo dello Stato in cui egli ha commesso il delitto, o da quello dello Stato a cui egli appartiene."

C.P. commento 10 (1999).

The term "common crime" (*delitto comune*) is meant to include crimes that anyone can commit (*reati comuni*), such as murder, as opposed to particular crimes (*reati propri*) which can be committed only by persons in a particular relation to the victim, such as a parent and child.[32] The brackets indicate that Italy is one of more than half the countries in the world which have abolished the death penalty.[33] The third paragraph is worded sufficiently broadly to suggest that it would include a case where the Italian authorities had decided as a matter of principle not to grant any extradition request, even if no state had yet made such a request.[34]

Second, under Article 7 (5) of the Italian Penal Code, courts have jurisdiction over a foreign national for crimes committed abroad where there is a specific law or treaty which establishes the applicability of Italian criminal law. That article provides:

> "Offences committed abroad. - Any citizen or foreigner who commits any of the following crimes on foreign territory shall be punished in accordance with Italian law:
> . . . .
> (5) any other crime for which special legal provisions or international agreements specify that Italian criminal law applies. . . ."[35]

[32] The term "common crime" in Article 10 is meant to exclude political crimes within the scope of Article 8, discussed below.

[33] Amnesty International, *List of abolitionist and retentionist countries (1 January 2001*) (AI Index: ACT 50/003/2001), April 2001.

[34] Italian Constitutional Court is reported to have reached this conclusion in a decision on 21 June 1979 n. 54, *Riv. Dir. Internaz. 1979*, 802, but it has not been possible to locate a copy of the decision.

[35] Italian Penal Code, Art. 7 (English translation by Amnesty International). The original text reads:

"7. Reati commessi all'estero. É punito secondo la legge italiana il cittadino o lo straniero che commette in territorio estero taluno dei seguenti reati:

1) delitti contro la personalità dello Stato;

2) delitti di contraffazione del sigillo dello Stato e di uso di tale sigillo contraffatto;

3) delitti di falsità in monete aventi corso legale nel territorio dello Stato, o in valori di bollo in carte di pubblico credito italiano;

4) delitti commessi da pubblici ufficiali a servizio dello Stato, abusando dei poteri o violando i doveri inerenti alle loro funzioni;

5) ogni altra reato per il quale speciali disposizioni di legge o convenzioni internazionali stabiliscono l'applicabilità della legge penale italiana."

There is no requirement in Article 7 that an accused be present in the jurisdiction at the time a criminal investigation is opened and the accused may be tried *in absentia*.[36] The special legal provisions cover some conduct which might amount to war crimes of sexual violence, such as trafficking in women and children (Article 537),[37] of the Penal Code; and conduct which would amount to war crimes if committed during armed conflict, but which is covered by Articles 17 and 18 of the Military Penal Code in Time of Peace (see discussion below); and crimes covered by Article 1080 of the Naval Code.[38] Article 7 (5) is worded sufficiently broadly to suggest that it may include international agreements such as the Geneva Conventions and Protocols and the Rome Statute.[39]

Despite the unequivocal language of Article 7 (5) of the Penal Code, there is some controversy over whether an Italian court could exercise universal jurisdiction over war crimes, whether grave breaches or crimes under customary international humanitarian law, under this provision (as opposed to Article 10). The first problem is that Italy has not provided that the full range of war crimes be crimes under national law. Italy has signed Hague Convention IV, but had not yet ratified it as of 1 September 2001. It is a party to the Geneva Conventions and Protocols I and II, but it has not yet 1 September 2001 enacted legislation making grave breaches or other violations of these treaties crimes under Italian law. However, the draft bill on ratification of the Rome Statute, which Italy has ratified, provides that "criminal provisions should be introduced to make all the criminal offences referred to in the Statute punishable under national law".[40] On 23 October 1998 a draft law was introduced, Articles 2 to 4 of which contained provisions on implementing the Rome Statute introduced in Parliament.[41] It was still pending in August 2001 and two working groups established to prepare a draft of such legislation had not completed its work as of this date.[42]

The second problem is that it is not entirely clear whether Italian law must incorporate the jurisdictional provisions of treaties into national law before courts may exercise universal jurisdiction under Article 7 (5). According to the authors of one of the most widely used criminal law textbooks in Italian universities, the criterion of "unconditional punishability" incorporated in Article 7 (5) provides for universal jurisdiction over *delicta juris gentium* (crimes under international law), which it states includes genocide, racial discrimination, hijacking and narcotics trafficking.[43] However, one Italian

[36] Thus, Article 7 is an exception to the general requirement in Article 9 of the Penal Code that the accused be present in the state. *Cass. Pen. Sez. I 69/112254.*

[37] *See* Article 3, Law of 20 February 1958, n. 75.

[38] The other special provisions are not relevant here, including: commercial fraud (Article 501), abandonment of children or handicapped persons (Article 591) and certain types of fraud (Article 642) of the Penal Code. Article 604 of the Penal Code provides that Articles 600 - 602, which prohibit exploitation of prostitution, pornography and sexual tourism involving minors, as forms of slavery also apply when such crimes are committed abroad to the detriment of an Italian citizen (passive personality jurisdiction).

[39] The annotation to the Italian Penal Code cites Article 22 (1) of the Treaty of 11 February 1929 between the Holy See and Italy, as implemented by Law No. 810 of 27 May 1929, as such an agreement.

[40] Draft Bill for the Ratification of the Statute Establishing the International Criminal Court, adopted by the Italian Cabinet, 8 October 1998, Art. 2 (unofficial translation by No Peace Without Justice obtainable from http://www.npwj.org). It was approved on 1 July 1999 and enacted as Law 232/99 on 12 July 1999. The original text is *obtainable from* http://www.senato.it/leg/13/Bgt/Schede/Ddliter/10570.htm.

[41] *See also Atto Senato 3594-bis*, introduced 9 February 1999. The original text is *obtainable from* http://www.senato.it/leg/13/Bgt/Schede/Ddliter/10570.htm. The provisions of this bill were originally part of *Atto Senato 3594*, introduced on the same date, and approved and enacted as Law 232/99.

[42] A sub-committee has been established by the Ministry of Justice and the Committee on International Humanitarian Law at the Ministry of Foreign Affairs is working on implementation of the Rome Statute.

[43] Giovanni Fiandaca & Enzo Musco, *Diritto Penale* 110 (Bologna: Zanichelli 1997).

international legal expert, Antonio Marchesi, has stated that most scholars have concluded that Article 7 (5) cannot be applied directly and that, as Italy is a dualist state, courts may exercise jurisdictional provisions of a treaty only when they have been enacted into Italian law.[44]

The two military penal codes. Italy has two military penal codes, one for war and the other for peacetime, but both are out of date and incomplete.

Article 13 (Crimes committed abroad by enemy soldiers against the laws and customs of war) of the *Codice Penale Militare di Guerra* (Military Penal Code of War) of 1941 provides for universal jurisdiction over certain war crimes committed by enemy soldiers:

[44] Antonio Marchesi, *L'attuazione in Italia degli obblighi internazionali di repressione della tortura, in Rivista di diritto internazionale* 463 (1999). *See also* Salvatore Zappatà, *Le Point sur la Législation Italienne en Matière de Crimes Internationaux*, unpublished draft manuscript submitted for discussion at the *Etude Comparée des Critères de Competence Juridictionnelle en Matière de Crimes Internationaux (Crimes Contre l'Humanité, Génocide, Torture, Crimes de Guerre, Terrorisme)*, Paris, 2 to 3 July 2001, as well as other Italian commentators cited in this work: N. Ronzitti, *Diritto internazionale dei conflitti armati* 153 (Torino: 1998).

> "The provisions of Title Four [on offences against war laws and usage], Book Three [on military offences in particular] of this code concerning offences against wartime laws and customs, also apply to military personnel and any other member of the enemy armed forces when any of these offences have been committed to the detriment of the Italian State or an Italian citizen or a subject thereof or of an allied state or a subject thereof."[45]

Title Four (Crimes against the laws and customs of war) (*Titolo Quarto (Dei reati contro le leggi e gli usi della guerra)*, Articles 165 to 230 define war crimes, but only in international armed conflict and they are 60 years out of date and also may not appear to cover peace-keeping operations.[46] It does not include grave breaches of the Geneva Conventions or of Protocol I or violations of common Article 3 or of Protocol II, although Italy is a party to these treaties.[47] Steps are being taken to address this gap.[48]

[45] Military Penal Code of War, Art. 13 (Crimes committed abroad by enemy soldiers against the laws and customs of war) (English translations of the two military codes are *obtainable from* http://www.giustiziamilitare.difesa.it). The original text provides:

> *"Codice Militare Penale di Guerra, Art. 13. Reati commessi da militari nemici contro le leggi e gli usi della guerra. Le disposizioni del titolo quarto, libro terzo, di questo codice, relative ai reati contro le leggi e gli usi della guerra, si applicano anche ai militari ed ogni altra persona appartenente alle forze armate nemiche, quando alcuno di tali reati sia commesso a danno dello stato italiano o di un cittadino italiano, ovvero di uno stato alleato o di un suddito di questo."*

[46] Although Article 9 of the Military Penal Code of War applies to Italian military forces abroad, it was considered not to apply to the crimes allegedly committed in 1993 and 1994 by Italian members of the peace-keeping operation in Somalia. Natalia Lupi, *Report by the Enquiry Commission on the Behaviour of Italian Peace-Keeping Troops in Somalia*, 1 Y. B. Int'l Hum. L. 375, 376 (1998). However, Parliament has appeared to assume that this code does apply to peace-keeping operations since it has repeatedly exempted Italian forces on peace-keeping operations from the Military Penal Code of War. 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, 753 (Berlin: Arno Spitz GmbH 2001) (listing such exemptions).

[47] An *ordine di esecuzione*, Law No.1739 of 27 October 1951, authorized the ratification of the Geneva Conventions in 1951 and an *ordine di esecuzione*, Law No.762 of 11 December 1985, authorized the ratification of the Protocols in 1985.

[48] As a result of an initiative of the Italian Red Cross, a governmental working group with representatives of the Ministries of Foreign Affairs, Justice and Defence and the Italian Red Cross was established to draft a bill amending Title Four of the Military Penal Code of War. Such a bill was approved by the Council of Ministers in December 1997 and sent to Parliament in 1998. It was believed to be still pending on 1 September 2001. However, the bill is limited to war crimes committed in international armed conflict and does not provide for universal jurisdiction.

Article 17 (Crimes committed in foreign occupied territory, or foreign territory of stay or transit) of the *Codice Penale Militare di Paci* (Military Penal Code of Peace) provides for jurisdiction over crimes committed by persons subject to military criminal law, but Article 1 appears to limit those subject to military criminal law for the purpose of the Military Penal Code of Peace to members of the Italian armed forces or others where this is provided by law.[49] Article 17 does not appear to cover all those subject to the Military Penal Code of War, such as members of enemy armed forces, but it is not at all clear whether this is case or not. Article 18 of the Military Penal Code of Peace (Offences committed on the territory of a foreign state) provides:

> "Except in the cases provided for in the previous article 17, any offence committed on the territory of a foreign state by a person subject to the military criminal law shall be punished as prescribed by this law, on the request of the Minister concerned in accordance with article 260."[50]

Article 18 would appear to permit the Minister of Defence to authorize the prosecution of a person subject to military criminal law for other crimes, presumably only crimes in the civilian Penal Code, but the scope of this provision is not clear and Article 260 does not appear to permit the Minister to authorize the prosecution of foreigners for violations of the Military Penal Code in Time of Peace committed abroad.

The number of provisions in this code that would cover conduct amounting to war crimes is limited and does not include contemporary war crimes, such as grave breaches of the Geneva Conventions or of Protocol I or other violations of these treaties, other treaties or of customary international humanitarian law. In particular, the Military Penal Code of Peace does not penalize torture or ill-treatment of civilians. This deficiency became a serious problem when a law-decree in 1993, supplemented by later legislation, provided that the Military Code of Peace applied to the Italian contingent (Operation IBIS-ITALFOR) participating in the UNITAF and UNOSOM II peace-keeping operations in Somalia and members of these forces were alleged to have tortured and ill-treated civilians.[51]

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[49] Military Penal Code of Peace, Art. 17(Crimes committed in foreign occupied territory or foreign territory of stay or transit) ("Military criminal law also applies to those subjected to it for offences committed in foreign occupied territory, or foreign territory of stay or transit, in accordance with international conventions and customs."). The original text in Italian provides:

> *"Art. 17. Codice Penale Militare di Pace. Reati commessi in territorio estero di occupazione, di soggiorno o di transito. La legge penale militare si applica alle persone che vi sono soggette, anche per i reati commessi in territorio estero di occupazione, soggiorno o transito delle forze armate dello stato, osservate le convenzioni e gli usi internazionali."*

Article 1 states that "Military Criminal Law applies to all military persons employed in the military service" and to other persons.

[50] Military Penal Code of Peace, Art. 18 (Crimes committed abroad) (English translation by Amnesty International). The original text reads:

> *"Art. 18 Codice Penale Militare di Pace. Reati commessi in territorio estero. Fuori dei casi preveduti dall'articolo precedente, per i reati commessi in territorio estero, le persone soggette alla legge penale militare sono punite secondo la legge medesima, a richiesta del Ministro competente ai termini dell'articolo 260."*

[51] Law-Decree No. 21 of 1 February 1993, Art. 1. For the subsequent legislation and a description of some of the deficiencies in the Military Penal Code of Peace in the context of peace-keeping operations, see Lupi, *supra*, n.46, 375-377.

It appears that statutory limitations do not apply to war crimes or crimes against humanity.[52] There is also no specific provision in the Penal Code recognizing official immunities of foreign officials, so, under Article 10 of the Constitution, Italian courts would only recognize such immunities to the extent permissible under international law. It is not clear if Italian courts would extend the application of the principle of *ne bis in idem* to foreign criminal judgments to preclude a second trial in Italy for the same conduct, even if the foreign proceedings were a sham.[53] It is also not certain whether Italian courts can exercise universal jurisdiction retrospectively over conduct that was criminal according to the general principles of law recognized by the community of nations at the time it occurred.[54]

A number of proposals have been made to amend the Penal Code and the two Military Penal Codes to bring them up to date, but, as far as is known, these proposals do not address the question of universal jurisdiction.[55]

A brief note on legislation providing for protective jurisdiction. In addition to the universal jurisdiction legislation mentioned above, it is worth noting Article 8 (Political crime committed abroad) of the Penal Code, which provides for protective jurisdiction over political crimes, since this provision has been used in several cases of Argentine military officers which have addressed many of the issues which arise during investigations and prosecutions based on universal jurisdiction (these cases are described in Chapter Two, Section V.A).[56]

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[52] Statutory limitations for crimes are addressed in Articles 157 to 161 of the Penal Code; Article 157 provides that statutory limitations do not apply to crimes carrying a life sentence. In the *Priebke* case, the Corte Militare di Roma (Military Court of Rome) held that the war crimes with which the accused was charged carried life sentences and, under Article 157, were not subject to statutory limitations. It also added that the crimes were not subject to statutory limitations because the crimes were war crimes and crimes against humanity under international law. The Italian court decisions in the lengthy and complex case have still not been published in English. However, an authoritative account of the decision said that in the Military Court of Rome's view,

> "the principle of non-applicability of statutory limitations results from a slow evolution of international law resulting in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity . . . . The Court stated clearly and unequivocally that the principle of non-applicability of statutory limitations to war crimes and crimes against humanity has the status of *jus cogens*, set, as it is, for the protection of the general interests of the international community and, thus, not subject to derogation by way of agreement."

Sergio Marchisio, *The* Priebke *Case before the Italian Military Tribunals: A Reaffirmation of the Principle of Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,* 1 Y. B. Int'l Hum. L. 344, 352 (1998).

[53] *See* Zappatà, *supra, n.43,*13 (noting that the answer to this question is not free from doubt).

[54] *See* Zappatà, *supra, n.43,* 3-14.

[55] *See* Fabio Raspadori, *Correspondents' Reports: Italy - Pending Legislation - Draft Law of the Senate No. 2984 on Adaptation of Italian Penal Military Legislation in the field of humanitarian law to international law, on enactment of the Additional Protocols to the 1949 Geneva Conventions*, 2 Y. B. Int'l Hum. L. 388 (1999). A Senate commission established after reports that members of the Italian peace-keeping forces in Somalia had committed crimes against civilians in 1993 and 1994 recommended that the offence of torture be included in the civilian Penal Code and in the Military Penal Code of Peace. Fabio Raspadori, *Correspondents' Reports: Italy - Peacekeeping - Conclusive Report on the Investigation of Behaviour of the Italian Military Contingent in Somalia in the Context of the UN Mission 'Restore Hope', Rome, 2 June 1999,* 2 Y. B. Int'l L. 385 (1999).

[56] Article 8 (Political crime committed abroad) provides in part:

> "A citizen or foreigner who commits a political crime on foreign territory which is not included among those indicated in subsection 1 of the foregoing article shall be punished in accordance with Italian law at the request of the Minister for Grace and Justice." (English translation by Amnesty International).

The original text of this part of Article 8 reads:

> *"8. Delitto politico commesso all'estero. Il cittadino o lo straniero, che commette in territorio estero un delitto politico non compreso tra quelli indicati nel numero 1 dell'articolo precedente, è punito secondo la*

legge italiana, a richiesta del Ministro di grazia e giustizia."

The term "political crime" in Article 8, however, does not have its usual meaning in international law, which excludes crimes under international law such as genocide, crimes against humanity, war crimes, torture, extrajudicial executions and "disappearances".[57] As used in Article 8, a political crime would include such crimes.[58] Article 8 uses the following definition:

> "For the purposes of the criminal law a political crime shall be any crime which offends a political interest of the State, or a political right of citizens. An ordinary crime which is wholly or partly driven by political reasons shall also be regarded as a political crime."[59]

The Minister of Justice must authorize a prosecution based on Article 8. It includes two categories of crimes. The first category includes crimes which have as their object harming a direct interest of the Italian state, including Italian citizens, and crimes which are politically motivated.[60] The second category of crimes is based on a broader concept of state interest which includes crimes which violate human rights.

[57] *See* Amnesty International, *The international criminal court: Making the right choices - Part III: Ensuring effective state cooperation*, November 1997 (AI Index: IOR 40/13/97), Section IV.B.2.c.

[58] The concept of political crime in Article 8 is separate from the different concept of political crime in Articles 10 and 26 of the Constitution, which prohibit the extradition of persons suspected of political crimes and granting them asylum, and does not affect the scope of Article 8 of the Criminal Code. However, some Italian legal experts consider that the distinction between the two concepts is not clear and that, therefore, the constitutional prohibition on extradition could apply to such crimes.

[59] (English translation by Amnesty International). The original text of this part of Article 8 reads:
"Agli effetti della legge penale, è delitto politico ogni delitto, che offende un interesse politico dello Stato, ovvero un diritto politico del cittadino. É altresì considerato delitto politico il delitto comune determinato, in tutto o in parte, da motivi politici."

[60] This first category reflects the origins of Article 8 in 1930, when it was adopted in order to be able to prosecute antifascist exiles for their political activities abroad.

For reasons which are not entirely clear, unless it was considered that it would make the exercise of extraterritorial jurisdiction more acceptable to the judges, the investigation of Argentine military officers for crimes against Italian citizens in Argentina, which was opened in at the request of the Ministry of Justice in1983, was based solely on Article 8, rather than on Article 10 or 7. Apparently, it was the first case of this kind brought under Article 8. In the 20 May 1999 brief (*decreto che dispone il giudizio*) in the *Santiago Omar Riveros* case, involving six Argentine military officers, the pre-trial judge (*Giudice per le Indagini Preliminari*) (GIP), the GIP stated that the state had an interest in protecting the rights of Italian citizens abroad.[61] The officers were charged with common crimes - aggravated murder under Articles 575 and 577 of the Penal Code and kidnapping under Article 605 of that code - committed abroad against Italian citizens for political reasons. He argued that crimes were of a political nature because they "find their rationale in the merciless repression of opposition through the systematic suppression, in secrecy, of opponents of the military government, and almost always also of their bodies; repression and suppression scientifically deliberated and implemented by the military government".[62] During the trial *in absentia*, the Rome Court of Assize stated that the crimes were politically motivated and that the state had a political interest within the meaning of Article 8 (3) because of the violation of the human rights of Italian citizens.[63] On 6 December 2000, General Carlos Guillermo Suarez 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.[64]

[61] He recognised "the interest of the Italian state and government to see guaranteed and not suppressed, through the physical annihilation of their bearers, inviolable rights of Italian citizens abroad" (*"l'interesse dello Stato Italiano e del rispettivo Governo a vedere garantiti e non soppressi, con l'annientamento fisico dei loro portatori, diritti inviolabili dei cittadini italiani all'estero: quali, appunto, i diritti politici di manifestare il proprio dissenso alle ciniche e spietatamente violente imposizioni della dittatura militare."*). *Decreto che dispone il giudizio*, 20 May 1999, 2 (indictment against Guillermo Carlos Suarez Mason, Juan Carlos Girardi, Santiago Omar Riveros, Roberto Julio Rossin, Alejandro Puertas, Jose' Luis Porchetto, and Hectoru Maldonado) (English translation by Amnesty International).

[62] *Ibid.* (*"trovano la loro ratio nella spietata repressione dell'opposizione con sistematica soppressione, nella clandestinita', degli oppositori alla dittatura militare e quasi sempre anche dei loro cadaveri; repressione e soppressione scientificamente deliberate ed attuate dalla Giunta Militare"*) (English translation by Amnesty International).

[63] *A carico di Riveros, Omar Santiago, Proc. Pen. No. 21/99 R.G., Odinanza* (Order) (*Il corte di Assise Roma* (Rome Court of Assize), 30 March 2000). It stated that "it is not possible not to recognize the nature of political crimes in the meaning indicated by art. 8 paragraph 3 c.p. to the charges discussed during this trial, being clear the political motivations of the crimes that, according to the public prosecutor, were committed against Italian citizens resident in Argentina . . . and being undeniable the existence of a political interest of the Italian state in presence of repressive actions against its citizens in violation of fundamental rights and principles" (*"alle imputazioni contestate nel presente processo non puo' non riconoscersi la natura di delitti politici nel senso indicato dall'art. 8 comma terzo codice penale, essendo evidenti le motivazioni politiche che hanno caratterizzato i crimini che secondo l'accusa sono stati commessi in danno dei cittadini italiani residenti in Argentina accusati di essersi opposti al regime di dittatura militare allora vigente in quel paese, ed essendo innegabile l'adesione di un interesse politico dello stato italiano, in presenza di azioni repressive subite da propri cittadini in violazione di principi e diritti fondamentali".*)

[64] *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*; *Desparecidos, 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).

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

Although Jamaica is not known to have a Geneva Conventions Act, the United Kingdom's Geneva Conventions Act 1957 applied to the British West Indies Federation, of which Jamaica was a member, under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below), at least before 1 January 1970. Jamaica become independent on 6 August 1962. Paragraph 4 (1) of the Jamaica (Constitution) Order in Council 1962 provided that the existing laws were to continue in force after that date and, as far as is known, the 1959 Order in Council has not been repealed either before or after independence.[65]

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

· ***Japan:*** It appears that Japanese courts may be able to exercise universal jurisdiction over grave breaches of the Geneva Conventions when the conduct constitutes crimes under national law, such as murder and other violent crimes. The relevant legislative provision is reinforced by Article 98 of the Constitution, which states that "[t]he treaties concluded by Japan and established laws of nations shall be faithfully observed."[66]

Article 4-2 (Crimes committed outside Japanese territory to be governed by treaty) of the 1966 Penal Code provides universal jurisdiction over certain crimes under Japanese law committed by anyone outside Japan when a treaty requires that they be punished even if committed outside Japan. That article states:

[65] The Jamaica (Constitution) Order in Council 1962, § 4 (1) ("All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law continue in force on and after that day . . ."). Section 3 of the First Schedule to the Jamaica Independence Act, 1962 provides that "[t]he legislature of Jamaica shall have full power to make laws having extra-territorial operation."

[66] Constitution of Japan, promulgated 3 November 1946, entry into force 3 May 1947, Art. 98 (English translation in T.S.Y. Lee & Osamu Nishi, *Japan, in* Albert P. Blaustein & Gisbert H. Flanz, eds, *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. April 1990). *See, generally,* Yuji Iwasawa, *International Law, Human Rights and Japanese Law: The Impact of International Law on Japanese Law* (Oxford: Clarendon Press 1998).

> "In addition to those provided for in the preceding three Articles [dealing with protective and active personality jurisdiction], this Code shall also apply to every person who has committed outside Japanese territory those crimes mentioned in Book II [Articles 77 to 264] which are considered to be punishable by a treaty even if committed outside Japanese territory."[67]

This provision would appear to be self-executing, so that a court could exercise universal jurisdiction over any conduct that amounts to an ordinary crime and that is also conduct over which a treaty provides for universal jurisdiction. A recent commentary on the Japanese Penal Code has suggested that this provision will apply to treaties ratified by Japan in the future.[68]

Japan is a party to the Geneva Conventions, but as of 1 September 2001 it had not yet ratified Protocols I and II and it has not signed or ratified the Rome Statute. There are a number of crimes mentioned in Book II which might constitute war crimes if committed during an armed conflict, including: rape and other crimes of sexual violence (Articles 176 to 182); homicide (Articles 199, 201and 203); inflicting bodily injury (Articles 204 to 208-2); illegal arrest (Articles 220 to 221); and kidnapping or abduction (Articles 224 to 228).

· ***Jordan:*** Jordanian courts may exercise a limited form of universal jurisdiction over acts of foreigners committed abroad, if the foreigner is resident in Jordan.

Article 10 (4) of the Penal Code of 1990 states:

> "Every foreign national residing in the Kingdom, who committed outside the Kingdom a felony or misdemeanour punishable by Jordanian law - whether he committed it, or was an accomplice, or incited it, or was involved in it, if his extradition has not been requested or accepted."[69]

[67] Penal Code of Japan (1996), EHS Law Bulletin Series, II EHS, PA-PC, Nos. 2400, 2402, Art. 4-2.

[68] Shigemitsu Dando, *The Criminal Law of Japan: The General Part* (Littleton, Colorado: Fred B. Rothman & Co. 1997). Although Article 4-2 appears on its face to be self-executing, Japan has enacted legislation expressly authorizing its courts to exercise universal jurisdiction over other treaties. This legislation may, however, have been to clarify that the courts had jurisdiction, rather than being necessary for its exercise. Although this matter is not entirely free from doubt, it is clear that Japan accepts the principle of permissive universal jurisdiction with respect to certain conduct which may amount to war crimes.

[69] Penal Code of Jordan of 1990 (English translation by Amnesty International). In its initial report to the Committee against Torture, Jordan explained that under this provision its criminal law applied to

> "any offence constituting a felony or a misdemeanour the perpetrator of which is arrested in Jordanian territory, regardless of the territory in which the offence is committed and regardless of the nationality of its perpetrator. In accordance with this principle, the provisions of the Penal Code have wide scope covering the entire world. The Jordanian legislator adopted this modern principle on the basis of the concept of international solidarity in the fight against crime in cases in which a criminal is not prosecuted before his natural judge."

Initial report of Jordan to the Committee against Torture, U.N. Doc. CAT/C/16/Add.5 (1995), para. 110.

There is no requirement that the act be criminal in the territorial state.[70] It would appear that the acts covered could include conduct that would amount to a war crime. It is not been possible to determine whether war crimes are crimes under national law, so prosecutions may have to be brought for ordinary crimes such as murder, abduction, assault and rape. Jordan is a party to the Geneva Conventions and to Protocols I and II. It has signed the Rome Statute, but as of 1 September 2001, it had not yet ratified it.

· ***Kazakhstan:*** Two legislative provisions, whose origins can be traced back to Russian universal jurisdiction legislation of 1903 (see Chapter Two, Section II.A) permit national courts to exercise universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I or other war crimes committed abroad. These legislative provisions are reinforced by Article 4 (3) of the Constitution, which provides that "[i]nternational treaties ratified by the Republic of Kazakhstan have priority over its laws and are directly implemented except in cases when the application of an international treaty shall require the promulgation of a law."[71]

First, paragraph 1 of Article 7 (The application of the penal law to persons that have committed violations outside the territory of the Republic of Kazakhstan) of the Penal Code permits national courts to exercise universal jurisdiction over stateless persons suspected of a crime committed abroad which is also a crime under the law of the territorial state. It states:

> "The present Code provides for the penal responsibility of the citizens of the Republic of Kazakhstan who have committed offences outside the territory of the Republic of Kazakhstan if these offences are incriminated by the state on whose territory they have been committed and if these persons have not been judged by another state. If the persons have been judged, the punishment can not exceed the upper threshold of the punishment as provided by the law of the state on whose territory the offence has been committed. The same provision applies to stateless persons."[72]

Paragraph 4 of Article 7 of the Penal Code of Kazakhstan gives its courts universal jurisdiction over crimes provided for in treaties to which Kazakhstan is a party. It provides:

> "The present Code provides for the penal responsibility of the offences committed by foreigners outside the Republic of Kazakhstan in the case where these offences are directed against the interests of the Republic of Khazakhstan or in the cases provided for by an international treaty of the Republic of Kazakhstan if these persons have not been judged in another state and prosecuted on the territory of the Republic of Kazakhstan."[73]

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[70] *Id.*, para. 111.

[71] Constitution of Khazakhstan, 30 August 1995, as amended through 7 December 1998, Art. 4 (3) (English translation in Gilbert H. Flanz, ed., *Republic of Khazakhstan, Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc.) (translation by Karin Hermanska). This memorandum uses the spelling of the state's name in English as "Kazakhstan", as adopted by the United Nations, except when a document uses another spelling, although normally Amnesty International uses the spelling "Kazakstan".

[72] Penal Code of Kazakhstan, 16 July 1997, entered into force 1998, Art. 7(1). This English translation has been reprinted in 2 Y.B. Int'l Hum. L. 552 (1999). *See also* the initial report of Kazakhstan to the Committee against Torture, U.N. Doc. CAT/C/47/Add.1, para. 54 (stating that "[s]tateless persons are held responsible on the same basis" as citizens who have committed a crime abroad).

[73] Penal Code, Art. 7 (4). *See also* the initial report of Kazakhstan to the Committee against Torture, U.N. Doc. CAT/C/47/Add.1, , para. 54 (stating that "Article 7, paragraph 4, of the Criminal Code states that foreigners who commit an offence outside the Republic of Kazakhstan shall be held responsible for their act if their offence is directed against the interests of the Republic of Kazakhstan, as well as in cases provided for in international treaties signed by Kazakhstan provided that they have not been convicted in another State and are brought to trial in the territory of the Republic of Kazakhstan").

Paragraph 2 of Article 1 (The penal legislation of the Republic of Kazakhstan) of the Penal Code states that "[t]he present Code is based on the Constitution of the Republic of Kazakhstan as well as on the principles and norms universally recognised in international law."[74]

Kazakhstan is a party to the Geneva Conventions and Protocols I and II. It has not signed the Rome Statute and as of 1 September 2001 it had not yet ratified it. A number of war crimes are crimes under the Penal Code.[75] Paragraph 6 of Article 69 (The exemption from Penal Responsibility and Punishment) provides that statutes of limitation do not apply to crimes against peace or the security of humanity, which include under Chapter 4 (Crimes against Peace and the Security of Humanity) war crimes. However, the Penal Code does not apply to persons with diplomatic immunity.[76] The Code provides that superior orders are generally not a defence.[77]

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

Section 3 (1) of the Geneva Conventions Act, 1968 provides for universal jurisdiction over grave breaches of the Geneva Conventions. That provision states

> "Any person, whatever his nationality, who, whether within or outside Kenya commits, or aids, abets or procures the commission by any other person of any grave breach of any of the Conventions such as is referred to in the following articles respectively of those Conventions - [listing the articles identifying the grave breaches of the four Geneva Conventions] is guilty of an offence. . .".[78]

[74] Penal Code, Art. 1 (2).

[75] *Ibid.*, Art. 158 (The production or the proliferation of arms of mass destruction); Art. 159 (The use of forbidden means and methods of waging war).

[76] The government has stated:
"52. Kazakhstan's criminal legislation is not applicable to persons enjoying diplomatic immunity. Such persons are listed in article 501 of the Code of Criminal Procedure.
53. Foreign nationals who are diplomatic representatives of a foreign State and other persons enjoying immunity who commit an offence in the territory of the Republic of Kazakhstan are held responsible for their act in accordance with the provisions of international instruments."
Initial report of Kazakhstan to the Committee against Torture, U.N. Doc. CAT/C/47/Add.1, , paras 52-53.

[77] Penal Code, Art. 37 (The execution of an order or an instruction), para. 2. However, this provision excludes the defence of superior orders only with respect to "manifestly illegal", which is inconsistent with the Nuremberg and Tokyo Charters and the Statutes of the Yugoslav and Rwanda Tribunals, all of which rule out superior orders as a defence in all cases.

[78] *The Laws of Kenya* (Nairobi: Government Printer Rev. Ed. 1970), Cap. 198, An Act of Parliament to enable effect to be given to certain International Conventions done at Geneva on the 12th August, 1949, and for purposes incidental thereto (Geneva Conventions Act), commencing 22 November 1968, § 3 (1). Previously, courts in Kenya could exercise universal jurisdiction over grave breaches pursuant to the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see entry on the United Kingdom below).

A prosecution for an offence under Section 3 (1) "shall not be instituted except by or on behalf of the Attorney General", a political official.[79] In addition, all questions concerning the applicability of the Conventions under common Article 2 of the conventions shall be determined by the Attorney General, unless the contrary is proved.[80]

Kenya has ratified the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but had not yet ratified it as of 1 September 2001. It is not known if Kenya has expressly provided that statutes of limitation do not apply to grave breaches, but it is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

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

Although Kiribati does not have a Geneva Conventions Act, the United Kingdom's Geneva Conventions Act 1957 applies to the state under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (For the text, see entry on the United Kingdom below) .[81]

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

· ***Kyrgyzstan:*** There are two legislative provisions, whose origins can be traced back to Russian universal jurisdiction legislation of 1903 (see Chapter Two, Section II.A), permitting national courts to exercise universal jurisdiction over conduct amounting to war crimes.

First, national courts may exercise universal jurisdiction over stateless persons suspected of committing war crimes abroad who are permanent residents if the conduct would amount to a crime under national law. Paragraph 1 of Article 6 (Action of Criminal Law with Regard to Persons who have Committed a Crime outside the Borders of the Kyrghyz Republic) of the Criminal Code provides for jurisdiction over crimes committed abroad by citizens and by stateless persons who are permanent residents and it appears that this provision would apply to crimes committed before they acquired citizenship or permanent residence. This provision states:

> "Citizens of the Kyrghyz Republic as well as stateless persons permanently residing in the Kyrghyz Republic, shall be liable under the present Code if they have not been punished by the judgment of a court of a foreign state."[82]

[79] Geneva Conventions Act, § 3 (3).

[80] *Ibid.*, § 3 (4).

[81] S.I. 1959, No. 1301. The Order in Council extended the scope of the Geneva Conventions Act, 1957 to the Gilbert and Ellice Islands Colony. The Gilbert Islands became independent on 12 July 1979 as the Republic of Kiribati. Section 7 (1) (b) of the Laws of Kiribati Act (No. 10 of 1989) states that the applied law includes "orders of Her Majesty in Council . . . as have or has effect as part of the law of Kiribati" (*obtainable from* http://www.vanuatu.usp.ac.fj/paclawmat/Kiribati). The Order in Council is believed to still be in effect.

[82] Kyrgzstan Criminal Code, Art. 6 (1) (English translation in ICRC IHL database, *obtainable from:* http://www.icrc.org/ihl-nat). A slightly different English translation can be found in the initial report to the Committee against Torture, U.N. Doc. CAT/C/42/Add.1 (1999), para. 39 ("Citizens of the Kyrgyz Republic and stateless persons permanently resident in the Kyrgyz Republic who commit a crime outside the territory of the Kyrgyz Republic shall be liable under the present Code unless a sentence has been passed upon them by a court in another State."). The spellings used in the translations are retained here.

Although the Criminal Code of Kyrgyzstan does not give its courts universal jurisdiction over non-citizens temporarily in its territory accused of crimes under national law, Article 6 (3) of the Criminal Code provides for extradition of foreigners and stateless persons (but not citizens) for crimes committed abroad. It has not been possible to obtain any jurisprudence or authoritative commentary concerning Article 6 which interprets the scope of its extraterritorial jurisdiction or its obligation to extradite. To the extent that courts are seeking to exercise universal jurisdiction pursuant to Article 6 (1) over conduct amounting to war crimes, they would largely have to rely on ordinary crimes, such as murder, since only a limited number of war crimes under international law are expressly incorporated in national law.[83]

Second, Article 1 (1) of the Criminal Law states that the "[c]riminal law of the Kyrghyz Republic consists of the present Code, of other laws based upon the Constitution of the Kyrghyz Republic and of the norms of international treaties and other acts ratified by Jogorku Kenesh of the Kyrghyz Republic."[84] This provision would appear to permit national courts to exercise universal jurisdiction over grave breaches of the Geneva Conventions and of Protocol I pursuant to the jurisdictional norms of international law with respect to jurisdiction over these war crimes embodied in those treaties. However, it has not been possible to obtain any jurisprudence or authoritative commentary concerning the scope of Article 1 (1).

Kyrgyzstan is a party to the Geneva Conventions and Protocols I and II and it is a successor state to the USSR, which was a party to the Hague Convention. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. It appears that statutes of limitations do not apply to war crimes. Article 72 (6) of the Criminal Code provides that "[p]rescription shall not be applicable to crimes against peace and security of mankind when expressly provided for by the laws of the Kyrghyz Republic."[85] Although the war crimes provisions cited do not contain exemptions from the statutes of limitations in the Criminal Code, Kyrgyzstan is a successor state to the USSR, which was a party to the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and Article 1 (1) of the Criminal Law states that the "[c]riminal law of the Kyrghyz Republic consists of the present Code, of other laws based upon the Constitution of the Kyrghyz Republic and of the norms of international treaties and other acts ratified by Jogorku Kenesh of the Kyrghyz Republic."

· ***Lao People's Democratic Republic:*** There are two grounds for exercising universal jurisdiction in Laos over conduct abroad amounting to war crimes.

First, paragraph 2 of Article 4 (The enforcement of the criminal code outside the territory of the Lao People's Democratic Republic) of the Criminal Code provides that aliens and non-citizens (apparently, stateless persons) who reside in Laos can be held criminally responsible for conduct abroad which constitutes a crime under national law. The first and second paragraph of that article read:

> "Lao citizens who commit criminal offences outside the territory of The Lao People's Democratic Republic will be held criminally responsible if their crimes are specified in the criminal code of The Lao People's Democratic Republic of the Lao People's Democratic Republic.

[83] Criminal Code, Art. 172 (Intentional Destruction of Historical and Cultural Monuments); *see also* Art. 224 (Capture of Hostages) (apparently including hostage-taking in armed conflict as well as in peacetime).

[84] Criminal Code, Art. 1 (1).

[85] Criminal Code, Art. 72 (6).

> Aliens and non-citizens who reside in The Lao People's Democratic Republic who commit criminal offences outside the territory of The Lao People's Democratic Republic will likewise be held criminally responsible."[86]

Second, paragraph 3 of that article provides that foreigners can be held criminally responsible for conduct abroad which constitutes a crime under national law. It states:

> "Foreign nationals who commit criminal offences outside the territory of The Lao People's Democratic Republic will be held criminally responsible under the laws of The Lao People's Democratic Republic in those cases that are specified by a treaty between nations."

