



VENEZUELA

END IMPUNITY THROUGH
UNIVERSAL JURISDICTION

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1. INTRODUCTION¹

Venezuela has a civil law legal system and a judicial system headed by the Supreme Court of Justice. However, it should be noted that that regional and international bodies have, in different occasions, criticised Venezuelan judiciary for a various range of reasons, including the indiscriminate recourse to temporary judges and the perceived exercise of jurisdictional powers by the Supreme Court without due independence and impartiality (see Section 2).² There is no death penalty in Venezuela, with the maximum possible punishment being imprisonment for 30 years, but the status of jails is in certain cases appalling.

Venezuela was the first country in Latin America to ratify the Rome Statute in 2000. However, although Venezuela has defined, to a certain extent, some crimes under international law (i.e. torture, enforced disappearances and war crimes), it has not defined other crimes under international law, such as crimes against humanity, genocide or extrajudicial executions as crimes under national law (see Section 6). Venezuela can exercise universal jurisdiction over some crimes under national law of international concern (for example, piracy, crimes abroad on foreign aircraft, hijacking and attacks abroad on foreign aircraft). However, it is not clear whether Venezuelan courts can exercise universal jurisdiction over crimes under international law (see Section 4 below), and recently the office of the prosecutor has denied that Venezuela courts can exercise such jurisdiction.

¹ This report was researched and drafted by Valentina Torricelli as Intern in the International Justice Project in the International Secretariat of Amnesty International. Amnesty International wishes to thank Fernando Fernandez, Patrizia Papaiani and Victor Rodriguez Cedeño for their thoughtful and helpful comments and suggestions on the report during the drafting stage. Amnesty International sent drafts of this paper to the Supreme Court of Justice, National Assembly, Ministry of External Relations, Ministry of Defence, Ministry of internal Relations and Justice, and to the Office of the General Prosecutor requesting comments. The organization regrets that as of 10 December 2009 no replies have been received.

Every effort was made to ensure that all the information in this paper was accurate as of December 2009. However, for an authoritative interpretation of Venezuelan law, counsel authorized to practice in Venezuela should be consulted. Amnesty International welcomes any comments or corrections, which should be sent to ijp@amnesty.org. Amnesty International plans to update and revise this and other papers in the *No Safe Haven Series* in the light of developments in the law.

² See Inter-American Court of Human Rights, Report on the Situation of Human Rights in Venezuela, Chapter 1, 29 December 2003 (<http://www.cidh.oas.org/countryrep/Venezuela2003eng/toc.htm>); “Preocupante la situación de la justicia en Venezuela”, *advierte experto de la ONU*, Unite Nations press release, 30 July 2009 (<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/8DF1C0C6B99B1DCFC125760300537310?opendocument>); and Human Rights Committee, Concluding Observations on the third periodic report submitted by Venezuela, CCPR/CO/71/VEN, 26 April 2001.

In addition to the failure to define a number of crimes under international law as crimes under national law or to define them in a manner consistent with the strictest requirement of international law and to provide for universal jurisdiction over these, there are a number of other obstacles to prosecution, including: improper defences, dual criminality, bars on retrospective application of international criminal law in national law, and *ne bis in idem* barring a retrial even after sham foreign proceedings (Section 6). Therefore, Venezuela is currently a safe haven from prosecution in its courts for foreigners who are responsible for genocide, war crimes, crimes against humanity and extrajudicial executions committed abroad.

The Venezuelan Constitution prohibits the refusal of extradition when the crime committed by a foreigner involved violations of human rights and Venezuela has signed a number of multilateral and bilateral extradition treaty. Nevertheless there are several inappropriate bars to the granting of extradition requests, such as the prohibition against extraditing Venezuelan nationals and the dual criminality principle (see Section 7) which could lead to Venezuela becoming a safe haven from extradition for crimes under international law. In addition, due to the lack of legislation regulating Venezuela's cooperation with international court or tribunals, if Venezuela failed to extradite or prosecute individuals suspected of crimes under international law, they could not be arrested and surrendered to the International Criminal Court or any other international tribunal.

No statute authorizes Venezuela to exercise universal civil jurisdiction. However, victims can file civil claims in criminal proceedings based on universal jurisdiction arising out of the crimes in that case (See Section 5).

As crimes under international law lack a clear recognition within Venezuela's legislation, no special to investigate and prosecute crimes under international law has been created so far (see Section 8).

There is almost no jurisprudence in Venezuela involving universal jurisdiction (see Section 9).

This paper, which is Number 5 of a series of 192 papers on each UN member state updating Amnesty International's 722-page study of state practice concerning universal jurisdiction at the international and national level in 125 countries, makes extensive recommendations for reform of law and practice so that Venezuela can fulfil its obligations under international law to investigate and prosecute crimes under international law, to extradite persons suspected of such crimes to another state able and willing to do so in a fair trial without the death penalty or a risk of torture or other cruel, inhuman or degrading treatment or punishment or to surrender them to the International Criminal Court.³

³ Amnesty International, *Universal jurisdiction: The duty of states to enact and enforce legislation*, AI Index: IOR 53/002 - 018/2001, September 2001 (<http://www.amnesty.org/en/library>).

2. THE LEGAL FRAMEWORK

2.1 TYPE OF LEGAL SYSTEM

Venezuela has a civil law legal system, which finds its roots in the Roman and Germanic legal tradition and is characterised by the predominance of written law and codes. The hierarchy of Venezuelan norms is fairly typical of civil law jurisdictions, having the Constitution as its supreme law the source and origin of all Venezuelan laws. A Constitutional Assembly was elected in July 1999 to draft a new constitution, which voters approved in December 1999. The 1999 Constitution gives full recognition to several basic principles, such as sovereignty, national integrity, self-determination and independence of the nation.

2.2 STATUS OF INTERNATIONAL LAW

Article 23 of the new Venezuelan Constitution adopted in 1999⁴ introduced a new provision concerning the rank of international treaties in the Venezuelan legal system, which states that:

“Treaties, agreements and conventions concerning human rights, which have been signed and ratified by Venezuela, have constitutional rank and have primacy over internal legislation, insofar as they contain provisions concerning the enjoyment and exercise of such rights that are more favourable than those established by this Constitution and the laws of the Republic, and shall be immediately and directly applied by the Courts and other organs of the Public Power.”⁵

Although the introduction of this provision represents a considerable step forward from the 1961 Constitution, which ignored the status of international law and treaties within the hierarchy of the sources of law, and incorporates years of jurisprudence and doctrine, the drafters of the Constitution, nevertheless, missed the opportunity to define clearly the status of treaties that do not concern human rights. According to Article 23 of the new Constitution, 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

⁴ *Constitución de la República Bolivariana de Venezuela*, published in the Official Gazette No. 36860 on 30 December 1999 (<http://www.gobiernoenlinea.ve/legislacion-view/sharedfiles/ConstitucionRBV1999.pdf>).

⁵ The translations provided in the text are unofficial translations by Amnesty International from the Spanish original text, unless otherwise indicated. Original text: “*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 en las leyes de la República, y son de aplicación inmediata y directa por los tribunales y demás órganos del Poder Público.*”

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. The meaning of this amendment was explained by Venezuela in its third periodic report to the Human Rights Committee.⁶ Venezuela affirmed that:

“Both in its Constitution and in practice Venezuela acknowledges that the international human rights rules constitute a list of minimum guarantees and that it is impossible to allow any restriction or impairment under the pretext that the Covenant does not recognize such rights or recognizes them to a lesser degree. Article 50 of the Constitution extends the interpretation in favour of the individual in the following terms: ‘The enunciation of the rights and guarantees contained in this Constitution must not be construed as a denial of other rights which, being inherent in the human person, are not expressly mentioned herein’. This rule is interpreted to mean that all the other rights inherent in the human person”, i.e. all the rights contained in the international human rights instruments ratified by Venezuela, have constitutional status.”⁷

Hence, according to the 1999 Constitution, once a human rights treaty has been duly ratified, the rights it embodies are considered ‘self-executing’ and therefore may be invoked before the judicial and administrative authorities if providing more favourable provisions than those established by this Constitution and the laws of the Republic. Besides, the competent national authority can and must apply such instrument even though a given domestic Act may not expand on its principles.⁸ Therefore, it is crucial to determine what is a human rights treaty for purposes of the Constitution.

The Constitutional Chamber of the Supreme Court has not ruled on this matter so far, but scholars have suggested that every treaty which aims to protect individuals and is inspired by a sense of humanity can be considered as human rights treaty, i.e. provisions aimed to protect International humanitarian law.⁹ In 2000, the Mixed Commission of the Permanent Commission of Internal Affairs of the Parliament (*Comisión Mixta de la Comisión Permanente de Política Interior de la Asamblea Nacional*) was charged with the study of the Code of Criminal procedure, the Criminal Code and the Code of Military Justice, with a view to their amendment. The sub-commission for the Criminal Code considered, in a 2002 report, the Rome Statute as a human rights treaty to this extent,¹⁰ and so did the Venezuelan

⁶ Third periodic reports of States parties due in 1993: Venezuela, UN Doc. CCPR/C/VEN/98/3, 30 March 1999.

⁷ *Ibid.*, para. 53.

⁸ Second periodic reports of State parties due in 1996: Venezuela, UN Doc. CAT/C/33/Add.5, 23 November 2000 para. 3. In the same paragraph Venezuela also stressed that, “conventions [are] ratified by Venezuela and incorporated in the Constitution with constitutional status, which means that they are immediately and directly applicable by the courts and other public bodies.”

⁹ Rocío San Miguel, *La Vigencia y Aplicación del Derecho Internacional Humanitario en Venezuela* (2004), pp. 126-136 (<http://www.controlciudadano.org/publicaciones/dih/>).

¹⁰ Report of the Sub-commission for the Criminal Code of the Mixed Commission, *Hacia un nuevo Código*

representative to the Eight session of the Assembly of States Party to the Rome Statute in November 2006.¹¹ Even if the Rome Statute is considered to be a human rights treaty, Venezuelan Constitution leaves a gap that courts need to address in order to determine the correct status of international law and treaties. In 2003, the Constitutional Section of the Supreme Court has stated that it is its prerogative to determine which norms protecting human rights prevail in the internal order as well as which human rights contemplated in international treaties have relevance in Venezuela.¹² In case of ambiguity it is prerogative of the Constitutional Section of the Supreme Court to indicate which is the most favourable, therefore applicable, provision.¹³ This position of the Supreme Court is at odds with the asserted self-applicability of human rights treaties.

All treaties other than human rights ones have the status of ordinary laws, since they are given the same rank as the instrument that approves them;¹⁴ this means that in case of conflicting provisions between a treaty and an ordinary law the regular principle of *lex posteriori derogat priori* (subsequent law supersedes prior law) applies, undermining the execution of international treaties. However, according to the principle of *lex specialis derogat legi generali* (special law has priority over general law), treaties addressing a specific matter should have primacy over ordinary laws covering the same area.