[86] English translation of 18 September 1990 by Isa Gucciardi of Benemann Translation Center, San Francisco. The term "non-citizens" appears to mean "stateless persons", as paragraph 2 is a standard formulation used in one model of universal jurisdiction legislation for foreigners and stateless persons which has been used in the legislation of many Communist states and often retained unchanged by successor governments.

Laos has ratified the Geneva Conventions and Protocols I and II. It has not signed the Rome Statute and as of 1 September 2001 it had not yet ratified it. As of 1990, the Criminal Code did not include war crimes, so prosecutions for conduct amounting to war crimes would have to be based on ordinary crimes, such as murder.[87] Laos is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[88]

· ***Latvia:*** There are two legislative provisions, whose origins can be traced back to Russian universal jurisdiction of 1903 (see Chapter Two, Section II.A), authorizing Latvian courts to exercise universal jurisdiction over certain conduct that might amount to war crimes.

First, Sub-section 1 of Section 4 (Applicability of the Criminal Law Outside the Territory of Latvia) of the Criminal Law of Latvia provides for universal jurisdiction over aliens and stateless persons resident in Latvia for any crimes committed abroad:

> "Latvian citizens and non-citizens, and aliens or stateless persons who have a permanent residence permit shall be held liable in accordance with this Law for a criminal offence committed in the territory of another state."[89]

Second, Subsection 4 of Section 4 provides for universal jurisdiction over aliens and stateless persons not permanently resident in Latvia who are suspected of crimes abroad when it is so provided in treaties to which Latvia is a party, if they have not previously been tried for the same crime:

> "Aliens or stateless persons who do not have a permanent residence permit for the Republic of Latvia and who have committed a criminal offence in the territory of another state, in the cases provided for in international agreements binding upon the Republic of Latvia, irrespective of the laws of the state in which the offence has been committed, shall be held liable in accordance with this Law if they have not been held criminally liable for such offence or committed to stand trial in the territory of another State.[90]

[87] It has not been possible to determine whether there have been any amendments to the 1990 Criminal Code.

[88] There is a fifteen year statute of limitations for major felonies, Criminal Code, Art. 124 (The statute of limitations for bringing a criminal charge), but, presumably, the Convention overrides it with respect to war crimes.

[89] The Criminal Law, Section 4 (1). The English text of the Criminal Law has been consolidated by Tulko_anas un terminoloiijas centrs (Translation and Terminology Centre), as amended on 18 May and 1 June 2000 (*obtainable from:* http://www.ttc.lv/new/Lv/EN_tulkojumi.htm).

[90] *Ibid.*, § 4 (4).

Statutes of limitation do not apply to war crimes.[91] However, certain ground for excluding liability, such as extreme necessity are not fully compatible with international law.[92] Certain war crimes are crimes under national law.[93]

· ***Lebanon:*** Lebanese courts have been able to exercise universal jurisdiction over certain conduct abroad amounting to war crimes for half a century.

Article 23 of Section IV (*De la compétence universelle*) (Universal jurisdiction) of the *Code pénal* (Penal Code) provides that Lebanese law applies to every foreigner found in Lebanese territory who has committed abroad a crime in the cases not covered by the articles granting protective or active personality jurisdiction. It states:

> "Lebanese law shall apply to any foreign national in Lebanese territory who, as perpetrator, instigator or accomplice, has committed, in a foreign country, a crime or offence other than those referred to in articles 19 [crimes against national security], 20 [crimes by Lebanese nationals] and 21 [crimes by Lebanese officials, including diplomats and consuls] and in respect of whom no application for extradition has been applied for or granted."[94]

Lebanon is a party to the Geneva Conventions and Protocols I and II. It has not signed the Rome Statute and as of 1 September 2001 it had not yet ratified it. Lebanon does not appear to have defined war crimes as crimes under national law, so prosecutions for conduct abroad amounting to war crimes would have to be brought based on ordinary crimes under national law, such as murder, abduction, assault and rape. Since prosecutions would have to be based on ordinary crimes, restrictions, such as ordinary principles of criminal responsibility, defences and statutes of limitations would apply. In addition, Lebanese law does not apply to conduct abroad which is not a crime under the law of the territorial state.[95] If there is difference between the foreign law and Lebanese law, the difference can be interpreted to the benefit of the accused.[96] Prosecutions are barred of foreigners who have been the subject of a final judgment and foreigners who have been sentenced abroad if a period of

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[91] *Ibid.*,§ 27 (4) ("A person who has committed an offence against humanity, an offence against peace, a war crime or has participated in genocide, shall be punishable irrespective of the time when such offence was committed.").

[92] Criminal Law, §§ 28, 34.

[93] *Ibid.*, § 73 (Manufacture, Amassment, Deployment and Distribution of Weapons of Mass Destruction); § 74 (War Crimes); § 75 (Force against Residents in the Area of Hostilities); § 76 (Pillaging); and § 79 (Destruction of Cultural and National Heritage). The latter crime is not limited to situations of armed conflict.

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

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

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

[95] *Ibid.*, Art. 24.

[96] *Ibid.*, Art. 25.

limitations for enforcement of the sentence has expired or the person has been pardoned.[97]

[97] *Ibid.*, Art. 27.

Article 23 has been invoked in ordinary criminal cases. For example, the *Avocat-général* (Attorney General) of Beirut decided in 1959 to refuse the extradition of a Palestine national to Jordan charged with murder in Yafa on the ground that Lebanese courts were competent under Article 23.[98] The *Cour de cassation* (Court of Cassation) approved this decision.[99] In 1962, the *hay'a ittihamiyya* (an indictment court) indicted a Yemeni from Hadramout who was charged with embezzling money from a bank in Saudi Arabia and was in Lebanon. The court held that mere presence in Lebanon and the absence of an extradition request from Lebanon was sufficient to establish jurisdiction.[100] The indictment was confirmed by the *Court d'Appel* or *Mahkamat alisti'naf* (Court of Appeal).[101] The concept of presence under Article 23 has been given a restrictive reading, suggesting that only those who enter Lebanon voluntarily, as opposed to those who have been abducted or extradited to Lebanon, are subject to Lebanese jurisdiction under Article 23.[102]

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

Although Lesotho is not known to have a Geneva Conventions Act, the United Kingdom's Geneva Conventions Act 1957 applied to Basutoland under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation in this chapter), at least before 1 January 1970. Lesotho became independent on 4 October 1966. Section 156 of Chapter XV (on transitional provisions) of the Constitution of Lesotho provided that the existing laws were to continue in effect and, as far as is known, the 1959 Order in Council has not been repealed either before or after independence.[103]

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

· ***Liberia:*** Apparently, Liberian courts have been able to exercise universal jurisdiction over conduct amounting to grave breaches of the Geneva Conventions since 1976 when it ratified them and of Protocol I since 1988 when it ratified it, provided that such conduct constitutes a crime under national law.

[98] *Avocat-général de Beirut,* 22 January 1959.

[99] *Cour de cassation,*

[100] *Hay'a ittihamiyya*, Decision on indictment, 26 November 1962, *reported in Musa Jreidini, Al-Mu'tamad, Ta'liq 'ala qanun al-'uqubat al-lubani* 119 (Beirut 1973).

[101] Court of Appeal, Decision, 21 March 1963, *reported in Musa Jureidini, Al-Mu'tamad, Ta'liq 'ala qanun al-'uqubat al-lubani* 119 (Beirut 1973).

[102] The *hay'a ittahimiyya* (indictment court) on 8 March 1969 and the *Cour de cassation* on 10 May 1969 are both reported (source unknown) to have held that Lebanese courts had jurisdiction under Article 23 only if it was established that they had come to Lebanon voluntarily.

[103] Lesotho Constitution of 1993, Chapter XV, Section 156, Inter Universtiy Associates, Inc, Lesotho in *Constitutions of the World,* Gisbert H. Flanz ed., Oceana Publications, Inc, Dobbs Ferry, New York, 99-6, 1999.

Paragraph (f) of Article 1.4.1 (Extraterritorial jurisdiction) of the Liberian Penal Law provides that "[e]xcept as otherwise expressly provided, extraterritorial jurisdiction over an offence exists when: . . . (f) Jurisdiction is conferred upon Liberia by treaty." [104] However, Article 1.5.1 (All offenses statutory) provides: "No conduct constitutes an offence unless it is a crime or infraction under this title or another statute of Liberia."[105] Article 1.4.1 (f) would appear to give Liberian courts universal jurisdiction over conduct which amounts to a grave breach of the Geneva Conventions and Protocol I when the conduct constitutes a crime under Liberian law, such as murder, assault or rape, and, possibly, other violations of the Geneva Conventions or of the Protocols.

Liberia is a party to the Geneva Conventions and Protocols I and II and it has signed the Rome Statute, although it had not yet ratified it as of 1 September 2000. It has not been possible to determine if Liberia has defined war crimes as crimes under national law, so prosecutions may have be for ordinary crimes.

· ***Liechtenstein:*** National courts have been able to exercise universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I abroad for more than a decade.

Article 64 (1) (6) of the Penal Code of 1988 provides for universal jurisdiction over acts which Liechtenstein is obliged to prosecute even when such acts are not criminal in the territorial state. This provision is sufficiently broadly worded to include war crimes, such as grave breaches, where it is clear that the state has an obligation to prosecute. It states:

> "(1) According to Liechtenstein criminal law, the following acts committed abroad are subject to penalties, independently of the criminal laws of the place, where the offence was committed:
>
> ...
>
> (6) Other punishable criminal acts which Liechtenstein is obliged to prosecute, even when they have been committed abroad, independently of the criminal laws of the place, where the offence was committed."[106]

Liechtenstein is a party to the Geneva Conventions and Protocol I and II. It has signed the Rome Statute and is expected to ratify it in 2001.

[104] Penal Law, Art. 1.4. (5), An Act Adopting a New Penal Law and Repealing Sections 31.3 and 32.1 of the Criminal Procedure Law, Approved 19 July 1976 (Published by Authority of, Government Printing Office, Ministry of Foreign Affairs, Monrovia, Liberia, 3 April 1978).

[105] *Ibid.*, Art. 1.5.1.

[106] Penal Code, § 64 (1) (6). The original German text reads:
"Nach den liechtensteinischen Strafgesetzen werden, unabhängig von den Strafgesetzen des Tatorts, folgende im Ausland begangene Taten bestraft: . . .6. sonstige strafbare Handlungen, zu deren Verfolgung das Fürstentum Liechtenstein, auch wenn sie im Ausland begangen worden sind, unabhängig von den Strafgesetzen des Tatortes verpflichtet ist[.]"
§ 64 (Strafbare Handlungen im Ausland, die ohne Rücksicht auf die Gesetze des Tatorts bestraft werden), (1) (6). Liechtensteinisches Landesgesetzblatt, Jahrgang 1988, Nr. 37, ausgegeben am 22.Oktober 1988.

· ***Lithuania:*** Lithuanian courts can exercise universal jurisdiction over conduct amounting to war crimes. These legislative provisions are reinforced by Articles 135 and 138 of the Constitution. Article 135 provides in part:

> In conducting foreign policy, the Republic of Lithuania shall pursue the universally recognized principles and norms of international law, shall strive to safeguard national security and independence as well as the basic rights, freedoms and welfare of its citizens, and shall take part in the creation of sound international order based on law and justice.

Article 138 states in relevant part that "[i]nternational agreements which are ratified by the Seimas [Parliament] of the Republic of Lithuania shall be the constituent part of the legal system of the Republic of Lithuania. In addition, the Law on International Treaties of the Republic of Lithuania provides in Article 12 that "[i]nternational treaties of the Republic of Lithuania shall have the force of law on the territory of the Republic of Lithuania" and Article 13 states that "[t]he Government of the Republic of Lithuania shall fulfill obligations assumed in international treaties of the Republic of Lithuania".[107] The Preamble of this law states that in adopting the law, the Supreme Council of the Republic of Lithuania was "proceeding from the universally recognised principles and norms of international law regulating the conclusion and execution of international treaties" and that it was "expressing its allegiance to the principle of scrupulous fulfilment of international obligations".[108]

Current Criminal Code. There are two bases for the exercise of universal jurisdiction over certain conduct amounting to war crimes under the current Criminal Code. The first paragraph of Article 6 (Criminal Responsibility for Crimes Committed Abroad) provides for universal jurisdiction over stateless persons permanently resident in Lithuania who have committed a crime under Lithuanian law abroad:

> "The citizens of Lithuania and people with no citizenship permanently resident in Lithuania shall be held responsible for the crimes committed abroad in accordance with the law of the Republic of Lithuania."[109]

The second paragraph of this article provides for universal jurisdiction over crimes committed abroad by other persons, but only if the conduct was a crime under the law of the place where it occurred and in Lithuania and the lesser of the two possible penalties is applied. It reads:

> "Other persons who have committed crimes abroad may be held responsible under the law of the Republic of Lithuania only in the event where the deed is recognized as a criminal offence by laws of both the territory where the crime was committed and the Republic of Lithuania. If a person who has committed a criminal offence abroad is charged under the criminal law of the Republic of Lithuania, but the criminal offence has different penalties applicable in the two countries, the lesser penalty shall be applied."[110]

Any prosecution based on universal jurisdiction under the current Criminal Code must satisfy a number of requirements. The third paragraph of Article 6 states:

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[107] Law on International Treaties of the Republic of Lithuania, Arts 12 & 13 (English translation *obtainable from* http://www.litlex.lt/Litlex/Eng/Frames/Laws/Documents/82.HTM).

[108] *Ibid.*

[109] Current Criminal Code, Art. 6, para. 1 (original text in Lithuanian of current Criminal Code *obtainable from* http://www.lrs.lt).

[110] *Ibid.*, Art. 6, para. 2.

> "A person who has committed a criminal offence abroad shall not be charged under criminal law if:
> 1) He fully served a sentence passed by a foreign court of law;
> 2) He was acquitted by a court in a foreign country and this court ruling has come into force, or was exempted from serving a sentence or a penalty was not given because of statute of limitations or on basis of other legal provisions of that country."[111]

The new Criminal Code. The new Criminal Code provisions which are to enter into effect from 1 January 2003 clarify that they will apply to war crimes and crimes against humanity and eliminate the double criminality requirement for these crimes and certain other crimes. Article 5 (Criminal Responsibility of the Citizens of the Republic of Lithuania and Other Persons that Live Permanently in Lithuania for Crimes Committed Abroad) provides:

[111] *Ibid.*, Art. 6, para. 3.

"Citizens of the Republic of Lithuania and other persons permanently resident in Lithuania shall be held responsible for the crimes committed abroad in accordance with this Code."[112]

Paragraph 1 of Article 7 (Criminal Responsibility for Crimes Provided for in International Treaties) provides:

> "The persons shall be held responsible in accordance with this Code, regardless of their nationality and place of residence and regardless of whether their deed is punishable under the law of the territory where the crime has been committed, when they commit crimes responsibility for which is provided for by international treaties.
> 1. Crimes against humanity and war crimes (Articles 99 to 113). . . ."[113]

The exercise of universal jurisdiction pursuant to Articles 5 and 6 is subject to a number of conditions, including that the conduct be criminal in both Lithuania and in the place where it occurred and that the maximum penalty should not exceed that applicable in the place where it occurred. Paragraph 1 of Article 8 (Criminal Responsibility for Crimes Committed Abroad) states:

> "1. A person who has committed crimes abroad, provided for by Article 5 and Article 6 of this Code, shall be held responsible in accordance with penal law only in the event where the deed is recognized as a criminal offence which is punishable by the Criminal Code of the country where the crime has been committed and the Republic of Lithuania. If a person who committed a crime abroad is tried in the Republic of Lithuania but the two countries stipulate different penalties for the criminal offence, the person shall be punished in accordance with the law of the Republic of Lithuania but it shall not exceed the maximum penalty stipulated by the law where the criminal offence was committed.

When a prosecution could otherwise be brought under Articles 5, 6 or 7, it may not proceed if the suspect has served a sentence for the conduct abroad, all or part of that sentence was waived, the suspect was acquitted or exempted from criminal responsibility because of a statute of limitations or other legal provision in the territorial state. Paragraph 2 of Article 8 states:

> "2. A person who has committed a criminal offence stipulated by Articles 5, 6 and 7 of the Criminal Code of the Republic of Lithuania, shall not be held responsible under this code if that person:
> 1) Has served a sentence given by a court in the foreign country;
> 2) Serving of the whole sentence given by a court in the foreign country or part thereof was waived;
> 3) Was acquitted by a court of law of a foreign country or exempted from criminal responsibility or a penalty or penalties were not given because of statute of limitations or on basis of other legal provisions of that country."

[112] Criminal Code of Lithuania, entry into effect, 1 January 2003, Art. 5. English translations of the new Criminal Code are by Amnesty International.

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

Lithuania is a party to the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. A broad range of war crimes are defined as crimes under the current Criminal Code.[114] After 1 January 2003, a similar set of war crimes will be expressly included in the new Criminal Code.[115]

· ***Luxembourg:*** There are three legislative provisions permitting national courts in Luxembourg to exercise universal jurisdiction over grave breaches of the Geneva Conventions and certain other war crimes. These provisions, two of which date back more than half a century, are among a number of other exceptions to the general principle of territoriality.[116]

First, Article 10 of the Law of 9 January 1985 provides for universal jurisdiction over persons, even if they are not in Luxembourg, suspected of grave breaches of the Geneva Convention. It states in relevant part:

> "Every individual, who has committed, outside the territory of the Grand Duchy, a violation covered by the present law, can be prosecuted in the Grand-Duchy even if he is not found here."[117]

[114] Current Criminal Code, Art. 333 (Killing of Persons Protected under International Humanitarian Law); Art. 334 (Deportation of Civilians of the Occupied State); Art. 335 (Mutilation or Torture or Other Inhuman Treatment of Persons Protected under International Humanitarian Law); Art. 336 (Violations of Norms of International Humanitarian Law with Regard to Civilians and Protection of their Rights in Time of War); Art. 337 (Prohibited Military Attack); Art. 338 (Compulsory Use of Civilians and Prisoners of War by Enemy Armed Forces); Art. 339 (Destruction of Protected Objects or Plunder of National Treasures); Art. 340 (Employment of Prohibited War Measures); Art. 341 (Marauding); Art. 342 (Delay in Prisoner Repatriation); Art. 343 (Delay in Release of Intern[ed] Civilians or Refusal to Permit Other Civilians to Repatriate); Art. 344 (Unlawful Use of the Emblem of the Red Cross, the Red Crescent, or the United Nations Organisation).

[115] New Criminal Code, Art. 101 (Murdering of People Prohibited by International Humanitarian Law); Art. 102 (Deporting of Citizens of the Occupied State); Art. 103 (Injuring, Torturing and Other Inhuman Behaviour of People that is Prohibited by International Humanitarian Law); Art. 104 (Violation of the Provisions of International Humanitarian Law Regarding Protection of Civilians and their Property); Art. 105 (Forcible Use of Civilians and Prisoners of War in the Armed Forces of the Enemy); Art. 106 (Destruction of Protected Objects or Plunder of National Heritage); Art. 107 (Delay in Repatriating of Prisoners of War); Art. 108 (Delay in Releasing Interned Civilians or Hindering the Repatriation of Other Civilians); Art. 109 (Unlawful Use of the Emblem of the Red Cross, the Red Crescent and the United Nations); Art. 111 (Prohibited War Attack); Art. 112 (Use of Prohibited Means of War); Art. 113 (Marauding).

[116] Penal Code, Art. 4 ("A crime committed outside the territory of the Grand Duchy, by Luxembourg nationals or by foreigners, is not punishable, in the Grand Duchy, except in the cases determined by law."). It is not clear whether the term "law" (*loi*) is limited to legislation or could also be interpreted to include international law. The original French text reads:

> *"L'infraction commise hors du territoire du Grand-Duché, par des Luxembourgeois ou par des étrangers, n'est punie, dans le Grand-Duché, que dans les cas déterminés par la loi."*

Code pénal, art. 4 (A. g.-d. 25 mai 1944).

[117] Law of 9 January 1985 Concerning the Repression of Grave Breaches of the Geneva Conventions of 12 August 1949, Art. 10. The relevant part of the original French text reads:

> *"Tout individu, qui a commis, hors du territoire du Grand-Duché, une infraction prévue par la présente loi, peut être poursuivi au Grand-Duché encore qu'il n'y soit pas trouvé."*

Loi du 9 janvier 1985 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 (Mém. A Nº 2 du 25 janvier 1985, p. 24).

Grave breaches are identified in Article 1, penalties are spelled out in Articles 2 to 6 and Article 7 provides for exemption of those involved who prevent harm from occurring.[118] However, Article 8 provides, contrary to the rule of international law recognized in the Nuremberg Charter and other international instruments, that superior orders may be a defence in certain circumstances.[119] Article 9 provides that other provisions of Book One apply to grave breaches.[120] Article 11 appears to recognize the applicability of prescription to grave breaches.[121] It also provides that grave breaches are not to be considered a political crime.[122] Article 12 permits a court to cede jurisdiction to a foreign court, but provides that if the foreign court decides not to pursue the case, the case could be returned to the court in Luxembourg.[123] Articles 12, 14 and 15 spell out certain procedural requirements.[124] The High Military Court (*la haute cour militaire*) has exclusive jurisdiction over grave breaches of the Geneva Conventions.[125]

Second, a law enacted in 1947 provides for universal jurisdiction over violations of the laws and customs of war. It provides:

> "Non-Luxembourg nationals may be prosecuted before a War Crimes Court (*une Cour des crimes de guerre*) and tried in conformity with the laws of Luxembourg and the provisions of the present law who are responsible for felonies (*crimes*) or misdemeanours (*délits*) falling under the jurisdiction of Luxembourg courts, committed since the opening of hostilities when the violations have been carried out on the occasion or under the pretext of a state of war and which are not justified by the laws or customs of war, whether by persons found in the Grand Duchy or in enemy territory or whom the government has obtained by extradition."[126]

[118] *Ibid.*, Arts 1 to 7.

[119] *Ibid.*, Art. 8.

[120] *Ibid.*, Art. 9. It has not been possible to review all of these provisions to determine whether they are consistent with international law.

[121] *Ibid.*, Art. 11 (stating that prescription with regard to instituting a prosecution or enforcing a sentence is determined by Luxembourg law). The original French text reads: *"que la prescription de l'action publique ou de la peine ne soit pas acquise d'après la loi luxembourgeoise"*).

[122] *Ibid.*

[123] *Ibid.*, Art. 12.

[124] *Ibid.*, Arts 13-15.

[125] Law of 31 December 1982 Concerning Reform of the Code of Military Procedure, Art. 11 (*Loi du 31 décembre 1982 concernant la refonte du code de procédure militaire (Mém. A Nº 114 du 31 décembre 1982, p. 2610), art. 11).*

[126] Law of 2 August 1947 Concerning the Repression of War Crimes, as amended by the law of 20 October 1948, Art. 1. The original French text reads:

> *"Seront poursuivis devant une Cour des crimes de guerre et jugés conformément aux lois luxembourgeoises en vigueur et aux dispositions de la présente loi les agents non luxembourgeois coupables de crimes ou de délits tombant sous la compétence des tribunaux luxembourgeois, commis depuis l'overture des hostilités, lorsque ces infractions ont été accomplies à l'occasion ou sous le prétexte de l'état de guerre et qu'elles ne sont pas justifiées par les lois ou coutumes de la guerre, soit que ces agents aient été trouvé dans le Grand-Duché ou en territoire ennemi, soit que le Gouvernement en ait obtenu l'extradition."*

Loi sur la répression des crimes de guerre, 2 août 1947 (Mém.1947. 755 - Pas. 1947. 500) telle qu'elle se trouve modifiée par la loi du 20 octobre 1948 (Mém. 1948. 1107 - Pas. 1948. 372).

Among the crimes identified in the 1947 law are murder, assault, acts of violence or cruelty against prisoners and others, deportation and pillage and similar property crimes.[127] Superiors can be held responsible for conduct of subordinates.[128] Article 4 states that superior orders are not a defence, but it has been interpreted in a manner which does not appear to be consistent with international law as recognized in the Nuremberg Charter and other international instruments.[129] The penalties and procedures for trial are spelled out in Articles 5 to 26.

Third, a 1944 law provides universal jurisdiction over certain crimes of sexual violence during wartime. Article 7 (2) of the Code of Criminal Investigation (*Code d'instruction criminelle*) provides:

> "Every foreigner who outside the territory of the Grand Duchy is responsible, whether as a principal or an accomplice, for the following:
> . . . .
> 2. In wartime, abduction of minors; attacks on modesty or rape; prostitution or corruption of youth; murder or intentional bodily injury; attacks on individual liberty committed against a Luxembourg national or a national of an allied country,
> Can be prosecuted and tried according to the provisions of Luxembourg laws if he is found either in the Grand Duchy, an enemy country or if the government obtains his extradition."[130]

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

· ***Macedonia, The former Yugoslav Republic of:*** The courts of the former Yugoslavia had been able to exercise universal jurisdiction over ordinary crimes since 1929 (see Chapter Two, Section II.A). Today, Macedonian courts may exercise universal jurisdiction over war crimes when such conduct is a crime under national law and the law of the territorial state and it is possible, according to an authoritative government opinion, that they may do so even if the conduct is not criminal under national law in the place where it occurred. This legislative grant of universal jurisdiction is buttressed by Article 118 of the Constitution, which provides that "[t]he international agreements ratified in accordance with the Constitution are part of the internal legal order and cannot be changed by law."[131]

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[127] *Ibid.,* Art. 2 (3)-(6).

[128] *Ibid.,* Art. 3.

[129] *Ibid.,* Art. 4. However, a decision on review by cassation on 1 December 1949 has held that it would be a defence if it is established that the accused did not know that the order was illegal and the superior had no criminal intent.

[130] Code of Criminal Investigation, Art. 7 (2). The original French text reads:
"Tout étranger qui hors du territoire du Grand-Duché, se sera rendu coupable, soit comme auteur, soit comme complice :
. . . .
2° En temps de guerre, d'une infraction d'enlèvement de mineurs ; d'attentat à la pudeur et de viol ' de prostitution ou de corruption de la jeunesse ; d'homicide ou de lésions corporelles volontaires ' d'attentat à la liberté individuelle commis envers un Luxembourgeois ou un ressortissant d'un pays allié, pourra être poursuivi et jugé d'après les dispositions des lois luxembourgeoises s'il est trouvé soit dans le Grand-Duché, soit en pays ennemi, ou si le Gouvernement obtient son extradition."
Code d'instruction criminelle (A. g.-d. 25 mai 1944), art. 7.

[131] Constitution of the Republic of Macedonia, 17 November 1991, as amended 6 January 1992, Art. 118 (English translation in Edith Marko-Stöckl & Gisbert H. Flanz, *Macedonia, in* Albert P. Blaustein & Gisbert H. Flanz, *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Ocean Publications, Inc.) (Release 93-7, November 1993).

Article 119 (2) of the Criminal Code of the Republic of Macedonia provides:

> "Criminal legislation is also applicable to a foreigner who commits a crime abroad, against a foreign country or a foreigner, who according to that legislation may be sentenced to five years' imprisonment or to a more severe punishment, when he is apprehended on the territory of the Republic of Macedonia, and is not extradited to the foreign country. The court may not mandate in such a case a punishment more severe than the punishment that is prescribed by the law of the country in which the crime was committed."[132]

Apparently, the Criminal Code applies to foreigners only if the conditions for an extradition have not been fulfilled or a request for extradition has been rejected.[133] This provision appears to be sufficiently broad to include some ordinary crimes which would amount to war crimes if committed during armed conflict. The state informed the Committee against Torture that,

> "[i]n cases where the act was considered a crime according to the generally recognized principles of the international community, the defendant could, with the approval of the Public Prosecutor, . . . be prosecuted regardless of the provisions of the domestic law prevailing in the country where the offence had taken place."[134]

The former Yugoslav Republic of Macedonia is a party to the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but, as of 1 September 2001, it had not yet ratified it. War crimes are crimes under national law.[135] Macedonia is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and the Criminal Code provides that statutes of limitation do not apply to criminal acts in Articles 403 to 408 (dealing with certain war crimes) and for criminal acts when this is envisaged in international agreements.[136]

· ***Malawi:*** The courts of Malawi have been able to exercise universal jurisdiction over grave breaches of the Geneva Conventions abroad at least since 1967. Although the Constitution does not directly address the question of the status of customary and conventional international law in national law, Article 10 provides that the Constitution is supreme over other law and Article 11 (2) provides that in interpreting the Constitution courts shall, "where applicable, have regard to current norms of public international law".[137]

Section 4 (1) of the Malawi Geneva Conventions Act, 1967 provides that national courts may exercise universal jurisdiction over grave breaches of the Geneva Conventions. That article states:

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[132] English text in initial report to the Committee against Torture, U.N. Doc. CAT/C/28/Add.4 (1998), para. 69 (with corrections by Amnesty International).

[133] *Id.*, para. 89.

[134] *Id.*, para. 16.

[135] War crimes are included in a number of articles in the Criminal Code, including: Art. 404 (Military crimes against civilians); Art. 405 (Military crimes against wounded and sick), Art. 406 (Military crimes against prisoners of war), Art. 407 (Use of prohibited means in fighting), Art. 408 (Organizing and instigating of genocide and war crimes), Art. 409 (illegal killing and wounding of the enemy)..

[136] Criminal Code, Art. 112.

[137] Constitution of the Republic of Malawi, 18 May 1994, *reprinted in* Gisbert H. Flanz, *Republic of Malawi - Introduction 1993/94 7 Comparative Notes, in* Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc.) (Release 95-1 January 1995), Art. 10; Art. 11 (2) ("In interpreting the provisions of this Constitution a court of law shall - . . . (c) where applicable, have regard to current norms of public international law and comparable foreign case law.").

> "Any person, whatever his nationality, who, whether within or without Malawi commits or aids, abets, or procures the commission by any other person of any such grave breach of any of the Conventions as is referred to in the following articles respectively of those Conventions, that is to say -
> (a) Article 50 of the Convention set out in the First Schedule;
> (b) Article 51 of the Convention set out in the Second Schedule;
> (c) Article 130 of the Convention set out in the Third Schedule;
> (d) Article 147 of the Convention set out in the Fourth Schedule,
> shall, without prejudice to his liability under any other written law, be guilty of an offence and -
> (i) in the case of a grave breach causing or resulting in or contributing to the death of the person protected by the Convention in question, shall be liable to imprisonment for life;
> (ii) in the case of any other grave breach, shall be liable to imprisonment for fourteen years."[138]

In contrast to many other states which require approval of investigations and prosecutions by a political official, proceedings for an offence under Section 4 "shall not be instituted except by or on behalf of the Director of Public Prosecutions".[139] However, questions concerning the applicability of the Geneva Conventions are to be determined by a minister, unless proof to the contrary is shown.[140] The act does not contain a statute of limitations, but it is not known if any statute of limitations would apply to this act.

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

· ***Malaysia:*** The courts of Malaysia have been able to exercise universal jurisdiction over grave breaches of the Geneva Convention committed abroad at least since 1962 and, in certain parts of the country, since 1959.

Section 3 (1) of the Malaya Geneva Conventions Act, 1962 provides that national courts may exercise universal jurisdiction over grave breaches of the Geneva Conventions.[141] Previously, the United Kingdom's Geneva Conventions Act 1957 applied to parts of Malaysia under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below). The independent state of Malaysia came into existence on 16 September 1946 as a federation of Malaya, Singapore, Sabah (North Borneo) and Sarawak. In 1965, Singapore withdrew from the federation to become a separate state. Proceedings may not be instituted except by or on behalf of the Public Prosecutor.[142] The Act does not contain a

[138] Laws of Malawi, , Cap. 12:03 (Geneva Conventions), An Act to enable effect to be given to certain International Conventions done at Geneva on the Twelfth Day of August, one thousand nine hundred and forty-nine and for purposes connected therewith (Geneva Conventions Act), 9 August 1967, § 4 (1).

[139] *Ibid.,* § 4 (3).

[140] *Ibid.,* § 4 (4). It is not clear from the text of the act which minister is meant, but, presumably, it would be the minister responsible for foreign affairs.

[141] Geneva Conventions Act, 1962, § 3 (1). That section reads:
"Any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits or aids, abets or procures the commission by any other person of any such grave breach of any of the scheduled conventions as is referred to in the following articles respectively of those conventions: [list of grave breaches provisions of each Geneva Convention attached in separate schedules to the Act] shall be guilty of an offence . . . ."

[142] Geneva Conventions Act, 1962, § 3 (4).

statute of limitations, but it is not known if any statute of limitations applies to grave breaches.

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

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

Although Malta is not known to have a Geneva Conventions Act, the United Kingdom's Geneva Conventions Act 1957 applied to Malta under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below), at least before 1 January 1970. Malta became independent on 21 September 1964. As far as is known, the 1959 Order in Council has not been repealed either before or after independence.

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

· ***Mauritius:*** The courts of Mauritius have been able to exercise universal jurisdiction over persons suspected of grave breaches of the Geneva Conventions, or of being an accomplice in such breaches, committed abroad since 1959.

Mauritius has a Geneva Conventions Act, Section 3 of which provides in part:

> "(1) Any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the Conventions shall commit an offence.
> (2) For the purposes of this section [a grave breach is one listed in the four Geneva Conventions]
> (3) This section applies to persons regardless of their nationality or citizenship.
> (4) Any person who commits an offence against this section shall, on conviction, be liable -
>
> (a) where the offence involves the wilful killing of a person protected by the relevant Convention, to the same penalty as that for the time being for murder;
> (b) in any other case, to penal servitude for a term not exceeding 15 years.
>
> (5) No proceedings for an offence under this section shall be instituted without the consent of the Director of Public Prosecutions."[143]

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

· ***Mexico:*** It appears that Mexican civilian courts may be able to exercise universal jurisdiction over grave breaches of the Geneva Conventions and of Protocol I committed abroad, although it has not been possible to locate any authoritative jurisprudence or commentary on this question. It appears, however, that military courts may only exercise extraterritorial jurisdiction over war crimes committed

[143] 2 Mauritius Laws 1990, Geneva Conventions Act, RL 3/37 - 24 December 1970, Section 3 (1) - (5). Prior to 1 January 1970, at least, the United Kingdom's Geneva Conventions Act 1957 applied to Mauritius under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation in this chapter).

by members of the Mexican armed forces.

Article 6 of the *Código Penal Federal* (Federal Penal Code) of 1931, as amended 2000,[144] provides that courts have jurisdiction to try crimes under special laws or international treaties to which Mexico is a party; it does not limit the scope of that jurisdiction to crimes committed in Mexico. That article provides that

> "[w]hen an act is committed which is not an offence under this Code but is an offence under a special law or under an international treaty to which Mexico is a party, the respective law or treaty shall apply, taking into account the provisions of Book I of this Code and, if applicable, the subsequent provisions of Book II."[145]

Book I contains general provisions, concerning matters such as principles of criminal responsibility and punishments. Book II includes Article 149 (Violations of obligations to humanity), which includes violations against prisoners of war, and wounded in hospitals.[146] In addition, Mexican civilian courts appear to have jurisdiction under military law over a number of other war crimes committed by civilians. Although there appears to be no jurisprudence concerning Article 6, this article is drafted sufficiently broadly to suggest that national courts could apply universal jurisdiction provisions in the Geneva Conventions and Protocol I concerning grave breaches, as well as those expressly made crimes under national law.[147]

As regards the hierarchy of international treaties in the Mexican legal system Article 133 of the Federal Constitution states:

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[144] It was originally named *Código Penal para el Distrito Federal en materia de fuero común y para toda la República en materia de fuero federal*. By Decree of 18 May 1999 it was renamed: *Código Penal Federal*. It was last amended by Decree of 12 June 2000.

[145] Federal Penal Code, Art. 6 (English translations of the Federal Penal Code in this memorandum are by Amnesty International). The original text in Spanish reads:

"Cuando se cometa un delito no previsto en este Código, pero si en una ley especial o en un tratado internacional de observancia obligatoria en Mexico, se aplicaran estos, tomando en cuenta las disposiciones del libro primero del presente Código, y en su caso, las conducentes del libro segundo.

Cuando una misma materia aparezca regulada por diversas disposiciones, la, especial prevalecera sobre la general."

Código Penal, Art. 6 (*obtainable from* http://info4.juridicas.unam.mx/ijure/fed/9/7.htm?s= .

[146] *Ibid.*, Art. 149. The original text in Spanish reads:

"Al que violare los deberes de humanidad en los prisioneros y rehenes de guerra, en los heridos o en los hospitales de sangre, se le aplicará por ese solo hecho: prisión de tres a seis años, salvo lo dispuesto, para los casos especiales en las leyes militares."

Código Penal Federal, art. 149 (Violaciones de los deberes de humanidad).

[147] According to an unpublished paper by Alonso González Villalobos and Pablo Héctor González Villalobos of 5 September 2001: "Even if it is true that it [Article 6] opens the jurisdictional spectrum to any crimes defined by special laws and international treaties, it would be possible to construe such article in a way in which its effectiveness might be jeopardised. Indeed, it could be argued that the *material* jurisdiction which is enhanced by such article, is nevertheless still bound by the other principles which regulate the jurisdiction of the criminal courts, namely, those which require the (i) *personal* connection with the offender/offended, or the (ii) *territorial* connection with the offence.

It must be said, however, that the opposite construction is possible."

This could be an explanation of why the initial report of Mexico to the Committee against Torture did not cite Article 6 of the Penal Code with respect to its obligations under Article 5 of the Convention against Torture to provide for universal jurisdiction over torture, but only Article 4, which provides for active and passive personality jurisdiction. U.N. Doc. CAT/C/34/Add.2 (1996), para. 91. However, based on the state report, the Committee against Torture concluded that Mexico had not fulfilled its obligation to provide for universal jurisdiction over torture. See Part Chapter Ten, Section II.

> "This Constitution, the laws of Congress that emanate from it and all treaties which are in accordance with it, concluded and that shall be concluded by the president of the Republic, with the approval of the Senate, shall be the supreme law of the Union. The judges in each State shall adapt to this Constitution, laws and treaties, despite provisions to the contrary to be founded in the State's constitutions and laws."[148]

Such Article might appear to mean that international law is at the same level of the Constitution and of the Federal Legislation. However, by means of defined jurisprudence, the Supreme Court of Justice has recently established that the wording of Article 133 means that the Constitution is placed at the top of the pyramidal structure, international treaties being immediately underneath it and above federal legislation.[149]

Such decision entails two consequences. The first one is that for an international treaty to be valid in Mexico (irrespectively of its validity according to international law), that is, to be enforceable, it needs to be (i) consistent with the contents of the Federal Constitution and (ii) ratified by the Senate. The second one is that international treaty law is superior to any federal legislation. Hence, national judges are obliged to apply the provisions of international treaties even if they are contrary to federal legislation. Otherwise their resolutions might be declared unconstitutional.

It has to be noted that Article 133 opens up the door only to International Treaty Law. This appears to preclude General International Law or Customary International Law from being part of the Mexican legal system. However, the decision of the Foreign Ministry in the Cavallo case recognizes the relevance of General International Law (see further on).