The 1999 Constitution missed the opportunity to establish clearly the status of customary and conventional international law in the internal legislative system and within the hierarchy of the sources of law. As in the majority of Latin-American constitutions, there is no norm in the Venezuelan one that expressly explains the status of international law within the internal legal system and clarifies whether Venezuela follows a monist or a dualist approach, leaving the debate to scholars and practitioners, and causing a great deal of uncertainty.¹⁵ Even in a

Penal, 13 March 2002. Original text: “*Obligados por los compromisos contraídos internacionalmente al ratificar ante la Organización de las Naciones Unidas y aprobar entre otros, mediante la respectiva Ley, el Estatuto de Roma de la Corte Penal Internacional el cual compromete a la República a tipificar el genocidio, crímenes de lesa humanidad, así como por la inserción de Venezuela en el contexto internacional de protección de los derechos humanos y en relación con el artículo 23 constitucional que señala la importancia de los tratados internacionales sobre derechos humanos en el ámbito interno.*”

¹¹ *Intervención del representante de la Republica Bolivariana de Venezuela, Sr. Agustín Pérez Celis, Embajador ante el Reino de los Países Bajos*, The Hague, 26 November 2006.

¹² *Tribunal Supremo, Sala Constitucional No. 01-0415*, 15 July 2003 (<http://www.tsj.gov.ve/decisiones/scon/Julio/1942-150703-01-0415.htm>). Original text: “*...Resulta así que es la Sala Constitucional quien determina cuáles normas sobre derechos humanos de esos tratados, pactos y convenios, prevalecen en el orden interno; al igual que cuáles derechos humanos no contemplados en los citados instrumentos internacionales tienen vigencia en Venezuela...*”.

¹³ *Tribunal Supremo, Sala Costitucional No. 01-0415*, 15 July 2003. Original text: “*...ante antinomias o situaciones ambiguas entre los derechos contenidos en los instrumentos internacionales señalados y la Constitución, corresponderá a la Sala Constitucional interpretar cuál es la disposición más favorable...*”.

¹⁴ Article 187(18) of the Constitution.

¹⁵ According to the dualist approach, international and national law are two completely separate legal systems. International law would apply within a state only to the extent that it has been adopted by that state's own national law, not as international law. According to the monist approach, international and

monist legal system, courts will normally take a dualist approach to treaties requiring the state to define and to try or extradite suspects, claiming that a prosecution based on the treaty alone would violate the principle of legality. Instead, they usually require that the state enact legislation defining the crime as a crime under national law and providing for a specific penalty. Furthermore, the Constitutional Section of the Supreme Court has lately regrettably shown a very narrow approach, considering international law submitted to national law and highlighting the immunity of Venezuela before 'foreign courts'.¹⁶

2.3 COURT SYSTEM

There are civilian and military courts in Venezuela.

Civilian Courts

The Supreme Court of Justice (*Tribunal Supremo de Justicia*)¹⁷ is at the apex of the Venezuelan court system. The Supreme Court is the court of last resort and may meet either in plenary sessions or in groups forming specialized chambers. There are six chambers or divisions: Constitutional, Political Administrative, Electoral, Civil Appeals, Criminal Appeals, and Social Issues Appeals for agrarian, labour and juvenile law.¹⁸ The Supreme Court is empowered to invalidate any laws, regulations or other acts of the other governmental branches conflicting with the constitution, decide conflicts of competence between lower courts, and receive interpretation appeals.¹⁹

As in many other civil law countries, in Venezuela there is no obligatory rule of *stare decisis* (binding precedent) and the principal role of case law is to interpret and to fill in legislative blanks. Although the Venezuelan Supreme Court is considered the ultimate interpreter of the National Constitution and laws enacted pursuant to the Constitution, its decisions are not mandatory for similar cases. Even when judging similar cases, lower courts, by virtue of their autonomy, may set aside the Supreme Court doctrine, without infringing the Constitution. That refusal, however, cannot be arbitrary or groundless because, although judges only decide the specific cases assigned to them, they must provide new arguments which justify disagreeing with what the Supreme Court has already decided in analogous instances.

The rest of the judiciary is divided into ordinary and special courts. Ordinary courts are composed of criminal courts, civil courts and commercial courts and are divided into

national law are part of a single legal system and international law can be directly applied by national courts. See generally, Robert Jennings and Arthur Watts, *Oppenheim's International Law*, London and New York: Longman, 1992, pp. 53-54.

¹⁶ *Se consolida la inmunidad de Venezuela frente a tribunales extranjeros*, 15 June 2009 (<http://www.tsj.gov.ve/informacion/notasdeprensa/notasdeprensa.asp?codigo=6941>).

¹⁷ <http://www.tsj.gov.ve/>.

¹⁸ Article 262 of the Constitution.

¹⁹ Article 266 of the Constitution.

seventeen judicial districts. Each district jurisdiction is divided into four levels: Parish Courts (*Tribunales de Parroquia*), District Courts (*Tribunales de Distrito*), Courts of First Instance (*Tribunales de Primera Instancia*) and Appeal Courts (*Tribunales Superiores*). Special courts include military courts, agrarian courts, labour courts, juvenile courts and tax courts. The newest and most innovative part of the judicial system is the Justice of Peace (*Justicia de paz*), a system of popularly elected neighbourhood judges introduced in 1994 to ensure access to justice to the sectors of populations who have scarce or no access to formal justice and guarantee free assistance in minor cases.²⁰ The Executive Office of the Magistracy (*Dirección Ejecutiva de la Magistratura*) supervises the lower courts as well as the selection and training of judges.

In these jurisdictions, courts are placed in hierarchical order and are competent on the basis of the amount involved or the importance of the case. As a rule, judicial decisions may be appealed to a higher tribunal, but cases may not be heard in more than two courts. The superior courts serve as appellate courts for matters originating in courts of first instance in the areas of civil and criminal law. The courts of first instance have both appellate and original jurisdiction and are divided into civil, commercial, criminal, fiscal, custom, labour, administrative, agrarian, military and juvenile courts. District courts have jurisdiction in small bankruptcy and boundary suits and appellate jurisdiction over all cases from the municipal courts. Municipal courts hear small claims cases and also try those accused of minor crimes and misdemeanours.

Regional and international bodies have, in different occasions, criticised the Venezuelan judicial system for a various range of reasons, including the indiscriminate recourse to temporary judges and the perceived exercise of jurisdictional powers by the Supreme Court without due independence and impartiality.²¹ The Special Rapporteur on the independence of judges and lawyers in July described the justice system in Venezuela as “still characterised by a conspicuous number of temporary judges and prosecutors, subject to political interference on many different level that affects their independence.”²² He also shared his concerns on the proposed amendment of the Supreme Court Law (*Ley Orgánica del Tribunal Supremo de Justicia*) aimed to introduce political affiliation as a criteria for the designation of prosecutors.²³ The 2003 Report on the Situation of Human Rights in Venezuela issued by the Inter-American Commission of Human Rights (IACHR) in 2003 indicated that 84% of

²⁰ *Ley Orgánica de la Justicia de Paz*, Extraordinary Official Gazette No. 4.817, 21 December 1994 (<http://www.gobiernoenlinea.ve/docMgr/sharedfiles/LeyOrganicaJusticiaPaz.pdf>).

²¹ See Inter-American Court of Human Rights, Report on the Situation of Human Rights in Venezuela, Chapter 1, 29 December 2003 (<http://www.cidh.oas.org/countryrep/Venezuela2003eng/toc.htm>); “Preocupante la situación de la justicia en Venezuela”, *advierte experto de la ONU*, United Nations press release, 30 July 2009 (<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/8DF1C0C6B99B1DCFC125760300537310?opendocument>); Human Rights Committee, Concluding Observations on the third periodic report submitted by Venezuela, UN Doc. CCPR/CO/71/VEN, 26 April 2001.

²² UN press release, 30 July 2009.

²³ *Ibid.*

magistrates were temporary at the time, considering the status of the judiciary very worrying.²⁴ The IACHR also showed concern for “the failure to follow the mechanisms set forth in the new Constitution for the election of its top authorities” and highlighted that “this failure to apply the procedures established by the Constitution as the guarantees of domestic law for ensuring the independence of the members of the judiciary means that the institutional legitimacy of that branch of government is undermined and the rule of law is weakened.”²⁵ Furthermore, the IACHR pointed out several factors that are encouraging increased levels of impunity in Venezuela, such as “the politicization of agencies in the justice system; legal insecurity because of uncertainty surrounding the State’s rules and laws; legislative delays; the provisional status of most judges; and the restricted access available to excluded and marginalized groups lacking the economic resources to hire legal counsel.”²⁶

Even though an analysis of the faults of the Venezuelan judicial system goes beyond the scope of this work, it is important to bear in mind that these circumstances could affect the application of the provisions examined throughout this paper.

Military Courts

Article 261 of the Venezuelan Constitution recognises that military criminal jurisdiction is an integral part of the Venezuelan judicial system. As Article 261 states, while ordinary crimes, human right violations and crimes against humanity are subject to the jurisdiction of ordinary courts, military courts are competent for trying only military crimes.²⁷ The norms that regulate military justice in Venezuela are enclosed in the Organic Code of Military Justice, as last amended in 1998.

The Permanent Military Judges of first instance (*Jueces Militares de Primera Instancia Permanente*) and the Permanent War Councils (*Los Consejos de Guerra Permanentes*) are first instance courts for military cases. The Martial Court (*Corte Marcial*), the Supreme Court and the War Councils in specific instances are competent for the appeals.²⁸

It is increasingly recognized that military courts should not have jurisdiction over members of the armed forces or civilians in cases involving human rights violations or crimes under international law (See below Section 4.3.1.).

²⁴ 2003 Report Inter-American Court of Human Rights, *supra* note 21, para. 178.

²⁵ 2003 Report Inter-American Court of Human Rights, *supra* note 21, paras. 159-177.

²⁶ *Ibid.*, para. 199.

²⁷ Original text: “**Artículo 261.** La jurisdicción penal militar es parte integrante del Poder Judicial, y sus jueces o juezas serán seleccionados o seleccionadas por concurso. Su ámbito de competencia, organización y modalidades de funcionamiento se regirán por el sistema acusatorio y de acuerdo con lo previsto en el Código Orgánico de Justicia Militar. La comisión de delitos comunes, violaciones de derechos humanos y crímenes de lesa humanidad, serán juzgados por los tribunales ordinarios. La competencia de los tribunales militares se limita a delitos de naturaleza militar...”

²⁸ Chapter 2, *De los Tribunales y Funcionarios de Justicia Militar*, Organic Code of Military Justice.