The *tribunales militares* (military tribunals) have jurisdiction over crimes and military disciplinary offences under the *Código de Justicia Militar* (Military Justice Code), published 31 August 1933, in force since 1 January 1934. The crimes in the Military Justice Code include both military disciplinary offences and war crimes.[150]

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[148] Spanish text reads: "ESTA CONSTITUCION, LAS LEYES DEL CONGRESO DE LA UNION QUE EMANEN DE ELLA Y TODOS LOS TRATADOS QUE ESTEN DE ACUERDO CON LA MISMA, CELEBRADOS Y QUE SE CELEBREN POR EL PRESIDENTE DE LA REPUBLICA, CON APROBACION DEL SENADO, SERAN LA LEY SUPREMA DE TODA LA UNION. LOS JUECES DE CADA ESTADO SE ARREGLARAN A DICHA CONSTITUCION, LEYES Y TRATADOS, A PESAR DE LAS DISPOSICIONES EN CONTRARIO QUE PUEDA HABER EN LAS CONSTITUCIONES O LEYES DE LOS ESTADOS."
Obtainable from http://info4.juridicas.unam.mx/ijure/fed/10/

[149] Spanish text of Supreme Court decision: *"TRATADOS INTERNACIONALES SE UBICAN JERARQUICAMENTE POR ENCIMA DE LAS LEYES FEDERALES Y EN UN SEGUNDO PLANO RESPECTO DE LA COSNTITUCION FEDERAL .(...) No obstante, esta Corte de Justicia considera que los tratados internacionales se encuentran en un segundo plano inmediatamente debajo de la Ley Fundamental y por encima del derecho federal y el local.(...) Como consecuencia de lo anterior, la interpretación del artículo 133 lleva a considerar en un tercer lugar al derecho federal y al local en una misma jerarquía en virtud de lo dispuesto en el artículo 124 de la Ley Fundamental, el cual ordena que 'Las facultades que no están expresamente concedidas por esta Constitución a los funcionarios federales, se entienden reservadas a los Estados.' No se pierde de vista que en su anterior conformación, este Máximo Tribunal había adoptado una posición diversa (...) Sin embargo, este Tribunal Pleno considera oportuno abandonar tal criterio y asumir el que considera la jerarquía superior de los tratados incluso frente al derecho federal."*
(Pleno de la Suprema Corte de Justicia de la Nación. Novena Epoca, Volumen X, Página 46, Noviembre de 1999, Amparo de revisión 1457/98- Sindicato Nacional de Controladores de Tránsito Aéreo- 11 de mayo de 1999- Unanimidad de diez votos).

[150] Military Justice Code, Art. 209 (includes certain war crimes, such as the burning of buildings, pillage of towns or places, direct attacks against hospitals, ambulances or asylums, bibliothecas, museums and so on) Art. 324 (concerning violence against prisoners, detainees or wounded or members of their families) or Art.203 (on treason).

Mexico has ratified Hague Convention IV, the Geneva Conventions and Protocol I and II. Mexico has signed the Rome Statute, but had not yet ratified it as of 1 September 2001. Although Mexico has signed the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, it had not yet ratified it as of 1 September 2001. Under national law, statutes of limitations apply to all crimes, including war crimes.

According to Article 100 of the Federal Penal Code the simple passing of time established by law, extinguishes the crime, the prosecution and its sanctions.[151] The Extradition Act (Ley de Extradición Internacional) provides that if the crimes are prescribed, either by the applicable Mexican Law or by the law of the requesting State, the extradition should not be granted.[152]

On August 25, 2000 judge Baltasar Garzón of the National Audience in Spain requested the preventive detention in Mexico and subsequent extradition to Spain of Ricardo Miguel Cavallo, known as Miguel Angel Cavallo, a former Argentinean military officer, under the charges of genocide, torture and terrorism.

Judge Luna stated in his legal opinion (required by the Mexican extradition process) that Mexico has the duty under its international treaty obligations to either extradite or prosecute the person or persons accused of crimes against humanity such as genocide, torture and terrorism. He did consider though that Cavallo could not be extradited under the charge of torture for being that prescribed under Mexican law. The Ministry of Foreign Affairs, in charge of ultimately deciding on extradition demands, allowed extradition to proceed on all charges and as shown in the quotation below recognised the relevance of customary international law when deciding on whether the crime of torture was extraditable:

> "It is crucially important for the purposes of the present case, particularly as regards the crime of torture, to understand the following. Despite the controversy which has always surrounded the accumulation or overlapping of offences, both in terms of doctrine and jurisprudence, particularly in the context of the statute of limitations, the application here of domestic legal norms regarding the statute of limitations, as well as complying with the requirements of Article 10 of the Bilateral Extradition Treaty, is wholly in line with Mexico's international treaty obligations which, according to the Constitution, take precedence over national law and it is therefore also in line with the Constitution itself.
>
> Indeed, Mexico is in any case obliged to ensure that any other attempted application or interpretation of these domestic legal norms leads necessarily to the same result, since only thus can Mexico comply with its obligations in this matter, not only under a body of multilateral treaties but also under general international law, which unquestionably commit the Mexican State to prosecute and punish the crime of torture in all circumstances."[153]

[151] Federal Penal Code, Art.100. The original text in Spanish reads: *"Por la prescripción se extinguen la acción penal y las sanciones conforme a los siguientes artículos."*

[152] International Extradition Law, Art.7. The original text in Spanish reads: *"No se concederá la extradición cuando: (...) III.- Haya prescrito la acción o la pena conforme a la ley penal mexicana o a la ley aplicable del Estado solicitante..."*

[153] Underlinings by Amnesty International.
The original text in Spanish reads:

> *"Resulta de la más crucial importancia para la suerte del presente caso, particularmente en cuanto al delito de tortura,entender que, a pesar de lo controvertido que siempre ha resultado todo lo relativo a la acumulación o al concurso de delitos, tanto en la doctrina como en la jurisprudencia, particularmente en el contexto de la prescripción, la aplicación de las reglas de la legislación nacional en materia de prescripción que aquí se ha hecho, además de permitir que se cumpla con lo requerido en la*

materia por el artículo 10 del Tratado bilateral de Extradición, es plenamente congruente con las obligaciones internacionales convencionales de México que, de conformidad con la Constitución, están por encima de la legislación nacional y es, por ende, congruente también con la propia Constitución.

En efecto, México está en todo caso obligado a que cualquier otro modo de aplicación o de interpretación de dichas reglas de la legislación interna que se intente, conduzca necesariamente al mismo resultado, pues sólo así puede México cumplir con las obligaciones que ha asumido en relación con el mismo asunto, no sólo en virtud de un conjunto de convenciones multilaterales, sino también en virtud del derecho internacional general, que, de manera incuestionable, comprometen al Estado Mexicano a mantener vigente la persecución y el castigo del delito de tortura en toda circunstancia."
(Resolución emitida por la Secretaría de Relaciones Exteriores (Dirección General de Asuntos Jurídicos) para acordar respecto de los autos del procedimiento de extradición seguido contra el nacional argentino RICARDO MIGUEL CAVALLO. Pag. 58-59) (English translation by Amnesty International)

· ***Moldova:*** National courts may exercise universal jurisdiction over conduct amounting to war crimes committed abroad in two situations. The relevant legislative provisions are supplemented by Article 4 (2) of the 1994 Constitution, which states that "[w]henever disagreements appear between conventions and treaties signed by the Republic of Moldova and her own national laws, priority shall be given to international regulations."[154]

Article 4 of the Criminal Code of Moldova (Applicability of this Code in relation to acts committed on the territory of the Republic of Moldova or beyond its borders) provides for universal jurisdiction in two situations. The second, unnumbered paragraph provides for universal jurisdiction over crimes committed abroad by stateless persons when the conduct is a crime under the Criminal Code of Moldova:

> "Citizens of the Republic of Moldova and stateless persons against whom criminal proceedings have been instituted or who have been committed for trial on the territory of the Republic of Moldova for crimes committed abroad, are subject to criminal liability in accordance with this Code."[155]

National courts may exercise universal jurisdiction over foreigners for conduct abroad that is a crime under the Moldovan Criminal Code when such jurisdiction is provided for in international agreements. The fourth unnumbered paragraph of Article 4 states:

> "Foreign citizens are subject to liability under this Code for crimes committed beyond the borders of the Republic of Moldova in those instances provided for by international agreements."[156]

Moldova is a party to the Geneva Conventions and to Protocols I and II. Moldova has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. It is not known if war crimes are defined as crimes under national law, so prosecutions may have to be brought for ordinary crimes, such as murder, abduction, assault and rape.

[154] Constitution of the Republic of Moldova, adopted 29 July 1994, Art. 4 (2) (English translation in Gisbert H. Flanz, *Republic of Moldova, in* Gisbert H. Flanz, *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc.) (Release 95-2 March 1995).

[155] Criminal Code of Moldova, Art. 4 (Applicability of this Code in relation to acts committed on the territory of the Republic of Moldova or beyond its borders) (as amended by Parliamentary Resolution of 22 September 1993), second unnumbered paragraph) (English translations of Criminal Code by Amnesty International). An explanatory note added by Law No. 665-XIV of 11 November 1999, states that Article 4 "is applied in a case when a crime committed on the territory of another state is recognized as such in the Criminal Code of the Republic of Moldova."

[156] *Ibid.*, Art. 4, 4th para. This paragraph was introduced by Law No. 665-XIV of 11 November 1999.

There are a number of conditions or limitations on the exercise of universal jurisdiction under Article 4. The third unnumbered paragraph of Article 4 of the Criminal Code provides that if a person has been punished abroad for the same conduct, the court may mitigate the punishment or exempt the person concerned from serving the full penalty under the law of Moldova (although this limitation appears to apply only to the second unnumbered paragraph concerning stateless persons).[157] A separate provision in the fifth unnumbered paragraph provides that punishments in territorial states are taken into account when determing criminal responsibility.[158] The sixth unnumbered paragraph of Article 4 deals with resolving questions of diplomatic immunity, but only for crimes committed in Moldova.

· ***Monaco:*** There are three legislative provisions, one of which dates to 1963, that permit the courts of Monaco to exercise universal jurisdiction over certain conduct that may amount to a war crime if committed during armed conflict.

First, Article 6-1 of the Code of Criminal Procedure provides universal jurisdiction over any person who commits a felony (*crime*) or a misdemeanour (*délit*) abroad who subsequently becomes a national of Monaco. That provision states:

> "The provisions of Articles 5 and 6 are applicable to anyone who has acquired Monagasque nationality after the act of which he is accused."[159]

Article 5 provides that any national of Monaco who does an act abroad that is a felony under the law of Monaco may be prosecuted in Monaco and Article 6 states that any national of Monaco who does an act abroad that would be a misdemeanour in Monaco can be prosecuted in Monaco, provided that the act is punishable in the territorial state, the prosecutor inititiates a prosecution and there is an official request for such a prosecution by the territorial state.[160]

Second, Article 9 (2) of the Code of Criminal Procedure provides for universal jurisdiction over any foreigner who has committed a felony or a misdemeanour abroad who is found in Monaco in possession of objects acquired by means of the crime, subject to the same conditions as in Article 6. Article 9 (2) states in relevant part:

> "A foreigner may be prosecuted and tried in the Principality who is responsible outside the territory:

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[157] *Ibid.*, Art. 4, 3rd para. ("If the persons concerned have been punished abroad, the court may mitigate accordingly the punishment passed on them or free the guilty person completely from serving the sentence imposed.").

[158] *Ibid.*, Art. 4, 5th para. It reads:

> "Punishments and criminal records for crimes committed on the territory of other states are taken into account in accordance with this Code and with international agreements when evaluating and legally qualifying the acts of a person who has committed a fresh crime on the territory of the Republic of Moldova, and also in other instances when criminal legislation is applied, including when deciding questions of amnesty and pardon."

The references to amnesty and pardon appear to be to their relevance in determining whether an amnesty or a pardon would be appropriate in Moldova, not to whether a foreign amnesty or pardon should be recognized by Moldova.

[159] Code of Criminal Procedure, Art. 6-1. The original French text reads:

> *"Les dispositions des articles 5 et 6 sont applicables à celui qui a acquis la nationalité monégasque postérieurement au fait qui lui est reproché."*

Code de procédure pénale, promulgué le 2 avril 1963 et declaré exécutoire à dater du 5 juillet 1963, art. 6-1 (Loi nº 1.173 du 13 décembre 1994).

[160] *Ibid.*, Arts 5 & 6.

. . . .

2. For a felony or misdemeanour committed even against another foreigner, if he is found in the Principality in possession of objects acquired by means of the crime.

In both cases, the prosecution may not take place except under the conditions set forth in Article 6."[161]

It is not clear whether the term, "objects", includes intangible property, such as monetary transfers, but if it does, this provision could be used in many cases when officials have robbed their victims in the course of their crimes and converted the property into cash. It has not been possible to locate any jurisprudence or commentary on this provision.

Prosecutions based on Articles 6-1 and 9 (2) are subject to several other conditions. Article 10 provides that Articles 6 and 9 do not apply when the person concerned has had a final judgment abroad and, if that was a conviction, served the sentence or the sentence has been prescribed or the person has been pardoned or received an amnesty.[162]

Third, certain conduct abroad against minors during armed conflict constituting crimes of enforced prostitution, sexual slavery or other forms of sexual violence could be prosecuted under Article 8 (3) of the Code of Criminal Procedure. That article provides for the prosecution and trial of

"whoever, outside the territory of the Principality, has committed acts against minors that constitute felonies or misdemeanours against the modesty or morals defined by Articles 261, 262, 263 and 265 (1), (2) and (5) of the Penal Code, when the person responsible is found in the Principality."[163]

Monaco has ratified the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. It is not known if Monaco has defined war crimes as crimes under national law, so prosecutions for such crimes may have to be for ordinary

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[161] *Ibid.*, Art. 9 (2). The original French text reads:

"Pourra être pousuivi et jugé dans la Principauté, l'étranger qui se sera rendu coupable hors du territoire:

. . . .

2° D'un crime ou d'un délit commis même au détriment d'un autre étranger, s'il est trouvé dans la Principauté en possession d'objets acquis au moyen de l'infraction.

Dans les deux cas, la poursuite n'aura lieu que dans les conditions prévues par l'article 6."

Code d procédure pénale, art. 9 (Loi nº 1.173 du [1]3 décembre 1994). The date of 23 December in the original appears to be a typographical error for 13 December.

[162] *Ibid.*, Art. 10. It expressly states:

"With the exception of the provisions of Article 7-1, the preceding provisions [including Articles 6-1 and 9] are not applicable if the person concerned has been finally judged and, in case of a conviction, has served the sentence or it has been prescribed, has obtained a pardon or benefited from an amnesty.

If the sentence ordered by the foreign court has been partially served, judges shall take into consideration time served in the application of the new sentence ordered."

The original French text reads:

"A l'exception de celles de l'article 7-1º, les dispositions précedentes ne sont pas applicables si l'intéressé justifie qu'il a été jugé définitivement à l'étranger et en cas de condamnation qu'il a subi ou prescrit sa peine, obtenu sa grâce ou bénéficié d'un amnistie."

Si la peine prononcée par les tribunaux étrangers a été exécutée pour partie, les juges tiendront compte de la détention ainsi subie, dans l'application de la nouvelle peine qu'ils prononceront."

Code de procédure pénale, art. 10 (Loi nº 1.173 du 13 décembre 1994).

[163] Code of Criminal Procedure, Art. 8 (3). The original French text reads:

"Quiconque aura, hors du territoire de la Principauté, commis sur des mineurs des faits qualifiés crimes ou délits d'attentat à la pudeur ou d'attentat aux moeurs prévus par les articles 261, 262, 263 et 265, 1º, 2º et 5º du Code pénal lorsque l'auteur sera trouvé dans la Principauté."

Code de procédure pénale, art. 8.3º (Ajouté par la loi nº 1.203 du 13 juillet 1998).

crimes, such as murder, abduction, assault or rape.

· ***Mongolia:*** There are two legislative provisions, apparently dating back to 1961, and two provisions of the Constitution which provide Mongolian courts with universal jurisdiction over war crimes.

First, paragraph b of Article 3 (Limits of the Effects of the Present Code) of the Criminal Code of 1961 states:

> "citizens of the Mongolian People's Republic and stateless persons in the Mongolian People's Republic who have committed crimes beyond the limits of the People's Republic shall, in the event they are detained on the territory of the MPR, be subject to criminal responsibility and punishment according to the present Code."[164]

Second, paragraph c of Article 3 provides:

> "foreign citizens who have committed crimes beyond the limits of the Mongolian People's Republic shall be subject to criminal responsibility according to the present Code in instances provided for by international agreements."[165]

Paragraph c is strengthened by Article 10 (3) of the 1992 Constitution, which provides: "The international treaties to which Mongolia is a Party, become effective as domestic legislation upon the entry into force of the laws on their ratification or accession."[166]

Independently of these two legislative provisions, it may be possible that Article 10 (1) of the Constitution of Mongolia permits the exercise of universal jurisdiction based on customary international law or general principles of law. That provison states that "Mongolia adheres to the universally recognized norms and principles of international law . . .".[167]

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

· ***Netherlands:*** Dutch courts have been able to exercise universal jurisdiction over war crimes for over half a century.[168]

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[164] Criminal Code of the Mongolian People's Republic of 1961, as amended through 1975, *reprinted in* William E. Butler, *The Mongolian Legal System: Contemporary Legislation and Documentation* (The Hague/Boston/London: Martinus Nijhoff Publishers 1982), Art. 3 (Limits of Effect of the Present Code), para. b.

[165] *Ibid.*, Art, 3 (b).

[166] Constitution of Mongolia (1992) (English translation *obtainable from* http://www.uni-wuerzburg.de/law/mg_indx.html), Art. 10 (3).

[167] *Ibid.*, Art. 10 (1). It has not been possible to locate any relevant jurisprudence or commentary on this provision.

[168] In addition to other materials cited in the bibliography, the discussion of jurisdiction in the Netherlands in this memorandum draws upon two unpublished papers, Jann K. Kleffner, *Report for the Netherlands, 20 June 2001*, a draft manuscript submitted for discussion to *:L'Etude Comparée des Critères de Competence Juridictionnelle en Matière de Crimes Internationaux (Crimes Contre l'Humanité, Génocide, Torture, Crimes de Guerre, Terrorisme)*, Paris, 2 to 3 July 2001, and Luc Reydams, *The Netherlands*, a draft chapter in his book, *Universal Jurisdiction in International Law* (Oxford: Oxford University Press) (forthcoming).

The relevant legislative grant of jurisdiction is supported by three constitutional provisions. Article 90 of the Constitution requires that "[t]he Government shall promote the development of the international rule of law."[169] Article 93 states that "[p]rovisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published." [170] According to Article 94, "Statutory regulations in force within the Kingdom shall not be applilcable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions."[171]

(1) Legislation. Article 8 of the Netherlands *Wet Oorlogsstrafrecht* (Criminal Law in Time of War Act) (1952) provides that national courts have jurisdiction over all violations of the laws and customs of war, including violations of the Geneva Conventions and Protocol I and other violations of customary international law or treaties.[172] Although a literal reading of the text suggests that jurisdiction over violations of the Geneva Conventions would exist only if they were committed during a war to which the Netherlands was a party, it has been interpreted to apply to other conflicts as well. Article 1 (3) of the Criminal Law in Time of War Act states that the term "war" includes civil war. Article 3 of that law provides that courts may exercise universal jurisdiction over violations of the laws and customs of war. The current Penal Code contains the impermissible defence of superior orders.[173] Crimes in the Penal Code are also subject to periods of limitation.[174]

[169] Constitution of the Kingdom of the Netherlands, 17 February 1983, amended 10 July 1995, Art. 90 (English translation in *Kingdom of the Netherlands, in* Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Ocean Publications, Inc.) (Release 96-1, February 1996, Frank Hendrickx trans.)).

[170] *Ibid.*, Art. 93.

[171] *Ibid.*, Art. 94.

[172] For references to Netherlands legislation adopted by the government-in-exile during the Second World War providing for extraterritorial jurisdiction over war crimes, see M. W. Mouton, *War Crimes and International Law: The Netherlands Share in the Detection and Punishment of War Criminals*, 1940-1946 Grotius Ann. Int'l Y. B. 38 (1948).

[173] Netherlands Penal Code, Art. 43 (1).

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

Netherlands is a party to Hague Convention IV, the Geneva Conventions and Protocols I and II. It has ratified the Rome Statute, but as of 1 September 2001 it had not yet enacted implementing legislation. It is expected that the implementing legislation for the Rome Statute will provide for universal jurisdiction over crimes in the Statute. There are a number of restrictions on the exercise of universal jurisdiction in the Netherlands. It appears that the principle of *ne bis in idem*, as incorporated in Dutch law, could preclude a retrial in the Netherlands if the same conduct had been the subject of a trial abroad.[175] It is not clear whether a national amnesty for a crime under international law would also bar a prosecution under this provision in the Netherlands. The Court of Appeals of Amsterdam declined to recognize the official immunity of a former head of state as a bar to prosecution for crimes against humanity in the *Bouterse* case in November 2000.[176] It is possible that other official immunities implicitly recognized in Article 8 of the Penal Code will be read to bar prosecutions in the Netherlands for war crimes and other crimes under international law, but it has not been possible to locate any jurisprudence on this matter.[177]

(2) Criminal investigation. A Special Criminal Court in 1949 recognized that under customary international law, national courts may exercise universal jurisdiction over war crimes:

> "There is a rule of customary international law by which those who violate the rules of war can be punished by those into whose hands they have fallen (the so-called theory of detention). This rule has the same universality as that applied internationally in the rule which treats pirates as enemies of mankind."[178]

On 11 November 1997, the *Hoge Raad* (Netherlands Supreme Court) held that a military - rather than a civilian - court could exercise universal jurisdiction to try Darko Kne_evi_ for war crimes, including violations of common Article 3 and grave breaches of the Geneva Conventions, committed in the former Yugoslavia.[179] Subsequently, the special investigation unit for crimes in the former Yugoslavia was reorganized into an investigation unit for war crimes and other crimes under international law. It reportedly had identified at least 85 persons from the former Yugoslavia and other countries as potential suspects.[180]

· ***New Zealand:*** New Zealand law permits courts to exercise universal jurisdiction over all war crimes recognized in the Rome Statute.

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[175] Criminal Code, Art. 68, para. 2. That paragraph provides that a prosecution in the Netherlands for conduct abroad is barred if the person concerned has been acquitted for that conduct, the charges were dismissed by the prosecution or the person was convicted and served the full sentence, was pardoned or the sentence was prescribed by a statute of limitations.

[176] *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, para. 4.2 (unofficial English translation *obtainable from* http://www.icj.org/objectives/decision.htm).

[177] Criminal Code, Art. 8. That article provides that "[t]he applicability of articles 2-7 is limited by the exceptions recognized in international law." For a discussion of the limits of official immunity under international law, see Chapter Fourteen, Section VIII.

[178] In re *Rohrig*, Special Criminal Court, Amsterdam, 24 December 1949, 17 Int'l L. Rep. 393.

[179] *Prosecution v. Darko Kne_evi_, Hoge Raad der Nederlanden, Strafkamer, Beschikking* nr. 3717, 11 November 1997 (Supreme Court of the Netherlands, Criminal Division, 11 November 1997) (reported in *Nederlandse Jurisprudentie* 1998, 463 (annotated by Professor t'Hart) and in *Militair Rechtelijk Tijdschrift* 1998, 198 (with annotations by H. van der Wilt); English translation by Peter Kell in 1 Y.B. Int'l Hum. L. 604 (1998), with a case note by Nico Keijzer at 1 Y. B. Int'l Hum. L. 483 (1998)). Reportedly, the accused fled the country before the Supreme Court decision.

[180] *See* Reydams, *supra*, n. 168.

Article 8 of the International Crimes and International Criminal Court Act 2000 provides for universal jurisdiction over war crimes within the jurisdiction of the International Criminal Court under Article 8 of the Rome Statute, occurring on or after 1 October 2000, the effective date of that part of the act which included Section 8, or, over acts which would have constituted crimes in New Zealand at the time they occurred had it taken place in New Zealand.[181] Section 8 (3) expressly provides that the accused does not need to be present in New Zealand at the time he or she is charged. A person may be charged and arrested without the consent by a political official, the Attorney-General, to a prosecution, but the consent of the Attorney-General is required for a prosecution.[182] Previously, Article 3 (1) of the New Zealand Geneva Conventions Amendment Act 1987, gave courts universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I, and that Act remains unaffected by the implementing legislation for the Rome Statute.[183]

New Zealand is a party to the Geneva Conventions and Protocols I and II. It has ratified the Rome Statute.

· ***Nicaragua:*** Nicaraguan courts may exercise custodial universal jurisdiction over war crimes in any kind of conflict.

Article 16 (3) (f) of the Penal Code (*Código Penal*) of Nicaragua of 1974 provides for custodial universal jurisdiction over certain crimes listed in Title XIV of Book II.[184] These crimes

[181] International Crimes and International Criminal Court Act 2000, § 8 (Jurisdiction in respect of international crimes) provides:

"(1) Proceedings may be brought for an offence---

(a) against section 9 or section 10, if the act constituting the offence charged is alleged to have occurred---

(i) on or after the commencement of this section; or

(ii) on or after the applicable date but before the commencement of this section; and would have been an offence under the law of New Zealand in force at the time the act occurred, had it occurred in New Zealand; and

(b) against section 11, if the act constituting the offence charged is alleged to have occurred on or after the commencement of this section; and

(c) against section 9 or section 10 or section 11 regardless of---

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

(ii) whether or not any act forming part of the offence occurred in New Zealand; or

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

[182] Section 13 (Attorney-General's consent to prosecutions required) states:

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

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

[183] Section 3 of the Geneva Conventions Act 1958 provided universal jurisdiction over grave breaches of the Geneva Conventions. Section 3 (1) of the Geneva Conventions Amendment Act 1987 extended the scope of universal jurisdiction to include grave breaches of Protocol I: Section 3 (3) provides that Section 3 "applies to persons regardless of nationality or citizenship". Section 3 (5) requires leave of the Attorney-General to commence a prosecution.

[184] Article 16 (3) (f) of the Penal Code (*Decreto Ejecutivo 297 gaceta 96 del 3-5-1974*) provides that "Nicaraguan criminal law is applicable: . . . (3) To those who commit any of the following offences outside of Nicaraguan territory: . . . (f) Piracy, slave-trafficking, causing the destruction of and damage to international roads or means of transport, racial discrimination and the offences described in Chapter I, Title XIV, Book II of this Code." (*"La Ley Penal de Nicaragua es aplicable: . . . 3° A los que fuera de su territorio hubieren cometido alguno de los*

expressly include war crimes during an international or non-international armed conflict.[185]

A 1999 proposal to reform the Penal Code would simplify and expand the scope of Article 16. The new Article 16 (1) (Principle of universality) would provide:

> "(1) The criminal laws of Nicaragua will also apply to those Nicaraguans and foreigners who have committed outside the national territory any of the following crimes:
> . . . .
> g. crimes against the international order;
> h. crimes against international humanitarian law;
> . . . .
> p. whatever other crime that, according to treaties and international conventions, must be prosecuted in Nicaragua, in accordance with constitutional norms.

delitos siguientes: . . . f) Los de piratería, comercio de esclavos, destrucción y deterioro de vías o medios de comunicaciones internacionales, discriminación racial y los de que tratan el Capítulo Unico del Título XIV del Libro II de este Código.") A final, unlettered paragraph states: "With regard to the last two paragraphs [(e) and (f)], it is essential for the accused to reach, by whatever means available, the territory of the Republic." (*"En los dos últimos incisos es condición indispensable que el agente venga por cualquier medio al territorio de la República."*) (English translations of the current Penal Code by Amnesty International).

[185] Article 551 in Chapter 1, Title XIV of Book II of the Penal Code ("A person commits an offence against international order and shall be liable to imprisonment for a period of ten to twenty years when he, in the course of an international or civil war, commits serious acts which breach international conventions on the use of weapons of war, the treatment of prisoners and other standards relating to war.") The original Spanish text provides:

> *"Comete delito contra el Orden Internacional, el que durante una guerra internacional o civil cometiere actos graves violatorios de los convenios internacionales sobre el empleo de armas bélicas, tratamiento de prisioneros y demás normas sobre la guerra y será penado con presidio de 10 a 20 años.*
> *Si los actos no tuvieren consecuencias graves en las personas o poblaciones afectadas, la pena será de 2 a 10 años de prisión."*

(2) (...)." [186]

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

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

Section 3 (1) - (2) of the Nigeria Geneva Conventions Act provides national courts with universal jurisdiction over grave breaches of the Geneva Conventions. That section provides in part:

"(1) If, whether in or outside the Federal Republic of Nigeria, any person, whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the Conventions as is referred to in the articles of the Conventions set out in the First Schedule to this Act, that is to say -
(a) article 50 of the First Geneva Convention, 1949;
(b) article 51 of the Second Geneva Convention, 1949;
(c) article 130 of the Third Geneva Convention, 1949;
(d) article 147 of the Fourth Geneva Convention, 1949;
he shall, on conviction thereof -
(i) in the case of such a grave breach as aforesaid involving the wilful killing of a person protected by the Convention in question, be sentenced to death, and (ii) in the case of any other such grave breach, be liable to imprisonment for a term not exceeding fourteen years.

[186] Proposal concerning the Penal Code of the Republic of Nicaragua, Article 16 (Principle of universality) (English translation of the proposal by Amnesty International). The relevant part of the original Spanish text of the proposal reads:

"1. Las leyes penales nicaragüenses serán también aplicables a los nicaragüenses o extranjeros que hayan cometido fuera del territorio nacional algunos de los siguientes delitos:
. . . .
g. delitos contra el orden internacional;
h. deliltos contra el derecho internacional humanitario;
. . . .
p. cualquier otro delito que, según los tratados o convenios internacionales, deba ser perseguido en Nicaragua, de acuerdo con las normas constitucionales.
2. Para todos los supestos expresados en este artículo rige el literal c contenido en el artículo 14."

Proyecto de Código Penal de la República de Nicaragua, Comisión de Justicia de la Asamblea Nacional, 24 de noviembre de 1999, Artículo 16 (Principio de universalidad). The original Spanish text is *obtainable from* http://www.asamblea.gob.ni/codigopenal.htm). According to the Legal Information Office of the Assembly of Nicaragua (*Dirección de Información Legislativa*) the proposal of new Penal Code is going through Assembly approval Article by Article as to September 2001.

> (2) A person may be proceeded against, tried and sentenced in the Federal Capital for an offence under this section committed outside Nigeria as if the offence had been committed in the Federal Capital, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in the Federal Capital."[187]

Section 3 (3) provides that questions concerning whether a Convention applies to the circumstances of a particular case are to be determined in a certificate by the defence minister.

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

· ***Norway:*** Norwegian courts have been able to exercise universal jurisdiction over ordinary crimes since 1902 (see Chapter Two, Section II.A). Three legislative provisions have provided or now provide for universal jurisdiction over conduct amounting to war crimes under Norwegian law.

First, Article 1 of the Law for the Punishment of Foreign War Criminals of 13 December 1946 provides for the prosecution of violations of the laws and customs of war, not only violations by enemy citizens or other aliens working for the enemy, but also acts committed abroad to the prejudice of Allied interests or equivalent interests defined in a Royal Decree.[188] This law remains in effect, although it has been amended an number of times, including a 1979 amendment to abolish the death penalty. According to the Norwegian Supreme Court, the Royal Decree "incorporates into Norwegian Law the provisions of International Law regarding war crimes as an integral part of the national legislation as far as it was considered necessary by the Legislature".[189]

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[187] Geneva Conventions Act, Laws of the Federation of Nigeria 1990, ch. 162 § 3 (1) - (2) (formerly the Geneva Conventions Ordinance, 1960). Previously, the United Kingdom's Geneva Conventions Act 1957 applied to Nigeria under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below), at least before the Federation of Nigeria became independent on 1 October 1960.

[188] Article 1 of the law provides that

> "acts which, by reason of their character, come within the scope of Norwegian criminal legislation are punishable according to Norwegian law, if they were committed in violation of the laws and customs of war by enemy citizens or other aliens who were in enemy service or under enemy orders, and if the said acts were committed in Norway or were directed against Norwegian interests . . . The above provision also applies to acts committed abroad to the prejudice of Allied legal interests or to interests which, as laid down by Royal Proclamation, are deemed to be equivalent thereto." (English translation in L.C. Green, *The maxim* nullum crimen sine lege *and the Eichmann Trial*, 38 Brit. Y.B. Int'l L. 457, 461 (1962)).

This law, which followed a provisional decree of 4 May 1945, increased the severity of sentences for war crimes compared to the punishments provided in the Military Penal Code of 1902 and was intended to apply to war crimes committed before 4 May 1945 during the Nazi occupation between 1940 and 1945.

[189] *Public Prosecutor v. Klinge*, Case No. 113, Norway, Sup. Ct., 27 February 1946 (Skau, J.), 1946 Annual Digest and Reports of Public International Law Cases 262, 263 (1951). Although the question of universal jurisdiction was not presented in the case, Judge Schjelderup, concurring with the plurality opinion of Judge Skau, stated that the accused had not been sentenced for "a violation of Norwegian Law in a narrow sense, but a violation of the laws and customs of war as accepted by universal custom" which were "universal rules of law . . .directly binding on the defendant". *Ibid.*, 264. The judgment in this case has been criticized by some Norwegian legal scholars as inconsistent with Section 97 of the Norwegian Constitution.

Second, Section 12 (3) of the Norwegian General Civil Penal Code of 1902, as amended 1998, which has some similarities to Swedish legislation (see below in this section), provides for universal jurisdiction over aliens domiciled in Norway for crimes that are also crimes in the place where they were committed.[190]

[190] Section 12 (3) (English translation by Norwegian Ministry of Foreign Affairs) states:

§ 12. Unless it is otherwise specially provided or accepted in an agreement with a foreign State, Norwegian criminal law shall be applicable to acts committed:

. . . .

3. abroad by any Norwegian national or any person domiciled in Norway when the act

a) is one of those dealt with in chapters 8, 9, 10, 11, 12, 14, 17, 18, 20, 23, 24, 25, 26 or 33 of this code or sections 135, 141, 142, 144, 169, 192 to 195, 197 to 199, 202, 203, 204 first paragraph litrae d, 222 to 225, 227 to 235, 238, 239, 242 to 245, 291, 292, 294 item 2, 317, 326 to 328, 330, last paragraph, 338, 367 to 370, or 423 and in any case when it

b) is a felony or misdemeanour against the Norwegian State or Norwegian state authority,

c) is also punishable according to the law of the country in which it is committed, or

d) is committed in relation to the EFTA Court of Justice and is included among those dealt with in section 163, cf. section 167 and section 165, of the present Act, or sections 205 to 207 of the Courts of Justice Act;

e) is punishable according to section 5 of the Act of 6 May 1994 No.10 relating to the implementation of the Chemical Weapons Convention;

f) should be punishable according to Article 113 of the UN Convention on the Law of the Sea of 10 December 1982 (injury of submarine cable or pipeline);

g) is punishable according to section 5 of the Act of 17 July 1998 No. 54 on the relating to the implementation of the Convention on the prohibition of the use, stockpiling production and transfer of antipersonnel mines and on their destruction, and

h) is punishable according to the Act of 15 December 1995 No. 74 on the prohibition of genital mutilation.

Second, Section 12 (4) of the General Civil Penal Code provides that unless it is otherwise specially provided or accepted in an agreement with a foreign State, Norwegian criminal law applies to acts committed abroad, by a foreigner when the act either constitutes one of a series of enumerated serious crimes or is a felony also punishable according to the law of the country in which it is committed, and the offender is resident in Norway or is staying therein.[191] Therefore, Norwegian courts would appear to have universal jurisdiction under Section 12 (4) over certain conduct constituting war crimes when they amount to specified ordinary crimes under Norwegian law or to felonies under Norwegian law, provided that the Norwegian felonies are also crimes under the law of the state where they were committed. The concept of "staying therein" does not specify the duration of the stay. According to two Norwegian legal experts, it is sufficient that a person be in Norway, so courts would have jurisdiction over persons in transit at an airport. Section 13 requires permission of the King in Council for prosecution pursuant to Section 12 (4).[192] Section 14 requires that the exercise of extraterritorial jurisdiction be consistent with international law.[193] Chapter 6 (Sections 66 to 76) provide for statutes of limitations with respect to the crimes in the Code; there are no exceptions in this chapter for conduct amounting to war crimes or other crimes under international law.

Section 1 of the General Civil Penal Code states that Part One (General Provisions), which includes Section 12 (4), applies to all criminal acts unless it is otherwise provided and subject to any limitation by treaty or international law generally. It is understood that this means that the General Civil Penal Code applies to the *Militaer Straffelov* (Military Penal Code) and Sections 9 and 11 of the (Military Penal Code) of 1902, No. 13 provide that the Military Penal Code applies

[191] Section 12 (4) (English translation by Norwegian Ministry of Foreign Affairs) states:

"§ 12. Unless it is otherwise specially provided or accepted in an agreement with a foreign State, Norwegian criminal law shall be applicable to acts committed:

. . . .

4. abroad, by a foreigner when the act either

a) is one of those dealt with in sections 83, 88, 89, 90, 91, 91 a, 93, 94, 98 to 104 a, 110 to 132, 148, 149, 150, 151 a, 152 first cf. second paragraph, 152 a, 152 b, 153 first to fourth paragraphs, 154, 159, 160, 161, 169, 174 to 178, 182 to 185, 187, 189, 190, 192 to195, 217, 220, 221, 222 to 225, 227 to 229, 231 to 235, 238, 239, 243, 244, 256, 258, 266 to 269, 271, 276, 291, 292, 324, 325, 328, 415 or 423 of this code or sections 1, 2, 3 or 5 of the Act relating to defence secrets,

b) is a felony also punishable according to the law of the country in which it is committed, and the offender is resident in the realm or is staying therein, or

c) is committed in relation to the EFTA Court of Justice and is included among those dealt with in section 163, cf. section 167 and section 165, of the present Act, or sections 205 to 207 of the Courts of Justice Act.

In cases in which the criminality of an act depends on or is influenced by any actual or intended effect, the act shall be regarded as committed also where such effect has occurred or is intended to be produced."

[192] Section 13 provides:

"In the cases dealt with in section 12, item 4, litrae a and b, a prosecution can only be instituted when the King so decides.

In the cases dealt with in section 12, item 4 b, a prosecution may not take place unless there is also power to impose a penalty according to the law of the country in which the act was committed. Nor may a more severe penalty be imposed than is authorized by the law of the said country.

The first and second paragraphs shall not apply when a criminal prosecution in this country takes place in accordance with a agreement with a foreign State concerning the transfer of criminal proceedings.

In every case in which a person who has been punished abroad is convicted of the same offence in this country, the penalty already served shall as far as possible be deducted from the sentence imposed here."

The reference to the King is interpreted to mean the King in Council, which means that the cabinet must approve a prosecution under Section 12 (4).

[193] Section 14 provides that "[t]he application of the above provisions shall be limited by the generally acknowledged exceptions of international law."

to crimes committed abroad. Article 108 of the Military Penal Code states that violations of all provisions of the Geneva Conventions (including common Article 3) and Protocols I and II protecting people and property are criminal under Norwegian law.[194] However, it appears that the Military Penal Code may provide that it applies only to persons who have enlisted in the Norwegian armed forces.

Norway is a party to Hague Convention IV, the Geneva Conventions, Protocols I and II and the Rome Statute.

· ***Panama:*** Panamanian courts may exercise custodial universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I, as well as other violations of these treaties, such as violations of common Article 3 of the Geneva Conventions, violations of Protocol II and violations of the 1907 Hague Regulations. The legislative grant of jurisdiction is buttressed by Article 4 of the Constitution, which provides that "[t]he Republic of Panama abides by the rules of International Law."[195]

Article 10 of the Panamanian Penal Code of 1982 (*Código Penal*) provides for custodial universal jurisdiction over crimes included in treaties ratified by Panama:

> "Regardless of the legal requirements in force in the place where the punishable act is committed and regardless of the nationality of the accused, Panamanian criminal law shall be applicable to those who commit punishable acts covered under international treaties which have been ratified by the Republic of Panama.

[194] Article 108 of the *Militaer Straffelov* (Military Penal Code) of 22 May 1902, No. 13, as incorporated by the law of 26 November 1954, No. 6, and amended by the law of 12 June 1981, No. 65 (it has not been possible to locate a copy of this code). *See* Morten Rund in *Anders Bratholm og Magnus Matingsdal, Straffeloven med kommentarer, Første Del. Alminnelige Bestemmelser* 37-44 (Oslo: Universitetsforlaget 1991).