2.4 OTHER ASPECTS OF THE LEGAL FRAMEWORK AND NATIONAL HUMAN RIGHTS INSTITUTIONS

Police. The national police system has been recently restructured by the Law Decree as Organic Law on National Police Body and Service of February 2008.²⁹ Pursuant to Article 33 of the new law, criminal investigations are carried out by the police, under the supervision of the Office of the General Prosecutor.³⁰ The Directorate of Intelligence and Prevention Services (*Dirección de los Servicios de Inteligencia y Prevención*), the national intelligence agency of Venezuela, and the organ devoted to the scientific investigation of crimes (*Cuerpo de Investigaciones Científicas Penales y Criminalísticas*) are also involved in criminal investigations. The Ministry of Justice and Internal Affairs (*Ministerio del Poder Popular para Relaciones Interiores y Justicia*), oversees the prison system and manages the national intelligence agency

Public prosecutor. The Office of the General Prosecutor (*Ministerio Público o Fiscalía General*) reports to the General Prosecutor (*Fiscal General de la República*). The Office's functions include: ensuring the observance of constitutional rights and guarantees in legal proceedings as well as in international treaties, conventions and agreements entered into by Venezuela; ordering and directing criminal investigations by the police in cases involving the perpetration of punishable offences; initiate criminal prosecution when there is no need for a party's request.³¹

Special immigration, police and prosecution units. As discussed below in Section 8, there are no special police and prosecution units charged with the investigation and prosecution of crimes under international law and there is no immigration unit which screens persons to determine whether they may have committed crimes under international law and to refer that determination to police or prosecutors for investigation and possible prosecution.

Human rights institutions related to criminal justice and reparations. The national human rights institutions in Venezuela include the Office of the Ombudsman (*Defensoría del Pueblo*), the National Human Rights Commission (*Comisión Nacional de Derechos Humanos*) and the Directorate for Human Rights and International Humanitarian Law (*Dirección de Derechos Humanos y de Derecho Internacional Humanitario*).

The Ombudsman is responsible for the promotion, defence and monitoring of the rights and guarantees established in the new Constitution and in the international human rights treaties, and also for addressing the legitimate, collective and widespread concerns of the citizens.³² As highlighted by Venezuela in the 2000 report to the Committee Against Torture, "one of his duties is to ensure the effective observance of the rights enshrined in the new Constitution

²⁹ *Decreto N° 5.895, con Rango, Valor y Fuerza de la Ley Orgánica del Servicio de Policía y del Cuerpo de Policía Nacional*, published on the Special Official Gazette on 9 April 2008.

³⁰ *Ibid.*, art. 33.

³¹ Articles 284 and 285 of the Constitution.

³² Article 280 of the Constitution.

and in the international human rights treaties, conventions and agreements ratified by Venezuela, and to investigate, either on his own initiative or at the request of a party, complaints brought to his attention.”³³

Decree No. 1034 of 24 January 1996³⁴ and following amendments set up for the first time in Venezuela a National Human Rights Commission. The Commission was intended to be composed of members both of the judiciary and the government, with the possibility to involve members of civil society in its deliberations. Although Venezuela in the 2000 report to the Committee against Torture stressed the intense activity of the Commission in providing training in human rights to police forces and dealing with complaints,³⁵ following the constitutional change in 1999, the National Human Rights Commission was established and ceased to exist in practice. Although the decree that set up the Commission was neither amended nor revoked, the Commission never started its work.³⁶

In 1998 a Directorate for Human Rights and International Humanitarian Law was created within the Ministry of Defence. This Directorate was mandated to advise the National Army (*Fuerza Armada Nacional*). Therefore, it has neither the composition nor the aims that characterise a national human rights monitoring body.³⁷

2.5 ROLE OF THE VICTIMS AND ORGANIZATIONS ACTING IN THE PUBLIC INTEREST IN CRIMINAL PROCEEDINGS

According to Venezuelan law, a prosecution is initiated *ex officio* by a prosecutor, except in the specific cases when it is initiated upon citation by the victims.³⁸ Furthermore, in certain instances prosecution can also be initiated by the Public Defender or by any individual or association protecting human rights or specific groups of victims.

Criminal proceedings initiated by victims

For a specific number of crimes the Venezuelan Criminal Code requires the victim to initiate the proceedings that lead to the prosecution.³⁹ These are generally minor offences not

³³ Second periodic reports of State parties due in 1996: Venezuela, *supra* note 8, para. 47(b).

³⁴ Published in the Official Gazette N. 35911, 1 March 1996.

³⁵ Second periodic reports of State parties due in 1996: Venezuela, *supra* note 8, para. 47(c).

³⁶ Rocío San Miguel, *La Vigencia y Aplicación del Derecho Internacional Humanitario en Venezuela* (2004), pp.176-178 (<http://www.controlciudadano.org/publicaciones/dih/>).

³⁷ *Ibid.*, p.178.

³⁸ Original text: “Artículo 24. La acción penal deberá ser ejercida de oficio por el Ministerio Público, salvo que sólo pueda ejercerse por la víctima o a su requerimiento.”

³⁹ Original text; “Artículo 25. Sólo podrán ser ejercidas por la víctima, las acciones que nacen de los delitos que la ley establece como de instancia privada, y su enjuiciamiento se hará conforme al procedimiento especial regulado en este Código.”

relevant to the scope of this paper. In these instances, if the victim does not file a complainant the criminal proceedings do not take place or in case the victim waives the right to file a complaint, further proceedings, are barred (Article 26 and 27 of the Venezuela Criminal Code).

Criminal proceedings initiated on behalf of victims

Two provisions in the Venezuelan Criminal Code allow third parties to initiate criminal proceedings on behalf of the victims. Article 121 of the Organic Code of Criminal Procedure provides:

“The Public Defender or any individual or human rights association is entitled to bring a private prosecution against state officials or police officers for human rights violations committed during the exercise of or due to their functions.”⁴⁰

With a similar intent, Article 122 allows victims to:

“[d]elegate the exercise of their rights to an association for the protection or assistance of the victims when this may enhance the defence of their interests...”⁴¹

2.6 PROPOSAL FOR LEGAL REFORM

In the early years of this decade, Venezuela started to consider the necessity of changes in order to update the protections granted by the Criminal Code. In 2000 the Criminal Code was amended to introduce the new crime of enforced disappearances, and in the same year the Mixed Commission of the Permanent Commission of Internal Affairs of the Parliament (Mixed Commission) was charged with the study of the Criminal Code, the Code of Criminal Procedure and the Code of Military Justice, with a view to a comprehensive reform of the criminal legislation.⁴² The Mixed Commission started a process of analysis of the present legislation with the objective to propose changes required to make Venezuelan criminal and military legislation a valuable instrument against the challenges posed by the contemporary reality involving crimes at national, transnational and international level. The Mixed Commission continued its work until December 2004 when, due to lack of political will connected with the change in the composition of the parliament, it was dissolved and the technical team that was coordinating its work was left with no resources to continue its work.

The Mixed Commission had among its aims the implementation of the Rome Statute into

⁴⁰ Original text: “Artículo 121. La Defensoría del Pueblo y cualquier persona natural o asociación de defensa de los derechos humanos podrán presentar querrela contra funcionarios o empleados públicos, o agentes de las fuerzas policiales, que hayan violado derechos humanos en ejercicio de sus funciones o con ocasión de ellas.”

⁴¹ Original text: “Artículo 122. La persona ofendida directamente por el delito podrá delegar, en una asociación de protección o ayuda a las víctimas, el ejercicio de sus derechos cuando sea más conveniente para la defensa de sus intereses...”

⁴² The relevant recommendations, although never formalised in an official proposal, are discussed at appropriate parts of this paper.

Venezuelan criminal legislation⁴³ and the amendment of the current legislation in order to ensure the exercise by Venezuelan Courts of universal jurisdiction for grave breaches of international humanitarian law and violations of human right law.⁴⁴ The original intention of the Mixed Commission was to include genocide and crimes against humanity in the Criminal Code, and war crimes in the Code of Military Justice. Regrettably, the works of the commission were interrupted when the Parliament took the decision to dismantle it. Unfortunately, when the Parliament adopted a partial amendment of the Criminal Code in 2005 the members of the Mixed Commission were not consulted.⁴⁵

⁴³ Report of the Sub-commission for the Criminal Code of the Mixed Commission, *Hacia un nuevo Código Penal*, *supra* note 10, para.6.

⁴⁴ Original text: "...con esta introducción Venezuela garantizará que los tribunales nacionales puedan ejercer la jurisdicción universal y otras formas de jurisdicción extraterritorial "sobre las violaciones y los abusos graves contra los derechos humanos y contra el derecho humanitario internacional", from *Comisión Mixta incluyó definitivamente principios penales que regirán crímenes internacionales*, 4 June 2004 (http://www.asambleanacional.gob.ve/index.php?option=com_content&task=view&id=6660&Itemid=131).

⁴⁵ Fernand Fernandez, Coordinator del Equipo tecnico de la Comision Mixta, *Propuesta para la implementación del Estatuto de Roma en la legislación penal y militar venezolana*, June 2002, p.12. In its recent statement to the Eighth session of the Assembly of States Party to the Rome Statute, Venezuela stated that the National Assembly is discussing a proposal to amend the Criminal Code, the Code of Criminal Procedure and the Organic Code of Military Justice to include definitions of genocide, war crimes and crimes against humanity consistent with those in the Rome Statute, see *Statement of the Bolivarian Republic of Venezuela in the VIII Assembly of States Parties of the Rome Statute*, The Hague, 19 November 2009 (http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-Venezuela-ENG.pdf). As of 1 December 2009 Amnesty International had not been able to locate the proposed amendments.

3. EXTRATERRITORIAL CRIMINAL JURISDICTION OTHER THAN UNIVERSAL JURISDICTION

Under international law, in addition to territorial jurisdiction, national courts can exercise jurisdiction over crimes (or torts) committed abroad if one of the following forms of jurisdiction is applicable:

- active personality jurisdiction;
- passive personality jurisdiction;
- protective jurisdiction; or
- universal jurisdiction.

The first three types of extraterritorial jurisdiction and the crimes that can be prosecuted under each one are discussed below in this section and the fourth, universal jurisdiction, and the crimes subject to this type of jurisdiction, are discussed below in Section 4.

A preliminary note on territorial jurisdiction

Territorial jurisdiction, the most commonly used form of jurisdiction, is outside the scope of this paper. However, it is useful to note here the scope of this form of jurisdiction since it can include jurisdiction over conduct that occurred outside the national boundaries of the state which is investigating or prosecuting a crime or where the civil tort action is being pursued (forum state). There are two main forms of territorial jurisdiction over crimes where some conduct occurs outside the national boundaries of the forum state: objective and subjective territorial jurisdiction. *Objective territorial jurisdiction* is widely accepted to exist when the conduct constituting the crime began abroad and the crime is either completed on the territory of the forum state (object state) or any essential element of the crime occurs in the forum state.⁴⁶ *Subjective territorial jurisdiction* exists when the crime commenced within

⁴⁶ Ian Brownlie, *Principles of Public International Law*, Oxford, Oxford University Press, 7th ed., 2008, p. 301 (Under the objective territorial principle, “jurisdiction is founded when any essential constituent element of a crime is consummated on state territory”); Robert Jennings and Arthur Watts, *Oppenheim’ International Law*, vol. 1, p. 460 (“[O]bjective jurisdiction allows jurisdiction over offences having their culmination within the state even if not begun there.”). Such an element in a prosecution for murder could be the death in the state of the court (object state) caused by someone firing across the border from another state or, in a prosecution for conspiracy, a step in the subject state to further the conspiracy agreed in another state. It could also include prosecuting in the object state a person for war

the forum state (subject state), but was completed outside the state.⁴⁷

There is also another, but controversial form of territorial jurisdiction – *effects jurisdiction* – which is similar to objective jurisdiction, but differs from it in a crucial respect. Under effects jurisdiction, the forum state has jurisdiction over a crime or tort where all elements were committed abroad, but the crime or tort had some impact, which could be incidental, in the forum state.⁴⁸ In addition, jurisdiction over ships and aircraft registered in the state seeking exercise jurisdiction is often treated as a form of territorial jurisdiction. In any event, all of the above examples are outside the scope of this paper.