[195] The Political Constitution of Panama, 11 October 1972, as amended 23 August 1994, Art. 4 (English translation in *Republic of Panama, in* Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc.) (Release 95-8, December 1995, Jorge Fábrega P. trans.)

> In order for the offences referred to in the preceding paragraph to be prosecuted and punished in Panama, it is necessary for the accused to be present on national territory."[196]

It is possible that this provision is broad enough to permit Panama to request extradition for the purpose of prosecution, but it has not been possible to locate any commentary on Article 10. Panama has ratified Hague Convention IV and the Geneva Conventions and Protocols I and II. It has not signed the Rome Statute or ratified it as of 1 September 2001. It is not known if Panama has defined war crimes as crimes under national law, so prosecutions may have to be for ordinary crimes, such as murder, abduction, assault or rape.

· ***Papua New Guinea:*** The courts of Papua New Guinea have been able to exercise universal jurisdiction over grave breaches of the Geneva Convention abroad since 1959.

Section 7 (2) of the Papua New Guinea Geneva Conventions Act 1967 provides national courts with universal jurisdiction over grave breaches of the Geneva Conventions. That section provides:

> "Any person who, in Papua New Guinea or elsewhere, commits a grave breach of any of the Geneva Conventions is guilty of an offence."[197]

[196] Penal Code, Art. 10 (English translation by Amnesty International). The original text in Spanish reads:

"Independientemente de las disposiciones vigentes en el lugar de la comisión del hecho punible y de la nacionalidad del imputado, se aplicará la ley penal panameña a quienes cometan hechos punibles previstos en los tratados internacionales ratificados por la República de Panamá.

Para que los delitos a que se refiere el párrafo anterior sean susceptibles de enjuiciamiento y sancionados en Panamá se requiere que el imputado se encuentre en el territorio de la República."
Código Penal, Artículo 10. (Ley 18 de 22 de septiembre de 1982. G.O. No.19, 667 de 6 de octubre de 1982)

[197] Geneva Conventions Act, 1967, § 7 (2).

Section 7 (3) provides that Section 7 "applies to persons regardless of their nationality or citizenship".[198] Grave breaches are listed in Section 7 (1), which refers to four schedules containing the texts of the Geneva Conventions.[199] The act does not specify who decides to institute proceedings under the act. However, a certificate concerning the application of the Geneva Conventions to a situation by a minister is evidence on that matter.[200] The act does not contain a statute of limitations, but it is not known if a statute of limitations elsewhere in national law would apply to grave breaches.

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

· ***Paraguay:*** There are two separate provisions which would permit Paraguayan courts to exercise universal jurisdiction over war crimes.

First, Article 8 (Acts against universally protected interests committed in a foreign country) of the *Código Penal de la República del Paraguay, Ley No. 1.160, Edición Especial* (Penal Code of the Republic of Paraguay, Law No. 1,160, Special Edition), adopted 26 November 1997 provides national courts with custodial universal jurisdiction with respect to crimes that the state is obliged under an international treaty to prosecute when it occurs outside the territory. Article 8 (1) (7) provides:

> "Paraguayan penal law shall also be applied to the following acts committed in a foreign country:
> . . . .
> (7) other acts that according to an international treaty, the Paraguayan state is obliged to [prosecute], even if they were committed in a foreign country." [201]

Article 8 (2) provides that "Paraguayan criminal law shall only be applicable if the perpetrator has entered national territory."[202] Article 8 (3) provides that Paraguayan criminal law

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[198] *Ibid.*, § 7 (3). Section 7 (2) and (3) is strengthened by Section 2, which states that "[t]his Act applies within and outside Papua New Guinea." In addition, Section 6 provides that, "[s]ubject to this Act and to any other law, effect shall be given to the Geneva Conventions.".

[199] *Ibid.*, § 7 (1).

[200] *Ibid.*, § 8. In contrast to many similar provisions in other Geneva Conventions Acts, the minister's certificate is simply evidence, without any particular weight ("Where in proceedings under this Part a question arises under Article 2 of any of the Conventions (which relates to the circumstances in which the respective Convention applies), a certificate under the hand of the Minister certifying as to any matter relevant to that question is evidence of that matter."). The minister is not specified; presumably it is the minister responsible for foreign affairs.

[201] Penal Code, Art. 8 (7) (the English translation of Article 8 by ICRC is *obtainable from* http://www.icrc.org/ihl-nat). An English translation is also available in 1 Y.B. Int'l Hum. L. 621 (1998). The original text in Spanish reads:

> *"Hechos punibles realizados en el extranjero contra bienes jurídicos con protección universal. . . .7. Hechos punibles que la Rca. en virtud de un tratado internacional vigente está obligada a perseguir aún si fuera realizada en el extranjero."*

Código Penal, Art. 8 (7) (the Spanish original is *obtainable from* http://www.unifr.ch/derechopenal).

[202] Penal Code, Art. 8 (2) (English translation by Amnesty International). The original text in Spanish reads:

"La ley penal paraguaya sólo se aplicará cuando el autor haya ingresado al terrritorio nacional". Código Penal, Art. 8 (2).

is not applicable to conduct abroad if a foreign court has acquitted the suspect and no further appeal is possible or a prison sentence has been served or extinguished or a pardon granted.[203]

[203] Article 8 (3) (English translation by Amnesty International) provides:
"Punishment shall not apply under Paraguayan criminal law if a foreign court:
(1) has definitively acquitted the perpetrator and no further appeal is possible; or
(2) has sentenced the perpetrator to a term of imprisonment and the sentence has been served or extinguished or a pardon has been granted."
The original text in Spanish reads:
" Queda excluida la punición en virtud de la ley penal paraguaya, cuando un tribunal extranjero:
1). haya absuelto al autor por sentencia firme; o
2. haya condenado al autor a una pena o medida privativa de libertad, y la condena haya sido ejecutada, prescrita o indultada."

Paraguay is a party to the Geneva Conventions and Protocols I and II and it has signed Hague Convention IV, but it had not yet ratified it as of 1 September 2001. It has ratified the Rome Statute, but had not yet enacted implementing legislation as of 1 September 2001. Article 320 provides that a number of war crimes are crimes under national law.[204]

Second, Article 9 (Other acts carried out abroad) of the Penal Code, Law No. 1,160, provides for universal jurisdiction over other acts carried out abroad. In such cases, the penalty may not be more severe than the penalty in the law of the territorial state. Article 9 states:

"(1) Paraguayan criminal law shall apply to other acts carried out abroad only when:
(1) the act constitutes a criminal offence in the place where it is carried out; and
(2) at the time the act is carried out, the perpetrator
(a) has Paraguayan nationality or acquires it after the act is carried out; or
(b) not having Paraguayan nationality but being present on Paraguayan territory, has his extradition refused despite the fact that, given the nature of the act, it may have been legally admissible;
The provisions of this paragraph shall also apply when the act is not punishable in the place where it was carried out.
(2) In this respect, the provisions of article 5, paragraph 2 shall also apply. [205]
(3) The punishment shall not be more severe than that applicable under the legislation in force in the place where the act was carried out."[206]

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[204] Penal Code, Art. 320. The original text in Spanish reads:
"El que violando las normas del derecho internacional en tiempo de guerra, de conflicto armado o durante una ocupación militar, realizara en la población civil, en heridos, enfermos o prisioneros de guerra, actos de:
homicidio o lesiones graves;
tratamientos inhumanos, incluyendo la sujeción a experimentos médicos o científicos;
deportación;
trabajos forzados;
privación de libertad;
coacción para servir en las fuerzas armadas enemigas; y
saqueo de la propiedad privada y su deliberada destrucción, en especial de bienes patrimoniales de gran valor económico o cultural,
será castigado con pena privativa de libertad no menor de cinco años."
Artículo 320 of the Penal Code.- Crímenes de guerra (the original text in Spanish is *obtainable from*: http://www.itacom.com.py/ministerio_publico/codigo_penal/index.html).

[205] Penal Code, Art.5.2: "If there is a change in the penalty during the period in which the criminal act is carried out, the law in force at the end of this period shall apply."
The original Spanish text reads:
"Cuando cambie la sanción durante la realización del hecho punible, se aplicará la ley vigente al final del mismo."

[206] Penal Code, Art. 9 . The original Spanish text reads:
"1) Se aplicará la ley penal paraguaya a los demás hechos realizados en el extranjero sólo cuando:
1. en el lugar de su realización, el hecho se halle penalmente sancionado; y
2. el autor, al tiempo de la realización del hecho,
a. haya tenido nacionalidad paraguaya o la hubiera adquirido después de la realización del mismo; o
b. careciendo de nacionalidad, se encontrara en el territorio nacional y su extradición hubiera sido rechazada, a pesar de que ella, en virtud de la naturaleza del hecho, hubiera sido legalmente admisible.
Lo dispuesto en este inciso se aplicará también cuando en el lugar de la realización del hecho no exista poder punitivo.
2) Se aplicará también a este respecto lo dispuesto en el artículo 5, inciso 2.
3) La sanción no podrá ser mayor que la prevista en la legislación vigente en el lugar de la realización del

hecho."
Código Penal, Art. 9.

Although Paraguay is not a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Article 5 of the Paraguayan Constitution of 1992 provides that genocide, torture as well as politically motivated enforced disappearances, kidnappings and homicide are not subject to statutes of limitation.[207] Therefore, to the extent that war crimes also constitute such crimes, they would not be subject to statutes of limitation. It is not known whether statutes of limitation in national law would apply to war crimes in other cases.

· ***Peru:*** Peruvian courts may exercise universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I. The legislative grant of jurisdiction is buttressed by Article 55 of the Constitution, which provides that "[t]reaties signed by the State and in force are part of national law."[208]

Article 2 (5) of the *Código Penal* (Penal Code) provides that courts have universal jurisdiction over crimes committed abroad which Peru is obliged to punish under the terms of international treaties. There is no express requirement in this article that the suspect be in the territory in order to open an investigation. Article 2 (5) states: "Peruvian law shall be applicable to any offence committed abroad when: . . . (5) it is an offence which Peru is obliged to punish under the terms of international treaties.".[209] Article 3 provides that Peruvian law can be applied when a request for extradition has not been honoured, but it does not appear to impose a requirement that a request for extradition have been received and refused before a court may exercise universal jurisdiction pursuant to Article 2 (5).[210]

However, the scope of these provisions is limited by a number of conditions. Article 4 (Exceptions to the Principle of Territoriality) of the Penal Code provides that courts may not exercise jurisdiction when the criminal proceedings have been terminated by legislation, the crime is a political one or linked to one, the accused has been acquitted or served a sentence for the crime or prosecution is precluded by a statute of limitations or a pardon.[211]

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[207] Article 5 of the Constitution of Paraguay - DE LA TORTURA Y DE OTROS DELITOS:
"Nadie será sometido a torturas ni a penas o tratos crueles, inhumanos o degradantes.
El genocidio y la tortura, así como la desaparición forzosa de personas, el secuestro y el homicidio por razones políticas son imprescriptibles."
Obtainable from: http://www.camdip.gov.py/Inicio/Legislacion/Constitucion/ParteI/partei.html

[208] Constitution of 29 December 1993, Art. 55 (English translation in peter B. Heller, *Peru, in* Gisbert H. Flanz, *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc.) (Release 95-1, January 1995).

[209] Penal Code, Art. 2 (5) (English translation by Amnesty International). The original Spanish text reads:
"La Ley Penal peruana se aplica a todo delito cometido en el extranjero, cuando:. . . 5. El Perú está obligado a reprimir conforme a tratados internacionales."
Código Penal, Art. 2 (5).

[210] Penal Code, Art. 3 ("Peruvian criminal law can be applied in cases where, following a request for extradition, the perpetrator has not been handed over to the relevant authorities of another State."). The original Spanish text reads: *"La Ley Penal peruana podrá aplicarse cuando, solicitada la extradición, no se entregue al agente a la autoridad competente de un Estado extrangero."* (Original Spanish text obtainable from http://www.unifr.ch/derechopenal).

[211] Penal Code, Art. 4 (Exceptions to the Principle of Extraterritoriality) (adopted by Legislative Decree No. 635, promulgated 3 March 1991, published 8 April 1991). Article 4 states:
"The provisions contained in Article 2, paragraphs 2, 3, 4 and 5 do not apply
1. When the criminal proceedings have been terminated in accordance with another law;
2. When it concerns political crimes or acts connected with them;
3. When the accused has been acquitted abroad or a convicted person has served the sentence or it has been prescribed or remitted.
If the person concerned has not completely served the sentence imposed, the proceedings can be renewed in

the courts of the Republic, but the part of the sentence served will be taken into account."

The original Spanish text reads:

"Las disposiciones contenidas en el Artículo 2º, incisos 2, 3, 4 y 5, no se aplican:

1. Cuando se ha extinguido la acción penal conforme a una u otra legislación;

2. Cuando se trata de delitos políticos o hechos conexos con ellos; y,

3. Cuando el procesado ha sido absuelto en el extranjero o el condenado ha cumplido la pena o ésta se halla prescrita o remitida.

Si el agente no ha cumplido totalmente la pena impuesta, puede renovarse el proceso ante los tribunales de la República, pero se computará la parte de la pena cumplida."

(Código Penal, Decreto Legislativo Nº 635, Promulgado : 03.04.91, Publicado : 08.04.91. Artículo 4. -Excepciones al Principio de Extraterritorialidad.)

Peru has signed Hague Convention IV, but has not yet ratified it, and it is a party to the Geneva Conventions and Protocol I and II. It has signed the Rome Statute and announced that it intended to ratify it in 2001. It is not known if Peru has defined war crimes as crimes under national law, so a prosecution for grave breaches of the Geneva Conventions or other war crimes may have to be brought for ordinary crimes, such as murder, abduction, assault or rape.

· ***Philippines:*** It appears that Philippine courts have been able to exercise universal jurisdiction over conduct abroad amounting to war crimes when it also constitutes an ordinary crime under national law, such as murder, kidnapping, assault or rape, at least since 1935.

Generally accepted principles of international law are part of the law of the Philippines. Section 2 of Article II (Declaration of Principles and State Policies) of the current Constitution of 1987 states:

> "The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations."[212]

This text is the same as that of Article 2 (3) of the Constitution of 1935, which provided that the Philippines "adopts the generally accepted principles of international law as part of the law of the nation".[213] Generally accepted principles of international law, as this legal memorandum confirms, include universal jurisdiction over war crimes and other crimes under international law.

[212] Constitution of the Philippines of 1987, Art. II, § 2 (*obtainable from* http://memory.loc.gov/law/GLINv1/GLIN.htm).

[213] Constitution of 1935, Art. 2 § 3, as quoted in *Kuroda v. Jalandoni*, 83 Phil. 171, 177 (Sup.Ct. 1949). This section differed from Art. II, § 2 of the 1987 Constitution in that it used "the law of the nation" instead of the current "the law of the land" and it did not include the current phrase "and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations". Even before the adoption of the 1935 Constitution, the Supreme Court of the Philippine Islands had stated that Philippine courts could exercise universal jurisdiction over the crime of piracy pursuant to the Penal Code of Spain, continued in force after the United States took over the Philippine Islands, since

> "[p]iracy is a crime not against any particular state but against all mankind. It may be punished in the competent tribunal of any country where the offender may be found or into which he may be carried. The jurisdiction of piracy unlike all other crimes has no territorial limits. As it is against all so may it be punished by all. Nor does it matter that the crime was committed within the jurisdictional 3-mile limit of a foreign state."

People v. Lol-Lo and Saraw, United States, Supreme Court of the Philippine Islands, 27 February 1922, Ann. Dig. 164, 165 (1932).

The Philippine Supreme Court has given this concept a broad reading in the *Kuroda* case more than half a century ago. In that case, the Supreme Court upheld the constitutionality under Article 2 (3) of the Constitution of 1935 of the exercise of territorial jurisdiction over the former Commander in Chief of the Japanese Imperial Forces in the Philippines between 1943 and 1944 who had been charged with having unlawfully disregarded and failed "to discharge his duties as such commander to control the operations of members of his command, permitting them to commit brutal atrocities and other high crimes against noncombatant civilians and prisoners of the Imperial Japanese Forces, in violation of the laws and customs of war".[214] The commander had been charged by a Military Commission convened by the Chief of Staff of the Armed Forces of the Philippines, pursuant to Executive Order No. 68, which established a National War Crimes Office and prescribed rules and regulations governing the trial of persons accused of war crimes.[215]

The Supreme Court stated:

> "In accordance with the generally accepted principles of international law of the present day, including the Hague Convention and significant precedents of international jurisprudence established by the United Nations, all those persons, military or civilian, who have been guilty of planning, preparing or waging a war of aggression and of the commission of crimes and offences consequent thereto, in violation of the laws and customs of war, of humanity and civilization, are held accountable therefor. Consequently, in the present promulgation and enforcement of Executive Order No. 68, the President of the Philippines has acted in conformity with the generally accepted principles and policies of international law which are part of our Constitution."[216]

The Supreme Court expressly rejected the contention that the military commission had no jurisdiction to try the commander for acts committed in violation of the Hague Convention of 1907 and the 1929 Geneva Convention relative to the Treatment of Prisoners of War because the Philippines had not signed the first and had only signed the latter in 1929. It explained:

> "It cannot be denied that the rules and regulations form part of and are wholly based on the generally accepted principles of international law . . . . Such rules and principles, therefore, form part of the law of our nation even if the Philippines was not a signatory to the conventions embodying them, for our Constitutions has bee deliberately general and

[214] *Kuroda, supra 213,* 176. It appears that war crimes had not been expressly codified as crimes under national law.

[215] The introduction to the executive order stated that the National War Crimes Office "was charged with the responsibility of accomplishing the speedy trial of all Japanese accused of war crimes committed in the Philippines" and was directed "to collect from all available sources evidence of war crimes in the Philippines". Executive Order No. 68 (Establishing a National War Crimes Office and Prescribing Rules and Regulations Governing the Trial of Accused War Criminals) (*quoted in Kuroda, supra n.*213,181 (Perfecto, J., dissenting). However, the introduction did not expressly state that the military commissions were limited to crimes committed in the Philippines and the jurisdictional provisions of the rules and regulations in the executive order governing trials do not limit the jurisdiction of military commissions to crimes committed in the territory of the Philippines.

Indeed, Rule II (a) states that military commissions appointed pursuant to the executive order "shall have jurisdiction over all persons charged with war crimes who are in the custody of the convening authority at the time of trial". *Ibid.* Moreover, Rule II (b) states that these military commissions shall have jurisdiction over all offences including, but not limited to, the following: . . . (2) Violations of the laws or customs of war. Such violations shall include, but not be limited to . . . murder or ill-treatment of prisoners of war or internees or persons on the seas or elsewhere . . . ." *Ibid.*

[216] *Kuroda, supra n.213,* 177 (citing Ex parte *Quirin,* 317 U.S. 1 (1942). The Supreme Court gave the Constitution a broad reading by holding that the principles of international law were not just part of "the law of the land", but also part of the Constitution itself, and, therefore, superior to legislation.

extensive in its scope and is not confined to the recognition of rules and principles of international law as contained in treaties to which our government may have been or shall be a signatory."[217]

[217] *Ibid.*, 178.

Although the Supreme Court's decision expressly discussed the application of substantive principles of international law, the leading commentary on international law as part of the law of the Philippines has explained that this decision should be given a broad reading.[218] Thus, in line with the

[218] The commentary explains:

"The incorporation clause... recognizes customary norms of international law and general principles of international law as "generally accepted principles of international law" and declares them as part of Philippine law. [p. 41]

. . . .

As a constitutional mandate, the Incorporation Clause assumes the existence of international law which binds the Philippines as a State. It thus becomes a method by which the Philippines can carry out its obligations under international law within its territorial jurisdiction. . . . Its effect is that is that international law as Philippine law creates legal rights and obligations within Philippine territory and regulates the conduct of government officials and organs as well as the relations of individual citizens with each other and with the government. In this context, questions of international law may be submitted to Philippine courts for decision. The outcome of litigation, however, does not affect the binding nature of international law in the relation to the Philippines with other States and other international persons. . . . .

The scope of the incorporation clause is defined [p. 44] by reference to "generally accepted principles of international law."

. . . .

Here, it is important to keep in mind the distinction between norms of general character and particular rules. Only general international law is to be understood as forming "part of the law of the land." Thus, deemed incorporated into Philippine law by virtue of the incorporation clause are (1) customary international norms or international custom, and (2) general principles of law. [p. 45]

. . . .

Once the incorporation clause is invoked in an appropriate case or proceeding in the Philippines and a norm is qualified as one of the "generally accepted principles of international law," it becomes applicable without the need of proving it as part of Philippine law. The Incorporation Clause dispenses with that burden of proof. [p. 47]

. . . .

Its [the court's] role is to identify what particular norm or principle of international law belongs to the category of general international law, in relation to a specific claim before the court in which that particular norm is to be applied as domestic law. . . . The Incorporation Clause itself requires that for norms of international law to form part of Philippine law they must be of a general character and that they must be so characterized by the international community. Philippine courts therefore are under duty to determine that such norms have assumed that character in the international legal order, and not in their arbitrary or whimsical opinion. . . .

Kuroda doctrine, generally accepted jurisdictional principles of international law - such as universal jurisdiction - must be considered as part of the law of the Philippines. Thus, even though the Revised Penal Code contains only a limited express grant of universal jurisdiction to piracy and to mutiny on the high seas, under the *Kuroda* doctrine, national courts would still be able to exercise universal jurisdiction over other crimes when such jurisdiction was consistent with generally accepted principles of international law.[219]

> It is by reason of the Constitution through the Incorporation Clause that general norms of international law have become part of domestic law. The court deals with the question of identification of particular norms or principles on the premise that they are already part of Philippine law. Thus, the court determines which norm of domestic law is to be applied as derived from general international law. . . . In other words, the judicial act is not constitutive of what forms part of domestic law. It is merely declaratory of what already forms part of domestic law as derived from general international law. [p. 48]

Merlin M. Magallona, *An Introduction to International Law in Relation to Philippine Law* 41-48 (Quezon City: Merlin M. Malaona 1999). In addition to the *Kuroda* case, the commentary cited seven cases in which human rights recognized in the Universal Declaration of Human Rights were defined as part of Philippine law derived from general principles of law.

[219] Revised Penal Code Annotated (Manila: National Bookstore Inc. Publishers 12th rev. ed. 1993, with 1994 Supp.), Art. 2. That article expressly provides only for territorial, protective and active personality jurisdiction and universal jurisdiction over piracy and mutiny on the high seas, but nothing in that article prohibits courts from exercising other forms of extraterritorial jurisdiction permitted under the Constitution:

> "Except as provided in the treaties and laws of preferential application, the provisions of this Code shall be enforced not only within the Philippine Archipelago, including its atmosphere, its interior waters and maritime zone, but also outside of its jurisdiction, against those who:
> 1. Should commit an offense while on a Philippine ship or airship;
> 2. Should forge or counterfeit any coin or currency note of the Philippine Islands or obligations and securities issued by the Government of the Philippine Islands;
> 3. Should be liable for acts connected with the introduction into these Islands of the obligations and securities mentioned in the preceding number;
> 4. While being public officers or employees, should commit an offense in the exercise of their functions; or
> 5. Should commit any of the crimes against national security and the law of nations, defined in Title One of Book Two of this Code."

Book Two (Crimes and Penalties), Title One (Crimes against National Security and the Law of Nations) of the Revised Code lists a number of crimes against national security (Articles 114 to 121) and also piracy and mutiny on the high seas (Articles 122 to 123).

This broad interpretation is also buttressed by the 1938 Philippine Manual of Courts-Martial, Armed Forces of the Philippines.[220] The Manual of Courts-Martial implements the 1938 Articles of War, which were modelled on the 1928 United States Articles of War, which, until 1950 when it was replaced by the Uniform Military Code of Justice, with the same jurisdictional provisions, authorized courts-martial (military courts following regular rules of procedure) to exercise universal jurisdiction over war crimes and recognized the continuing jurisdiction of military commissions (*ad hoc* bodies with the powers of courts free to determine their own procedure), which had universal jurisdiction over war crimes (see entry on the United States in this section discussing the scope of general courts-martial and military commissions).[221] The Manual of Courts-Martial expressly states that "[t]he sources of military jurisdiction include the Constitution of the Philippines, and International Law, the specific provisions of the Constitution relating to such jurisdiction being found in the powers granted to the National Assembly, and in the authority vested in the President as Commander-in-Chief of all armed forces."[222]

[220] Manual of Courts-Martial, Armed Forces of the Philippines, Executive Order 178, 17 December 1938 (also known as the Manual of Courts-Martial, Philippine Army).

[221] Articles of War, Commonwealth Act No. 408, 14 September 1938, as amended.

[222] Manual of Courts-Martial, para. 1.

According to the leading commentary on Philippine military jurisdiction, Philippine courts-martial may exercise over crimes committed in occupied territory.[223] Article 12 of the Articles of War provides that "[g]eneral courts-martial shall have the power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals.".[224] Persons subject to military law primarily include members of the Philippine armed forces, but the phrase "any other person who by the law of war is subject to trial by military tribunals" includes interned persons and prisoners of war, which presumably includes crimes committed by such persons before internment or capture.[225] Although it appears that no conduct amounting to war crimes is defined as a military offence under the Articles of War, a catch-all provision in Article 97 may well cover such crimes.[226] The jurisdiction of courts-martial does not depend, as a general rule, on the location of the offence.[227]

Philippine military commissions, like United States military commissions, appear to have a clear mandate under international law to exercise universal jurisdiction over war crimes. According to Gloria, their jurisdiction is derived from the laws of war and broader than that of general courts-martial.[228]

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[223] Claro C. Gloria, *Philippine Military Law Annotated* 38 (Rev. ed. 1956). In a commentary on Article 12 of the Articles of War, the author states:

> "The jurisdiction of general courts-martial is coextensive with the territory of the Philippines . . . The jurisdiction of a general court-martial extends to the places or territory held or occupied by our army when invading the domain of a foreign nation with which we are at war. A court-martial whether convened in a foreign territory or in the Philippines, will have jurisdiction of military offenses committed within those places equally as if committed on our own soil."

Ibid. (citing the leading authority on the Articles of War before the Second World War, *Winthrop's Military Law and Precedents* 81 (2nd ed. 1920). As explained in Chapter One, Section II.A, when an occupying power is exercising jurisdiction over war crimes, it is exercising universal jurisdiction, not territorial jurisdiction).

[224] Articles of War, Art. 12.

[225] Gloria, *supra n.223*, 43. According to Gloria, who cites paragraph 369 of the Digests of Opinions of the Judge Advocate General of the United States Army, 1912-1940, these persons include: interned persons in a civilian compound, interned persons within the prison limits, prisoners of war and spies.

[226] Articles of War, Art. 97 (General Article). That article provides that the following are military offences: "all disorders and neglects to the prejudice of good order and military discipline and all conduct of a nature to bring discredit upon the military service".

[227] Manual of Courts-Martial, para. 7. That paragraph states that "[t]he jurisdiction of courts-martial is entirely penal or disciplinary . . . Their jurisdiction does not, in general, depend on where the offense was committed. See, however, [Articles of War, Art.] 94 as to various crimes." Article 94 (Various Crimes) refers to "any felony, crime, breach of law or violation of municipal ordinance which is recognized as an offense of a penal nature and is punishable under the penal laws of the Philippines or under municipal ordinances", inside or outside a reservation of the armed forces of the Philippines. Although nothing in this article prohibits the exercise of universal jurisdiction, some have suggested that a basic principle of Philippine law is territoriality and that this principle limits the exercise of jurisdiction to territorial jurisdiction. However, under the *Kuroda* doctrine, Philippine courts may exercise jurisdiction consistent with generally accepted principles of law, which include universal jurisdiction.

[228] Gloria, *supra n. 223*, 51-52. This authority explains:

> "Military commissions are criminal war courts resorted to for the reason that the jurisdiction of courts-martial, creatures as they are of statute, is restricted by law, and cannot extend to include certain classes of offenses which in war would go unpunished in the absence of a provisional forum for the trial of the offenders. Their authority is derived from the law of war, though in some cases their powers have been added to by statute." (Digests of Opinions of The Judge Advocate General, US Army, 1912, p. 1066).
>
> . . . .
>
> "Military commissions are authorized to exercise jurisdiction over two classes of offenses, namely: (1) Violations of the laws of war; and (2) Civil crimes, which, because the civil authority is superseded by the military, and civil courts are closed or their functions suspended, cannot be taken cognizance by the ordinary tribunals. These offenses are committed whether by civilians or military persons, either (1) in the enemy's

The Philippines has ratified the Geneva Conventions and has signed Protocol I, but had not yet ratified it as of 1 September 2001. It has signed the Rome Statute but, as of 1 September 2001, it had not yet ratified it. The Philippines has not expressly excluded statutes of limitation for war crimes, crimes against humanity, genocide or torture, but it is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes. Under the *Kuroda* doctrine, it would appear that Philippine courts would not be barred from trying cases involving war crimes and other crimes under international law by statutes of limitation in the Revised Penal Code. However, it has not been possible to locate any definitive jurisprudence or commentary on this specific question. The Philippines appears to recognize certain official immunities, including sovereigns and other heads of state and ambassadors and other senior diplomats, as well as for members of the United States armed forces under the Republic of the Philippines-United States Visiting Forces Agreement.[229]

country during its occupation by our armies and while it remains under military government, or (2) in a locality, not within the enemy's country or necessarily within the theatre of war, in which the martial law has been established by proper authority." (Id.)

[229] However, such immunities under the *Kuroda* doctrine are to be respected only insofar as they are consistent with generally accepted principles of law. This restriction is expressly provided in Article 14 of the Civil Code of the Philippines, which provides that "[p]enal laws and those of public security and safety shall be obligatory upon all who live or sojourn in the Philippine territory, subject to the principles of international law and treaty stipulations." Civil Code of the Philippines, Republic Act No. 386, 18 June 1949, Art. 14 (*obtainable from* http://www.chanrobles.com/civilcodeofthephilippines1.htm).

· ***Poland:*** Polish courts have been able to exercise universal jurisdiction over ordinary crimes since 1932 (see Chapter Two, Section II.A). At the end of the Second World War, Polish courts had universal jurisdiction over war crimes.[230] Today, there are two legislative provisions and one constitutional one which permit Polish courts to exercise universal jurisdiction over war crimes.

The general rule is that courts may exercise territorial jurisdiction, unless otherwise specified. Article 5 of the 1997 Penal Code, which repeats the wording of Article 3 of the previous Penal Code, states that the general rule of jurisdiction is that the "The Polish penal law shall be applied to the perpetrator who has committed a prohibited act in the territory of the Republic of Poland, or on a Polish vessel or aircraft, unless an international agreement to which the Republic of Poland is a party stipulates otherwise."[231] Chapter XIII (Liability for offences committed abroad) of the Penal Code, which regulates extraterritorial jurisdiction, provides two bases for universal jurisdiction, one over ordinary crimes and the other over crimes which Poland is required to prosecute under an international treaty. According to the government, in its revision of the Penal Code in 1996, the legislature "took into account to a greater extent the developments in international relations that have taken place recently in the area of prosecuting offences".[232]

The first basis is set out in Article 110 (2), which provides for custodial universal jurisdiction over aliens who have committed crimes abroad which have no link with Poland when the crime would have been subject to a penalty of two years' imprisonment if committed in Poland, but Article 111 requires that the conduct have been punishable in the place where it occurred (double criminality). Article 110 (2) reads:

> "The Polish penal law shall be applied to aliens in the case of the commission abroad of an offence other than listed in § 1 [crimes linked to Poland], if, under the Polish penal law, such an offence is subject to a penalty exceeding 2 years of deprivation of liberty, and the perpetrator remains within the territory of the Republic of Poland and where no decision on his extradition has been taken."[233]

[230] On 31 August 1944, the Polish Committee of National Liberation promulgated a decree providing for the punishment of Axis war criminals by Special Criminal Courts. Official Gazette No. 4, 13 September 1944. This decree applied both to Polish nationals and aliens and, with regard to certain war crimes, crimes outside Poland. On 17 October 1946, the Special Criminal Courts were abolished by a decree which transferred their jurisdiction to the ordinary criminal courts, except for certain cases that were assigned to the Supreme National Tribunal. Official Gazette, No. 59. The Tribunal had been established by decree on 26 January 1946 for the trial, among other casses, of persons who were to be surrendered to Poland in accordance with the Moscow Declaration of 1 November 1943 for crimes committed on Polish territory during Axis occupation. Official Gazette, No. 5. By the 17 October 1946 decree, the Tribunal's jurisdiction was extended to include all persons suspected of war crimes surrendered to Poland for trial, regardless where they had been committed. This account is based on the extensive discussion of Polish jurisdiction over war crimes committed during the Second World War in United Nations War Crimes Commission, 7 *Law Reports of Trials of War Criminals* (London: H.M.S.O. 1948), Annex (*obtainable from* http://www.ess.uwe.ac.uk/wcc/polishlaw.htm).

[231] Polish Penal Code, Art. 5 (formerly Art. 3), Act of 6 June 1997, entered into force on 1 September 1998 (English translation supplied by Amnesty International Poland).

[232] Third periodic report of Poland to the Committee against Torture, U.N. Doc. CAT/C/44/Add.5, 18 March 1999, para. 74.

[233] Polish Penal Code, Art. 110 (2) (formerly Art. 114).

Article 111 (1) imposes a double criminality requirement, stating that "[t]he liability for an act committed abroad is, however, subject to the condition that the liability for such an act is likewise recognised as an offence, by a law in force in the place of its commission."[234] Article 111 (2) provides that "[i]f there are differences between the Polish penal law and the law in force in the place of commission, the court may take these differences into account in favour [of] the perpetrator."[235]

The second basis for universal jurisdiction is found in Article 113, which provides:

> "Notwithstanding regulations in force in the place of commission of the offence, the Polish penal law shall be applied to a Polish citizen or an alien, with respect to whom no decision on extradition has been taken, in the case of the commission abroad of an offence which the Republic of Poland is obligated to prosecute under international agreements."[236]

These legislative provisions are reinforced by the 1997 Constitution. Article 87 declares that "[t]he sources of universally binding law of the Republic of Poland are: the Constitution, laws, ratified international agreements, and regulations."[237] Article 91 (1) states that "[a] ratified international agreement after its promulgation in the Official Gazette (*Dziennik Ustaw*), constitutes part of the domestic legal order and applies directly, unless its application depends on the enactment of a law."[238] Article 91 (2) provides that "[a]n international agreement ratified upon prior consent granted by law shall have precedence over laws if such an agreement cannot be reconciled with the provisions of such laws."[239]

Poland has ratified the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. Poland has provided in Chapter XVI (Offences against peace, and humanity, and war crimes) of the Special Part of the Penal Code that a wide range of war crimes are crimes under national law.[240] Poland is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Statutes of limitation do not apply to war crimes.[241]

· ***Portugal:*** There are three provisions in Portuguese law which permit national courts to exercise universal jurisdiction over certain conduct amounting to war crimes. These legislative grants

[234] *Ibid.,* Art. 111 (1) (formerly Art. 114 (1)).

[235] *Ibid.,* Art. 111 (2).

[236] *Ibid.,* Art. 113 (revising former Art. 115).

[237] The Constitution of the Republic of Poland, Art. 87. All English translations of the Constitution in Gisbert H. Flanz, *Poland: Booklet 1, in* Gisbert H. Flanz, *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc.) (Release 97-5 August 1997).

[238] Polish Constitution of 1997, Art. 91 (1).

[239] *Ibid.,* Art. 91 (2). Article 9 provides that "[t]he Republic of Poland shall respect international law binding upon it."

[240] The Special Part applies to civilians, as well as to the military. In contrast, the Military Part applies only to the military. The relevant provisions include Art. 121 (weapons of mass destruction), Art. 122 (attacks on undefended places), Art. 123 (intentional killing, torture, experiments and use as human shields of protected persons), Art. 124 (forced service in hostile armed forces, displacement, corporal punishment, deprivation of liberty or the right to fair trial of protected persons), Art. 125 (destruction or damage of cultural property), and Art. 126 (misuse of Geneva emblems).

[241] Penal Code, Art. 105 (1) ("The provisions of Articles 101 through 103 [statutes of limitation] shall not be applied to crimes against peace, crimes against humanity or war crimes.").

of jurisdiction are strengthened by Article 8 (1) to (2) of the Constitution:

> "1. The norms and principles of general or customary international law are an integral part of Portuguese law.
> 2. The rules provided for in international conventions that have been duly ratified or approved, apply in internal law, after their official publication, so long as they remain internationally binding with respect to the Portuguese State."[242]

First, paragraph 1 (b) of Article 5 (Acts committed outside Portuguese territory) of the Penal Code of Portugal (*Código Penal Português*) provides for universal jurisdiction over persons suspected of certain crimes of sexual violence and of destruction or damage during an armed conflict of historical and cultural monuments, provided that the suspect is found in Portugal and it is not possible to extradite the person. It states:

> "Unless any international treaty or agreement is to the contrary, Portuguese criminal law shall also apply to acts committed outside national territory:
> . . . .
> (b) When they constitute crimes defined in Articles 159, 160, 169, 172, 173, 176, 236 to 238, paragraph 1 of Article 239 and Article 242, if the suspect is found in Portugal and it is not possible to extradite the suspect."[243]

Second, Article 5 (1) (e) provides Portuguese courts with jurisdiction over crimes for which extradition is permitted and have been committed by foreigners abroad when they are found in Portugal and cannot be extradited. It provides:

> "Unless any international treaty or agreement is to the contrary, Portuguese criminal law shall also apply to acts committed outside national territory:
> . . . .
> (c) By foreigners in Portugal whose extradition has been requested when the acts constitute crimes which permit extradition and this cannot be granted."[244]

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[242] Constitution of the Portuguese Republic, 2 April 1976, fourth revision, based on Constitutional Law No. 1/97 of 20 September 1997, Art. 8 (English translation by Gisbert H. Flanz in *Portugal - Booklet 1, in* Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc.) (Release 99-3, May 1999)).

[243] Portuguese Penal Code of 1999, Art. 5 (1) (b) (all English translations of the 1999 Code by Amnesty International). The original Portuguese text states:

> *"1. Salvao tratado ou convenção internacional em contrário, a lei penal portuguesa é ainda aplicável a factos cometidos fora do território nacional:*
> . . . .
> *(b) Quando constituírem os crimes previstos nos artigos 159.º, 160.º, 169.º, 172.º, 173.º, 176.º e 236.º a 238.º, no. n.º 1 do artigo 239.º e no artigo 242.º, desde que o agente seja encontrado em Portugal e não possa ser extraditado[.]"*

Código Penal, 1999, no. n.º1 (b) do artigo 5.º (Factos praticados fora do território português), redacção da Lei n.º 65/98.

Several of the crimes covered in the articles listed in Article 5 (1) (b) could, in certain circumstances, amount to war crimes if committed during armed conflict, including: Article 159 (Slavery) (*Escravidão*); Article 160 (Abduction) (*Rapto*); Article 169 (Trafficking in persons) (*Tráfico de pessoas*), Article 172 (Sexual abuse of minors) (*Abuso sexual de crianças*); Article 173 (Sexual abuse of minors who are dependants) (*Abuso sexual de menores dependentes*); and Article 176 (Procuring and trafficking in minors) (*Lenocínio e tráfico de menores*). Article 242 (Destruction of monuments) (*Destruiçao de monumentos*) prohibits the destruction of historical and cultural monuments in violation of international humanitarian law during armed conflict.

[244] *Ibid.*, Art. 5 (1) (e). The original Portuguese text states:

"1. Salvao tratado ou convenção internacional em contrário, a lei penal portuguesa é ainda aplicável a

factos cometidos fora do território nacional:

. . . .