The definitions of the forms of geographic jurisdiction are those used in each of the 192 Amnesty International country papers in the *No Safe Haven Series*. Since there is no unanimity among governments or scholars, Amnesty International adopted certain definitions which seemed to make the most sense and to be clear and consistent with each other.

Article 3 of the Venezuelan Criminal Code states that the territoriality of criminal law is the basic criterion for Venezuelan courts to exercise jurisdiction.⁴⁹ Nevertheless, Article 4 of the Criminal Code and several provision included in special legislation extend the application of Venezuelan law across territorial boundaries, providing for a list of situations where Venezuelan courts can exercise jurisdiction on the basis of extraterritorial principles, including active and passive personality jurisdiction and protective jurisdiction. For universal jurisdiction see Section 4 of this paper.

3.1 ACTIVE PERSONALITY JURISDICTION

Active personality jurisdiction is a category of jurisdiction based on the nationality of the suspect or defendant at the time of the commission of the crime or tort.⁵⁰ This category of

crimes suspected of funding or training of armed fighters abroad to fight in the object state.

⁴⁷ Brownlie, *supra* note 46, p. 301 (The subjective application of the territorial principle “creates jurisdiction over crimes commenced within the state, but completed or consummated abroad”.); Jennings and Watts, *supra*, note 42, vol. 1, p. 460 (“The subjective application of the principle allows jurisdiction over offences begun within the state but not completed there”) (footnote omitted). For example, a person suspected of firing from the subject state across the border into another state could be prosecuted in the subject state for murder even though the death occurred in the neighbouring state. In addition, a person suspected of sending funds from the subject state or training fighters in the subject state to fight abroad could be prosecuted for war crimes in the subject state.

⁴⁸ For example, a person could have been tortured abroad and continue to suffer the effects of that torture after entering the forum state.

⁴⁹ Original Text: “*Todo el que cometa un delito o una falta en el territorio de la República será penado con arreglo a la ley venezolana.*”

⁵⁰ This is the approach taken in the International Bar Association Legal Practice Division, Report of the Task Force on Extraterritorial Jurisdiction (October 2008) (IBA Report), p. 144: “The active personality principle, also known as the active nationality principle, permits a state to prosecute its nationals for crimes committed anywhere in the world, if, at the time of the offense, they were such nationals.”. For the scope of the active personality principle, see Amnesty International, *Universal jurisdiction: The duty of states to enact and enforce legislation* – Ch. One, AI Index: IOR 53/003/2001, September 2001. See

jurisdiction does not include jurisdiction over crimes committed by a foreigner who is not a national, but who is a resident of the country, at the time of the crime, or who subsequently becomes a resident, domiciliary or national of the forum state. Jurisdiction over crimes on such a basis instead falls under the category of universal jurisdiction (see Section 4 below).

Subsections 1, 3, 6, 9, 10, 11, 12 and 16 of Article 4 state the following:

“Article 4 - The following shall be subject to prosecution in Venezuela and punished in accordance with Venezuelan criminal law:

1- Venezuelan nationals who, whilst in a foreign country, commit treason against the Republic of Venezuela ...

...3- Venezuelan nationals ... who, without governmental authorisation, fabricate, acquire or deal arms or munitions into Venezuela, or facilitate their introduction into Venezuelan territory...

... 6- The members of the diplomatic missions of the Republic of Venezuela who fail to carry on their duties, or who commit any punishable act that cannot be prosecuted in the place of their residence by virtue of the privileges inherent to their status.

... 9- Venezuelan nationals ... who have come to the country who, on the high seas, commit piracy or atrocities and crimes against humanity as qualified by International Law; except when they have already been tried for them in another country and have served their sentence.

10- Venezuelan nationals who, regardless of whether on Venezuelan territory or outside of it, take part in slave trade.

11- Venezuelan nationals ... who find themselves on Venezuelan soil and who, in another country, counterfeit or take part in counterfeiting of Venezuela legal currency or seals of public use, stamps or Venezuelan credit instruments, bearer negotiable instruments or title-deeds emitted according to national laws.

12- Venezuelan nationals ... who in any way aid the introduction in the Republic of the titles specified in the above section ...

13- Commanders, officials and any other individuals of an army, by virtue of the punishable acts that they commit while marching through neutral foreign territory against its inhabitants.

also Dapo Akande, *Active Personality Principle*, Antonio Cassese, ed., *The Oxford Companion to International Justice*, Oxford: Oxford University press, 2008, 229 (criticizing the application of the active personality principle to persons possessing the forum state's nationality at the time of prosecution, but not at the time of the crime, except when it was a crime under international law; seeing prosecution of persons who residents of the forum state after the crime as analogous to active personality jurisdiction).

... 16- Venezuelan nationals ... who, during peace time, from foreign territory, warships or airplanes, throw projectiles or damage in any other way Venezuelan population, inhabitants or territory [...]"⁵¹

These provisions provide Venezuelan courts with active personality criminal jurisdiction. Of course, if the Venezuelan diplomat is not a citizen of Venezuela, jurisdiction over that diplomat pursuant to Article 4(6) would be based on universal jurisdiction, not active personality jurisdiction. Nevertheless, for the first subsection to apply, other requirements must be met: the suspect has to be on Venezuelan territory, there has to be a complaint filed against the suspect and the suspect must not have been judged by a foreign tribunal, or, having been judged, the suspect has escaped the sentence.⁵²

⁵¹ Original Text: "*Artículo 4. Están sujetos a enjuiciamiento en Venezuela y se castigarán de conformidad con la ley penal venezolana:*

1- Los venezolanos que en país extranjero, se hagan reos de traición contra la República y los que, unos contra otros, cometan hechos punibles según sus leyes.

[...] 3- Los venezolanos...que, sin autorización del Gobierno de la República, fabriquen, adquieran o despachen armas o municiones, con destino a Venezuela, o favorezcan en alguna manera su introducción en el territorio venezolano.

[...] 6- Los empleados diplomáticos de la República que desempeñen mal sus funciones, o que cometan cualquier hecho punible no enjuiciable en el lugar de su residencia por razón de los privilegios inherentes a su cargo.

[...] 9- Los venezolanos... 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.

10- Los venezolanos que, dentro o fuera de la República, tomen parte en la trata de esclavos [...]."

[...] 11- Los venezolanos ... venidos al territorio de la República que, en otro país, falsifiquen o tomen parte en la falsificación de moneda de curso legal en Venezuela o sellos de uso público, estampillas o títulos de crédito de la Nación, billetes de banco al portador o títulos, de capital y renta, de emisión autorizada por la ley nacional.

12- Los venezolanos ... que de alguna manera favorezcan la introducción, en la República, de los valores especificados en el número anterior [...].

13- Los Jefes, Oficiales y demás individuos de un ejército, en razón de los hechos punibles que cometan en marcha por territorio extranjero neutral, contra los habitantes del mismo.

[...] 16- Los ... venezolanos que, en tiempo de paz, desde territorio, buques de guerra o aeronaves extranjeras, lancen proyectiles o hagan cualquier otro mal a las poblaciones, habitantes o al territorio de Venezuela [...]."

⁵² Article 4, Section 2, original text: "*[...] En los dos casos anteriores se requiere que el indiciado haya venido al espacio geográfico de la República y que se intente acción por la parte agraviada, o por el Ministerio Público en los casos de traición o de delito contra la seguridad de Venezuela. Requiere también que el indiciado no haya sido juzgado por los Tribunales extranjeros, a menos que habiéndolo*

Subsection 4, providing Venezuelan courts with for jurisdiction over

... Venezuelan citizens who, while in a foreign country, breach laws concerning the civil status or the capacity of Venezuelans ...,⁵³

involves both the active and the passive personality principle.

3.2 PASSIVE PERSONALITY JURISDICTION

Passive personality jurisdiction is a category of jurisdiction based on the nationality of the victim at the time of the commission of the crime or the tort.⁵⁴ It does not include crimes committed against someone who became a national, domiciliary or resident of the forum state after the crime was committed. In addition, it also does not apply to crimes committed against a national of a co-belligerent state in an armed conflict who is not a national of the forum state.

Venezuelan law authorizes national courts to exercise extraterritorial criminal jurisdiction on the basis of the passive personality principle. Pursuant to Article 4, subsection 2:

“The following shall be subject to prosecution in Venezuela and punished in accordance with Venezuelan criminal law

... 2. A foreigner who, while in a foreign country, commits a crime ... against any [Venezuelan] national [...]”⁵⁵

In other instances, Venezuelan law provides for passive personality jurisdiction, but in combination with the active personality principle. According to Article 4, subsection 1 and 16:

“The following shall be subject to prosecution in Venezuela and punished in accordance with Venezuelan criminal law:

sido hubiere evadido la condena.”

⁵³ Original Text: “Artículo 4. Están sujetos a enjuiciamiento en Venezuela y se castigarán de conformidad con la ley penal venezolana:

[...] 4- Los venezolanos que, en país extranjero, infrinjan las leyes relativas al estado civil y capacidad de los venezolanos.”

⁵⁴ IBA Report, *supra* note 50, p.146: “The victim must have been a national of the foreign state, State A, at the time of the crime”. For the scope of the passive personality principle, see Amnesty International, *Universal jurisdiction* (Ch. One), *supra*, n. 17, at Sect. II.C. See also Dapo Akande, *Active Personality Principle*, Cassese, *supra* note 50, at p. 452 (justifying the passive personality jurisdiction on the ground that perpetrators “will often select their victims based on this nationality and will know that the state of nationality has an interest in preventing such acts”).

⁵⁵ Article 4, Section 2, original text: “Los súbditos o ciudadanos extranjeros que en país extranjero cometan algún delito contra la seguridad de la República o contra alguno de sus nacionales. [...]”

1. Venezuelan nationals who, while in a foreign country ... commit acts punishable under Venezuelan law against each other.

... 16. Venezuelan nationals ... who, during peace time, from foreign territory, warships or airplanes, throw projectiles or damage in any other way Venezuelan population, inhabitants or territory [...]"

The jurisdiction applies only if both suspect and victim are Venezuelans, in a peculiar combination of the two principles.

As with active personality jurisdiction provided for in Article 4(1), the suspect, in addition, has to be on Venezuela territory, there has to be a complaint filed against the suspect and the suspect must not have been judged by a foreign tribunal (*ne bis in idem*), or, having been judged, the suspect escaped and avoided serving the sentence.⁵⁶

3.3 PROTECTIVE PERSONALITY JURISDICTION

The category of protective jurisdiction involves jurisdiction over crimes committed against the forum state's own special interests, such as counterfeiting the forum state's currency, treason and sedition.⁵⁷

Venezuelan courts may exercise extraterritorial criminal jurisdiction based on the protective principle. Subsections 2, 11, 12 and 16, Article 4 of the Criminal Code provide that:

–“The following shall be subject to prosecution in Venezuela and punished in accordance with Venezuelan criminal law:

1. Venezuelan nationals who, whilst in a foreign country, commit treason against the Republic of Venezuela.

2. A foreigner who, while in a foreign country, commits a crime against the security of the Republic of Venezuela ...

...7. The personnel and the crew of national warships and war aircraft, for the commission, anywhere, of punishable acts.

8. Captains or skippers, the personnel and the crew, as well as passengers of merchant ships of Venezuela, for punishable acts committed on the high sea or on board in waters belonging to another nation ...

⁵⁶ *Ibid.*

⁵⁷ For the scope of protective jurisdiction, see Amnesty International, *Universal jurisdiction* (Ch. 1), *supra* note 3, at Sect. II.D. For a somewhat more restrictive definition, see IBA Report, *supra* note 50, p. 149: “[T]he ‘protective principle’ ... recognizes a state’s power to assert jurisdiction over a limited range of crimes committed by foreigners outside its territory, where the crime prejudices the state’s vital interests”. See also Dapo Akande, *Active Personality Principle*, Cassese, *supra* note 50, at p. 474 (similar narrow definition).

... 11. Foreigners who find themselves on Venezuelan soil and who, in another country, counterfeit or take part in counterfeiting of Venezuelan legal currency or seals of public use, stamps or Venezuelan credit instruments, bearer negotiable instruments or title-deeds emitted according to national laws.

12-Foreigners who in any way aid the introduction in the Republic of the titles specified in the above section ...

... 16. Foreigners who, during peace time, from foreign territory, warships or airplanes, throw projectiles or damage in any other way Venezuelan population, inhabitants or territory ...”⁵⁸

There are also a number of protective personality jurisdiction provisions in the *ad hoc* legislation concerning crimes under national law of international concern (see Section 4.2 below). Active personality jurisdiction is provided for:

- Terrorist bombing (Article 7 and 31(1) of the 2005 Organic Law against Organized Crime);

⁵⁸ Original Text: “*Artículo 4. Están sujetos a enjuiciamiento en Venezuela y se castigarán de conformidad con la ley penal venezolana:*

1- Los venezolanos que en país extranjero, se hagan reos de traición contra la República y los que, unos contra otros, cometan hechos punibles según sus leyes.

2- Los súbditos o ciudadanos extranjeros que en país extranjero cometan algún delito contra la seguridad de la República o contra alguno de sus nacionales. En los dos casos anteriores se requiere que el indiciado haya venido al territorio de la República y que se intente acción por la parte agraviada, o por el Ministerio Público en los casos de traición o de delito contra la seguridad de Venezuela. Requiérase también que el indiciado no haya sido juzgado por los Tribunales extranjeros, a menos que, habiéndolo sido, hubiere evadido la condena.

[...] 7- Los empleados y demás personas de la dotación y la marinería de los buques y aeronaves de guerra nacionales por la comisión, en cualquier parte, de hechos punibles.

8- Los Capitanes o Patrones, demás empleados y la tripulación y marinería, así como los pasajeros de los buques mercantes de la República, por los hechos punibles cometidos en alta mar o a bordo en aguas de otra nación.

[...] 11- Los ... extranjeros venidos al territorio de la República que, en otro país, falsifiquen o tomen parte en la falsificación de moneda de curso legal en Venezuela o sellos de uso público, estampillas o títulos de crédito de la Nación, billetes de banco al portador o títulos, de capital y renta, de emisión autorizada por la ley nacional.

12- Los... extranjeros que de alguna manera favorezcan la introducción, en la República, de los valores especificados en el número anterior [...].

[...] 16- Los extranjeros... que, en tiempo de paz, desde territorio, buques de guerra o aeronaves extranjeras, lancen proyectiles o hagan cualquier otro mal a las poblaciones, habitantes o al territorio de Venezuela [...].”

- Financing terrorism (Article 7 and 31(1) of the 2005 Organic Law against Organized Crime);
- Transnational organized crime (Article 16 para.2 and 31(1) of the 2005 Organic Law against Organized Crime);
- Trafficking of human being (Article 16(11) and 31(1) of the 2005 Organic Law against Organized Crime);
- Manufacturing and trafficking in firearms (Article 9 and 31(1) of the 2005 Organic Law against Organized Crime);
- Nuclear terrorism (Article 7, 8 and 31(1) of the 2005 Organic Law against Organized Crime).

4. LEGISLATION PROVIDING FOR UNIVERSAL CRIMINAL JURISDICTION

A number of provisions included in the Venezuelan Criminal Code or in *ad hoc* legislation provide Venezuelan courts with universal jurisdiction over certain ordinary crimes, a range of crimes that are identified as such in international treaties and that are considered of international concern, and certain crimes under international law, such as torture and crimes against humanity. Other crimes under international law, such as genocide and extrajudicial executions, are not subject to universal jurisdiction.

The Mixed Commission had among its aims the implementation of the Rome Statute into Venezuelan criminal legislation⁵⁹ and the amendment of the current legislation in order to ensure that Venezuelan courts could exercise universal jurisdiction over grave breaches of international humanitarian law and violations of human right law.⁶⁰ Regrettably, the work of the Commission was interrupted in December 2004 when it was disestablished.

Despite the existence of the provisions that are discussed below, the Office of the General Prosecutor has recently denied that Venezuelan courts can exercise universal jurisdiction.⁶¹ In response to a request made by lawyer and President of the Association Civil for Citizen Control (*Asociación Civil Control Ciudadano para la Seguridad la Defensa y la Fuerza Armada Nacional*) Rocío San Miguel to initiate the proceedings to request a rogatory letter to obtain information related to the war crimes committee by F.A.R.C. and E.L.N. members in Colombia, the General Prosecutor stressed that:

“Venezuela does not have internal legislation allowing courts to apply universal jurisdiction...Therefore, until legislation regulating the application of the universal jurisdiction principle is introduced in the internal legal system, Venezuelan juridical bodies cannot open investigations against individual not present on Venezuelan territory.”⁶²

⁵⁹ Report of the Sub-commission for the Criminal Code of the Mixed Commission, *Hacia un nuevo Código Penal*, *supra* note 10, para. 6.

⁶⁰ *Supra* note 44.

⁶¹ *Decisión de la Fiscalía Sexta del Ministerio Público a Nivel Nacional con competencia Plena a cargo de María Alejandra Pérez G.*, C-115-2008, 07 February 2008.

⁶² Original text: “...el Estado Venezolano no posee la legislación interna que establezcan los mecanismos que permitan aplica el principio de jurisdicción universal...Es por ello, que hasta tanto no exista en

4.1 ORDINARY CRIMES

There is no general provision in the Venezuelan Criminal Code or other criminal law providing for universal jurisdiction over ordinary crimes, such as homicide, assault, rape or kidnapping. However, under exceptional circumstances, courts might be able to exercise universal jurisdiction over ordinary crimes due to the particular position or role covered by the offender.

Article 4 (5) and 4(13) of the Criminal Code state that Venezuelan courts shall have jurisdiction over

“...5. [d]iplomatic personnel, in the instances permitted by the Public Law of Nations, according to what established by the Constitution of the Bolivarian Republic of Venezuela.

...13. [c]ommanders, officials and any other individuals of an army, by virtue of the punishable acts that they commit while marching through neutral foreign territory against its inhabitants.”⁶³

Even though in almost all instances, such individuals will be Venezuelan nationals, subject though to extraterritorial jurisdiction based on the active personality principle, the article does not expressly state that Venezuelan citizenship is a requirement for the courts to exercise jurisdiction. This leaves the door open for foreign nationals or, most likely, dual nationals, to be tried in Venezuelan courts for crimes committed while serving as diplomats in a third country and for foreign nationals or, most likely, dual nationals serving in the national armed forces to be tried in Venezuelan courts for crimes committed while marching through neutral foreign territory.

4.2 CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN

Venezuelan courts may exercise universal jurisdiction over a number of crimes under national law of international concern. Most of these crimes are listed in treaties which Venezuela ratified allowing or requiring state parties to exercise universal jurisdiction.⁶⁴ While all of the legislation implementing such treaties contains extraterritorial jurisdiction provisions (see Section 3 above), universal jurisdiction is granted to Venezuela Courts only over certain crimes, such as piracy, hijacking, and crimes related to terrorism, and not over others, such as attacks on internationally protected persons and theft of nuclear material.

nuestro ordenamiento jurídico interno las leyes que regulen la aplicación del principio de jurisdicción universal, los órganos del sistema de justicia venezolano no pueden iniciar la persecución de ninguna persona que se encuentra fuera de nuestro territorio.”

⁶³ Original text: “... 5- Los empleados diplomáticos, en los casos permitidos por el Derecho Público de las Naciones, de conformidad con lo que establece la Constitución de la República Bolivariana de Venezuela. [...] 13- Los Jefes, Oficiales y demás individuos de un ejército, en razón de los hechos punibles que cometan en marcha por territorio extranjero neutral, contra los habitantes del mismo.”

⁶⁴ Crimes under international law, including crimes against humanity of apartheid, war crimes, enforced disappearances, torture and extrajudicial executions are discussed below in section 4.3.

4.2.1 AN OVERVIEW: CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN SUBJECT TO UNIVERSAL JURISDICTION

Crimes under national law of international concern, most of which are identified in treaties authorizing or requiring states parties to exercise universal jurisdiction are listed below. Section 4.2.2 indicates whether Venezuela has signed or ratified each treaty, summarizes the relevant provisions of each treaty and then states whether Venezuela has defined the crimes in the treaty as crimes under national law and whether its court can or cannot exercise universal jurisdiction over these crimes. However, no attempt has been made in this report to determine whether the crime, such as “hostage taking”, fully corresponds with each of the crimes covered by the relevant treaty.

For the purposes of this paper, it is sufficient simply to note whether Venezuela has implemented, at least in part, the relevant treaty obligation. If so, it is indicated whether the Criminal Code or the *ad hoc* criminal legislation expressly defines the conduct, or at least some of the conduct, prohibited in the treaty as a crime or not. In most instances, there is no jurisprudence addressing the scope of jurisdiction. The crimes are discussed roughly in chronological order, based on when a crime became generally recognized as subject to universal jurisdiction as with piracy, or when it was the subject of an international or regional treaty provision, regardless when Venezuela became a party. Indeed, in some cases, Venezuela has not ratified the relevant treaty. In these instances, the crimes might nonetheless be defined and punished in the Criminal Code or in the special legislation, and universal jurisdiction provided therein.