(e) Por estrangeiros que forem encontrados em Portugal e cuja extradição haja sido requerida, quando constituírem crimes que admitam a extradição e esta não possa ser concedida."

Código Penal, 1999, no. n.º1 (e) do artigo 5.º (Factos praticados fora do território português), redacção da Lei n.º 65/98.

Third, Article 5 (2) of the Penal Code provides for universal jurisdiction over acts committed abroad which the state is obligated under any international treaty to try. It reads:

> "Portuguese criminal law shall also apply to acts committed outside national territory which the Portuguese State is obliged to try as a result of an international treaty or agreement."[245]

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

· ***Romania:*** Romanian courts can exercise universal jurisdiction over some conduct which amounts to war crimes.

The legislative grant of jurisdiction is reinforced by Article 11 of the 1991 Constitution, which provides:

> "1. The Romania state pledges to fulfill, to the letter and in good faith, its commitments under the treaties to which it is a party.
> 2. The treaties ratified by Parliament, according to the law, are part of domestic law."[246]

Two provisions of the Romanian Criminal Code of 1988, based on proposals made in 1928 (see Chapter Two, Section II.A) gives national courts custodial universal jurisdiction over crimes by foreigners and stateless persons committed abroad, provided that the conduct was criminal in the place where it occurred and there are no bars to prosecution under the law of that place.

First, Article 6 of the Criminal Code provides:

> "The criminal law also applies to offences other than those specified in article 5 sub-section 1 committed outside the territory of the country by a foreign citizen or stateless person who is not domiciled in the territory of the country, if:
> (a) the act is also regarded as an offence by the criminal law of the country in which it was committed,
> (b) the offender is in the country.
> An offender may also be tried for offences against the interests of the Romanian state or against a Romanian citizen if his extradition has been obtained.

[245] *Ibid.*, Art. 5 (2). The original Portuguese text reads:

"A Lei penal portuguesa é ainda aplicável a factos cometidos fora do território nacional que o Estado português se tenha obrigado a julgar por tratado ou convenção internacional."

Código Penal, 1999, no. n.º2 do artigo 5.º (Factos praticados fora do território português), redacção da Lei n.º 65/98.

[246] Constitution of Romania, 21 November 1991, Art. 11 (English translation in Gisbert H. Flanz, *Romania*, *in* Albert P. Blaustein & Gisbert H. Flanz, eds., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc.) (Release 92-2, March 1992)).

> The provisions of the foregoing paragraph do not apply in circumstances where in accordance with the law of the state in which the offender committed the offence there is any reason which prevents criminal proceedings from being initiated or continued or prevents punishment from being administered. When the punishment has not been administered or has only been administered in part, the procedure shall follow the legal provisions concerning the recognition of foreign decisions."[247]

Second, Article 4 of the Criminal Code provides for universal jurisdiction over stateless persons residing in Romania. It states that "[c]riminal law applies to crimes committed outside Romania, if the perpetrator is a Romanian citizen or if possessing no citizenship, the perpetrator has residence in Romania."[248]

Article 7 of this Code states that "[t]he provisions included in Articles 5 and 6 shall only apply if international agreements do not otherwise provide."[249] The meaning of this provision is not entirely clear, but it appears to mean that if a treaty provides for universal jurisdiction without the restrictions in Article 6, then the broader treaty provisions would control. There does not seem to be any jurisprudence or authoritative commentary on Articles 6 and 7. However, Article 10 (2) of the Romanian Constitution provides that treaties ratified by Romania become part of national law.

Romania is a party to Hague Convention IV, the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but as of 1 September 2001 had not yet ratified it. Romania has defined certain war crimes as crimes under national law.[250] In addition, Article 6 appears to be worded sufficiently broadly to include ordinary crimes which would amount to war crimes if committed during armed conflict. Statutes of limitation do not apply to crimes against peace and humankind, which include war crimes.[251] Article 8 provides that diplomats and certain other persons are immune from jurisdiction.[252]

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[247] Criminal Code of Romanian of 1988, Art. 6 (English translation by Amnesty International; another English version is *obtainable from* http://www.era.int/domains/corpus-juris/public/texts/legal_text.htm). This provision is unchanged from Article 6 of the Penal Code of the Romanian Socialist Republic of 1968,effective 1 January 1969, published in Official Bulletin Number 79-79 *bis* of June 1968, Supplemented by Law Number 6/1973, Official Bulletin Number 49, April 1973 (English translation in *The Penal Code of the Romanian Socialist Republic* (South Hackensack, N.J.: Fred B. Rothman & Co. and London: Sweet & Maxwell Limited 1976). Apparently, the last amendment to the Penal Code was in 1996.

[248] *Ibid.*, Art. 4 (English version is *obtainable from* http://www.era.int/domains/corpus-juris/public/texts/legal_text.htm).

[249] *Ibid.*, Art. 7 (English translation by Amnesty International). This provision is also unchanged from Article 7 of the 1968 Penal Code.

[250] *Ibid.*, Art. 358 (Inhuman treatment) (prohibiting inhuman treatment of wounded or sick medical personnel and personnel of humanitarian organizations and others and conduct which would constitute violations of common Article 3 of the Geneva Conventions); Art. 359 (Destruction of certain objectives and appropriation of certain goods) (prohibiting certain other war crimes); Art. 360 (Destroying, looting, or appropriating cultural valuables); Art. 361 (Penalties for attempt, concealment, and assistance) . It is believed that all of these provisions are still in effect. Although closely following the wording of prohibitions of war crimes, nothing in Title XI (Offenses against peace and mankind), where they are located, limits their applicability to armed conflict, so it is possible that many of the prohibitions in these articles apply in peacetime as well.

[251] *Ibid.*, Art. 121 (Periods of limitation of penal liability) (stating that "[t]he period of limitation does not affect penal liability in cases of offences against peace and mankind); Art. 125 (The period of limitation of the enforcement of a penalty) (providing that "[t]he period of limitation does not affect the enforcement of principal penalties for offenses against peace and mankind"). It is believed that both provisions are still in effect. Romania is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

[252] *Ibid.*, Art. 8 (Immunity from jurisdiction) ("The penal law does not apply to offenses committed by

diplomatic representatives of foreign nations or by persons who, according to international conventions, are not under the criminal jurisdiction of the Romanian State.").

· ***Russian Federation:*** Russian courts were able to exercise universal jurisdiction as early as 1903 over crimes committed abroad when this was envisaged under treaties to which Russia was a party (see Chapter Two, Section II.A). Today, two legislative provisions give Russian courts universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I and, possibly, over other war crimes as well. These two legislative provisions are buttressed by the constitutional status of international law in Russian law. Article 15(4) of the Russian Constitution provides that "the commonly recognized principles and norms of the international law and the international treaties of the Russian Federation shall be a component part of its legal system."[253] This provision is reflected in Article 1 (2) of the Criminal Code.[254] It is further reinforced by provisions of the 1995 Federal Law of the Russian Federation on International Treaties of the Russian Federation.[255]

The first legislative provision, Article 12 (1) of the 1997 Russian Criminal Code provides jurisdiction over stateless persons permanently resident in the Russian Federation who have committed crimes abroad if that conduct was a crime under the law of the territorial state, provided that they had not been convicted in that state. This provision states:

[253] Constitution of the Russian Federation, 1993, Art. 15(4) (English translation in Gisbert H. Flanz, The Russian Federation, in Albert P. Blaustein & Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. May 1994) (Release 94-3 Moscow Bureau of Federal News Service trans.)).

[254] Criminal Code, Art. 1 (2) ("The present Code is based on the Constitution of the Russian Federation and generally-recognised principles and norms of international law."). Article 2 (1) provides that the tasks of the Code include "ensuring the peace and security of mankind" and "the prevention of crimes".

[255] Federal Law of the Russian Federation on International Treaties of the Russian Federation, 16 June 1995, Preamble. The Preamble states:

> "International treaties of the Russian Federation, together with generally-recognized principles and norms of international law, when in accordance with the Constitution of the Russian Federation an integral part of its legal system. International treaties are a material element of the stability of the international legal order and relations of Russia with foreign countries and the functioning of a rule-of-law state.
>
> The Russian Federation favours undeviating compliance with treaty and customary norms and affirms its adherence to the basic principle of international law - the principle of the good faith fulfilment of international obligations."

Article 5 (International Treaties of Russian Federation in Legal System of Russian Federation) of the 1995 Federal Law provides that treaties become part of national law on ratification:

> "1. International treaties of the Russian Federation shall, together with generally-recognized principles and norms of international law be [are?] an integral part of its legal system in accordance with the Constitution of the Russian Federation.
>
> 2. If other rules have been established by an international treaty of the Russian Federation than those provided for by a law, then the rules of the international treaty shall apply.
>
> 3. The provisions of officially published international treaties of the Russian Federation which do not require the publication of intra-State acts for application shall operate in the Russian Federation directly. Respective legal acts shall be adopted in order to effectuate other provisions of international treaties of the Russian Federation."

Articles 31 and 32 of this law require that obligations of ratified treaties be fulfilled. The English translation of this law is from William E. Butler & Jane E. Henderson, *Russian Legal Texts: The Foundations of a Rule-of-Law State and a Market Economy* (The Hague/London/Boston: Kluwer Law International & London: Simmonds & Hill Publishing Ltd 1998) (William E. Butler trans.).

> "Citizens of the Russian Federation and stateless persons permanently residing in the Russian Federation who have committed a crime beyond the limits of the Russian Federation shall be subject to criminal responsibility according to the present Code if the act committed by them is deemed to be a crime in the State on whose territory it was committed and if these persons were not convicted in the foreign State. In the event of the conviction of the said persons the punishment may not exceed the upper limit of the sanction provided for by the law of the foreign State on whose territory the crime was committed."[256]

Second, Article 12 (3) gives Russian courts universal jurisdiction over foreigners and stateless persons who are not permanent residents for crimes under Russian law where a treaty which the Russian Federation has ratified provides for prosecution for such conduct, as long as the suspect has not been convicted of such conduct in another state. That provision states:

> "Foreigners and stateless persons who are not permanent residents of the Russian Federation who have committed a crime outside the borders of the Russian Federation shall incur criminal responsibility under the present Code in cases when the crime was directed against the Russian Federation and in cases provided for by an international treaty of the Russian Federation if they have not been convicted in a foreign state and if criminal proceedings against them are instituted within the territory of the Russian Federation."[257]

Thus, Article 12 (3) would appear to give Russian courts universal jurisdiction over a wide range of war crimes included in treaties it has ratified which, expressly or impliedly, provide for prosecution for violations of their provisions, including the Geneva Conventions and Protocols I and II and Hague Convention IV and its Regulations.[258] Nothing in wording of Article 12 (3) limits the scope to cases where the treaty expressly provides for universal jurisdiction, but according to the authoritative commentary published by the Ministry of Justice in 2000, there have been no cases decided under Article 12 or its predecessor provisions which would resolve this question.

The Russian Federation is a party to the Geneva Conventions, Protocols I and II and Hague Convention IV. It has signed the Rome Statute, but as of 1 September 2001, it had not yet ratified it. The Russian Federation is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and, apparently, periods of limitation do not apply to certain war crimes.[259]

[256] Russian Criminal Code, adopted 13 June 1996 and entered into force 1 January 1997, Art. 12 (1) (English translation in *Criminal Code of the Russian Federation* (The Hague/New York/Boston: Kluwer Law International and Simmonds & Hill Publishing Ltd 3rd ed. 1999) (William E. Butler, trans.)).

[257] Russian Criminal Code, Art. 12 (3). The English translation is by the ICRC and is obtainable from http://icrc.org/ihl-nat . A similar English translation of the Russian Criminal Code is in *Criminal Code of the Russian Federation* (The Hague/New York/Boston: Kluwer Law International and Simmonds & Hill Publishing Ltd 3rd ed. 1999) (William E. Butler, trans.)).

[258] The question whether Hague Convention IV and its Regulations and Protocol II impliedly provide for prosecution of violations of their provisions is not free from doubt. There are no express provisions in any of these instruments authorizing prosecution and it may be that prosecution must be on the basis of the rules in those instruments which are now seen as customary law, rather than on the basis of the treaties themselves. No Russian Federation court is known to have ruled on this question and there appears to be no legal commentary on Article 12 (3) which would shed light on how those courts would interpret this provision.

[259] Criminal Code, Art. 78 (Relieving from Criminal Responsibility in Connection with Expiry of Periods of Limitation). Paragraph 5 provides that periods of limitation do not apply to Article 356.

Some of the prohibitions in international humanitarian law treaties are made crimes under Russian law, thus avoiding the problems associated with the direct enforcement of international criminal law by national courts.[260] However, certain defences which are impermissible under international law are permitted under the Criminal Code and it is not clear whether principles of criminal responsibility, such as command and superior responsibility, are reflected in the Criminal Code.[261] The recognition of official immunities, such as diplomatic immunity, under the Criminal Code appears to apply to war crimes, but it is subject to international law.[262]

· ***Saint Kitts and Nevis:*** It appears that the courts of Saint Kitts and Nevis have been able to exercise universal jurisdiction over grave breaches of the Geneva Conventions committed abroad as early as 1959.

Although Saint Kitts and Nevis is not known to have a Geneva Conventions Act, the United Kingdom's Geneva Conventions Act 1957 applied to the West Indies Federation, of which Saint Christopher and Nevis was a member, under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text and scope, see discussion of United Kingdom legislation below), at least before 1 January 1970. Saint Christopher and Nevis became independent on 19 September 1983. A schedule to the Saint Christopher and Nevis Constitution Order 1983 containing transitional provisions stated that the existing laws were to continue in effect from the date of independence and, as far as is known, the 1959 Order in Council has not been repealed either before or after independence.[263] The name of the state is now Saint Kitts and Nevis.

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

· ***Saint Lucia:*** It appears that the courts of Saint Lucia have been able to exercise universal

[260] Criminal Code, Art. 355 (Production or Dissemination of Mass Strike Weapon) (Butler trans.); Art. 356 (Employment of forbidden means and methods of waging war) (paragraph 1provides that "[c]ruel treatment of prisoners of war or civilian population, deportation of the civilian population, pillage of national property on the occupied territory, use in an armed conflict of means and methods prohibited by an international treaty of the Russian Federation" is punishable by a term of imprisonment of up to 20 years) (English translation by ICRC, *obtainable from* http://icrc.org/ihl-nat).

[261] *See, for example,* Criminal Code, Art. 42 (Performance of Order or Instruction).

[262] Criminal Code, Art. 11.

[263] The Saint Christopher and Nevis Constitution Order 1983, Statutory Instruments 1983, No. 881, made 22 June 1983, coming into operation 23 June 1983, Schedule 2 (Transitional Provisions) (*obtainable from* http://www.georgetown.edu/pdba/Constitutions/Kitts/stkitts-nevis.html). Section 2 of the schedule provides in relevant part:

> "2.--(1) The existing laws shall, as from 19th September 1983, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order.
>
> (2) Any existing law enacted by any legislature with power to make laws at any time before 19th September 1983 shall have effect as from that date as if it were a law enacted by Parliament:
>
> . . . .
>
> (7) For the purposes of this paragraph the expression "existing law" means any Act, Ordinance, rule, regulation, order or other instrument made in pursuance of or continued in force by or under the former Constitution and having effect as law immediately before 19th September 1983 and includes any Act of the Parliament of the United Kingdom or Order in Council or other instrument made under any such Act (except this Order and the Supreme Court Order) and any order made under section 4(2) of this Order to the extent that it so had effect on that date."

jurisdiction over grave breaches of the Geneva Conventions committed abroad since 1959.

Although Saint Lucia is not known to have a Geneva Conventions Act, the United Kingdom's Geneva Conventions Act 1957 applied to the West Indies Federation, of which Saint Lucia was a member, under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below), at least before 1 January 1970. Saint Lucia became independent on 22 February 1979. A schedule of transitional provisions stated that existing laws were to continue in effect from the commencement of the Constitution and, as far as is known, the 1959 Order in Council has not been repealed either before or after independence. Section 2(1) of Schedule 2 to the Saint Lucia Constitution Order 1978 provided that the existing laws were to continue in effect from the date of the Constitution and, as far as is known, the 1959 Order in Council has not been repealed either before or after independence.[264]

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

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

Although Saint Vincent and the Grenadines does not have a Geneva Conventions Act, the United Kingdom's Geneva Conventions Act 1957 applied to the West Indies Federation, of which Saint Vincent and the Grenadines was a member, under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below), at least before 1 January 1970. Saint Vincent and the Grenadines became independent on 26 October 1979 and appears to have provided that the existing laws, including the 1959 Order in Council. In 1983, supplementary legislation was enacted governing appeals by prisoners of war and protected internees convicted of serious crimes.[265]

Saint Vincent and the Grenadines is a party to the Geneva Conventions and Protocol I and II. It has not signed the Rome Statute and as of 1 September 2001 it had not yet ratified it. It is not known if Saint Vincent and the Grenadines has expressly provided that statutes of limitations do not apply to grave breaches, but it is a party to the Convention on the Non-Applicability of

[264] The Saint Lucia Constitutional Order 1978, Shedule 2 (Transitional Provisions) in Gisbert H. Flanz, Saint Lucia, *Constitutions of the Countries of the World*, Albert P. Blaustein & Gisbert H. Flanz ed., Oceana Publications, Inc., Dobbs Ferry, New York, October 1979. That section provides in part:

2(1). "The existing laws shall, as from the commencement of the Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order.

. . . .

(5) For the purposes of this paragraph. the expression "existing law" means any Act, Ordinance, law, rule, regulation, order or other instrument made in pursuance of or continued in force by or under the former Constitution and having effect as part of the law of Dominica or of any part thereof immediately before the commencement of the constitution ."

[265] 4 The Laws of Saint Vincent and the Grenadines in force on the 1st January 1991, cap. 138, Geneva Conventions (Supplementary Provisions), An act to supplement the Geneva Convention Act 1957 of the United Kingdom as extended to Saint Vincent and the Grenadines by the Geneva Conventions Act (Colonial Territories) Order in Council 1959 so as to enable full effect to be given to certain international conventions done at Geneva on the twelfth day of August nineteen hundred and forty-nine, commenced 2 August 1983.

Statutory Limitations to War Crimes and Crimes against Humanity.

· ***Samoa:*** Samoan courts may exercise universal jurisdiction over grave breaches of the Geneva Conventions.

Although Samoa does not have a Geneva Conventions Act, the New Zealand Geneva Conventions Act 1958 (see the discussion of the New Zealand legislation above in this section above) applies to Samoa pursuant to Article 10 of that act.[266]

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

· ***San Marino:*** The courts of San Marino are able to exercise universal jurisdiction over grave breaches of the Geneva Conventions and of Protocol I, based on legislation dating to 1868.

Article 8 of the Penal Code of 1868 provides:

> "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."[267]

Article 3 (2) provides for protective jurisdiction over persons suspected of counterfeiting and (3) provides for passive personality jurisdiction over foreigners who commit crimes against citizens of San Marino. Although Article 8 uses the word reciprocity (*reciprocanza*), it is likely that it would not be interpreted narrowly by San Marino courts to apply to bilateral treaties, which were the most common form of treaties in the middle of the 19th century, but also to multilateral treaties where the obligations are not strictly reciprocal, but rather mutual. It has not been possible to locate any relevant jurisprudence or commentary on this article.

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[266] An Act to enable effect to be given to certain International Conventions done at Geneva on the twelfth day of August, nineteen hundred and forty-nine, and for purposes connected therewith (Geneva Conventions Act 1958), 18 September 1958, Art. 10 (Application of Act to island territories and Western Samoa). Article 10 reads:

"(1) This Act shall be in force in the Cook Islands, the Tokelau Islands, and Western Samoa.

(2) In this Act, except in this section, both in New Zealand and in the Cook Islands, the Tokelau Islands, and Western Samoa, the term 'New Zealand' shall be construed as including the Cook Islands, the Tokelau Islands, and Western Samoa.

(3) Every reference in this Act to the Attorney General shall be construed, -

. . . .

(d) In the application of this Act to Western Samoa, as including the High Commissioner of Western Samoa.

(4) The other Ministers specified in this Act may exercise the powers conferred on them by this Act in the Cook Islands, the Tokelau Islands, and Western Samoa.

(5) All criminal jurisdiction conferred by this Act may be exercised . . . by the High Court of Western Samoa in the ordinary course of its criminal jurisdiction. For the purposes of this subsection, subsection one of section three of this Act shall apply as if the word 'indictable' were omitted.

(6) The Samoa Amendment Act 1957 is hereby amended by adding to the Second Schedule the words - '1958, No. 19 - The Geneva Conventions Act 1958. The whole Act.'"

[267] Penal Code, Art. 8. 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."

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

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

Section 3 of the Seychelles Geneva Conventions Act, 1985 provides national courts with universal jurisdiction over grave breaches of the Geneva Conventions and, possibly, over grave breaches of Protocol I and serious violations of Protocol II.[268] Prosecutions may not be instituted except by or on behalf of the Attorney-General.[269] The Act does not contain a statute of limitations, but it is not known if any statute of limitations applies to grave breaches.

The Seychelles has ratified the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but as of 1 September 2001, it had not yet ratified it.

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

The United Kingdom's Geneva Conventions Act 1957 applied to Sierra Leone under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below), at least before 1 January 1970. On 1 September 1959, the date of the Order in Council, Sierra Leone adopted legislation providing that section 4 (1) of the Geneva Conventions Act 1957 concerning appeals by prisoners of war would apply to Sierra Leone as of that date.[270] Sierra Leone became independent on 27 April 1961. As far as is known, neither the 1959 Order in Council nor the 1959 Act have been repealed.

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

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

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[268] Geneva Conventions Act, 1985, Act 20 of 1985, § 3 (1). It states:

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

Although the grave breaches provisions of Protocol I and serious violations of this protocol and of Protocol are not expressly listed, the definitions section of the Act in Section 2 states with respect to each convention that it is to be "read with the Protocols". It is not clear, however, whether the Act provides universal jurisdiction over these violations, since the normal method in Geneva Conventions Acts to provide for broader jurisdiction is to state so expressly and it would seem odd to include violations of Protocol II, but not of common Article 3. There appears to be no jurisprudence or authoritative commentary on this question.

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

[269] Geneva Conventions Act, 1985, No. 15 of 1973, Art. 3 (3).

[270] 5 The Laws of Sierra Leone in force on the 1st day of January 1960, cap. 289, An Ordinance to Enable Effect to be Given to Certain International Conventions Done at Geneva on the 12th day of August, 1949, and for Purposes Connected Therewith.

Section 3 (1) of the Singapore Geneva Conventions Act, 1973 provides national courts with universal jurisdiction over grave breaches of the Geneva Conventions.[271] Proceedings may not be instituted except by or on behalf of the Public Prosecutor.[272]

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

· ***Slovak Republic:*** There are three legislative provisions in the Penal Code of permitting courts in the Slovak Republic to exercise universal jurisdiction over conduct amounting to war crimes. These legislative provisions date to proposals made in the former Czechoslovakia in 1926 (see Chapter Two, Section II.A). These three legislative provisions are reinforced by two provisions of the Constitution. Article 1 (2) of the Constitution of 1992, as amended 2001, provides that "[t]he Slovak Republic recognizes and observes the general principles of international law, international treaties, by which it is bound, and its further international obligations."[273] Second, as of 1 July 2001, Article 7 (5) of the Constitution authorizes direct enforcement of treaty obligations. It provides:[274]

> "International treaties concerning human rights and fundamental freedoms, international treaties, for whose implementation a law is required, and international treaties which directly establish rights or obligations of physical persons or juridicial persons and which were ratified and promulgated in the manner established by law, have precedence before those (established) by laws."[275]

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[271] Geneva Conventions Act, 1973, Art. 3(1). It provides:

> "Any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any scheduled Convention as is referred to in the following Articles respectively of those Conventions: - [list of grave breaches provisions in the Conventions which are attached as schedules to the Act] shall be guilty of an offence under this Act . . . ."

[272] *Ibid.*, Art. 3 (3).

[273] Constitution of the Slovak Republic, 3 September 1992, as amended 23 February 2001 (English translation in Gisbert H. Flanz, *The Slovak Republic, in* Gisbert H. Flanz, *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc.) (Release 2001-3, May 2001), Art. 1 (2).

[274] During the consideration of the initial report of Slovakia to the Committee against Torture, Ms. Štofová of the Slovakian delegation explained that

> "On 1 July 2001 an amendment to the Constitution with far-reaching implications for the relationship between international law and domestic legislation would come into force. It would basically change the existing dualist system into a monist system entailing direct implementation of certain international treaties. Under article 7, paragraph 5, of the Constitution, the following international instruments would acquire such status: treaties on human rights and fundamental freedoms, self-executing treaties and treaties establishing specific rights and duties of individuals."

Summary records of the 467th meeting of the Committee against Torture, 7 May 2001, U.N. Doc. CAT/C/SR.467, 16 May 2001, para. 8.

[275] Constitution of 1992, as amended 2001, Art. 7 (5). During the consideration of the initial report of Slovakia to the Committee against Torture, Ms. Štofová of the Slovakian delegation explained the scope of the predecessor of Article 7 (5) as follows:

> "under article 11 of the Slovak Constitution ["International treaties on human rights and basic liberties that were ratified by the Slovak Republic and promulgated in a manner determined by law take precedence over its own laws, provided that they secure a greater extent of constitutional rights and liberties." (*obtainable from* http://www.uni-wuerzburg.de/law/1000000_.htm)], international human rights treaties ratified by Slovakia and promulgated in the Official Gazette took precedence over domestic legislation but not over the Constitution itself. In some cases, moreover, the Constitution afforded greater protection than international instruments. If a complaint was filed concerning the practical application of a right protected by an international standard, the right concerned must be interpreted and applied in accordance with the

Constitution and in the light of the international standard and any relevant case law. In the absence of precedents, the Slovak judicial authorities were required to explain the content and purpose of the protected right. A party to legal proceedings who was dissatisfied with a decision taken by the domestic courts could lodge a complaint with the relevant international body. The Constitutional Court had ruled along those lines in decision No. 28/1996."

Summary records of the 467th meeting of the Committee against Torture, 7 May 2001, U.N. Doc. CAT/C/SR.467, 16 May 2001, para. 7.

First, Article 19 of the Penal Code states that foreign nationals and stateless persons who are not resident in the Slovak Republic are criminally liable for certain war crimes committed abroad.[276] Article 19 provides in relevant part:

> "This Act shall also be used to determine criminal liability for criminal offences of . . . use of prohibited means of warfare and unlawful combat practices (sections 187a and 188), . . .war atrocities (section 263), persecution of the population (section 263a), plundering in the war operations theatre (section 264), abuse of internationally recognised and state symbols (section 265) . . .if such a criminal offence was committed abroad by a foreign national or a stateless person who does not have permanent residency on the territory of the Slovak Republic."[277]

Second, Article 20 provides that foreign nationals or stateless persons who are permanent residents are criminally responsible for conduct abroad which is a crime under the law of Slovakia and the law of the place where it occurred, if they are found in Slovakia and if they are not extradited to another state.[278] They may not, however, be given a more severe sentence than they would have received in the territorial state.

Third, Article 20a of the Penal Code provides for universal jurisdiction over conduct abroad that is criminal under Slovakian law when this is required by a treaty binding on Slovakia.[279] It states:

> "(1) This Act shall be used to determine criminal liability also when it is prescribed by a promulgated international instrument which is binding for the Slovak Republic.
> (2) Provisions of Sections 17 through 20 shall not be used if their use is prohibited by an international instrument which is binding for the Slovak Republic."[280]

The government has explained that "[t]he reason for such legislation is also the common interest of States to sentence negative phenomena which are a threat to all countries (e.g. combatting slavery, trafficking in women, children, international terrorism, the crime of genocide)."[281] It has further explained the differences between the provisions on universal jurisdiction.[282]

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[276] Summary of Section 19 of Penal Code in the initial report of the Republic of Slovakia to the Committee against Torture, U.N. Doc. CAT/C/24/Add.6, 18 August 2000, para. 77. It has not been possible to locate a copy of the full text of the current Penal Code of the Slovak Republic or a translation of the full text in English.

[277] Penal Code of 1961, as amended, § 19 (unofficial English translation provided by a national expert of the Slovak Republic).

[278] Summary of Section 20 of the Penal Code in the initial report of the Republic of Slovakia to the Committee against Torture, U.N. Doc. CAT/C/24/Add.6, para. 78.

[279] Summary of Section 20a of the Penal Code in the initial report of the Slovak Republic to the Committee against Torture, U.N. Doc. CAT/C/24/Add.6, para. 79.

[280] Penal Code, § 20a (unofficial English translation provided by the government).

[281] Initial report of the Slovak Republic to the Committee against Torture, U.N. Doc. CAT/C/24/Add.6, para. 79.

[282] During the consideration of the initial report of the Slovak Republic to the Committee against Torture, Ms. Štofová of the Slovak Republic delegation explained that

> " The principle of universal jurisdiction was recognized in Slovak law in articles 19, 20 and 21 of the Criminal Code. A distinction was drawn between absolute universality (arts. 19 and 21) and subsidiary universality (art. 20). Article 19 listed crimes that were punishable in Slovakia even if perpetrated abroad by a foreign citizen or stateless person not permanently resident in Slovakia. Those crimes included terrorism, sabotage and genocide, but not torture. Article 21, meanwhile, covered crimes defined in international treaties binding on Slovakia, one of which was the Convention. Under article 20 of the Criminal Code, Slovak courts were authorized to initiate criminal proceedings even if the crime in question had been

committed abroad by a foreign citizen or stateless person who did not have permanent residence in Slovakia, provided that the crime was punishable in the territory where it had occurred and that the offender had been arrested in the territory of Slovakia and not extradited."

Summary records of the 467th meeting of the Committee against Torture, 7 May 2001, U.N. Doc. CAT/C/SR.467, 16 May 2001, para. 12.

It is understood that the Penal Code is to be revised and that the current Section 19 is to be amended and renumbered as Section 6 and include additional crimes, but these do not appear to include additional war crimes. Section 20a would be renumbered as Section 8 without substantive changes.

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

· ***Slovenia:*** The courts of the former Yugoslavia had been able to exercise universal jurisdiction over ordinary crimes since 1929 (see Chapter Two, Section II.A). Today, Slovenian courts may exercise universal jurisdiction over many war crimes. Article 123 (2) of the Penal Code of Slovenia provides that the Penal Code applies to foreigners found in the territory who have committed crimes abroad against another country or any of its citizens, provided that the offence is punishable by at least three years' imprisonment under the Penal Code.[283]

Article 124 imposes a number of conditions for the exercise of universal jurisdiction under Article 123. According to the government, prosecution may not take place pursuant to Article 123 in the following circumstances: (1) the suspect has served the sentence imposed in the place where the crime occurred "or it was decided in accordance with an international agreement that the sentence imposed in the foreign country is to be served in the Republic of Slovenia"; (2) the suspect "has been acquitted by a foreign court or if his sentence has been remitted or the execution of the sentence has fallen under the statute of limitations"; (3) "if, according to foreign law, the criminal offence concerned may only be prosecuted upon the complaint of the injured party and the latter has not been filed"; (4) if the conduct is not criminal according to the law of the place where it occurred; and (5) if the Ministry of Justice has not given its permission, in cases where the criminal offence is not punished in the place where it was committed, provided that "according to the general principles of law recognized by the international community, the offence in question constituted a criminal act at the time it was committed".[284] Therefore, it is probable that it includes non-international armed conflict.

[283] Article 123 (2) (English translation by ICRC *obtainable from* http://www.icrc.org/ihl-nat) provides: "The Penal Code of the Republic of Slovenia shall also be applicable to any foreign citizen who has, in a foreign country, committed a criminal offence against a third country or any of its citizens and has been apprehended in or extradited to the Republic of Slovenia, provided that the offence concerned is punishable by a prison sentence of at least three years according to the present Code. In such cases, the court shall not impose a sentence on the perpetrator heavier than the sentence prescribed by the law of the country in which the offence was committed."

[284] Initial report of Slovenia to the Committee against Torture, U.N. Doc. CAT/C/24/Add.5, para. 228.

Slovenia has ratified the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but as of 1 September 2001, it had not yet ratified it. The Penal Code includes an extensive list of war crimes, all of which have maximum punishments exceeding three years.[285] The term "armed conflict" used in the Penal Code is not limited to international armed conflict. It is not known if Slovenia has expressly provided that statutes of limitations do not apply to war crimes, but it is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

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

Although the Solomon Islands does not have a Geneva Conventions Act, the United Kingdom's Geneva Conventions Act 1957 applies to the state under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959, which applied to the British Solomon Islands Protectorate before it became independent on 7 July 1978. Section 5 of The Solomon Islands Independence Order 1978 provides that existing laws shall continue to have effect and Section 3, which provides for the revocations of several Orders does not include the 1959 Order in Council.[286]

The Solomon Islands has ratified the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but as, of 1 September 2001, had not yet ratified it.

· ***South Africa:*** Although as of 1 September 2001 South Africa had not expressly provided for universal jurisdiction over war crimes, it intends to do so. For the possibility that South African courts can exercise universal jurisdiction over crimes under international law, see Chapter Six, Section II.

The draft implementing legislation for the Rome Statute, which was introduced in Parliament 0n 18 July 2001, provides for universal jurisdiction over the war crimes in Article 8. Section 4 (2) of the draft bill states:

> "In order to secure the jurisdiction of any court referred to in section 166 (*c*) to (*e*) of the Constitution for purposes of this Act, any person who commits a crime contemplated in subsection (1) [genocide, crimes against humanity or war crimes as defined in the Rome Statute] outside the territory of the Republic is deemed to have committed that offence in the territory of the republic if
> . . . .
> (*b*) that person is not a South African citizen, but is ordinarily resident in the Republic; or
> (*c*) that person, after the commission of the crime, is present in the territory of the Republic. . .."[287]

[285] These include: Articles 374 (War Crimes against the Civilian Population); 375 (War Crimes against the Wounded and Sick); 376 (War Crimes against Prisoners of War); 377 (War Crimes of Use of Unlawful Weapons); 378 (Association and Incitement to Genocide and War Crimes); 380 (Unlawful Plundering on the Battlefield); 381 (Infringement of Parliamentary Rights); 382 (Maltreatment of the Sick and Wounded and of Prisoners of War); 383 (Unjustified Postponement of Repatriation of Prisoners of War); 384 (Destruction of Cultural and Historical Monuments and Natural Sites); 385 (Warmongering); and 389 (Endangering Persons under International Protection). (ICRC translation).

[286] The Solomon Islands Independence Order 1978, No. 783 in Wayne E. Olson, Solomon Islands, Constitutions of the Countries of the World, Albert P. Blaustein & Gisbert H. Flanz ed., Oceana Publications, Inc, Dobbs Ferry, New York.

[287] Republic of South Africa, International Criminal Court Bill, as introduced on 18 July 2001, § 4 (2) (*b*) & (*c*). The full text of the bill is *obtainable from* http://www.polity.org.za/govdocs/legislation/index.htm. The memorandum accompanying the draft bill states: "A person who commits such a crime outside of the Republic is deemed to have committed that crime in the Republic if he or she is a South African citizen or is ordinarily resident in

the Republic, if he or she is in the Republic after the commission of the crime . . .” Memorandum on the Objects of the International Criminal Court Bill, 2001.

In addition, the government is reported to be planning to propose adoption of a Geneva Conventions Act giving courts universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I, as well as over other breaches of those treaties which are punishable by more than two years' imprisonment.[288]

South Africa has ratified the Geneva Conventions, Protocols I and II and the Rome Statute.

· ***Spain:*** There are two grounds under Spanish law for exercising universal jurisdiction over conduct which may amount to a war crime if committed during armed conflict.[289] The relevant legislative provisions are reinforced by Article 96 (1) of the Constitution, which provides that

> "[v]alidly concluded international treaties once officially published in Spain shall constitute part of the internal (legal) order. Their provisions may only be abolished, modified or suspended in the manner provided for in the treaties themselves or in accord with general norms of international law."[290]

[288] A Draft Military Discipline Code, 1996 would have provided in Article 48 (a):

"Any person who -

at any place whether within or beyond the borders of the Republic commits a war crime listed in the Second Schedule shall be guilty of an offence under this Code and liable on conviction to any punishment which could under section 198 be imposed by a general court martial in respect of such offence."

[289] In addition to the other sources on Spain cited in the bibliography (Annex I), the following unpublished papers were used in drafting the entries on Spain in this memorandum: Valentine Bück, *Rapport Espagnol*, unpublished manuscript submitted for discussion to the *Etude Comparée des Critères de Competence Juridictionnelle en Matière de Crimes Internationaux (Crimes Contre l'Humanité, Génocide, Torture, Crimes de Guerre, Terrorisme)*, Paris, 2 to 3 July 2001; Luc Reydams, *Spain*, a chapter in his book, *Universal Jurisdiction in International Law* (Oxford: Oxford University Press) (forthcoming).

[290] The Spanish Constitution, 29 December 1978, Art. 96 (1). The English translation is in Gisbert H. Flanz, *Spain, in Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc.) (March 1991). The original Spanish text reads:

"*Los tratados internacionales válidamente celebrados, una vez publicados oficialmente en España, formarán parte del ordenamiento interno. Sus disposiciones sólo podrán ser derogadas, modificadas o suspendidas en la forma prevista en los propios tratados o de acuerdo con las normas generales del Derecho internacional.*"

(*Obtainable from* http://www.congreso.es/funciones/constitucion/indice.htm).

First, Article 23.2 of the *Ley Orgánica del Poder Judicial* (Organic Law of the Judicial Power), 6/1985 of 1 July 1985 (updated by Organic Law 11/1999) provides that Spanish courts may exercise universal jurisdiction over ordinary crimes committed abroad by aliens who subsequently become Spanish nationals, provided that the act was punishable under the law of the place where it occurred and the suspect has not been acquitted, convicted or pardoned.[291] Although this particular provision is narrow in scope, it could be invoked in those cases when persons suspected of responsibility for war crimes abroad subsequently take up Spanish nationality.

Second, Article 23.4 provides universal jurisdiction over certain enumerated crimes and any other acts constituting an offence under Spanish law committed abroad which Spain has a duty to prosecute under a treaty. The current text of that provision states in full:

> "The Spanish courts shall also try acts committed abroad by Spaniards or foreigners outside Spanish territory which are likely to be deemed to constitute the following offences punishable under Spanish law:
> a) Genocide.
> b) Terrorism.
> c) Piracy and the unlawful capture of aircraft.
> d) Falisfication of foreign currency.
> e) Offences related to prostitution and corruption of minors and mentally disabled.
> f) Unlawful trafficking of psychotropic, toxic and narcotic drugs.
> g) And any other offence which Spain has a duty to prosecute under international treaties and conventions."[292]

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[291] Organic Law of the Judicial Power, 6/1985 of 1 July 1985, Art. 23.2. as updated by Organic Law 11/1999, 30 April 1999. It provides:

> "They [Spanish courts] shall also be responsible for trying acts deemed to be offences under Spanish criminal law, even if they have been committed outside of Spanish territory, as long as those responsible for the offence in question are Spaniards or foreigners who have acquired Spanish nationality after the act was committed and as long as the following requirements are met:
> a) The act is punishable in the place where it was committed unless such a requirement is rendered unnecessary by virtue of an international Treaty or normative act of an international Organization of which Spain is a member.
> b) The injured party or the public prosecutor reports it or presents a complaint to the Spanish courts;
> c) The offender has not been acquitted, pardoned or punished abroad, or, in the case of the latter, has not completed the sentence. If the sentence has only partially been served, this shall be taken into account in order to reduce any sentence that might be applicable by the relevant proportion." (English translation by Amnesty International).