The crimes and the relevant treaties (protocols are discussed together with the related treaty) discussed below are as follows:

- **Piracy:** Customary international law, 1958 Convention on the High Seas and 1982 United Nations Convention on the Law of the Sea;
- **Counterfeiting:** 1929 International Convention for the Suppression of Counterfeiting Currency;
- **Narcotics trafficking:** 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol amending the Single Convention on Narcotic Drugs;
- **Violence against passengers or crew on board a foreign aircraft abroad:** 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention);
- **Hijacking a foreign aircraft abroad:** 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention);
- **Sale of psychotropic substances:** 1971 Convention on Psychotropic Substances
- **Certain attacks on aviation:** 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention);
- **Terrorist attacks against internationally significant persons:** 1971 Convention to Prevent and Punish the Acts of terrorism taking the Forms of Crimes against Persons and Related

Extortion that are of International significance;

- **Attacks on internationally protected persons, including diplomats:** 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;
- **Hostage taking:** 1979 International Convention against the Taking of Hostages;
- **Theft of nuclear materials:** 1979 Convention on the Physical Protection of Nuclear Material;
- **Attacks on ships and navigation at sea:** 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;
- **Use, financing and training of mercenaries:** 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries;
- **Trafficking in minors:** 1994 Inter-American Convention on International Traffic in Minors;
- **Attacks on UN and associated personnel:** 1994 Convention on the Safety of United Nations and its 2005 Protocol;
- **Terrorist bombing:** 1997 International Convention for the Suppression of Terrorist Bombings;
- **Financing of terrorism:** 1999 International Convention for the Suppression of the Financing of Terrorism;
- **Transnational crime - Transnational organized crime:** 2000 UN Convention against Transnational Organized Crime;
- **Transnational crime - Trafficking of human beings:** 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children;
- **Transnational crime – Firearms:** 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition;
- **Nuclear terrorism:** 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.

4.2.2. SPECIFIC CRIMES

Piracy

The crime of piracy can be committed only on the high seas or outside the territorial jurisdiction of any state. Under customary international law, courts of any state can exercise universal jurisdiction over piracy independently of any treaty. However, one definition has

been codified in two treaties providing for universal jurisdiction over this crime, the 1958 Convention on the High Seas⁶⁵ to which Venezuela has been a party since 15 August 1961, and the 1982 United Nations Convention on the Law of the Sea,⁶⁶ which Venezuela has not signed. Both treaties provide for universal jurisdiction over piracy and give an identical definition:

“Piracy consists of any of the following acts:

(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.”⁶⁷

Venezuela expressly criminalises and defines piracy in Article 152 of the Criminal Code, which states that:

“[f]oreigners who commit acts of piracy are punished with imprisonment from 10 to 15 years. Every individual who commits piracy, as governing or crewing a ship not belonging to the army navy of any nation, nor provided with a correctly issued authorisation, or being part of an armed group on board of such a ship, attacks other ships or commits predatory acts against them or on the coast, or revolts against the government of the Republic.”⁶⁸

⁶⁵ Convention on the High Seas, 29 April 1958 (entered into force 29 Sept. 1962), Arts. 19 (authorizing seizure of pirate ships or aircraft on the high seas), 15 (defining piracy), available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf,

⁶⁶ UN Convention on the Law of the Sea, 10 December 1982 (entered into force 16 Nov. 1994), Arts. 101 (Definition of piracy), 105 (Seizure of a pirate ship or aircraft) (http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf),

⁶⁷ Article 15, Convention on the High Seas; Article 101, United Nations Convention on the Law of the Sea.

⁶⁸ Original Text: “Artículo 152. Los venezolanos o extranjeros que cometan actos de piratería serán castigados con presidio de diez a quince años. Incurren en este delito los que rigiendo o tripulando un buque no perteneciente a la Marina de guerra de ninguna nación, ni provisto de patente de corso

Venezuelan courts can exercise universal jurisdiction over acts of piracy on the high seas based on Article 4 (9) of the Criminal Code which extend their jurisdiction to

“[f]oreigners who have come to the country who, on the high seas, commit acts of piracy ...; except when they have already been tried for them in another country and have served their sentence.”⁶⁹

Counterfeiting

Venezuela is not a party to the 1929 International Convention for the Suppression of Counterfeiting. This treaty requires states parties to make counterfeiting of foreign currency and attempts to do so ordinary crimes (Art.3), to make such crimes subject to extradition (Art. 10) and, if the state party recognizes a general rule of extraterritorial jurisdiction, to prosecute persons suspected of counterfeiting of foreign currency abroad if extradition has been requested and rejected for a reason not connected with the crime (Art. 9).⁷⁰ However, the Venezuelan Criminal Code punishes counterfeiting of national and foreign currency and titles in Chapter I of Title VI (Articles 298-304).

Venezuela makes counterfeiting of foreign currency and related crimes offences under national law in Articles 298 to 304 of the Criminal Code. Venezuela does not authorise its courts to exercise universal jurisdiction for the counterfeiting of foreign currency.

Narcotics trafficking – 1961 Single Convention

Venezuela has been a party to the 1961 Single Convention on Narcotics Drugs, as amended by its 1972 Protocol amending the Single Convention on Narcotic Drugs since 14 February 1969.⁷¹ This treaty requires states parties to define certain conduct concerning narcotic drugs as crimes under national law (Art. 36 (1)) and, if a person suspected of conduct is present in its territory and not extradited, to prosecute the suspect (Art. 36 (2) (a) (iv)).

Venezuela has defined much of the drug offences listed in the Convention, as amended by

debidamente expedida, o haciendo parte de un cuerpo armado que ande a su bordo, ataquen otras naves o cometan depredaciones en ellas o en los lugares de la costa donde arriben, o se declaren en rebelión contra el Gobierno de la República.”

⁶⁹ Original Text: “Artículo 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 República 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 hubieran sido ya juzgados en otro país y cumplido la condena.”

⁷⁰ UN International Convention for the Suppression of Counterfeiting (http://www.pactii.org/pits/en/treaty_database/1929/3.html).

⁷¹ Single Convention on Narcotics Drugs, 30 March 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 25 March 1972 (http://www.unodc.org/pdf/convention_1961_en.pdf).

the 1972 Protocol, as crimes in the Organic Law on Consumption and Trafficking of Narcotic Drugs and Psychotropic Substances.⁷² Nevertheless, there is neither clear reference to the scope of its application, nor reference to the possibility by courts to exercise universal jurisdiction over the crimes listed therein.

Violence against passengers or crew on board a foreign aircraft abroad

Venezuela has been a party to the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention) since 4 February 1983.⁷³ This treaty authorizes states parties to take measures to ensure persons suspected of violence against passengers or crew on board a foreign aircraft abroad can be extradited or prosecuted (Art. 13 (2)) and to extradite persons suspected of responsibility for such acts or to institute criminal proceedings against them in their own courts (Art. 15 (1)).

Venezuela has defined violence against passengers or crew on board a foreign aircraft abroad as provided in the Tokyo Convention as crimes under national law in 2005 with the Civilian Aviation Law (*Ley de Aeronáutica Civil*).⁷⁴ The instances in which Venezuela can exercise jurisdiction are listed in Article 2 of this law, which provides for protective jurisdiction (subsection 3) and universal jurisdiction, provided that the aircraft lands on Venezuelan soil or flies in its aerial space (subsection 1).⁷⁵

Hijacking a foreign aircraft abroad

Venezuela has been a party to the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) since 7 July 1983.⁷⁶ This treaty requires states parties to define seizures of aircraft as crimes under national law (Art. 2), to establish jurisdiction over persons suspected of such seizures who are present in its territory if they are not extradited

⁷² *Ley Orgánica contra el Tráfico Ilícito y el Consumo de Sustancias Estupefacientes y Psicotrópicas*, 16 December 2005 (http://www.ona.gob.ve/Pdf/Ley_drogas2006.pdf).

⁷³ Convention on Offences and Certain Other Acts Committed on Board Aircraft (<http://www.mcgill.ca/files/iasl/tokyo1963.pdf>), Tokyo, 14 September 1963 (entered into force 4 Dec. 1969).

⁷⁴ *Ley de Aeronáutica Civil*, 12 June 2005 (<http://clacsec.lima.icao.int/Leves/Ven/Ley%20Aeronautica%20Civil.pdf>).

⁷⁵ Original Text: “Artículo 2. Quedan sometidos al ordenamiento jurídico venezolano vigente: 1) Toda aeronave civil que se encuentre en el territorio venezolano o vuele en su espacio aéreo, su tripulación, pasajeros y efectos transportados en ella. 2) Los hechos que ocurran a bordo de aeronaves civiles venezolanas, cuando vuelen fuera del espacio aéreo de la República. 3) Los hechos cometidos a bordo de aeronaves civiles, cualesquiera sea su nacionalidad, cuando ocurran en el espacio aéreo extranjero y produzcan efectos en el territorio venezolano o se pretenda que lo tengan en éste. 4) Los hechos ocurridos en aeronaves civiles extranjeras que vuelen el espacio aéreo venezolano.”

⁷⁶ Convention for the Suppression of Unlawful Seizure of Aircraft (http://untreaty.un.org/unts/1_60000/24/40/00047980.pdf), The Hague, 15 December 1970 (entered into force 14 October 1973).

(Art. 4 (2)), to take measures to ensure presence for prosecution or extradition (Art. 6 (1) and (2)) and to submit the cases to the competent authorities if they are not extradited (Art. 7).

Article 357 of the Criminal Code⁷⁷ punishes hijacking of any means of transport, and the jurisdiction of the courts over those crimes follows the general rules on jurisdiction set out in Article 4 of the Criminal Code. Venezuela defines and punishes the crime of hijacking of foreign aircraft in Article 142 of the Civilian Aviation Law of 2005.⁷⁸ The instances in which Venezuela can exercise jurisdiction are listed in Article 2 of this law, which provides for protective jurisdiction (subsection 3) and universal jurisdiction, provided that the aircraft is present on Venezuelan territory (subsection 1).⁷⁹

1971 Convention on Psychotropic Substances

Venezuela has been a party to the 1971 Convention on Psychotropic Substances since 23 May 1972.⁸⁰ The Convention requires each state party, subject to its constitutional limitations, to treat as a punishable offence, any intentional action contrary to a law or regulation adopted in pursuance of its obligations under the Convention, to ensure that serious offences are liable to adequate punishment (Art. 22 (1) (a)), and to prosecute offences committed in their territory and suspects found in its territory, if extradition is not acceptable under that state's law (Art. 22 (2) (b)).

Venezuela has defined many of the acts prohibited by the 1961 Single Convention as crimes in the Organic Law on Consumption and Trafficking of Narcotic Drugs and Psychotropic Substances.⁸¹ Nevertheless, there is no clear reference to the scope of its application, nor reference to the possibility by courts to exercise universal jurisdiction over the crimes listed therein.

⁷⁷ Original Text: "*Artículo 357. [...] Quien asalte o ilegalmente se apodere de buque, accesorio de navegación, aeronaves, medios de transporte colectivo o de carga, o de la carga que éstos transporten, sean o no propiedad de empresas estatales, será castigado con pena de prisión de ocho años a dieciséis años [...]*".

⁷⁸ Original Text: "*Artículo 142. Desviación y obtención fraudulenta de rutas. Quien desvíe la ruta sin causa justificada o utilice una ruta de manera fraudulenta, será sancionado con prisión de seis a ocho años. En la misma pena incurrirá quien obtenga, tramite, otorgue una ruta de manera fraudulenta Si el desvío injustificado de la ruta persigue un provecho o causa falsa alarma, la pena será de ocho a diez años de prisión.*"

⁷⁹ *Supra* note 75.