An important amendment was adopted in 1999, adding the words "unless such a requirement is rendered unnecessary by virtue of an international Treaty or normative act of an international Organization of which Spain is a member" in paragraph 2 (a) after the first part of the sentence reading "That the act is punishable in the place where it was committed". The original Spanish texts reads:

> *"2. Asimismo, conocerá de los hechos previstos en las leyes penales españolas como delitos, aunque hayan sido cometidos fuera del territorio nacional, siempre que los criminalmente responsables fueren españoles o extranjeros que hubieren adquirido la nacionalidad española con posterioridad a la comisión del hecho y concurrieren los siguientes requisitos:*
> *a) Que el hecho sea punible en el lugar de ejecución, salvo que, en virtud de un Tratado internacional o de un acto normativo de una Organización internacional de la que España sea parte, no resulte necesario dicho requisito.*
> *b) Que el agraviado o el Ministerio Fiscal denuncien o interpongan querella ante los Tribunales españoles.*
> *c) Que el delincuente no haya sido absuelto, indultado o penado en el extranjero, o, en este último caso, no haya cumplido la condena. Si sólo la hubiere cumplido en parte, se le tendrá en cuenta para rebajarle proporcionalmente la que le corresponda."*

Ley Orgánica del Poder Judicial, *Boletin Oficial del Estado*, No. 157, and No. 264 of 4 November 1985.

[292] Organic Law of the Judicial Power, Art. 23.4. as updated by Organic Law 11/1999. The original Spanish text reads:

"4. Igualmente será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la ley penal española, como alguno de los siguientes delitos:

a) Genocidio.

b) Terrorismo.

c) Piratería y apoderamiento ilícito de aeronaves.

d) Falsificación de moneda extranjera.

e) Los delitos relativos a la prostitución y los de corrupción de menores o incapaces.

f) Tráfico ilegal de drogas psicotrópicas, tóxicas y estupefacientes.

g) Y cualquier otro que, según los tratados o convenios internacionales, deba ser perseguido en España."

The phrase, "corruption of minors and disabled" (*corrupción de menores y discapacitados*), was added by an amendment in 1999.

Pretrial investigations of *delitos* (crimes) are conducted by the *juez central de instrucción* (central examining judge) after a *denuncia* (information) or *querella* (complaint) with the *Ministerio Fiscal* (public prosecutor). Appeals decisions by the central examining judge are heard by the *Audiencia Nacional* (National Criminal Court). Under the legality principle embodied in Article 105 of the *Ley de Enjuiciamiento Criminal* (Code of Criminal Procedure), the prosecutor has no discretion, but must prosecute all public crimes. A victim (*perjudicado*) may institute a criminal prosecution. In addition, any Spanish citizen, whether harmed or not by the crime, may institute an *action popularis delitos públicos* (a prosecution of public crimes), either when the prosecutor fails to prosecute or as a parallel prosecution tried at the same time as the public prosecution. Trials involving crimes provided for in treaties fall within the jurisdiction of the Criminal Chamber of the *Audiencia Nacional*.[293]

Spain has ratified the Geneva Conventions, Protocols I and II and the Rome Statute. However, it had not yet enacted implementing legislation as of 1September 2001. Spain has defined certain war crimes as crimes under its national law.[294]

The principle of *ne bis in idem* in Spanish law does not appear to prevent a prosecution in Spain of someone who has been tried abroad. Spain also does not recognize foreign national amnesties for crimes under international law. The *Audiencia Nacional* refused to recognize the Argentine and Chilean amnesties in the Argentine military officers investigation and in the *Pinochet* case.

[293] Organic Law of the Judicial Power,6/1985 of 1 July 1985, Art. 65 (1) (e). It provides:

"The Criminal Division of the Spanish National Court has jurisdiction over:

1. The prosecution of cases brought in connection with the following crimes, unless this falls at first instance to the Central Criminal Courts:

. . . .

e) Crimes committed outside the national territory, when according to law or treaty the prosecution of such crimes falls to the Spanish courts."

The original Spanish text reads:

"La Sala de lo Penal de la Audiencia Nacional conocerá:

1.º Del enjuiciamiento, salvo que corresponda en primera instancia a los Juzgados Centrales de lo Penal, de las causas por los siguientes delitos:

. . . .

e) Delitos cometidos fuera del territorio nacional, cuando conforme a las leyes o a los tratados corresponda su enjuiciamiento a los Tribunales españoles."

Ley Orgánica del Poder Judicial, Art.65.1º.e.

[294] Title XXIV (Crimes against the international community) of the Spanish Penal Code of 1995, adopted in the Organic Act of Parliament 10/95 of 23 November 1995 (English translation in 1 Y.B. Int'l Hum. L. 636, 637-639 (1998)), Chapter III (crimes against protected people and property in the event of armed conflict), Art. 608 (defining protected persons), Art. 609 (abuse of rights and endangerment of life, health and integrity of protected persons, torture or inhuman treatment, biological experiments), Art. 610 (use of prohibited means of combat), Art. 611 (indiscriminate attacks and other war crimes), Art. 612 (attacks on undefended localities, medical and religious personnel, deprivation of food and medical assistance and other war crimes), Art. 613 (attacks on religious or cultural property, reprisals,attacks on civilian property and assets essential to survival of civilian population), Art. 614 (other violations of international humanitarian law treaties) and Art. 615 (provocation, conspiracy and encouragement to commit foregoing acts).

There are a number of restrictions on the exercise of jurisdiction under Article 23. Article 23.5 provides that the provisions of Article 23.2.c concerning acquittal, conviction and pardon apply to Article 23.4. Article 23 does not require that the suspect be in Spain at the time an investigation is opened, but trials *in absentia* are not permitted in Spanish law, except in circumstances not relevant here.[295] Spain does not recognize immunities of former heads of state. However, the Criminal Chamber of the *Audiencia Nacional* has repeatedly refused to consider complaints against serving heads of state.[296] The statute of limitation in Article 131 (1) of the Penal Code appears to apply to war crimes. Since Article 23 (4) of the Organic Law is a procedural one, Spain may exercise universal jurisdiction over crimes before it was enacted in 1985, as Spanish courts did in the Argentine and Chilean cases mentioned above.

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

Although Swaziland is not known to have a Geneva Conventions Act, the United Kingdom's Geneva Conventions Act 1957 applied to Swaziland under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below), at least before 1 January1970. Swaziland become independent on 6 September 1968. A schedule of transitional provisions stated that the existing laws were to continue in effect from the commencement of the Constitution and, as far as is known, the 1959 Order in Council has not been repealed either before or after independence and applies to the entire country.[297]

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

· ***Sweden:*** Swedish courts may exercise universal jurisdiction over war crimes under several legislative provisions in the *Brottsbalken* (Penal Code). These provisions date to proposals made in 1923 (see Chapter Two, Section II.A).

First, Section 2 of Chapter 2 of the Swedish Penal Code provides:

"Crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court where the crimes ha[ve] been committed:

1. by a Swedish citizen or an alien domiciled in Sweden,
2. by an alien not domiciled in Sweden who, after having committed the crime, has become a Swedish citizen or has acquired domicile in the Realm or who is a Danish, Finnish, Icelandic, or Norwegian citizen and is present in the Realm, or
3. by any other alien, who is present in the Realm, and the crime under Swedish law can result in imprisonment for more than six months.

[295] Code of Criminal Procedure, Arts 789 (4), 791 (4) and 793.

[296] According to reports, on 25 April 1991, it refused to accept a complaint against the Bishop of la Seu d'Urgell, Co-Prince of Andorra, because he benefited from privileges and immunities that international law accords to heads of state and reached the same conclusion on 4 March 1999 with respect to a complaint against President Fidel Castro of Cuba. It is also reported to have rejected complaints against President Teodoro Obiang of Equatorial Guinea (for terrorism) and King Hassan II of Morocco (for genocide against the Saharaui people). *See* Bück, *supra*, n. 289, 102.

[297] The Swaziland Independence Order 1968, Statutory Instruments 1968 No. 1377, Shedule, (obtainable from http://members.nbci.com/pudemo/documents/1968/constitution/1968.html).

The first paragraph shall not apply if the act is not subject to criminal responsibility under the law of the place where it was committed or if it was committed within an area not belonging to any state and, under Swedish law, the punishment for the act cannot be more severe than a fine.
In cases mentioned in this Section, a sanction may not be imposed which is more severe that the severest punishment provided for the crime under the law in the place where it was committed."[298]

Second, Section 3 of Chapter 2 of the Penal Code provides in relevant part:

"Even in cases other than those listed in Section 2, crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court:
. . . .
7. if the crime is hijacking, maritime or aircraft sabotage, airport sabotage, an attempt to commit such crimes, a crime against international law [see Chapter 22, Section 6 (SFS 1994:1721], unlawful dealings with chemical weapons [Chapter 22, section 6a (SFS) 1994: 119, entered into force on 29 April 1997, in accordance with SFS 1997: 120], unlawful dealings with mines [Chapter 22, section 6 b (SFS 1998:1703, entered into force on 1 May 1999)] , or false or careless statement before an international court, or

[298] The Swedish penal Code (Departementsserien (Ds 1999:36), Swedish Ministry of Justice, Stockholm, 1999;
Translation into English, as of 1 May 1999), Ch. 2, § 2 (as amended SFS 1972:812) (SFS – *Svensk Författningssamling* is the official gazette). The Swedish Penal Code was adopted on 21 December 1962, SFS 1962:700, and entered into force on 1 January 1965 and thereafter was amended numerous times. An unofficial English translation of the entire Penal Code, but it is now partly out of date, can be found in National Council for Crime Prevention, Sweden, *The Swedish Penal Code 1986* (Stockholm May 1986), Report 1986:2.

8. if the least severe punishment prescribed for the crime in Swedish law is imprisonment for four years or more.[299]

Section 6 of Chapter 22 of the Penal Code provides that any serious violation of international humanitarian law, whether incorporated in a treaty or part of customary law, is a crime under national law, whether committed in a war or any other type of armed conflict, which would necessarily include a non-international armed conflict. That section reads:

"A person guilty of a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognized principle or tenet relating to international humanitarian law concerning armed conflicts shall be sentenced for crime against international law (*folkrättsbrott*) to imprisonment for at most four years. Serious violations shall be understood to include:

1. use of any weapon prohibited by international law,
2. misuse of the insignia of the United Nations or of insignia referred to in the Act on the Protection of Certain International Medical Insignia (Law 1953:771), parliamentary flags or other internationally recognized insignia, or the killing or injuring of an opponent by means of some other form of treacherous behaviour,
3. attacks on civilians or on persons who are injured or disabled,
4. initiating an indiscriminate attack knowing that such attack will cause exceptionally heavy losses or damage to civilians or to civilian property,
5. initiating an attack against establishments or installations which enjoy special protection under international law,
6. occasioning severe suffering to persons enjoying special protection under international law; coercing prisoners of war or civilians to serve in the armed forces of their enemy or depriving civilians of their liberty in contravention of international law; and
7. arbitrarily and extensively damaging or appropriating property which enjoys special protection under international law in cases other than those described in points 1-6 above.

If the crime is gross, imprisonment for at most ten years, or for life shall be imposed. In assessing whether the crime is gross, special consideration shall be given to whether it comprised a large number of individual acts or whether a large number of persons were killed or injured, or whether the crime occasioned extensive loss of property.

If a crime against the international law has been committed by a member of the armed forces, his lawful superior shall also be sentenced in so far as he was able to foresee the crime but failed to perform his duty to prevent it.[300]

[299] As amended as of 1 August 2000 (SFS 2000:345 and 646) (English translation based on the Swedish Ministry of Justice translation, but with some revision).

[300] Penal Code, Chapt. 22, § 6 (SFS 1994:1721).

All crimes currently are subject to statutes of limitation, but the applicability to crimes within the jurisdiction of the International Criminal Court is under review (see below).[301] In certain cases, prosecution of a foreign official requires approval of the government.[302] In addition, section 7 of Chapter 2 provides that the Penal Code is subject to limitation by fundamental principles of international law and conventional international law.[303]

Sweden is a party to Hague Convention IV, the Geneva Conventions and Protocols I and II. It has ratified the Rome Statute, but as of 1 September 2001it had not yet enacted implementing legislation. However, a review of legislation in the light of ratification of the Rome Statute in now in progress.[304]

· ***Switzerland:*** There are several legislative provisions, whose origins date back to proposals before the First World War (see Chapter Two, Section II.A), giving Swiss courts universal jurisdiction over war crimes. Courts have exercised such jurisdiction in at least three cases. In addition, Switzerland intends to provide for universal jurisdiction over war crimes in its legislation implementing the Rome Statute.

War crimes fall within the jurisdiction of military tribunals, not civilian courts, under the *Code pénal militaire suisse* (Swiss Military Penal Code) of 13 June 1927.[305]

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[301] All crimes in Swedish law are subject to a statute of limitation or limitations on sanctions (*preskription*). Penal Code, Chapter 35.

[302] Penal Code, Chap. 2, § 7 a (Introduced by SFS 1985:518 and entering into force on 1 July 1985) provides:

> "If an alien has committed a crime in the exercise of an office or duty comprising a general position held on behalf of another state or international organization, a prosecution for the crime may only be instituted on order of the Government. The foregoing does not apply if, by means of misleading information, disguise or other means, the perpetrator has attempted to conceal the capacity in which he acted."

Penal Code, Chap. 2, § 7 b (introduced by SFS 1996:401 and entered into force on 1 July 1996) provides:

> "If, on the occasion of a visit to Sweden of a foreign power's military forces within the framework of international co-operation, a crime is committed by personnel of the foreign power belonging to its forces, a prosecution for the crime may only be instituted on order of the Government."

[303] Penal Code, Chapt. 2, § 5. That section provides:

> "In addition to the provisions of this Chapter on the applicability of Swedish law and the jurisdiction of Swedish courts, limitations resulting from generally recognised fundamental principles of public international law or from special provisions in agreements with foreign powers, shall be observed."

It is not clear whether the term "public" is a correct translation.

[304] The Commission on International Penal Law was appointed (Directive 2000:76 – Criminal responsibility for crimes against humanity and other international crimes according to international law) in October 2000 to review Swedish penal law in light of the development of international law, with particular regard to the Rome Statute, and to submit a report with proposals for amendments to Swedish law, no later than 31 October 2002. The review covers issues of substantive law as well as procedural issues such as Swedish jurisdiction and the applicability of limitations on sanctions for crimes under international law.

[305] In addition to the provisions of the Military Penal Code cited, Article 6*bis* of the *Code pénal suisse* (Swiss Penal Code) gives Swiss civilian courts universal jurisdiction over acts committed abroad which the state is obliged to prosecute by treaty, provided that the act is punishable in the territorial state, the suspect is found in Switzerland and the suspect is not extradited (for the text and a discussion of this provision, see Chapter Six). However, this provision would not, as a practical matter, be applicable to violations of international humanitarian law treaties, as these cases would be tried by military tribunals pursuant to Article 108 of the Military Penal Code, except when the alleged war crimes were committed together with other crimes over which the military court lacked jurisdiction. In re *A.M.* [*Alfred Musema* case], *Tribunale militaire de cassation*, 8 July 1996, para. 2.a (quoted on this point in footnote 314, *infra*).

Article 2 (9) of Military Penal Code provides for jurisdiction by military tribunals over civilians or members of foreign forces who committed violations of international law during armed conflict. [306] Article 9 provides that the Military Penal Code is applicable to violations committed in Switzerland and those which have been committed abroad:

> "This code applies to offences committed in Switzerland and to those which have been committed in a foreign country.
> Any custodial sentence served in a foreign country in respect of the offence being prosecuted in Switzerland will be deducted from the sentence given."[307]

Articles 108 (1) of the Military Penal Code gives military tribunals jurisdiction over violations of international humanitarian law treaties during international armed conflict:

> "The provisions of this chapter apply to cases where war has been declared and to other armed conflict between two or more States; attacks on neutrality and the use of force to repel such attacks shall be treated in the same way as the aforementioned conflicts.".[308]

Article 108 (2) gives military tribunals jurisdiction over violations of international humanitarian law treaties during non-international armed conflict:

> "The violation of international agreements is also punishable if such agreements stipulate a wider scope.".[309]

Article 109 provides for the punishment of those who violate international conventions concerning the conduct of war, as well as those which protect persons and property, and those who violate recognized laws and customs of war:

> "Any person who has contravened the provisions of international conventions on the conduct of war or on the protection of persons and property and anyone who has contravened other recognised laws and customs of war shall be punished with imprisonment, unless harsher penalties apply. In serious cases, the penalty will be extended imprisonment (*réclusion*).
> Less serious offences will be punished as a disciplinary matter (*punie disciplinairement*)."[310]

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[306] Article 2 (9) provides for jurisdiction by military tribunals over "civilians who are responsible for violations of international law during armed conflict" (English translation by Amnesty International) (*"Sont soumis au droit pénal militaire: . . . 9. Les civils qui, à l'occasion d'un conflit armé, se rendent coupables d'infractions contre le droit des gens (art. 108 à 114)."*).

[307] English translation by Amnesty International. The original text in French reads: *"Le présent code est applicable aux infractions commises en Suisse et à celles qui ont été commises à l'étranger. Toute peine privative de liberté subie à l'étranger à raison de l'infraction poursuivie en Suisse sera imputée sur la peine à prononcer."*

[308] Article 108 (1) states: *"Les dispositions de ce chapitre sont applicables en cas de guerres déclarées et d'autres conflits armés entre deux ou plusieurs Etats; à ces conflits sont assimilés les atteintes à la neutralité, ainsi que le recours à la force pour repousser de telles atteintes."* (English translation by Amnesty International).

[309] Article 108 (2) states: *"La violation d'accords internationaux est aussi punissable si les accords prévoient un champ d'application plus étendu."* (English translation by Amnesty International).

[310] Article 109 provides: *"Celui qui aura contrevenu aux prescriptions de conventions internationales sur la conduite de la guerre ainsi que pour la protection de personnes et de biens, celui qui aura violé d'autres lois et coutumes de la guerre reconnues, sera, sauf si des dispositions plus sévères sont applicables, puni de l'emprisonnement. Dans les cas graves, la peine sera la réclusion. L'infraction sera punie disciplinairement si elle est de peu de gravité."* (English translation by Amnesty International).

Switzerland is a party to Hague Convention IV, the Geneva Conventions and Protocol I and II. It has signed the Rome Statute, but, as of 1 September 2001, had not yet ratified it, although it is expected to do so in 2001. The implementing legislation for the Rome Statute is expected to preserve universal jurisdiction over war crimes and other crimes within the International Criminal Court's jurisdiction.[311] The provisions of the Military Penal Code cited above, read together, give Swiss military tribunals universal jurisdiction over most war crimes under customary international law, including those committed during non-international armed conflict. There is no express requirement in the Military Penal Code that the suspect be in Switzerland to open a criminal investigation, although the normal practice is that prosecutors will not open a criminal investigation unless the suspect is believed to be in Switzerland. It is also the normal practice that an accused must be in custody for a trial to take place. Nevertheless, it is possible under Swiss law for trials *in absentia* to occur, but, if the convicted person is subsequently arrested, he or she has the right to a trial *d*e novo.[312] There is no statute of limitations for war crimes.[313]

(2) Criminal investigations and prosecutions. No criminal investigations or prosecutions are known to have been opened in Switzerland since the Second World War concerning persons in the country suspected of crimes that occurred during that conflict or other crimes that occurred abroad before 1991. The first known case of a complaint based on universal jurisdiction for a post-1945 war crime, that of Felicien Kabuga for alleged crimes in Rwanda in 1994, the suspect was simply expelled without a criminal investigation (for a brief discussion of this case, see Chapter Fourteen, Section III.B). However, Swiss courts have exercised universal jurisdiction over war crimes in at least three cases involving crimes in Rwanda in 1994 and the former Yugoslavia since 1991: the *Musema, Grabe_* and *Niyonteze* cases.

Case of Alfred Musema (also known as A.M. or X in the court documents). On 11 February 1995, a Rwandan, Alfred Musema, was arrested pursuant to Article 109 of the Military Penal Code for violations of the laws of the laws of war in the Kibuye prefecture, Rwanda based on an investigation by a *juge d'instruction* (investigating magistrate) of the *Tribunal militaire de division 1* (Military tribunal, Division 1). The Rwanda Tribunal in an informal request dated 12 March 1996 asked the military tribunal to defer its investigation and to surrender Alfred Musema. On 8 July 1996, the *Tribunal militaire de cassation* (Military Tribunal of Cassation) stated that Swiss military courts had jurisdiction over war crimes committed during international and non-international armed conflict:

[311] For the background to the drafting of implementing legislation, see *Message relatif au Statut de Rome de la Cour pénale internationale, à la loi fédérale sur la coopération avec la Cour pénale international ainsi qu'à une révision du droit pénal,obtainable from:* http://www.admin.ch/ch/f/ff/2001/index)_7.html.

[312] The Swiss Penal Code is silent on the possibility of trials *in absentia* and it is not clear if trials *in absentia* before federal courts (which will have jurisdiction over the crime of genocide - see Chapter Eight) are permitted. However, the criminal procedure codes of all but one of the individual cantons, which have the primary jurisdiction over criminal cases in civilian courts provide for trials *in absentia.* In general, the convicted person may seek a new trial within ten days of his or her arrest, but it will be up to the court to decide whether to grant the request and, if so, what supplementary investigation, if any, is required. With respect to military tribunals, Article 131 (2) of the Military Procedure Code provides for trials *in absentia* (*"Si l'accusé ne peut être amené ou si le tribunal renonce à sa présence, il y a lieu d'appliquer la procédure par défaut.")* and the procedure for such trials is regulated in Articles 155 to 158 of the Military Procedure Code.

[313] Penal Code, Art. 75*bis.*

> "a) Under national law, any civilian who, in times of armed conflict, commits offences against international law within the meaning of articles 108 to 114 of the CPM [Military Penal Code], shall be subject to military penal law (art. 2, ch. 9 CPM), even if the offence is committed in another country (art. 9.1 CPM); such persons shall then be subject to the jurisdiction of the military courts (art. 218.1 CPM). Under the terms of Art. 109.1 CPM, anyone who contravenes the provisions of international conventions on the conduct of war or on the protection of persons and property is guilty of 'violation of the laws of war', in the same way as anyone who contravenes other recognised laws and customs of war. In the case in question A.M. is suspected, in particular, of serious contraventions of the provisions of the Geneva Conventions of 12 August 1949 and Additional Protocols to these Conventions of 8 June 1977, with the result that he has been deemed to be subject to the jurisdiction of the military courts and a criminal investigation has consequently been initiated into his activities."[314]

It explained that such cases fell within the exclusive jurisdiction of the military courts, except when the war crimes were committed together with crimes over which military courts could not exercise jurisdiction and which were the subject of an investigation by another court.[315] It decided to defer proceedings pending a formal request from the Rwanda Tribunal for transfer, but to reassert jurisdiction if that request was not received within six months.[316]

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[314] The court stated:

"a) En droit interne, les civils qui, à l'occasion d'un conflit armé, se rendent coupables d'infractions contre le droit des gens, au sens des art. 108 à 114 CPM [Code pénal militaire], sont soumis au droit pénal militaire (art. 2 ch. 9 CPM), même si l'infraction a été commise à l'étranger (art. 9 al. 1 CPM); ils sont alors justiciables des tribunaux militaires (art. 218 al. 1 CPM). L'art. 109 al. 1 CPM réprime, sous le titre "violation des lois de la guerre", celui qui aura contrevenu aux prescriptions de conventions internationales sur la conduite de la guerre ainsi que pour la protection de personnes et de biens, de même que celui qui aura violé d'autres lois et coutumes de la guerre reconnues. En l'espèce, A.M. est soupçonné en particulier de violations graves de prescriptions des Conventions de Genève du 12 août 1949 et des Protocoles additionnels à ces conventions, du 8 juin 1977, de sorte qu'il a été considéré comme justiciable des tribunaux militaires et qu'une instruction pénale a alors été ouverte à son encontre." (Text reproduced from ICRC National Implementation Database).

[315] *In re A.M.* (*Le Tribunal militaire de cassation* 8 July 1996), para. 2.a (English translation by Amnesty International). The original French text reads:

"b) Dans le système du droit suisse, comme cela vient d'être exposé, la poursuite et la répression des infractions graves au droit international humanitaire incombent en principe à la justice militaire; dans ce cas, il appartient exclusivement au Tribunal militaire de cassation de statuer sur le dessaisissement. La "juridiction pénale ordinaire", mentionnée à l'art. 9 al. 2 de l'Arrêté fédéral, n'est compétente à cet egard que dans l'hypothèse où les violations du droit international auraient été commises en concours avec d'autres delits, non justiciables des tribunaux militaires et faisant l'objet d'une instruction devant une autre juridiction pénale (cf. Message du Conseil fédéral concernant l'Arrêté fédéral, FF 1995 IV p. 1065 ss, p. 1077).

La seule procédure pénale dirigée en Suisse contre A.M. est menée par la juridiction pénale militaire; le Tribunal militaire de cassation est donc compétent pour statuer sur les conditions du dessaisissement, conformément à l'art. 9 al. 2 de l'arrêté fédéral."

Ibid., para. 2.b (Text reproduced from ICRC National Implementation Database).

[316] The court stated:

"1. L'autorité pénale suisse se dessaisit en faveur du Tribunal pénal international pour le Rwanda de la procédure menée par la justice militaire contre A.M..

La présente décision ne déploiera ses effets que si et dès le moment où une demande de transfèrement aura été agréée.

L'instruction pénale reprendra devant la juridiction suisse si une demande de transfèrement n'est pas présentée dans un délai de six mois dès la communication du présent prononcé au Tribunal pénal international pour le Rwanda."

Ibid., para. 1 of conclusion.

The Prosecutor of the Rwanda Tribunal filed charges of genocide, conspiracy to commit genocide, crimes against humanity and violations of common Article 3 of the Geneva Conventions and violations of Protocol II against Alfred Musema in the Rwanda Tribunal on 11 July 1996, which were confirmed by a Trial Chamber on 15 July 1996. The Registrar of the Rwanda Tribunal sent a formal request for A.M.'s transfer to Switzerland on 26 August 1996. After lengthy challenges in civilian courts, the Federal Court on 28 April 1997 ordered Alfred Musema's transfer to the Rwanda Tribunal.[317]

Case of Goran Grabe_. In the second case, Goran Grabe_ was charged on 28 February 1997, with grave breaches of the Third and Fourth Geneva Conventions and Protocol I, as well as of violations of Protocol II, by torturing prisoners in 1992 in the Omarska and Keraterm camps in Bosnia and Herzegovina, but he was later acquitted for lack of sufficient credible evidence.[318] The military tribunal held that it had jurisdiction under Articles 108 (2) and 109 of the Military Penal Code over violations of the laws and customs of war, grave breaches of the Third and Fourth Geneva Conventions and of Protocol I and violations of Protocol II and this part of the judgment was upheld by the Military Court of Cassation.[319]

[317] The court decided:

"Sur le vu de ce qui précède, le recours de droit administratif doit être rejeté. Le transfèrement du recourant est accordé au TPIR, sans conditions. Dans la mesure où elle est recevable, la demande de mise en liberté doit aussi être écartée."

In re X (*Tribunal fédéral* 28 April 1997), *considérant 9* (text available on ICRC National Implementation Database). The pseudonym of X was used in this litigation instead of A.M. He was convicted by the Rwanda Tribunal on 27 January 2000 of genocide and crimes against humanity, but acquitted of violations of common Article 3 and Additional Protocol II. *Prosecutor v. Musema*, Judgement, Case No. ICTR-96-13-T (Trial Chamber I, 27 January 2000).

[318] *In re G.* (*Tribunal militaire de Division*, Division 1, Lausanne, Switzerland, 18 April 1997), *aff'd in part, rev'd on the scope of damages*, Military Tribunal of Cassation, 5 September 1997 (The text of both decisions - without page numbers - is available on ICRC National Implementation Database). See also the report of this case in *In re G.*, 92 Am. J. Int'l L. 78 (1998).

[319] *In re G.* (*Tribunal militaire de Division*, Division 1, Lausanne, Switzerland, 18 April 1997) 8, *aff'd in part, rev'd on the scope of damages*, Military Tribunal of Cassation, 5 September 1997.

Case of Fulgence Niyonteze. In the third case, a Swiss military tribunal in Lausanne on 30 April 1999 found a Rwandese citizen, Fulgence Niyonteze, the former mayor of Mushubati, guilty of murder (*assassinat*), incitement to murder (*instigation à assassinat*) and crime by omission (*dèlit manqué*) with respect to those crimes, grave breaches of the provisions of international conventions on the law of war concerning the protection of persons and objects, as well as violations of common Article 3 of the Geneva Conventions and of Protocol II in the context of a non-international armed conflict in Rwanda in 1994, and sentenced him to life imprisonment.[320] The tribunal based its decision on Articles 2 (9), 108 (2) and 109 of the Military Penal Code, among others (see discussion above). The judgment was notable because it was the first conviction in Switzerland based on universal jurisdiction over war crimes during a non-international armed conflict. On 26 May 1999, the *Tribunal militaire d'appel* (Military Appeals Tribunal) affirmed the conviction for war crimes, set aside the convictions for murder and incitement to murder; it also reduced the sentence for war crimes to 14 years' imprisonment.[321] As of 1 September 2001, the text of the appeals court decision had not yet been made public. Both the Prosecutor and Fulgence Niyonteze sought review by the *Tribunal militaire de cassation* (Military Court of Cassation). On 27 April 2001, the Military Tribunal of Cassation confirmed the appeals court decision in a public session at the Hôtel de Ville d'Yverdon-les-Bains.[322]

Reportedly, there were approximately one dozen other cases pending in Switzerland at the beginning of 2001 where persons are facing charges of war crimes abroad.

· ***Syrian Arab Republic:*** It appears that two legislative provisions permit Syrian courts to exercise universal jurisdiction over certain conduct amounting to war crimes committed abroad.

First, Article 20 of Title I (Competence), Section 3 (Personal Competence) of the Syrian Penal Code of 1949, as amended 1953 provides for jurisdiction over crimes in the Code committed by foreigners abroad. It states:

> "1- Syrian law applies to every Syrian or foreigner, whether a perpetrator, instigator or accessory, who commits a crime or an offence, punishable by Syrian law, outside Syrian territory.
> [2 -]The situation remains unchanged even if the accused loses or gains Syrian nationality after the crime or offence has been committed."[323]

[320] *Affaire Fugence Niyonteze, Jugement du 30 avril 1999, Tribunal militaire de division 2, Lausanne* (*"reconnaît NIYONTEZE Fulgence coupable d'assassinat, d'instigation à assassinat, de délit manqué de ce crime et d'infractions graves aux prescriptions des conventions internationales sur la conduite de la guerre ainsi que pour la protection de personnes et de biens"*). Although the indictment (*acte d'accusation*) listed grave breaches of the Geneva Conventions, these were not applicable because the conflict in Rwanda was largely a non-international one.

[321] *Fulgence Niyonteze condamné en appel à 14 ans de réclusion par le Tribunal militaire d'appel 1. Il recourt devant le Tribunal militaire de cassation, 6 mai 2000, obtainable from* http://www.vbs.admin.ch/internet/gst/kvr/f/actu-fn-29-5-2000.htm.

[322] *N., Jugement, Tribunal militaire de cassation, 27 mai 2001* (*obtainable from* http://www.vbs.admin.ch/internet/OA/e/urteile.htm). This case is discussed in Luc Reydams, *Prosecutor v. Niyonteze, Military Tribunal, Division 2, Lausanne, Switzerland, April 30, 1999*, 95 Am. J. Int'l L.(forthcoming 2001). *See also Fati Mansour, La Justice militaire confirme la condamnation d'un notable rwandais, Le Temps, 28 avril 2001; Agence France Presse, Première condamnation définitive en Suisse, Le Monde, 28 avril 2001.*

[323] Syrian Penal Code of 1949, as amended 1953, Art. 20 (English translation by Amnesty International).

Second, Article 23 of Title I, Section 4 (Comprehensive Competency) provides for jurisdiction over crimes committed by foreign residents, without any territorial restriction, when extradition has either not been requested or has not been accepted. It reads:

> "Syrian law applies to every foreigner residing in Syria who commits a crime, or an offence, as a perpetrator, instigator or accessory, where such act is not cited in Article 21 [crimes committed by state officials abroad] and where extradition may not have been requested or accepted."[324]

Although Article 23 does not expressly state that it applies to crimes committed abroad, the title of the section, the exclusion of crimes committed abroad by one class of persons, the absence of any territorial restriction and the placement with a series of articles all providing for extraterritorial jurisdiction strongly
suggest that it was intended to apply to crimes committed abroad. One commentary has treated Article 23 as applying to crimes committed abroad.[325]

[324] *Ibid.*, Art. 23.

[325] Foreign Law Branch, International Affairs Division, Office of the Judge Advocate General of the Army, *The Criminal Law System of Syria* 32 (March 1964) ("Aliens located in Syria who are not extradited may even be punished for serious offenses committed by them abroad, if these are recognized by the laws of Syria and of the state where the act took place (Art. 23-26)."). The commentary notes that "[t]he Syrian Penal Code of 22 June 1949, as amended in 1953, is a modern code rooted in European, primarily Italian, practice." *Ibid.*, 31.

There are a number of conditions applicable to Article 20 and 23. Article 24 provides that "Syrian law does not apply to offences referred to in Article 20, which are punishable by less than three years' imprisonment nor to any crime referred to in Article 23, where the law of the state in which such crimes were committed punishes the perpetrator."[326] In prosecutions under either Article 20 or 23, the accused benefits from the most lenient law applicable in Syria or abroad.[327] In addition, the personal law of the accused will be taken into account when prosecuting crimes committed abroad.[328] The principle of *ne bis in idem* precludes a second trial in Syria for the same conduct and, apparently, a sentence which has been served or elapsed by prescription or a pardon will also preclude a trial in Syria.[329]

Syria is a party to the Geneva Conventions and Protocol I. It has signed the Rome Statute but as of 1 September 2001 it had not yet ratified it. The Penal Code does not provide that war crimes are crimes under national law, so prosecutions based on universal jurisdiction would have to be brought for ordinary crimes, such as murder, abduction, assault or rape.

· ***Tadjikistan:*** National courts may exercise universal jurisdiction over war crimes under two provisions of the 1998 Criminal Code of the Republic of Tajikistan whose origins can be traced back to Russian universal jurisdiction legislation of 1903 (see Chapter Two, Section II.A). The relevant legislative provisions are reinforced by Article 10 of the Constitution. That article provides in relevant part:

> "International legal acts recognized by Tajikistan are a constituent part of the legal system of the Republic. If laws of the Republic do not conform to the recognized international legal acts, the norms of the international acts apply.
>
> International laws and acts recognized by Tajikistan apply following official publication."[330]

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[326] Penal Code, Art. 24.

[327] *Ibid.*, Art. 25 (1) ("Where Syrian law and the law of the country in which the crime was committed differ, the court should reconcile the judgement in favour of the defendant, in accordance with Articles 20 and 23.").

[328] *Ibid.*, Art. 26. That article provides:

"For crimes committed inside or outside Syria, the personal law of the defendant is taken into consideration in indicting him:

a) when one factor of the crime committed is subject to a special law of the personal or competence law.

b) when one of the reasons of the legal constraint or pardon, excluding legal confinement, originates from personal or competence law."

[329] Penal Code, Art. 27. That article provides:

"Apart from the crimes stated in Article 19 and crimes on Syrian territory, no Syrian or foreigner should be tracked down providing that he has been tried abroad. In case of indictment, whether the judgement has been enforced or has elapsed by prescription or pardon."

[330] The Constitution of the Republic of Tajikistan, 6 November 1994, as amended 26 September 1999, Art. 10, paras 3 and 4. English translation in Gisbert H. Flanz, *Republic of Tajikistan*, Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. Release 2000-1, Patricis Ward trans.).

The first legislative provision, paragraph 1 of Article 15 (Application of the Criminal Law in Regard to Persons who Committed Crimes outside the Republic of Tajikistan), provides for jurisdiction over stateless permanent residents who committed crimes under Tajikistan law outside the country.[331]

[331] Article 15 (1) provides: "Citizens of the Republic [of] Tajikistan and permanent residents without citizenship are liable to criminal responsibility for crimes committed outside the Republic [of] Tajikistan in conformity with this Code in case if [sic] they were not punished under the court verdict of any other state." The Criminal Code is obtainable from http://www.osi.hu/ipf/fellows/zaripova/PenalCode.hts. A slightly different English translation is available from the ICRC IHL Implementation Database: http://www.icrc.org/ihl-nat.

The second, Article 15 (2) of the Criminal Code, provides for jurisdiction over foreigners and stateless persons not resident in Tajikistan who commit crimes under the Code when the crime is prohibited by norms of international law or treaties.[332]

Tajikistan is a party to the Geneva Conventions and Protocols I and II. It has ratified the Rome Statute but as of 1 September 2001 it had not yet enacted implementing legislation. It has provided that war crimes in international and non-international armed conflict are crimes under national law.[333] It has also provided that crimes against peace and security of mankind, which include war crimes, are not subject to a statute of limitations.[334]

· ***Tanzania, United Republic of:*** It appears that the courts of Tanzania on the mainland have been able to exercise universal jurisdiction over grave breaches of the Geneva Conventions abroad since 1959.

Although Tanzania is not known to have a Geneva Conventions Act, the United Kingdom's Geneva Conventions Act 1957 applied to Tanganika, which became part of Tanzania, under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below), at least before 1 January 1970. Tanganyika become independent on 9 December 1961 and Zanzibar on 10 December 1963. On 26 April 1964, the two states merged into the United Republic of Tanganyika and Zanzibar; six months later the name was changed to the United Republic of Tanzania. As far as is known, the 1959 Order in Council has not been repealed either before or after independence and applies to the entire country.

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

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

Although Trinidad and Tobago does not have a Geneva Conventions Act, the United Kingdom's Geneva Conventions Act 1957 applied to Trinidad and Tobago before independence under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council (for the text, see discussion of United Kingdom legislation below), at least before 1 January 1970. Trinidad and Tobago became independent on 31 August 1962. Section 5(1) of Act No 4. Of 1976 provides that existing laws are to continue in effect from the date of independence and, as far as is known, the 1959 Order in Council has not been repealed either before or after independence.[335]

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[332] Article 15 (2) (a) states:
"(2) Foreign citizens and persons without citizenship not living constantly in the Republic [of] Tajikistan are liable to criminal proceedings for crimes committed outside the Republic [of] Tajikistan according to the present Code in the following cases:
a) if they committed a crime prescribed by norms of International law recognized by the Republic of Tajikistan or interstate treaties and agreements[.]"

[333] Criminal Code, Art. 397 (Production or proliferation of weapons of mass destruction), Art. 403 (Intentional Violations of Norms of International Humanitarian Law Committed in the Course of Armed Conflicts), Art. 404 (Intentional Violation of Norms of International Humanitarian Law Committed During International or Internal Armed Conflicts With Threat to the Health or Causing Physical Mutilations) and Art. 405 (Other Violations of Norms of International Humanitarian Law).

[334] Criminal Code, Art. 75 (Release from criminal liability because of the expiry of period of limitations).

[335] Act No. 4 of 1976 (An Act to establish the Republic of Trinidad and Tobago and to enact the

Constitution thereof in lieu of the former Constitution), in Gisbert H. Flanz & Hope P. White-Davis, Trinidad & Tobago, *Constitutions of the Countries of the World*, Albert P. Blaustein & Gisbert H. Flanz ed., Oceana Publications, Inc., Dobbs Ferry, New York, September 1988.

Trinidad and Tobago has ratified the Geneva Conventions, but, as of 1 September 2001, it had not yet ratified Protocols I and II. It has ratified the Rome Statute and has begun drafting implementing legislation which is expected to include universal jurisdiction over all crimes recognized in the Statute.