⁸⁰ Convention on Psychotropic Substances (http://www.incb.org/pdf/e/conv/convention_1971_en.pdf), United Nations Conference for the Adoption of a Protocol on Psychotropic Substances, adopted 21 February 1971.

⁸¹ *Supra* note 72.

Terrorist attacks against internationally significant persons

Venezuela has been a party to the 1971 Convention to Prevent and Punish the Acts of Terrorism taking the Forms of Crimes against Persons and Related Extortion that are of International Significance since 2 February 1971.⁸² This treaty requires states parties to prevent and punish acts of terrorism, especially kidnapping, murder, and other assaults against the life or physical integrity of those persons to whom the state has the duty according to international law to give special protection, as well as extortion in connection with those crimes (Art. 1) and when and extradition request because the person sought is a national of the requested state or because of some other legal or constitutional impediment, to submit the case to its competent authorities for prosecution, as if the act had been committed in its territory (Art. 5).

Venezuela has not yet explicitly defined attacks on persons who are of international significance and related extortion as provided in the Convention as crimes under national law. At this stage Venezuelan courts have jurisdiction over persons suspected of such attacks only if they were committed on Venezuelan territory.

Certain attacks on aviation

Venezuela has been a party to the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention) since 21 November 1983.⁸³ This treaty requires states parties to define certain attacks on aviation (Article 1) as crimes under national law (Art. 3), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 5 (2)), to take measures to ensure presence for prosecution or extradition (Art. 6 (1) and (2)) and to submit the cases to the competent authorities if they are not extradited (Art. 7).

Venezuela has defined these attacks on aviation as crimes in Chapter III of the Civilian Aviation Law of 2005.⁸⁴ The instances in which Venezuela can exercise jurisdiction are listed in Article 2 of this law, which provides for protective jurisdiction (subsection 3) and universal jurisdiction, provided that the aircraft is lands on Venezuelan soil or flies in its aerial space (subsection 1).⁸⁵

⁸² Convention to Prevent and Punish the Acts of Terrorism taking the Forms of Crimes against Persons and Related Extortion that are of International Significance, 2 February 1971 (<http://www.oas.org/juridico/English/treaties/a-49.html>).

⁸³ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (<http://www.mcgill.ca/files/iasl/montreal1971.pdf>), 23 September 1971 (entered into force 26 January 1973).

⁸⁴ *Supra* note 74.

⁸⁵ *Supra* note 75.

Attacks on internationally protected persons, including diplomats

Venezuela has been a party to the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents since 19 April 2005.⁸⁶ This treaty requires states parties to define attacks on internationally protected persons, including diplomats, as crimes under national law (Art. 2), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 3 (2)), to take measures to ensure presence for prosecution or extradition (Art. 6 (1)) and to submit the cases to the competent authorities if they are not extradited (Art. 7).

Venezuela has not yet expressly defined attacks on internationally protected persons as crimes under national law. At this stage Venezuelan courts have jurisdiction over persons suspected of such attacks only if they were committed on Venezuelan territory.

Hostage taking

Venezuela has been a party to the 1979 International Convention against the Taking of Hostages since 13 December 1988.⁸⁷ This treaty requires states parties to define hostage taking, as defined in Article (1) of the Convention, as a crime under national law (Art. 2), to establish jurisdiction over persons suspected of such crimes who are present in its territory if they are not extradited (Art. 5 (1)), to take measures to ensure presence for prosecution or extradition (Art. 6 (1)) and to submit the cases to the competent authorities if they are not extradited (Art. 8).

The Venezuelan Criminal Code defines and punishes hostage taking in Article 460.⁸⁸ The

⁸⁶ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (<http://untreaty.un.org/English/Terrorism/Conv4.pdf>), 14 December 1973 (entered into force 20 Feb. 1977).

⁸⁷ International Convention against the Taking of Hostages (<http://untreaty.un.org/English/Terrorism/Conv5.pdf>), 17 December 1979 (entered into force 3 June 1983).

⁸⁸ Original text: "*Artículo 460. Quien haya secuestrado a una persona para obtener de ella o de un tercero, como precio de su libertad, dinero, cosas, títulos o documentos a favor del culpable o de otro que éste indique, aun cuando no consiga su intento, será castigado con prisión de veinte años a treinta años. Si el secuestro se ejecutare por causar alarma, la pena será de diez años a veinte años de prisión.*

Quienes utilicen cualquier medio para planificar, incurrir, propiciar, participar, dirigir, ejecutar, colaborar, amparar, proteger o ejercer autoría intelectual, autoría material, que permita, faciliten o realicen el cautiverio, que oculten y mantengan a rehenes, que hagan posible el secuestro, extorsión y cobro de rescate, que obtengan un enriquecimiento producto del secuestro de personas, por el canje de éstas por bienes u objetos materiales, sufrirán pena de prisión no menor de quince años ni mayor de veinticinco años, aun no consumado el hecho.

Parágrafo Primero: Los cooperadores inmediatos y facilitadores serán penalizados de ocho años a catorce años de prisión. Igualmente, los actos de acción u omisión que facilite o permita estos delitos de secuestros, extorsión y cobro de rescate, y que intermedien sin estar autorizado por la autoridad competente.

general rules outlined in Article 4 of the Criminal Code apply, which means that Venezuelan courts are not authorised to exercise universal jurisdiction over hostage taking, except in the rare cases according to Article 4(5) (see Section 4.1 above).

Trafficking in minors

Venezuela signed, but has not yet ratified the 1994 Inter-American Convention on International Traffic in Minors.⁸⁹ This treaty requires states parties to adopt effective measures, under their domestic law, to prevent and severely punish the international traffic in minors (Art. 7) and provides that the state party in which the suspect is located has jurisdiction if the suspect has not been extradited (Art. 7).

Nevertheless, Venezuela has defined trafficking in minors as a crime under national law in Article 16 (11)⁹⁰ of the Organic Law against Organized Crime enacted in 2005.⁹¹ Furthermore Paragraph II of Article 16 of the Organic Law lists as an aggravating circumstance “[t]he crimes provided therein being committed against children or adolescents.”⁹²

Pursuant to Article 31(2) of the Organic Law Venezuelan courts have jurisdiction over

Parágrafo Segundo: La pena del delito previsto en este artículo se elevará en un tercio cuando se realice contra niños, niñas, adolescentes y ancianos, o personas que padezcan enfermedades y sus vidas se vean amenazadas, o cuando la víctima sea sometida a violencia, torturas, maltrato físico y psicológico. Si la persona secuestrada muere durante el cautiverio o a consecuencia de este delito, se le aplicará la pena máxima. Si en estos delitos se involucran funcionarios públicos, la aplicación de la pena será en su límite máximo.

Parágrafo Tercero: Quienes recurran al delito de secuestro con fines políticos o para exigir liberación o canje de personas condenadas por Tribunales de la República Bolivariana de Venezuela, se les aplicará pena de doce años a veinticuatro años de prisión.

Parágrafo Cuarto: Quienes resulten implicados en cualquiera de los supuestos anteriores, no tendrán derecho a gozar de los beneficios procesales de la ley ni a la aplicación de medidas alternativas del cumplimiento de la pena.”

⁸⁹ Inter-American Convention on International Traffic in Minors, 18 March 1994 (<http://www.oas.org/juridico/English/treaties/b-57.html>).

⁹⁰ Original text: “Artículo 16. Se consideran delitos de delincuencia organizada de conformidad con la legislación de la materia, además de los delitos tipificados en esta Ley, cuando sean cometidos por estas organizaciones, los siguientes: ... 11. La trata de personas y de migrantes.”

⁹¹ *Ley Orgánica Contra La Delincuencia Organizada*, published in the Extraordinary Official Gazette No. 5.789, 26 October 2005 (http://www.gobiernoenlinea.ve/legislacion-view/sharedfiles/Ley_Contra_la_Delincuencia_Organizada.pdf).

⁹² Original Text: “Parágrafo Segundo: La pena de prisión será de diez a quince años para la privación ilegítima de libertad y de diez a dieciocho años para el secuestro, cuando los delitos tipificados en el presente artículo se cometan: 1. Contra niños, niñas y adolescents...”

“[t]he suspect or the indictee who is on the territory of the Republic and has committed any of the crimes provided therein ... in the high seas or in international air space. This principle of extraterritorial jurisdiction shall be applicable unless the suspect was judged in another country and fulfilled his sentence.”⁹³

Therefore, Venezuelan courts can exercise universal jurisdiction in relation to trafficking of human being if the acts took place in the high seas or in international air space, the suspect is on Venezuela territory and was not judged in another country or, if judged, escaped the sentence.

Theft of nuclear material

Venezuela has neither signed nor ratified the 1980 Convention on the Physical Protection of Nuclear Material.⁹⁴ This treaty requires states parties to define theft of nuclear material and certain other acts as crimes under national law (Art. 7), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 8(2)), to take measures to ensure presence for prosecution or extradition (Art. 9) and to submit the cases to the competent authorities if they are not extradited (Art. 10).

Although Article 129 of the Venezuelan Constitution states that:

“[t]he State will prevent the entry into the country of toxic or dangerous waste, as well as the fabrication or use of nuclear, chemical or biological weapons.”⁹⁵

The same Article provides that “[a] Special Law will regulate the use, management, transport and the storage of toxic and dangerous substances”,⁹⁶ but such a law has yet not been enacted. Theft of nuclear material could be prosecuted as an ordinary crime, but it would not be subject to universal jurisdiction under Venezuelan law, except in the rare cases under Article 4(5) and 4(13) (see Section 4.1. above).

⁹³ Original Text: “*Artículo 31. Están sujetos a enjuiciamiento y se castigarán de conformidad con esta Ley: ... 2) El sospechoso o investigado que se encuentre en la República Bolivariana de Venezuela y haya cometido alguno de los delitos tipificados en esta Ley, o si parte del delito se ha cometido en el territorio de la República Bolivariana de Venezuela, en el mar extraterritorial o en el espacio aéreo internacional. Este principio de jurisdicción extraterritorial se aplicará, salvo que haya sido juzgado en otro país y cumplido la condena.*”

⁹⁴ Convention on the Physical Protection of Nuclear Material, Vienna 26 October 1979 (<http://untreaty.un.org/English/Terrorism/Conv6.pdf>).

⁹⁵ Original text: “*Artículo 129. [...] El Estado impedirá la entrada al país de desechos tóxicos y peligrosos, así como la fabricación y uso de armas nucleares, químicas y biológicas...*”

⁹⁶ Original text: “*Artículo 129. [...] Una ley especial regulará el uso, manejo, transporte y almacenamiento de las sustancias tóxicas y peligrosas.*”

Attacks on ships and navigation at sea

Venezuela has neither signed nor ratified the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.⁹⁷ This treaty requires states parties to define attacks on ships and navigation at sea as crimes under national law (Art. 5), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 6 (4)), to take measures to ensure presence for prosecution or extradition (Art. 7 (1) and (2)) and to submit the cases to the competent authorities if they are not extradited (Art. 10).