· ***Turkey:*** Turkish courts have been able to exercise universal jurisdiction over ordinary crimes since 1926 (see Chapter Two, Section II.A). Today, they may exercise universal jurisdiction over certain conduct amounting to war crimes.

Article 6 (b) of the Penal Code provides for universal jurisdiction over crimes carrying a penalty of at least three years, provided that there is no extradition treaty with the territorial state or state of the suspect's nationality - or the extradition is refused. Prosecutions must be authorized by the Minister of Justice. This provision appears to be sufficiently broadly worded to include ordinary crimes which would constitute war crimes if committed during armed conflict. It states:

> "A foreigner who commits a felony other than one mentioned in Article 4 [counterfeiting and similar offences], in a foreign country, against Turkey or a Turk, entailing punishment restricting liberty for a minimum authorized period of one year under Turkish law, shall be punished in accordance with Turkish laws, if he is in Turkey.
>
> However, institution of prosecution is subject to the request of the Minister of Justice or the complaint of the injured party.
>
> If the felony is committed against a foreigner, the perpetrator shall be punished upon the request of the Minister of Justice, provided the following conditions exist:
>
> 1. the act, according to Turkish law, entails a punishment restricting liberty for a minimum authorized period of not less than three years;
>
> 2. no extradition treaty exists or the extradition of the perpetrator is rejected either by the Government of the State in whose territory the felony was committed, or by the State of which the offender is a citizen.
>
> If a Turk or foreigner commits felonies described in Chapter VIII, of Part 3 [offences against the state], of the Turkish Criminal Code, in a foreign country, prosecution shall be instituted directly, and the perpetrator shall be subject to the punishments provided for in the Articles of that Part."[336]

A commentator has explained that although Turkey adopts the principle of territoriality as a general rule, with a few exceptions,

[336] Turkish Criminal Code, 1 March 1926, Statute No. 765, Official Gazette No. 320 or 13 March 1926, as amended to June 1964, Art. 6 (English translation of the Criminal Code in: Tugrul Ansay, Mustafa T. Yüce; & Michael Friedman, eds, *The Turkish Criminal Code* (South Hackensack, New Jersey & London: Sweet & Maxwell Limited 1965) (Orhan Sepiçi & Mustafa Ovaçik, trans.); a similar translation is found in the initial report of Turkey to the Committee against Torture, U.N. Doc. CAT/C/7/Add.6 (1990), para. 32). As of 2000, this article, which was cited in an earlier version in the 1927 *Lotus* case, had not been amended. The venue for trying extraterritorial crimes is determined in Articles 9 and 10 of the Code of Criminal Procedure. *Ibid.*, para. 33.

> "[u]nder Articles 4 to 8 [of the Criminal Code] the systems of individual and universal criminal jurisdiction are accepted, under certain conditions, in order not to let the criminal go unpunished. This means that some crime committed outside of Turkish territory, by Turkish citizens or against them, or by foreigners or against them, will be prosecuted and punished in accordance with Turkish law."[337]

However, as Article 6 states, prosecutions may only be instituted if a political official, the Minister of Justice, so requests. In addition, Article 3 provides that a foreigner who has been sentenced in a foreign court for a crime committed abroad, if the Minister of Justice requests a prosecution.[338] Statutes of limitation may apply to crimes under international law.[339] War crimes are not defined as crimes under national law, so prosecutions would have to be for ordinary crimes, such as murder, abduction, assault and rape.

· ***Turkmenistan:*** There are two legislative provisions, whose origins can be traced back to Russian universal jurisdiction legislation of 1903 (see Chapter Two, Section II.A), permitting national courts to exercise universal jurisdiction over war crimes committed abroad. This legislative grant of universal jurisdiction is reinforced by Article 6 of the Constitution, which provides:

> "Turkmenistan shall acknowledge the priority of generally recognized norms of international law. Turkmenistan shall be an authorized member of the world community, observing in its foreign policy the principles of peaceful co-existence, non-use of force, and the non-interference in the internal affairs of other states."[340]

Article 8 (1) of the Turkmenistan Criminal Code of 1997, which entered into force in 1998, provides:

> "Nationals of Turkmenistan and permanent residents of Turkmenistan without citizenship who have committed a crime outside Turkmenistan, provided for under the criminal laws of Turkmenistan, shall be subject to responsibility under criminal laws of Turkmenistan, if responsibility for the act as committed, is provided for under the criminal laws of the state on whose territory it has been committed and the said persons have not been convicted in a foreign state. In this case, a penalty may not be imposed that exceeds the upper limit for the penalties provided for under the law in force in the *locus criminis.*"[341]

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[337] Feyyaz Gölcüklü, *Criminal Law, in* Tu_rul Ansay & Don Wallace, Jr., eds, *Introduction to Turkish Law* 203, 206 (Deventer/Antwerp/London/Frankfurt/Boston/New York: Kluwer Law and Taxation Publishers 3ed. 1987). The government has made a similar explanation of the scope of universal jurisdiction. Initial report of Turkey to Committee against Torture, U.N. Doc. CAT/C/7/Add.6, 10 May 1990, paras 30, 32 (b).

[338] Criminal Code, Art. 3 ("A foreigner who has been sentenced in a foreign country for a crime, shall be tried in Turkey upon the request of the Minister of Justice.") An English translation of this part of Article 3 may be found in the initial report of Turkey to the Committee against Torture, U.N. Doc. CAT/C/7/Add.6, ,para. 30. However, the government has stated that in the application of Article 3, "the general principles of law, including that of *non bis in idem* are duly taken heed of." *Ibid.* As explained in Chapter Fourteen, Section I.G, this principle applies only within a single jurisdiction. In the absence of any jurisprudence or commentary on this point, it is not clear whether a retrial in these circumstances would be possible in Turkey.

[339] Criminal Code, Art. 102, Art. 112. *See also* Gölcüklü, *supra,* n337., 215.

[340] Constitution of Turkmenistan, 18 May 1992, Art. 6 (English translation in Vladimir I. Lafitsky, trans., *Turkmenistan, in* Albert P. Blaustein & Gisbert H. Flanz, eds, *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc.) (Release 94-5, July 1994)).

[341] Turkmenistan Criminal Code of 1997, entered into force 1 January 1998, Art. 8 (1) (English translation by Amnesty International).

Second, Article 8 (2) states:

> "Foreign nationals and stateless persons who do not reside permanently in Turkmenistan, are subject to responsiblity under the criminal laws of Turkmenistan for a crime committed outside Turkmenistan, if the crime is directed against Turkmenistan or its citizens and also in the cases provided for by international treaties entered into by Turkmenistan, if they have not been convicted in a foreign state and criminal proceedings have been instituted against them on the territory of Turkmenistan."[342]

Turkmenistan is a party to the Geneva Conventions and Protocols I and II. It has not signed the Rome Statute and, as of 1 September 2001, it had not yet ratified it. The Criminal Code does not define war crimes as crimes under national law, so prosecutions for war crimes would have to be based on conduct that was also an ordinary crime under national law, such as murder, abduction, assault or rape. Such crimes are subject to statutes of limitations. There is no requirement in the Criminal Code that a political official, such as the Minister of Justice, approve an investigation or prosecution. The Criminal Code does not include provisions on immunity or require that the conduct abroad be a crime in the territorial state.

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

Although Tuvalu does not have a Geneva Conventions Act, the United Kingdom's Geneva Conventions Act 1957 applies to the state under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for text, see discussion below in this section of United Kingdom legislation) at least before Tuvalu became independent on 1 October 1978. Section 2(1) of the Schedule 5 of the Constitution of 1978 provides that existing laws shall continue to have effect as if they have been made in pursuance of the Constitution and as far as is known, the 1959 Order in Council has not been repealed before or after independence.[343]

Tuvalu has ratified the Geneva Conventions, but, as of 1 September 2001, it had not yet ratified Protocols I and II. It has not signed the Rome Statute and as of 1 September 2001 it had not yet ratified it.

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

[342] *Ibid.*, Art. 8 (1).

[343] Constitution of Tuvalu Ordinance 1986, in A.H. Angelo & Rosemary Gordon, Tuvalu, *Constitutions of the Countries of the World,* Gisbert H. Flanz, ed., Oceana Publications, Inc, Dobbs Ferry, New York, 96-5, 1996

Section 1 (1) of the Uganda Geneva Conventions Act, provides national courts with universal jurisdiction over grave breaches of the Geneva Conventions.[344] Previously, the United Kingdom's Geneva Conventions Act 1957 applied to Uganda under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below), at least before the Uganda Protectorate became independent on 9 October 1962. Proceedings may not be instituted except by or on behalf of the Director of Public Prosecutions.[345] There is no statute of limitations in the Act, but it is not known if any statute of limitations applies to grave breaches. Section 273 of the Constitution of 1995 provides that existing laws are to continue in effect as from the date of the Constitution.[346]

Uganda has ratified the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but, as of 1 September 2001, it had not yet ratified it.

· ***Ukraine:*** Ukranian courts can exercise universal jurisdiction over conduct amounting to war crimes based on legislative provisions whose origins can be traced back to Russian universal jurisdiction legislation of 1903 (see Chapter Two, Section II.A), in two situations: stateless persons suspected of crimes abroad and foreigners suspected of crimes abroad in circumstances provided by treaties.

Article 5 (Operation of the Criminal Code in Respect of Acts Committed outside of Ukraine) of the Criminal Code of 1997 states:

> "Nationals of Ukraine who have committed crimes outside of Ukraine, are subject to criminal responsibility under this Code, if they are brought to criminal responsibility or justice in the territory of Ukraine.
>
> Stateless persons who have committed crimes outside of Ukraine, bear responsibility on the same grounds.
>
> If the above-mentioned persons have suffered punishment for their crimes abroad, the Court can correspondingly mitigate the punishment imposed on them or completely release a guilty person from penalty. Foreign nationals bear responsibility for crimes committed outside Ukraine under criminal laws of Ukraine in cases provided for in international treaties."[347]

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[344] Geneva Conventions Act, 1964, § 1 (1). That section states:

> "Any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of any of the Conventions as is referred to in the following articles respectively of those Conventions, that is to say, [list of grave breaches provisions of the four Geneva Conventions attached as schedules to the Act] commits an offence. . . ."

Prior to independence, the United Kingdom Geneva Conventions Act (Colonial Territories) Order in Council, 1959 extended the scope of the Geneva Conventions Act, 1957 to the Uganda Protectorate. Section 7 (1) of the Geneva Conventions Act, 1964 repealed the 1957 Act insofar as it formed part of the law of Uganda.

[345] Geneva Conventions Act, 1964, Art. 1 (3).

[346] Constitution of 1995, Section 273 in, Jefri Jay Ruchti, Republic of Uganda, in *Constitutions of the Countries of the World*, Gisbert H. Flanz, ed., Oceana Publications, Inc., Dobbs Ferry, New York, 96-2, 1996.

[347] Criminal Code of 1997, Art. 5 (English translation by Amnesty International). As of 31 July 2000, this article had not been amended. Fourth periodic report of Ukraine to Committee against Torture, U.N. Doc. CAT/C/55/Add.1, 17 November 2000, para. 45. The government has explained that

> "[u]nder articles 4 and 5 of the Criminal Code, all persons (except individuals benefiting from diplomatic immunity) are liable under the Code if they have committed crimes in Ukrainian territory or have been brought before the Ukrainian courts, even if the crime of which they stand accused was committed outside the Ukraine."

Ibid., para. 67.

Article 9 of the Constitution provides that international law is part of national law, although it does not provide that international law is superior to either the Constitution or national legislation.[348] Nevertheless, it seems that international law which is not contrary to the Constitution can be enforced directly by national courts, although it is not clear whether this includes criminal law.[349] A commentary explains:

> "In general, Article 9 establishes in Ukrainian law the concept of international law that is already well-known in many other countries: international law as part of that country's law. In accordance with this concept, a rule of international law, once incorporated into [a] national legal system, becomes an integral part of the national legal system and consequently acquires the ability to govern relations among subjects of municipal law. Having become an element of the national legal system, such a norm is implemented according to principles and goals of the system and in a manner established by its procedural rules."[350]

The Ukraine is a party to the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but as of 1September 2001 it had not yet ratified it. It does not appear to have expressly provided that war crimes are crimes under national law, but Article 5 would appear to give courts jurisdiction over conduct committed abroad, such as murder and rape, which are crimes under national law, if committed during armed conflict. It is not known if the Ukraine has expressly excluded statutes of limitations for war crimes, but it is a party to the Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes against Humanity. The Criminal Code appears to permit anyone with diplomatic immunity to avoid being held criminally responsible for crimes under international law.[351]

·***United Kingdom:*** United Kingdom courts, and those of certain dependencies, can exercise universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I, certain war crimes committed during the Second World War and other war crimes in certain circumstances.

Royal Warrant of 14 June 1945. As indicated above in Part One, Section II.C, a Royal Warrant, issued on 14 June 1945 at the end of the Second World War in Europe, authorized British military courts to exercise jurisdiction over violations of the laws and customs of war.[352] The 1958

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[348] Constitution of the Ukraine of 28 June 1996, Art. 9. It reads:
"International treaties that are in force, agreed to be binding by the *Verkhovna Rada* [Supreme Council], are part of national legislation of Ukraine. The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine."

[349] A previous draft of Article 9, based on a monist approach, provided that "generally acknowledged principles and norms of international law, as well as international treaties of Ukraine are an integral part of its legal system" and that "if an international treaty establishes different rules from those envisaged by the national legislation of Ukraine, the rules of such international treaty are applied". Quoted in Alexander A. Merezhko and Amy E. Eckert, *Ukraine in the New World Order: The Role of International Law*, 1 J. Const. L. East. & Centr. Eur.111, 117 (1996). This article describes the drafting history of this provision and the scope of Article 9.

[350] *Ibid.*, 117-118. It is not clear how a conflict between an obligation in a treaty and national legislation would be resolved and whether the first in time would govern or the treaty in all cases. *Ibid.*, 118-119.

[351] The government has stated that, "[u]nder articles 4 and 5 of the Criminal Code, all persons (except individuals benefiting from diplomatic immunity) are liable under the Code if they have committed crimes in Ukrainian territory or have been brought before the Ukrainian courts, even if the crime of which they stand accused was committed outside Ukraine." Fourth periodic report of Ukraine to the Committee against Torture, U.N. Doc. CAT/C/55/Add.1, 17 November 2000, para. 67.

[352] Royal Warrant of 14 June 1945, promulgated on 18 June 1945 in Army Order 81/1945. The text of the

British *Manual of Military Law* expressly states that "British Military Courts have jurisdiction outside the United Kingdom over war crimes committed . . . by . . . persons of any nationality . . . It is not necessary that the victim of the war crime should be a British subject."[353] The *Manual* adds that

> "The courts, whether military or civil, of neutral States may also exercise jurisdiction in respect of war crimes. This jurisdiction is independent of any agreement made between neutral and belligerent States. War Crimes are crimes *ex jure gentium* [under international law] and are thus triable by the courts of all States."[354]

Royal Warrant is in the United Kingdom *Manual of Military Law*, Part III, 347 (1958).

[353] *Manual of Military Law*, III (1958), para. 637.

[354] *Ibid.*

The Royal Warrant, which is still in effect, gives British military courts sitting outside, but not within, the United Kingdom, jurisdiction over war crimes committed by civilians or members of armed forces.[355] The crimes must have taken place during a conflict in which the United Kingdom is involved.[356] However, British military courts may not exercise jurisdiction under the Royal Warrant over persons other than enemy aliens when the civilian courts where a military court sits are functioning normally, except in enemy countries or countries under occupation.[357] Leading commentators believe that military courts under the Royal Warrant now may exercise universal jurisdiction when sitting overseas only during an armed conflict or in a period of military occupation of territory immediately afterwards.[358]

There is now express statutory provision for United Kingdom military or civilian courts sitting in the United Kingdom to exercise universal jurisdiction over war crimes under three separate pieces of legislation: the War Crimes Act 1991; the Geneva Conventions Act 1957 and the Geneva Conventions (Amendment) Act 1995.

War Crimes Act 1991. The War Crimes Act 1991 gives United Kingdom courts a very limited ability to exercise universal jurisdiction over war crimes amounting to murder, manslaughter or culpable homicide committed in Europe during the Second World War by a person who subsequently became a United Kingdom citizen or resident.[359] No statute of limitations applies to war crimes under this legislation.

[355] A.V.P. Rogers, *War Crimes Trials under the Royal Warrant: British Practice 1945-1949*, 39 Int'l & Comp. L. Q. 780, 791, 795 (1990).

[356] The Preamble to the Royal Warrant states that it provides "for the trial and punishment of violations of the laws and usages of war committed during any war in which WE have been or may be engaged at any time after the second day of September, nineteen hundred and thirty-nine."

[357] Rogers, *supra n.355*, 790.

[358] *Ibid.*, 796 (also citing G.I.A.D. Draper).

[359] Section 1 of the War Crimes Act 1991 provides in part:

"[P]roceedings for murder, manslaughter or culpable homicide may be brought against a person in the United Kingdom irrespective of his nationality at the time of the alleged offence if that offence -

(a) was committed during the period beginning with 1st September 1939 and ending with 5th June 1945 in a place which at the time was part of Germany or under German occupation; and

(b) constituted a violation of the laws and customs of war.

No proceedings shall by virtue of this section be brought against any person unless he was on 8th March 1990, or has subsequently become, a British citizen or resident in the United Kingdom, the Isle of Man or any of the Channel Islands . . ."

For further information about the War Crimes Act 1991, see: A. J. Cunningham, *To the Uttermost Ends of the Earth? The War Crimes Act and International Law*, 11 L.S. 281 (1991); G. Ganz, *The War Crimes Act 1991 -Why No Constitutional Crisis?*, 55 Mod. L. Rev. 87 (1992); Christopher Greenwood, *UK War Crimes Act 1991*, in Hazel Fox & Michael A. Meyer, *Effecting Compliance* 215 (London: British Institute of International and Comparative Law 1993); S.N. McMurtrie, *The Constitutionality of the War Crimes Act 1991*, 13 Statute L. Rev. 128 (1992); *Report of the War Crimes Inquiry of the Parliament of the United Kingdom* (H.M.S.O. Cmd. 744 1989) (Hetherington-Chalmers Report); A.T. Richardson, *War Crimes Act, 1991*, 55 Mod. L. Rev. 73 (1992).

A War Crimes Inquiry Group reviewed over 400 cases pursuant to the War Crimes Act 1991 of alleged war crimes committed during that war in Europe with a view to possible prosecution and a special unit of the Metropolitan Police was established to investigate these cases with a view to prosecution. On 15 April 1996, a resident, Szymon Serafinowicz, was charged under this legislation with murder in violation of the laws of war and of the common law of three persons in 1941-1942 at a concentration camp in the Byelorussian S.S.R. (now Belarus) where he was serving as a guard. On 17 January 1997, after a week of hearings on his medical condition, the accused was found by a jury at the Central Criminal Court to be unfit to stand trial.[360] The Attorney General then entered a *nolle prosequi* on the ground of the accused's medical condition.[361] On 1 April1999, Anthony (Andrzej) Sawoniuk was sentenced under the War Crimes Act 1991 to life imprisonment for the murder of two civilians.[362] The Court of Appeal upheld his conviction on 10 February 2000.[363] The House of Lords denied leave to appeal on 20 June 2000.[364]

Grave breaches of the Geneva Conventions and Protocol I. The Geneva Conventions Act 1957 gives United Kingdom courts universal jurisdiction over grave breaches of the four Geneva Conventions of 1949.[365] The act was amended in 1995 to give United Kingdom courts universal jurisdiction over grave breaches of Protocol I.[366] However, neither the 1957 nor the 1995 act includes other breaches of these treaties or of Protocol II. In addition to ratifying the Geneva Conventions and Protocols, the United Kingdom is a party to Hague Convention IV.

[360] *See* Jane L. Garwood, *The British Experience*, in M. Cherif Bassiouni, 3 *International Criminal Law* 325-326 (Ardsley, New York: Transnational Publishers, Inc. 2d ed. 1999); Helen Smith, *Britain's first war crimes trial collapses*, Reuter, 17 January 1997; John Mason, *War crime prosecution collapses*, *Financial Times*, 18 January 1997.

[361] Hansard, House of Lords, Vol. 596, 11 January 1999, Written Answers (*obtainable from* http://www.parliament.uk/hophome.htm).

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

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

[364] *War Criminal Refused New Hearing, Financial Times*, 20 June 2000.

[365] Section 1 of the Geneva Conventions Act 1957 provides:

"(1) Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by another person of, any such grave breach of any of the scheduled conventions as is referred to in the following articles respectively of those conventions, that is to say - [list of articles omitted] shall be guilty of felony and on conviction thereof -

(I) in the case of such a grave breach as aforesaid involving the wilful killing of a person protected by the convention in question, shall be sentenced to imprisonment for life;

(ii) in the case of any other such grave breach as aforesaid, shall be liable to imprisonment for a term not exceeding fourteen years.".

[366] Section 1 of the Geneva Conventions (Amendment) Act 1995, which came into force on 20 July 1998 by means of the Geneva Conventions (Amendment) Act 1995 (Commencement) Order 1998, provides in paragraphs 2 and 3 that grave breaches include grave breaches of Protocol I in Articles 11 (4) and 85 (2), (3) and (4).

Grave breaches of the Geneva Conventions in territories or dependencies. Article 2 of the Geneva Conventions Act (Colonial Territories) Order in Council, 1959 provides that the bulk of the Geneva Conventions Act 1957, including its universal jurisdiction provisions, applies to certain colonial territories listed in the First Schedule to the Order.[367] These territories fall into five groups: (1) territories which are still dependencies of the Crown; (2) independent states which have retained or transformed this order into their own national legislation; (3) states which now have Geneva Conventions Acts of their own; and (4) states which have not retained the Order or enacted their own legislation; and (5) states where it has not been possible to confirm whether any legislation exists providing for jurisdiction over grave breaches.[368]

Implementation of the Rome Statute. The United Kingdom has signed the Rome Statute and the Foreign Secretary has pledged that it would be among the first 60 states to ratify it. A bill to implement the Rome Statute in England and Wales and Northern Ireland was introduced in the House of Lords on 14 December 2000. It has received Royal Assent and similar legislation for Scotland is expected to be enacted in the second half of 2001. However, despite an overwhelming number of recommendations made by independent experts and non-governmental organizations during a period of consultations after a draft bill was circulated for consultation on 25 August 2000, the Act does not extend universal jurisdiction to the other war crimes recognized in the Rome Statute. In addition, in eliminates the ability of the independent Crown Prosecution Service to determine whether to institute a prosecution of a person suspected of a grave breach and now provides that this decision will be taken by a political official, the Attorney General. No statute of limitations applies to war crimes, crimes against humanity or genocide under the Act.

· ***United States:*** United States general courts-martial (military courts operating pursuant to pre-existing rules of procedure) and military commissions (*ad hoc* bodies with the power of courts, free to determine their own procedure in each case) have long been able to exercise universal jurisdiction over any person, military or civilian, suspected of war crimes abroad.[369] However, the scope of

[367] Article 2 states:

"Subject to the exceptions and modifications specified in the Second Schedule [not relevant to jurisdiction] to this Order, the provisions of the Geneva Conventions Act, 1957 (other than section 4 and subsection (2) of section 8) shall extend to the territories specified in the First Schedule to this Order [see list in following footnote]."

[368] These territories or states are:

· (1) territories which are still dependencies of the Crown (Bermuda, Falkland Islands and Dependencies, Gibraltar, Pitcairn, St. Helena);

· (2) independent states and autonomous territories which have transformed this order into their own national legislation (Bahamas, Belize (formerly British Honduras), Fiji, Gambia, Guyana (formerly British Guiana), Hong Kong (as an autonomous region of China), Kiribati (including the Gilbert Islands in the former Gilbert and Ellice Islands Colony and the Central and Southern Line Islands, which consisted of the following islands: Caroline, Kiritimati (also called Christmas Island), Malden, Starbuck, Tauaeran, Teraina and Vostok), Sierra Leone (formerly Colony and Protectorate of Sierra Leone), Solomon Islands (formerly British Solomon Islands Protectorate) and certain states which were formerly part of the West Indies Federation (including Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and Trinidad and Tobago), Tuvalu (formerly the Ellice Islands in the Gilbert and Ellice Islands Colony);

· (3) states which now have Geneva Conventions Acts of their own (Botswana (formerly Bechuanaland Protectorate), Cyprus, Kenya, Malaysia (successor to North Borneo and Sarawak), Mauritius, Nigeria (formerly Federation of Nigeria), Papua New Guinea, Seychelles, Uganda (formerly Uganda Protectorate));

· (4) states which have neither retained the Order nor enacted their own Geneva Conventions legislation (Yemen (as successor to Aden Colony and Kamaran) appears to fall into this category, although it does provide for universal jurisdiction over some war crimes); and

· (5) states where it has not been possible to confirm whether any legislation exists providing for jurisdiction over grave breaches (Lesotho (Basutoland), Malta, Somalia (as successor to Somaliland Protectorate), Swaziland, Tanzania (as successor to Tanganika)).

[369] For a description of the military court system at the end of the Second World War, which is still relevant

persons subject under the United States Constitution to such jurisdiction today, either in peace or in war, is not entirely certain. Moreover, there appears to be a reluctance to use the full scope of such jurisdiction in practice. To a limited extent, such jurisdiction is concurrent with civilian Federal District Courts with regard to civilians accompanying United States armed forces abroad and former members of those forces for crimes committed when they were in the armed forces.

Brief overview of military and civilian court jurisdiction. The current jurisdictional framework of military courts and commissions and Federal civilian courts over persons suspected of crimes under international law is somewhat complicated. As explained in more detail below, traditionally there have been two types of military jurisdiction over persons and crimes, with a third type giving concurrent jurisdiction with civilian Federal District Courts since 1996.

in many respects, see *United States Law and Practice Concerning Trials of War Criminals by Military Commissions and Military Government Tribunals, in* United Nations War Crimes Commission, 1 *Law Reports of Trials of War Criminals* 111 (London: H. M. S. O. 1947).

- persons subject to the UCMJ. First, general courts-martial have jurisdiction over members of the armed forces and prisoners of war in the custody of the armed forces. Collectively, these persons are defined in Article 2 of the Uniform Code of Military Justice (UCMJ) and are usually called "persons subject to the code" or persons in a Title 10 status.[370] Such persons are subject to a general court-martial pursuant to the first sentence of Article 18 of the UCMJ. That sentence provides:

> "Subject to article 17 [defining jurisdiction of courts-martial], general courts-martial shall have jurisdiction to try persons subject to this code for any offense made punishable by this code and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code, including the penalty of death when specifically authorized by this code."[371]

Article 17 of the UCMJ provides that "[e]ach armed force has court-martial jurisdiction over all persons subject to this chapter."[372] Article 5 of the UCMJ provides that "[t]his chapter applies in all places."[373] United States citizens and foreign nationals not listed in Article 2 of the UCMJ are not persons subject to the Code or in Title 10 status.[374]

- persons subject to trial under international law for war crimes. Second, military courts and military commissions have jurisdiction over any person who under international humanitarian law is subject to trial in a military court. General courts-martial have jurisdiction under the UCMJ over persons suspected of war crimes. The second sentence of Article 18 of the UCMJ states:

> "General courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."[375]

In addition, *ad hoc* military commissions continue to have jurisdiction over persons suspected of war crimes, whether inside the United States or abroad, and, apart from constitutional considerations (see below) over both military and civilian suspects. Article 21 of the UCMJ makes clear that pre-existing military jurisdiction has not been eliminated by the adoption of the UCMJ:

[370] Uniform Military Code of Justice (UCMJ) (*obtainable from* http://jaglink.jag.af.mil/ucmj.htm), Art. 2; 10 U.S.C. § 802. The UCMJ was adopted in 1950 and replaced the Articles of War, which date from the first years of the Republic (see below).

[371] UCMJ, Art. 18; 10 U.S.C. § 818.

[372] *Ibid.*, Art. 17; 10 U.S.C. § 817.

[373] *Ibid.*, Art. 5; 10 U.S.C. § 805.

[374] Jan E. Aldykiewicz & Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts,* 167 Mil. L. Rev. 74, 80 n. 10 (2001).

[375] UCMJ, Art. 18, 10 U.S.C. § 818.

> "The provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals."[376]

This second type of jurisdiction applies in all places under Section 5 of the UCMJ, cited above. It is not limited in Article 18 or any other provision of the UCMJ by the place where the crime occurred, the nationality of the suspect or victim, the status of the accused as member of an armed force or armed group or as civilian, the status of the accused as a member of a belligerent or adversarial force, the existence of a conflict or not at the time the court-martial is sitting or the time when the crime was committed.

- international and constitutional constraints on military jurisdiction over war crimes. There are a number of important international constraints on the use of military courts and military commissions to try persons, whether military or civilian suspected of grave human rights violations and abuses and crimes under international law (see Chapter Fourteen, Section IV.C).[377] There are also a number of possible constitutional limits on the use of such courts over civilians, as discussed below.

[376] UCMJ, Art. 21; 10 U.S.C. § 821. Similarly, Articles 104 and 106 of the UCMJ authorize such courts to exercise jurisdiction over anyone committing certain violations of the laws of war. 10 U.S.C. §§ 904, 906.

[377] Amnesty International has opposed military jurisdiction over persons suspected of crimes under international law. *Amnesty International's 14-Point Program for the Prevention of "Disappearances",* Point 11 (Prosecution) ("Trials should be in the civilian courts."), *in* Amnesty International, *"Disappearances" and Political Killings: Human Rights Crisis of the 1990s - A Manual for Action* 291 (Amsterdam: Amnesty International 1994), AI Index: ACT 33/01/94; *Amnesty International's 14-Point Program for the Prevention of Extrajudicial Executions, in Ibid.*, 293. Nothing in this description of the scope of United States military jurisdiction over war crimes or other crimes under international law today should be seen as an endorsement of such jurisdiction in preference to trials in civilian courts. Indeed, as noted below, the absence of constitutional and internationally recognized fair trial guarantees in military commissions is a matter of deep concern.

The provisions under which persons are charged for conduct amounting to a war crime depends on their military status. In practice, if the person is subject to the code (Title 10 status), such as a member of the United States armed forces or a prisoner of war in the custody of those forces, then the person will be charged with a violation of the UCMJ, not directly under international law for the war crime.[378] However, if the suspect is a member of enemy armed forces, that person is normally charged with a war crime directly under international law.[379] As stated in subparagraph b (Persons Charged With War Crimes) of paragraph 507 (Universality of jurisdiction) of the 1956 *Field Manual:*

> "The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code. Violations of the law of war committed within the United States by other persons will usually constitute violations of federal or state criminal law and preferably will be prosecuted under such law (see pars. 505 and 506). Commanding officers of United States troops must insure that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished."[380]

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[378] Aldykiewicz & Corn, *supra n.374,*151 n. 319 ("A commander can prosecute a U.S. service member under Article 18, clause 2, for violating the law of war. Generally, however, service members are prosecuted for violating the punitive provisions of the UCMJ under Article 18, clause 1, as persons subject to the code."). Thus, in the My Lai incident in Vietnam, 1st Lt. William Calley was charged with violations of the UCMJ, not war crimes. *Ibid. See also* Everett, *American Service Members and the ICC, supra,* n. 150, 142 (citing the various provisions of the UCMJ that might be charged with respect to conduct amounting to war crimes). *See also* U.S. Army, *The Law of Land Warfare* (Field Manual, FM 27-10), 18 July 1956, with minor amendments as of 18 July 1976 (1956 *Field Manual*), para. 505 (Trials) (d) (How Jurisdiction Exercised), which states that "[w]ar crimes are within the jurisdiction of general courts-martial (UCMJ, Art. 18), military commissions, provost courts, military government courts, and other military tribunals (UCMJ, Art. 21) of the United States, as well as of international tribunals." However, as one authority noted,

> "Rare exceptions were two Army officers involved in the My Lai massacre, Capt. Eugene M. Kotouc . . . and 1st Lt. Thomas K. Willingham, who were initially charged with violations of the law of war. The charges were otherwise worded as ordinary UCMJ offenses. Eventually Willingham's charges were dropped, and Kotouc was acquitted of lesser offenses."

Gary D. Solis, *Son Thang: An American War Crime* 346 n. 33 (Bantam Books: New York/Toronto/London/ Sydney/Auckland 1998) (paperback edition). Given this practice, it is difficult to determine the extent to which members of United States armed forces have been convicted of conduct amounting to war crimes, rather than ordinary crimes under the UCMJ. There has not been a uniform requirement to report to a central authority all charges based on conduct amounting to war crimes. Of course, the practice of prosecuting members of United States armed forces for ordinary crimes for the same conduct that would lead to charges of war crimes for members of other armed forces is unsatisfactory, not merely because of the unequal treatment, but because charges based on ordinary crimes, regardless of the severity of the punishment possible or imposed, does not reflect the gravity of the crimes under international law.

[379] 1956 *Field Manual,* para. 505 (Trials) (e) (Law Applied) states:

> "As the international law of war is part of the law of the land in the United States, enemy personnel charged with war crimes are tried directly under international law without recourse to the statutes of the United States. However, directives declaratory of international law may be promulgated to assist such tribunals in the performance of their function. (See pars. 506 and 507.)"

[380] *Ibid.*, para. 507 (b). As an eminent authority on United States military law has explained in the context of the decision by prosecutors on what charges to bring against members of the United States Marine Corps in the 1970 Son Thang incident in Vietnam:

> "It was also easily decided that the charge against the killer team would be alleged as a violation of UCMJ Article 118 - murder - rather than the war crime of murder under the law of war. Indeed, those involved in the case probably did not even consider charging war crimes. Battlefield war crimes committed by one's own forces are almost never charged as such. Instead, they are simply alleged as the UCMJ offenses of murder, rape, or aggravated assault, whichever the case might be. They are denominated war crimes only if committed by enemy nationals.

> When U.S. military personnel are accused of crimes amounting to violations of the law of war, UCMJ Article 18 incorporates such war crimes into military law, and within the jurisdiction of GCMs [general courts-martial] 'The military court, by punishing the acts, executes international law even if it applies . . . Its own military law. The legal basis of the trial is international law, which establishes the individual responsibility of the person committing the act of illegitimate warfare.'"

Solis, *supra n.378*, 120-121(footnotes omitted).

Finally, it is important to note a third independent basis of jurisdiction over war crimes, under the War Crimes Act of 1996, as amended by the Expanded War Crimes Act in 1997, military and civilian courts have jurisdiction over a person suspected of war crimes if the suspect or the victim is "a member of the Armed Forces of the United States or a national of the United States".[381] Jurisdiction under the War Crimes Act is a separate grant of active and passive personality jurisdiction and it does not affect general court-martial universal jurisdiction.[382] This military jurisdiction is buttressed by the Military Extraterritorial Jurisdiction Act of 2000, which establishes civilian Federal District Court jurisdiction over civilians who accompany United States armed forces abroad and former members of those armed forces suspected of crimes when they were members.[383] This Act would permit the exercise of active personality jurisdiction by civilian Federal District Courts over former members of the United States armed forces suspected of having committed war crimes abroad when they had been members.[384] Nothing in the Military Extraterritorial Jurisdiction Act of 2000 deprives military courts or commissions of existing jurisdiction over war crimes.[385]

Universal jurisdiction of military courts and tribunals. Since the early days of the Republic, Congress expressly authorized military tribunals under the Articles of War to prosecute individuals directly for crimes under international law, without limiting their geographic jurisdiction to the United States.[386] As the Supreme Court has explained:

> "From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. By the Articles of War,

[381] War Crimes Act 1996, as amended by the Expanded War Crimes Act 1997, 18 U.S.C. § 2441. For a discussion of the legislative history of these acts and flawed assumptions concerning the scope of military jurisdiction over war crimes, see Aldykiewicz and Corn, *supra n.374*,144-150. Although one authority had argued prior to the adoption of these acts that Federal civilian courts may exercise universal jurisdiction over civilians suspected of war crimes in certain cases, this view was not widely accepted by others. *See* Jordan J. Paust, *After My Lai: the Case for War Crime Jurisdiction over Civilians in Federal District Courts*, 50 Tex. L. Rev.6 (1971). In any event, the War Crimes Act 1996 and the Expanded War Crimes Act 1997 simply provide for active and passive personality jurisdiction in Federal District Courts over civilians, not universal jurisdiction.

[382] H. R. Rep. No. 104-698, at 12 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166, 2177. *See also* Everett, *American Servicemembers and the ICC, supra*,150 n. 39.

[383] Pub. L. No. 106-523, 114 Stat. 2000 (to be codified at 18 U.S.C. §§ 3261-3267). For a discussion of this legislation and its historical background, see Mark J. Yost & Douglas S. Anderson, *The Military Extraterritorial Jurisdiction Act of 2000,* 95 Am. J. Int'l L.446 (2001); *see also* Robinson O. Everett & Larry Hourcle, *Crime without Punishment: Ex-Servicemen, Civilian Employees and Dependents,* 13 A. F. l. Rev. 184 (1971).

[384] Yost & Anderson, *The Military Extraterritorial Jurisdiction Act of 2000, supra,* 449 n. 23 ("Presumably, this subsection [§ 3261 (a)] allows for the prosecution of former service members who committed war crimes that were not discovered until after those members left active duty.").

[385] Section 3261 (c) provides:

> "Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offences that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal."

[386] The history of Article 18 of the UCMJ and its predecessors since 1806 is chronicled in Aldykiewicz & Corn, *supra,* 90-101. *See also* Walter T. Cox, III, *The Army, The Courts, and The Constitution: The Evolution of Military Justice,* 118 Mil. L. Rev. 1 (1987); Robert O. Rollman, *Of Crimes, Courts-Martial and Punishment - A Short History of Military Justice,* 11 A. F. Jag. L. Rev. 212 (1969); Robinson O. Everett, *Symposium: War Crimes: Bosnia and Beyond: Possible Use of American Tribunals to Punish Offenses Against the Law of Nations,* 34 Va. In'l L. 289 (1994); Robinson O. Everett & Scott L. Sullivan, *Forums for Punishing Offences Against the Law of Nations,* 29 Wake Forest L. Rev. 509 (1994).

> and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses, which according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals . . . . It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns. An act of Congress punishing 'the crime of piracy, as defined by the law of nations' is an appropriate exercise of its constitutional authority, Art. I, sec. 8, cl. 10, 'to define and punish' the offense, since it has adopted by reference the sufficiently precise definition of international law."[387]

As recounted above in Chapter Two, Section III.A, after the Second World War, United States military courts and commissions exercised universal jurisdiction under Allied Control Council Law No. 10 and other authority over war crimes and crimes against humanity (including conduct now recognized as genocide), as defined under international law, that had been committed during that conflict, such as in the *List* (*Hostages*) case. These precedents suggest that jurisdiction under the UCMJ over violations of the laws of war would still extend to crimes against humanity, as well as to genocide, if committed during an armed conflict. However, there is no recent jurisprudence on this question.

[387] *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942). For the background to this case, see the note in 1 J. Sup. Hist. 60 (1996). *See also In re Yamashita*, 327 U.S. 1 (1946) (upholding the use of a military commission sitting in the Philippines to try an enemy soldier for war crimes committed in that country); *Duncan v. Hahanomoku*, 327 U.S. 304, 312 (1945) (recognizing the "power of the military to exercise jurisdiction over . . . enemy belligerents, prisoners of war, or others charged with violating the laws of war"). *See also Madsen v. Kinsella*, 343 U.S. 341 (1952) (upholding as consistent with the law of war jurisdiction of the United States Court of the Allied High Commission for Germany, an occupation court, to try an American civilian dependant on charges of murder in Germany).

United States military courts and military commissions may still exercise universal jurisdiction under the UMCJ over conduct amounting to war crimes committed today by members of United States or foreign armed forces, but, as explained below, the extent to which any such jurisdiction is limited under the United States Constitution for United States or foreign civilians is not entirely clear. The 1956 United States Army field manual, *The law of land warfare*, still in effect today, recognizes "universality of jurisdiction" over war crimes.[388] The UCMJ does not limit the jurisdiction of military courts or military commissions to territorial, active personality, passive personality or protective jurisdiction. They may sit anywhere - inside or outside the United States - and exercise jurisdiction over crimes committed by anyone (apart from any constitutional limitations, discussed below) anywhere. Indeed, after the United States ratified the Geneva Conventions on 2 February 1956, the Department of State advised Congress that no implementing legislation was required to enable United States courts to exercise either territorial or universal jurisdiction over war crimes "since offenders could be prosecuted under federal and state penal statutes (in the case of crimes within United States jurisdiction) or the Uniform Code of Military Justice (with respect to crimes committed abroad)."[389]

As mentioned above, Article 18 of the UCMJ provides that "[g]eneral courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."[390] A leading expert on United States military law has argued that Article 18 of the UCMJ provides that general courts-martial may not only exercise jurisdiction over war crimes committed by members of the land and naval forces pursuant to Article I, Section 8, Clause 14 of the United States Constitution, which authorizes Congress to "make Rules for the Government and Regulation of the land and naval forces", but also over anyone who commits a violation of the law of war, independent of their military status, pursuant to Article I, Section 8, Clause 10 of the Constitution, which authorizes Congress to "define and punish . . . [o]ffences against the Law of Nations" (the question whether general courts-martial can ever try civilians is addressed below).[391]

In addition, as mentioned above, Article 21 of the UCMJ makes clear that pre-existing military jurisdiction has not been eliminated:

[388] U.S. Army, *The Law of Land Warfare* (Field Manual, FM 27-10), 18 July 1956, with minor amendments as of 18 July 1976 (*Field Manual*), para. 507 (a) ("The jurisdiction of United States military tribunals in connection with war crimes is not limited to offences committed against nationals of the United States but extends also to all offences of this nature committed against nationals of allies and of cobelligerents and stateless persons").

[389] Hearings before the Subcomm. On Immigration and Claims of the Comm. on the Judiciary (1995 Hearings), 104th Cong., 2d Sess. 1, 11-12 (recalling the 1956 submission).

[390] UCMJ, Art. 18; 10 U.S.C. § 818.

[391] Robinson O. Everett, *American Servicemembers and the ICC*, in Sarah B. Sewall & Carl Kaysen, eds, *The United States and the International Criminal Court: National Security and International Law* 137, 144 (Lanham/Boulder/New York/Oxford: American Academy of Arts and Sciences & Rowman & Littlefield Publishers, Inc. 2000). Others have express doubts about whether such courts can exercise jurisdiction over civilians. See the discussion of this question in Michael A. Newton, *Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes* 153 Mil. L. Rev. 1 (1996).

> "The provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals."[392]

Legislation subsequent to the adoption of the UCMJ in 1950 has not abrogated the jurisdiction of general courts-martial and military courts with respect to the laws of war.[393] The 1998 *Manual for Courts-Martial United States* recognizes universal jurisdiction over war crimes.[394] In the same year, the Department of Defense distributed a memorandum to the military attaches in Washington, D.C. of more than 100 countries stating that every country had a duty to investigate and prosecute war crimes.[395]

The scope of war crimes within United States military and civilian court jurisdiction. Although the Uniform Code of Military Justice and the *Manual for Courts-Martial* use the term "law of war", it is likely that both military and civilian courts may exercise jurisdiction over war crimes under contemporary international law, which include war crimes committed during non-international armed conflict. A recent article in the Military Law Review confirms this interpretation.[396] Since the constitutional basis for the jurisdiction of military courts and commissions is, as stated above, based on the power of Congress to define and punish offences against the law of nations, it can be presumed, as implied in the passage quoted from *Ex parte Quirin*, that Congress intended such bodies to exercise jurisdiction over contemporary international humanitarian law. The 1956 *Field Manual* defines the term "war crime" as "the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime."[397] The list of war crimes in that manual include grave breaches and a series of acts which "are representative of violations of the laws of war (war crimes)".[398] Therefore, it is clear that these examples are simply illustrative, not exhaustive.

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[392] UCMJ, Art. 21; 10 U.S.C. § 821. Similarly, Articles 104 and 106 of the UCMJ authorize such courts to exercise jurisdiction over anyone committing certain violations of the laws of war. 10 U.S.C. §§ 904, 906.

[393] Everett, *supra n.391*, 151 n. 39(noting that legislative counsel had assured him at the time the War Crimes Act of 1996 was being considered that there was no need for the legislation to contain an express provision that it did not repeal by implication the jurisdiction of general courts-martial and military commissions with respect to the laws of war and that the legislative history included a statement that the Act was not intended to repeal any existing jurisdiction of military tribunals).

[394] *Manual for Courts-Martial United States* (*obtainable from* http://jaglink.jag.af.mil), R.C.M. 201 (f) (1) (B) (i) (general courts-martial may try any person who under the law of war is subject to trial by military tribunal for any crime or offense against: (a) The law of war . . . ."); R.C.M. 202 (b) ("Nothing in this rule limits the power of general courts-martial to try persons under the law of war."). *See also* Douglass Cassel, *The ICC's New Legal Landscape: The Need to Expand U.S. Domestic Jurisdiction to Prosecute Genocide, War Crimes and Crimes against Humanity*, 23 Ford. Int'l L. J. 378, 384, 384-385 (1999) (citing these provisions as evidence that "general courts-martial have universal jurisdiction over crimes against the law of war"); _____, *Empowering United States Courts to Hear Crimes within the Jurisdiction of the International Criminal Court*, 35 New Eng. L. Rev. 421 (2001).

[395] The memorandum stated that "every nation has the responsibility to prevent and punish war crimes. . . . [States] have the right and duty to investigate and, if appropriate, prosecute such crimes." Department of Defense, Memorandum, 27 March 1998. The memorandum did not suggest that such jurisdiction excluded universal jurisdiction.

[396] Aldykiewicz & Corn, *supra*,101-143.

[397] *Field Manual*, *supra*, para. 499.

[398] *Ibid.*, paras 502, 504.

In 1979, a Defense Department Directive stated that United States military personnel were required to "comply with the laws of war in conduct of military operations and related activities in armed conflict, however such conflicts are characterized."[399] Moreover, when Congress amended the War Crimes Act of 1996, which provides active and passive personality jurisdiction over grave breaches of the Geneva Conventions, in the 1997 Expanded War Crimes Act, it provided that United States courts, both military and civilian, could exercise such jurisdiction over war crimes, which were defined to include violations of common Article 3 of the Geneva Conventions, as well as violations of the Amended Protocol on Land Mines (when ratified by the United States) and certain provisions of the Hague Regulations.[400] Given the strong support by the United States for including violations of international humanitarian law in the jurisdiction of the Yugoslavia and Rwanda Tribunals and of the International Criminal Court and this statutory definition, it is likely that military courts and military commissions could exercise universal jurisdiction over war crimes committed in non-international armed conflict as well as violations of the laws of war in international armed conflict. This situation could arise when United States armed forces in a peace-keeping operation established after the end of an internal armed conflict encountered persons suspected of having committed war crimes during that prior conflict.

Constitutional limitations on the exercise of universal jurisdiction. It is not entirely clear to what extent it remains permissible today under the United States Constitution for United States military courts or commissions to prosecute civilians, American or foreign, other than persons subject to the UCMJ, in peacetime or during armed conflict based on universal jurisdiction for war crimes (or other crimes under international law, such as crimes against humanity and genocide).

Sometime after the United States ratified the Geneva Conventions on 2 February 1956, the Department of State noted in a submission to Congress that "over the years, U.S. courts have handed down a series of decisions which cast doubt on the constitutionality of the exercise by military tribunals of criminal jurisdiction over the acts abroad of various categories of persons who are not in active military service."[401] It was referring to a number of decisions in which the United States Supreme Court has held that the Constitution precluded or limited military jurisdiction over civilians in cases involving ordinary crimes under national law.

[399] Department of Defense, Directive 5100.77, DOD Law of War Program, para. E91 (a), 10 July 1979.

[400] 18 U.S.C. § 2441 et seq.; H. R. Rep. No. 105-204 (1997).

[401] Hearings before the Subcomm. On Immigration and Claims of the Comm. on the Judiciary (1995 Hearings), 104th Cong., 2d Sess. 1, 11-12.

However, the Supreme Court seems to have left open the possibility that military courts and commissions may still exercise jurisdiction over civilians in some situations during armed conflict, although there is no clearly dispositive jurisprudence on this question. In *Ex parte Milligan*, the Supreme Court determined in a case involving American civilians subjected to military jurisdiction in the United States during the Civil War, at a time when the civilian courts were still open, that under the Constitution military courts may not replace civilian courts that are open and operating in the proper and unobstructed exercise of their jurisdiction. It determined that only when a foreign invasion or civil war actually closes the courts and renders it impossible for them to administer criminal judge can martial law be used to suspend their functions, but then only temporarily until civilian courts are reinstated.[402] The Supreme Court has also held in a series of later cases involving civilian dependants of members of the United States armed forces and civilian employees of the armed forces accused of ordinary crimes committed abroad in peacetime that military courts could not exercise jurisdiction over them.[403] In these cases, the Supreme Court appears to have left open the possibility of prosecutions of civilians for crimes committed during armed conflict.[404]

The 1950 UCMJ, as amended, the 1956 *Field Manual* and the 1998 *Manual for Courts-Martial United States* do not limit military jurisdiction to members of United States or foreign armed forces and appear to leave open the possibility that civilians could be tried for war crimes in military courts in certain circumstances. As noted above, Article 18 of the Uniform Code of Military Justice states that "[g]eneral courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the laws of war". The 1956 *Field Manual* states that in practice United States military tribunals "normally punish[] war crimes as such if they are committed by enemy nationals or by persons serving the interests of the enemy State", without suggesting that the accused are limited to members of armed forces.[405] As previously mentioned, Rule 201 (f) (1) (B) of the 1998 *Manual for Courts-Martial United States* provides that "[g]eneral courts-martial may try any person who by the law of war is subject to trial by military tribunal for any crime or offense against: (a) The law of war . . . ."

[402] *Ex parte Milligan,* 71 U.S. 2 (1866). *See also Duncan v. Kahanamoku,* 66 S. Ct. 606 (1946) (unconstitutional for military courts to try civilians under martial law in a territory of the United States during wartime when civilian courts could have remained open and rest of United States not subject to martial law)

[403] *United States ex rel. Toth v. Quarles,* 349 U.S. 949 (1955) (unconstitutional for military court to try civilian for accused of committing murder committed overseas when formerly with armed forces in peacetime); *Reid v. Covert,* 351 U.S. 487 (1957) (unconstitutional to try civilian wife of a member of armed forces for capital crime of murder committed overseas in peacetime); *Kinsella v. United States ex rel. Singleton,* 361 U.S. 234 (1960) (unconstitutional to try civilian wife of member of armed forces for non-capital crime committed overseas in peacetime); *Grisham v. Hagan,* 361 U.S. 278 (1960) (unconstitutional to try civilian employee of armed forces for capital crime of murder committed overseas in peacetime); *McElroy v. United States ex rel. Guagliardo,* 361 U.S. 281 (1960).

[404] For example, in *Guagliardo,* the Supreme Court distinguished a number of early cases involving trials of civilians attached to or following the armed forces for crimes committed during armed conflict being "all during a period of war, and hence are not applicable here". 361 U.S. at 284. Similarly, it distinguished cases of civilians serving with troops in building defensive earthworks against threatened Indian attacks as inapposite, noting that they involved "'hostilities' with Indian tribes or were in territories governed by entirely different considerations". *Ibid.,* 285-286. For discussions of the scope of military jurisdiction over civilians, see Robinson O. Everett, *Military Jurisdiction over Civilians,* 1960 Duke L. J. 366; Susan S. Gibson, *Lack of Extraterritorial Jurisdiction over Civilians: A New Look at an Old Problem,* 148 Mil. L. Rev. 114 (1995).

[405] *Field Manual, supra,* para. 507 (a).

One eminent authority on United States military jurisdiction has argued that Article I, Section 8, Clause 10 of the United States Constitution, which authorizes Congress to define and punish "offences against the Law of Nations", gives Congress the power to authorize courts martial to exercise jurisdiction over civilians for violations of the laws of war, despite the holding in *Reid v. Covert*.[406] He noted that Congress had provided for trial of spies by a general court-martial or by a military commission and that the Supreme Court in *Ex parte Quirin* had rejected a challenge to the jurisdiction of an *ad hoc* military commission established by the President pursuant to a predecessor of Article 18 of the UCMJ to try civilians, one of whom claimed United States citizenship, during the Second World War for sabotage in the United States during that conflict.[407] In that case, the Supreme Court said that, in contrast to the situation in *Ex parte Milligan*, where the prosecution was based on martial law, the accused were being tried under the law of war, a part of the law of nations, and under Article I, Section 8, Clause 10 of the Constitution Congress could authorize the trial of civilians by a military commission or court-martial for sabotage.[408] The Supreme Court was careful to note that "[w]e have no occasion now to define with meticulous care the ultimate boundaries of jurisdiction of military tribunals to try persons according to the law of war."[409] Although military commission challenged in *Ex parte Quirin* was sitting during an armed conflict, the Supreme Court subsequently upheld in the *Yamashita* case the use of a military commission after that conflict had come to an end, albeit in a case involving a member of enemy armed forces.[410]

Even if the Constitution still permits general courts-martial to exercise jurisdiction over civilians and military commissions to exercise jurisdiction over civilian and military accused, there are serious concerns about the use of courts-martial and military commissions in such cases, apart from the international standards cited in Chapter Fourteen, Section IV.C.[411] Despite significant reforms in the military justice system after *Reid v. Covert*, general courts-martial still do not afford all the same trial rights available to civilians before a Federal District Court.[412] Moreover, *ad hoc* military commissions are free to devise their own procedures in each case and do not afford military or civilian suspects many fair trial guarantees.[413] Finally, given some of the practical problems, due process concerns and

[406] Everett, *supra*,n.404, 144. As noted above, this view is not unanimously accepted. *See* Newton, *supra*, n. 391.

[407] *Ibid.*, 145.

[408] *Ex parte Quirin*, 317 U.S. 1 (1942).

[409] *Ibid.*, 45-46.

[410] *In Re Yamashita*, 327 U.S. 1, 12 (1946). The Supreme Court cited practical reasons in support of this conclusion:

> "We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before the cessation, at least until peace has been officially recognized by treaty of proclamation of the political branch of the Government. In fact, in most instances the practical administration of the system of military justice under the law of war would fail if such authority were thought to end with the cessation of hostilities. For only after their cessation could the greater number of offenders and principal ones be apprehended and subjected to trial."

[411] The decision to try the former leader of Panama, Noriega, held as a prisoner of war, in a civilian Federal District Court rather than under military jurisdiction may reflect a reluctance to prosecute civilians in military jurisdictions. *United States v. Noriega*, 746 F.Supp. 1506 (S.D. Fla. 1990).

[412] Although there have been major reforms in the procedure before general courts-martial which provide greater due process protections at certain stages of the proceedings than in civilian courts, such as the right to cross-examine witnesses at the equivalent of a grand jury hearing, they do not afford civilians being tried by general courts-martial the same procedural rights as to members of the armed forces, such as in the selection of panels (juries) or in pre-trial confinement determinations.

[413] Everett & Sullivan, *Forums, supra,n.389*, 518-519; Everett, *Possible Use of American Military Tribunals, supra,n.386*, 292-293.

the contemporary reluctance to exercise military jurisdiction over civilians, it is essential to ensure that civilian Federal District Courts be able to exercise such jurisdiction over war crimes, as well as over crimes against humanity and genocide.

Amendment of national legislation. The Departments of State and Defense supported a 1995 proposal in the House of Representatives to remedy one perceived gap with respect to the persons and crimes covered in part by giving United States courts, civilian as well as military, universal jurisdiction over grave breaches of the Geneva Conventions.[414] The initial impetus for the proposal appears to have been the result of concerns that United States nationals who were the victims of war crimes abroad could not obtain justice.[415] The extension from passive to active personality jurisdiction was to address the perceived gap that, as a result of Supreme Court jurisprudence, it would not (or might not) be possible for military courts or commissions to try former members of the United States armed forces for war crimes committed while on duty.[416] Despite the urging of the Defence and State Departments the War Crimes Act of 1996 simply provided United States courts with active and passive personality jurisdiction only over grave breaches of the Geneva Conventions, or any Protocols subsequently ratified by the United States, where the person who committed the breach or the victim is a member of the United States armed forces or a national of the United States.[417] Although, as stated above, the 1997 Expanded War Crimes Act extended the scope of the 1996 Act to include violations of common Article 3 and, at such time as the United States ratified Protocol II, that treaty as well. However, it also did not provide for universal jurisdiction.[418] Therefore, a number of Americans have

[414] Judith Miller, the General Counsel of the Department of Defence urged that the jurisdictional provisions in the draft bill, H. R. 2587, "should be broadened from the current focus on the nationality of the victims of the war crime." In addition to urging that the draft bill include active personality jurisdiction over United States nationals, she urged that it include jurisdiction "where the perpetrator is found in the United States, without regard to the nationality of the perpetrator or the victim", that it include conduct prohibited by Articles 23, 25, 27 and 28 of the Hague Regulations of Hague Convention IV of 1907 and violations of international humanitarian law during non-international armed conflict. Letter of Judith Miller, dated 22 May 1996, House Report No. 104-698, 13. Barbara Larkin, Acting Assistant Secretary of State, Legislative Affairs, made the same recommendations in a letter dated 17 May 1996. *Ibid.*, 13-15.

[415] Everett, *American Servicemembers and the ICC, supra, n.391*,150 n. 34.

[416] House Report, H. R. No. 104-698, 5-7.

[417] It provides:

"(a) OFFENSE - Whoever, whether inside or outside the United States, commits a grave breach of the Geneva Conventions, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall be subject to the penalty of death.

(b) CIRCUMSTANCES - The circumstances referred to in subsection (a) are that the person committing such breach or the victim of such breach is a member of the Armed Forces of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) DEFINITIONS - As used in this section, the term 'grave breach of the Geneva Conventions' means conduct defined as a grave breach in any of the international conventions relating to the laws of warfare signed at Geneva 12 August 1949 or any protocol to such convention to which the United States is a party."

18 U.S.C. § 2401.

[418] The House Judiciary Committee Report apparently rejected universal jurisdiction again for the same reasons it gave for not including it in the 1996 Act:

> "The Committee decided that the expansion of H. R. 3680 to include universal jurisdiction would be an unwise [sic] at present. Domestic prosecution based on universal jurisdiction could draw the United States into conflicts in which this country has no place and where our national interests are slight. In addition, problems involving the witnesses and evidence would likely be daunting. This does not mean that war criminals should go unpunished. There are ample alternative venues available which are more appropriate. Prosecutions can be handled by the nations involved or by international tribunal[s]. If a war criminal is discovered in the United States, the federal government can extradite the individual upon request in order to facilitate prosecution overseas. The Committee is not presently aware that these alternative

proposed amending this legislation to provide for universal jurisdiction by civilian and military courts over all war crimes, genocide, crimes against humanity and other crimes under international law.[419]

Ratification of treaties. Although the United States has ratified Hague Convention IV and the Geneva Conventions and has signed Protocols I and II, the Senate has not given its advice and consent to ratification of these two protocols. The United States voted against adoption of the Rome Statute at the Diplomatic Conference, but it has played a major role in the work of the Preparatory Commission for the International Criminal Court and it has signed, but not ratified the Rome Statute.

venues are inadequate to meet the task.

Finally, even if enacted, universal jurisdiction will in all likelihood be purely symbolic. The Committee has been informed that there has never been a single case of a signatory country to the Geneva Conventions exercising its own criminal jurisdiction over an alleged war criminal on the basis of universal jurisdiction."

H. R. 104-698, 8 (footnotes omitted). In concluding that no state party to the Geneva Conventions had ever exercised its criminal jurisdiction over a war crimes suspect, the Committee relied upon a statement submitted to the Immigration and Claims Subcommittee in connection with the Subcommittee's 12 June 1996 hearing on H. R. 2587 by Alfred P. Rubin, Distinguished Professor of International Law, the Fletcher School of Law and Diplomacy, Tufts University. However, as of this date, courts in well publicized cases in Belgium, Denmark and Switzerland had exercised universal jurisdiction over persons suspected of war crimes (see entries on these countries in this section of this chapter).

[419] *See, for example,* Cassel, *supra, n.394,* 394-395; _____, *Empowering United States Courts to Hear Crimes within the Jurisdiction of the International Criminal Court,* 35 New Eng. L. Rev. 421 (2001); Everett, *supra,*n.391, 147-148; Note, *U.S. Prosecution of Past and Future War Criminals and Criminals Against Humanity: Proposals for Reform Based on the Canadian and Australian Experience,* 29 Va. J. Int'l L. 887 (1989); Jordan P. Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and Act of State Doctrine,* 23 Va. J. Int'l L. 191 (1983); Mark S. Zaid, *Will or Should the United States Ever Prosecute War Criminals?: A Need for Greater Expansion in the Areas of Both Criminal and Civil Liability,* 35 New Eng. L. Rev. 447 (2001); _____, *The U.S. War Crimes Act of 1996*, in M. Cherif Bassiouni, ed., 3 *International Criminal Law* 331 (Ardsley, New York: Transnational Publishers, Inc. 2d ed. 1999).

Recognition of universal jurisdiction by courts in civil cases. United States courts have recognized in civil cases the existence of universal criminal jurisdiction over war crimes in non-international armed conflict and have also adjudicated civil claims based on violations of international humanitarian law during non-international armed conflict.[420] To the extent that Federal courts have extraterritorial jurisdiction over crimes, it has been held that jurisdiction extends to ancillary crimes - such as attempt, conspiracy or being an accessory.[421]

Reluctance to exercise universal jurisdiction. The United States has generally been reluctant to prosecute war crimes cases based on universal jurisdiction since the Allied Control Council Law No. 10 trials ended. For example, when large numbers of persons suspected of committing war crimes as members of Axis forces during the Second World War were discovered in the United States, the policy was to deport them, not to prosecute them under military courts or commissions under existing law or to extend the jurisdiction of Federal civilian courts to do so. Similarly, recent proposed legislation introduced in the Senate to track down persons suspected of war crimes and other crimes under international law is aimed at deporting, rather than prosecuting, them.[422]

· ***Uruguay:*** Uruguayan courts may exercise universal jurisdiction over war crimes defined in treaties to which it is a party.

Paragraph 7 of Article 10 (The Principle of Defence and Legal Personality) of the Uruguayan *Penal Code* provides that courts have universal jurisdiction to try crimes which were committed abroad, when this is provided for in national law or in treaties. It specifically provides:

> "Uruguayan law shall not apply to crimes committed by nationals or foreigners on foreign territory with the following exceptions:
>
> . . . .
>
> (7) All other offences subject to Uruguayan law under special domestic provisions or under the provisions of international conventions."[423]

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[420] *Beanal v. Freeport-McMoRAN, Inc.*, 969 F. Sup. 362, 371 (E.D. La. 1997) (stating that universal jurisdiction existed over war crimes and that it included civil, as well as criminal, jurisdiction); *Kadi_ v. Karadi_*, 70 F.3d 232 (2d Cir. 1995) (civil suit based on war crimes committed abroad); *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 254 (D.C.D.C. 1985).

[421] *United States v. Bin Laden*, 92 F. Supp. 2d 189 (S.D.N.Y. 2000) (U.S. courts have implicit protective jurisdiction).

[422] Anti-Atrocity Alien Deportation Act, H.R. 3058, 107th Cong., 1st Sess. (2001). Section 2 would provide that any alien who outside the United States has committed torture or a war crime is inadmissible for entry into the United States.

[423] Penal Code, Art. 10 (7) (English translation in the replies of the Government of Uruguay to questions asked by the Committee against Torture, U.N. Doc. CAT/C/5/Add.30 (1992), question 7). The Spanish original text reads:

> *"Se sustraen a la aplicacion de la ley uruguaya, los delitos cometidos por nacionales o extranjeros en territorio extranjero, con la siguientes excepciones:*
>
> *…*
>
> *7. Todos los demas delitos sometidos a la ley uruguaya en virtud de disposiciones especiales de orden interno, o de convenios internacionales".*

Código Penal. Segunda Edicion, Actualizada, Capitulo II: De la aplicacion de las leyes penales." 10. La ley penal. El principio de la defensa y el de la personalidad.

The government has explained that, "[i]n this regard, and where paragraph 7 in particular is concerned, our Penal Code follows the doctrine of 'universality' since it affirms that Uruguayan law applies to acts which by their seriousness offend and injure higher interests."[424]

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

· ***Uzbekistan:*** Uzbek courts may exercise universal jurisdiction over war crimes under two separate provisions, whose origins can be traced back to Russian universal jurisdiction legislation of 1903 (see Chapter Two, Section II.A). These legislative grants of jurisdiction are reinforced by the Preamble of the Constitution, which recognizes "the priority of the generally accepted norms of the international law", and Article 17, which states that Uzbekistan's "foreign policy shall be based on . . . universally recognized norms of international law".[425] Article 1 of the Criminal Code states that "[t]he criminal legislation of the Republic [of] Uzbekistan is based on the Constitution and generally-recognized norms of international law and consists of the present Code."[426]

First, the first unnumbered paragraph of Article 12 of the Uzbekistan Criminal Code provides that national criminal law applies to stateless persons who have committed a crime outside the national territory, provided that they have not served a sentence for the crime in the place where it was committed. It states:

> "Citizens of the Republic [of] Uzbekistan, and also stateless persons permanently residing in Uzbekistan, shall be subject to responsibility for crimes committed on the territory of another State under the present Code unless they bore punishments by judgment of the court of the State on whose territory the crime was committed."[427]

Second, the third unnumbered paragraph of Article 12 of the Criminal Code provides national courts with universal jurisdiction over foreign citizens and stateless persons not permanently resident in Uzbekistan for offences under the Criminal Code committed outside the country only when international treaties or agreements so provide. It reads:

[424] Second periodic report of Uruguay to the Committee against Torture, U.N. Doc. CAT/C/17/Add.16 (1996), para. 67.

[425] Constitution of the Republic of Uzbekistan, 8 December 1992, Preamble & Art. 17 (English translation in *Uzbekistan*, *in* Albert P. Blaustein & Gisbert H. Flanz, eds, *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc.) (Release 94-5, July 1994)).

[426] Criminal Code, Art. 1 (Criminal Legislation of the Republic [of] Uzbekistan).

[427] Criminal Code of the Republic Uzbekistan, adopted 22 September 1994, as amended 25 December 1998, Art. 12 (Operation of Code With Respect to Persons Who Have Committed Crimes Beyond Limits of Uzbekistan), para.1 (English translation in William E. Butler, *Uzbekistan Legal Texts* (The Hague: Kluwer Law International and London: Simmonds & Hill Publishing Ltd. 1999); a similar English translation is available in the initial report of Uzbekistan to the Committee against Torture, U.N. Doc. CAT/C/Add.3, 24 August 1999, para. 94).

> "Foreign citizens, and also stateless persons who do not reside permanently in Uzbekistan, shall be subject to responsibility for crimes committed beyond its limits under the present Code only in instances provided for by international treaties or agreements."[428]

Uzbekistan is a party to the Geneva Conventions and to Protocols I and II. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. The Criminal Code provides that certain violations of the laws and customs of war are crimes under national law.[429] Periods of limitations are not applicable to war crimes.[430]

· ***Vanuatu:*** The courts of Vanuatu have been able to exercise universal jurisdiction over grave breaches of the Geneva Conventions committed abroad, provided that the conduct also would have violated Vanuatu law if committed in Vanuatu, at least since 1982.

Section 4 of Chapter 150 of the Laws of the Republic of Vanuatu provides:

> "(1) Any grave breach of any of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an offence under such prevision of the Penal Code or any other law if committed outside Vanuatu.
> (2) For the purposes of this section - [a grave breach is a grave breach as defined in the four Geneva Conventions]."[431]

Proceedings may not be instituted without the consent of the Public Prosecutor.[432] By requiring that the conduct also be a crime under national law, Section 4 may also subject prosecutions to general principles of national law, defences, excuses, justification and other bars to prosecution, such as statutes of limitation or immunities, but there appears to be no jurisprudence or commentary on this point.

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

· ***Venezuela:*** It appears that Venezuelan courts may exercise universal jurisdiction over war crimes.

Article 4 (9) of the *Código Penal* (Penal Code) of Venezuela provides that courts have jurisdiction to try and punish piracy and "other crimes which international law defines as atrocities and crimes against humanity" committed abroad, by nationals or foreigners, when they are in Venezuelan territory:

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[428] *Ibid.*, Art. 12, para. 3. The government has stated that "[a]liens and stateless persons not permanently resident in Uzbekistan can only be held liable under the Uzbek Criminal Code for crimes committed outside Uzbekistan when international treaties or agreements so provide." Initial report of Uzbekistan to the Committee against Torture, U.N. Doc. CAT/C/Add.3, 24 August 1999), para. 106.

[429] *Ibid.*,Art. 152 (Violations of the Laws and Customs of War).

[430] *Ibid.*,Art. 64 (Relief from Responsibility for Crime as Consequence of Expiry of Period of Limitation for Bringing to Responsibility) (The final unnumbered paragraph states: "The periods of limitations provided for by the present Article shall not be applied to persons who committed a crime against peace and the security of mankind.").

[431] Laws of the Republic of Vanuatu, Revised Edition 1988, Act 22 of 1982, commenced 24 August 1982, Cap. 150, Sec. 4.

[432] *Ibid.*, Sec. 6.

> "The following shall be subject to prosecution in Venezuelan and punished in accordance with Venezuelan criminal law:
> . . . .
> 9. Venezuelans or foreigners who have come to the country who, on the high seas, commit acts of piracy or other crimes classified under international law as atrocious and [crimes] against humanity; except when they have already been tried for them in another country and have served their sentence."[433]

According to Article 23 of the Constitution international treaties, agreements and conventions concerning human rights ratified by Venezuela, acquire constitutional status and prevail in the internal legal order, as long as they set out norms more favourable than those set out in the Constitution and in the law of the Republic, and are directly applicable by the courts and other public entities.[434]

Article 29 provides that crimes against humanity, grave violations of human rights and war crimes are not subject to statutes of limitations.[435]

[433] *"Código PENAL, LIBRO PRIMERO, Disposiciones Generales Sobre los Delitos y las Faltas, las personas responsables y las penas.*
(. . .)
Articulo 4.
Están sujetos a enjuiciamiento en Venezuela y se castigarán de conformidad con la ley penal venezolana:
(...)
9. Los venezolanos o extranjeros venidos a la Republica que, en alta mar, cometan actos de piratería u otros delitos de los que el Derecho Internacional califica de atroces y contra la humanidad; menos en el caso de que por ellos hubieren sido ya juzgados en otros país y cumplido la condena.".

[434] Spanish text of the Constitution (*Constitución Bolivariana de Venezuela 1999*) reads:
"Artículo 23. Los tratados, pactos y convenciones relativos a derechos humanos, suscritos y ratificados por Venezuela, tienen jerarquía constitucional y prevalecen en el orden interno, en la medida en que contengan normas sobre su goce y ejercicio más favorables a las establecidas por esta Constitución y la ley de la República, y son de aplicación inmediata y directa por los tribunales y demás órganos del Poder Público."
Obtainable from http://www.asambleanacional.gov.ve/index03.htm

[435] Spanish text reads *"Artículo 29. El Estado estará obligado a investigar y sancionar legalmente los delitos contra los derechos humanos cometidos por sus autoridades. Las acciones para sancionar los delitos de lesa humanidad, violaciones graves a los derechos humanos y los crímenes de guerra son imprescriptibles. Las violaciones de derechos humanos y los delitos de lesa humanidad serán investigados y juzgados por los tribunales ordinarios. Dichos delitos quedan excluidos de los beneficios que puedan conllevar su impunidad, incluidos el indulto y la amnistía."*

Venezuela is a party to the Geneva Conventions and Protocols I and II and it has ratified the Rome Statute. It has also provided in Article 156 of the Penal Code that certain violations of principles of international law or of international humanitarian law are crimes under national law.[436] The term "atrocities" (*atroces*) in Article 4 (9) of the Penal Code would appear to include some of the war crimes prohibited in Article 156. It is not clear whether this provision is limited to crimes committed on the high seas. It has not been possible to locate jurisprudence on Article 4 (9).

· ***Viet Nam:*** There are two provisions of the 1985 Criminal Code which would permit Vietnamese courts to exercise universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I and other war crimes when the conduct would violate national law.

First, Paragraph 2 of Article 6 (Applicablity of the Code of Criminal Law with Respect to Criminal Acts Committed Outside the Boundaries of the Socialist Republic of Vietnam) of the Criminal Code of the Socialist Republic of Vietnam gives courts universal jurisdiction over crimes when treaties provide for such jurisdiction. Paragraph 2 states:

> "Foreigners who commit crimes outside the boundaries of the Socialist Republic of Vietnam may be prosecuted for criminal responsibility under Vietnamese criminal law in situations provided for by international agreements that the Socialist Republic of Vietnam has signed or recognized".[437]

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[436] Art. 156 Penal Code:

"the following shall incur the penalty one to four years' imprisonment (*arresto en Fortaleza o Cárcel Política*):

1. Venezuelans or foreigners who, in the course of a war between Venezuela and another Nation, violate truces or armistices or the principles of war observed by civilized peoples, such as due respect for prisoners, non-combatants, the white flag, parliamentarians, the Red Cross and other similar cases, without prejudice to the provisions of military law, which shall apply especially in this regard.

2. Venezuelans or foreigners who violate the neutrality of the Republic in the event of a war between foreign nations by means of hostile acts against one of the belligerents committed within the territory of the Republic.

3. Venezuelans or foreigners who violate Covenants or Treaties to which Venezuela is party in such a way that they engage the responsibility of the state." (English translation by Amnesty International)

Art. 156 Código Penal:

"Incurren en pena de arresto en Fortaleza o Cárcel Política por tiempo de uno a cuatro años:

1. Los venezolanos o extranjeros que, durante una guerra de Venezuela contra otra Nación, quebranten las treguas o armisticios o los principios que observan los pueblos civilizados en la guerra, como el respeto debido a los prisioneros, a los no combatientes, a la bandera blanca, a los parlamentarios, a la Cruz Roja y otros casos semejantes, sin perjuicio de lo que dispongan las leyes militares que se aplicarán especialmente en todo lo que a este respecto ordenen.

2. Los venezolanos o extranjeros que, con actos de hostilidad contra uno de los beligerantes, cometidos dentro del territorio de la República, quebranten la neutralidad de ésta en caso de guerra entre naciones extrañas.

3. Los venezolanos o extranjeros que violen las Convenciones o Tratados celebrados por la República de un modo que comprometa la responsabilidad de ésta." Obtainable from http://www.unifr.ch/derechopenal/ljvenezuela/cpvene2.htm.

[437] Criminal Code of the Socialist Republic of Vietnam (1985) (ratified by the Ninth Session of the Seventh National Assembly of the Socialist Republic of Vietnam on 27 June 1985), *reprinted in* 13 Review of Socialist

Second, Article 6 (1) of the Criminal Code provides for universal jurisdiction over crimes under national law committed abroad by aliens resident in the state.[438]

Viet Nam is a party to the Geneva Conventions and Protocol I. As of 1 September 2001, it had not ratified Protocol II or signed the Rome Statute. Article 279 (War Crimes) defines certain war crimes as crimes under national law. It is not known if the Criminal Code expressly excludes statutory limitations for war crimes, but Vietnam is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Articles 26 (Effect of the Code of Criminal Procedures) and 146 (Territorial jurisdiction) specify the procedures and venue for prosecutions of extraterritorial crimes.[439]

Law121 (1987), Art. 6 (2).

[438] Article 6 (1) provides:
"Citizens of Vietnam who commit crimes outside the boundaries of the territory of the Socialist Republic of Vietnam may be prosecuted for criminal responsibility in Vietnam in accordance with the present Code. This provision shall also apply to persons who are not citizens but are permanent residents of the Socialist Republic of Vietnam."

[439] Law on Criminal Procedures of the Socialist Republic of Vietnam, adopted by the Third Session of the Eighth National Assembly of the Socialist Republic of Vietnam on 28 June 1988, 42090190 Hanoi NHAN DAN, JPRS-SEA-89-019, 10 May 1989, Arts 26 and 146.

· ***Yemen:*** Yemeni courts may exercise universal jurisdiction over war crimes committed by enemy soldiers prior to capture.[440]

Article 5 of Law No. 21/1998 relative to military offences and penalties provides that any person covered by this law who commits an act outside Yemen which would be criminal under the law of Yemen may be punished, even if the act is not criminal under the law of the territorial state. It states:

> "Any person covered by the provisions of this law who commits an act outside the Republic as principal or co-principal of one of the offences set out in this law, will be punished by the provisions thereof, even if the offence is not punished by the law of the country where it was committed."[441]

Article 3 of this law provides that it applies to Yemen soldiers and certain others associated with the military forces and to prisoners of war and Article 4 states that it applies to anyone who commits violations in military facilities or in places occupied for the benefit of military forces.

Yemen is a party to the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. A wide range of war crimes are crimes under national law and that law does not include a requirement that such war crimes take place in an international armed conflict.[442] War crimes under that law are not subject to a statute of limitations.[443] Therefore, Article 5 would permit national courts to exercise universal jurisdiction over war crimes committed outside Yemen by members of enemy forces prior to capture.

· ***Zimbabwe:*** The courts of Zimbabwe have been able to exercise universal jurisdiction over grave breaches of the Geneva Conventions abroad since 1981.

Section 3 (1) of the Geneva Conventions Act, 1981 (as amended by the Geneva Conventions Amendment Act, 1996) provides jurisdiction over any person, whatever his nationality, who, whether in or outside Zimbabwe, commits a grave breach of the Geneva Conventions or
Protocol I.[444]

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[440] Prior to the independence of the People's Democratic Republic of Yemen, which subsequently merged to form the current state of Yemen, the United Kingdom's Geneva Conventions Act 1957 applied to South Aden and Karaman under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959 (for the text, see discussion of United Kingdom legislation below). However, it is believed that the Order in Council may no longer be in force for those two regions.

[441] Law No. 21/1998, Art. 5 (English translation by Amnesty International). A French translation is *obtainable from* http://www.icrc.org/ihl-nat ("*Titre I: Dispositions générales; Chapitre II: Champ d'applications, No. 5. Toute personne soumise aux dispositions de la présente loi qui aura commis à l'exterieur de la République un acte, en tant qu'auteur principal ou coauteur de l'une des infractions prévues par cette loi, sera punie en vertu de ses dispositions, même si l'infraction n'est pas punie par la loi du pays où elle a eu lieu.*").

[442] Law No. 21/1998, Art. 21.

[443] *Ibid.*, Art. 22. In addition, Yemen is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

[444] That section provides:
"Any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of a scheduled Convention or of the First Protocol as is referred to in -
(a) article 50 of the Convention set out in the First Schedule; or

(b) article 51 of the Convention set out in the Second Schedule; or
(c) article 130 of the Convention set out in the Third Schedule; or
(d) article 147 of the Convention set out in the Fourth Schedule; or
(e) paragraph 4 of Article 11 or paragraph 2, 3 or 4 of Article 85 of the First Protocol;
shall be guilty of an offence."

Geneva Conventions Act, 1981 (as amended by the Geneva Conventions Amendment Act, 1996), § 3 (*obtainable from* http://www.icrc.org/ihl-nat).

Zimbabwe has ratified the Geneva Conventions and Protocols I and II. It has signed the Rome Statute, but not yet ratified it as of 1 September 2001.