Nevertheless, Article 357 of Venezuelan Criminal Code punishes the assault or hijacking of ships.⁹⁸ In these instances courts will have jurisdiction according to the general rules set out by Article 4, which means that Venezuelan courts are not authorised to exercise universal jurisdiction over these crimes, except in the rare cases under Article 4(5) and 4(13) (see Section 4.1. above).

Use, financing and training of mercenaries

Venezuela has neither signed nor ratified the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries.⁹⁹ This treaty requires states parties to define the use, financing or training of mercenaries as crimes under national law (Art. 5 (3)), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 9 (2)), to take measures to ensure presence for prosecution or extradition (Art. 10 (1)) and to submit the cases to the competent authorities if they are not extradited (Art. 12).

Venezuela has not expressly defined the use, financing or training of mercenaries as crimes under national law, therefore its courts cannot exercise universal jurisdiction over such conduct.

Attacks on UN and associated personnel

Venezuela has neither signed nor ratified the 1994 Convention on the Safety of United Nations and Associated Personnel¹⁰⁰ or its 2005 Optional Protocol.¹⁰¹ The Convention

⁹⁷ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome 10 March 1988, entered into force on 1 March 1992 (<http://untreaty.un.org/English/Terrorism/Conv8.pdf>).

⁹⁸ Original text: “Artículo 357. [...] Quien asalte o ilegalmente se apodere de buque, accesorio de navegación, ... o de la carga que éstos transporten, sean o no propiedad de empresas estatales, será castigado con pena de prisión de ocho años a dieciséis años.”

⁹⁹ International Convention against the Recruitment, Use, Financing and Training of Mercenaries, UN GA Res. 44/34, 4 December 1989 (<http://www.un.org/documents/ga/res/44/a44r034.htm>).

¹⁰⁰ Convention on the Safety of United Nations and Associated Personnel, UN GA Res. 49/59, 9 December 1994 (<http://www.un.org/law/cod/safety.htm>).

¹⁰¹ Optional protocol to the Convention on the Safety of United Nations and Associated Personnel, UN

requires states parties to define attacks on UN and associated personnel as crimes under national law (Art. 9 (2)), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 10 (4)), to take measures to ensure presence for prosecution or extradition (Art. 13 (1)) and to submit the cases to the competent authorities if they are not extradited (Art. 14). The 2005 Optional Protocol expands the scope of protection found in the Convention and incorporates the same obligations.

Venezuelan legislation does not expressly define attacks on UN and associated personnel as a crime *per se*. Therefore, Venezuelan courts are not authorized its courts to exercise universal jurisdiction over such attacks unless they amount to other crimes over which Venezuelan courts can exercise such jurisdiction.

Terrorist bombing

Venezuela has been a party to the 1997 International Convention for the Suppression of Terrorist Bombings since 23 September 2002.¹⁰² This treaty requires states parties to define terrorist bombing as a crime under national law (Arts. 4 and 5), to establish jurisdiction over persons suspected of such bombings who are present in its territory if they are not extradited (Art. 6 (4)), to take measures to ensure presence for prosecution or extradition (Art. 7) and to submit the cases to the competent authorities if they are not extradited (Art. 8).

In the Organic Law against Organized Crime enacted in 2005,¹⁰³ Article 7 punishes bombing as a terrorist act.¹⁰⁴ Pursuant to Article 31 (2) of the Organic Law, Venezuelan courts have jurisdiction over

“[t]he suspect or the indictee who is on the territory of the Republic and has committed any of the crimes provided therein ... in the high seas or in international air space. This principle of extraterritorial jurisdiction shall be applicable unless the suspect was judged in another country and fulfilled his sentence.”¹⁰⁵

Therefore, Venezuelan courts can exercise universal criminal jurisdiction in relation to

GA Res. 60/42, 8 December 2005 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/490/12/PDF/N0549012.pdf?OpenElement>).

¹⁰² International Convention for the Suppression of Terrorist Bombings, UN GA Res. 52/164, 15 December 1997 (<http://www.un.org/law/cod/terroris.htm>).

¹⁰³ *Supra* note 91.

¹⁰⁴ Original text: “*Artículo 7. Quien pertenezca, actúe o colabore con bandas armadas o grupos de delincuencia organizada con el propósito de causar estragos, catástrofes, incendios o hacer estallar minas, bombas u otros aparatos explosivos o subvertir el orden constitucional y las instituciones democráticas o alterar gravemente la paz pública, será castigado con prisión de diez a quince años.*”

¹⁰⁵ *Supra* note 93.

terrorist bombing if the acts took place on the high seas or in international air space, provided that the suspect is on Venezuela territory and was not tried in another country or, if tried, escaped the sentence.

Financing of terrorism

Venezuela has been a party to the 1999 International Convention for the Suppression of Financing of Terrorism since 23 September 2003.¹⁰⁶ This treaty requires states parties to define financing of terrorist activities as a crime under national law (Arts. 4 and 5), to establish jurisdiction over persons suspected of such financing who are present in its territory if they are not extradited (Art. 7 (4)), to take measures to ensure presence for prosecution or extradition (Art. 9 (1) and (2)) and to submit the cases to the competent authorities if they are not extradited (Art. 10 (1)).

In the Organic Law against Organized Crime enacted in 2005,¹⁰⁷ Article 7 penalizes financing terrorism.¹⁰⁸ Pursuant to Article 31 (2) of the Organic Law, Venezuelan courts have jurisdiction over

“[t]he suspect or the indictée who is on the territory of the Republic and has committed any of the crimes provided therein ... on the high seas or in international air space. This principle of extraterritorial jurisdiction shall be applicable unless the suspect was judged in another country and fulfilled his sentence.”¹⁰⁹

Therefore, Venezuelan courts can exercise universal criminal jurisdiction in relation to financing of terrorism if the acts took place on the high seas or in international air space, provided that the suspect is on Venezuela territory and was not tried in another country or, if tried, escaped the sentence.

Transnational crime - Transnational organized crime

Venezuela has been a party to the 2000 UN Convention against Transnational Organized Crime since 13 May 2002.¹¹⁰ This treaty requires states parties to define certain transnational crimes which involve criminals acting in organized groups as a crime under national law (Arts. 5, 6, 8 and 23), authorizes them to establish jurisdiction over persons

¹⁰⁶International Convention for the Suppression of Financing of Terrorism, UN GA Res. 54/109, 9 December 1999 (<http://untreaty.un.org/english/Terrorism/Conv12.pdf>).

¹⁰⁷ *Supra* note 91.

¹⁰⁸ *Supra* note 104.

¹⁰⁹ *Supra* note 93.

¹¹⁰ UN Convention against Transnational Organized Crime, UN GA Res. 55/25, 15 November 2000 (http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf).

suspected of such crimes who are present in its territory if they are not extradited (Art. 15 (4)) and authorizes them to take measures to ensure presence for prosecution or extradition (Art. 16 (9)).

Venezuela has defined organized crimes as the ones listed in this Convention in the Organic Law against Organized Crime enacted in 2005.¹¹¹ Paragraph II of Article 16 of the Organic Law lists as aggravating circumstance “[t]he crimes provided therein being committed transnationally.”¹¹²

Pursuant to Article 31 (2) of the Organic Law, Venezuelan courts have jurisdiction over

“[t]he suspect or the indictee who is on the territory of the Republic and has committed any of the crimes provided therein ... in the high seas or in international air space. This principle of extraterritorial jurisdiction shall be applicable unless the suspect was tried in another country and fulfilled his sentence.”¹¹³

Therefore, Venezuelan courts can exercise universal criminal jurisdiction in relation to transnational organised crimes if the acts took place on the high seas or in international air space, provided that the suspect is on Venezuela territory and was not tried in another country or, if tried, escaped the sentence.

Transnational crime - Trafficking of human beings

Venezuela has been a party to the 2001 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime since 13 May 2002.¹¹⁴ This treaty, which incorporates all of the jurisdictional requirements of the UN Convention against Transnational Organized Crime (Art. 2), requires states parties to define trafficking in human beings as a crime under national law (Art. 3).

Venezuela has defined trafficking in human beings as a crime under national law in Article 16 (11)¹¹⁵ of the Organic Law against Organized Crime enacted in 2005.¹¹⁶ Furthermore

¹¹¹ *Supra* note 91.

¹¹² Original Text: “*Parágrafo Segundo: La pena de prisión será de diez a quince años para la privación ilegítima de libertad y de diez a dieciocho años para el secuestro, cuando los delitos tipificados en el presente artículo se cometan: ... 6. ... con traslado a territorio extranjero.*”

¹¹³ *Supra* note 93.

¹¹⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, (UN GA Res. 55/25, 15 November 2000, Annex II).

¹¹⁵ *Supra* note 90.

¹¹⁶ *Supra* note 91.

Paragraph II of Article 16 of the Organic Law lists as aggravating circumstance “[t]he crimes provided therein being committed against children or adolescents.”¹¹⁷

Pursuant to Article 31 (2) of the Organic Law Venezuelan courts have jurisdiction over

[t]he suspect or the indictee who is on the territory of the Republic and has committed any of the crimes provided therein ... in the high seas or in international air space. This principle of extraterritorial jurisdiction shall be applicable unless the suspect was tried in another country and fulfilled his sentence.¹¹⁸

Therefore, Venezuelan courts can exercise universal jurisdiction in relation to trafficking of human being if the acts took place in the high seas or in international air space, provided that the suspect is on Venezuela territory and was not tried in another country or, if tried, escaped the sentence.

Transnational crime – Firearms

Venezuela is not a party to the 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime.¹¹⁹ This treaty, which incorporates all of the jurisdictional requirements of the UN Convention against Transnational Organized Crime (Art. 2), requires states parties to define certain firearms offences as crimes under national law (Art. 5).

Nevertheless, Article 9 of the Organic Law against Organized Crime enacted in 2005¹²⁰ defines and punishes manufacturing and trafficking in firearms.¹²¹ Pursuant to Article 31 (2) of the Organic Law, Venezuelan courts have jurisdiction over

“[t]he suspect or the indictee who is on the territory of the Republic and has committed any of the crimes provided therein ... in the high seas or in international air space. This principle of extraterritorial jurisdiction shall be

¹¹⁷ Original Text: “*Parágrafo Segundo: La pena de prisión será de diez a quince años para la privación ilegítima de libertad y de diez a dieciocho años para el secuestro, cuando los delitos tipificados en el presente artículo se cometan: 1. Contra niños, niñas y adolescents...*”

¹¹⁸ *Supra* note 93.

¹¹⁹ Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, UN GA Res. 55/255, 8 June 2001 (http://www.unodc.org/pdf/crime/a_res_55/255e.pdf),

¹²⁰ *Supra* note 91.

¹²¹ Original text: “*Artículo 9 . Tráfico de Armas Quien importe, exporte, fabrique, trafique, suministre u oculte de forma indebida algún arma o explosivo, será castigado con pena de cinco a ocho años de prisión. Si se trata de armas de guerra la pena será de seis a diez años de prisión.*”

applicable unless the suspect was judged in another country and fulfilled his sentence.”¹²²

Therefore, Venezuelan courts can exercise universal criminal jurisdiction in relation to manufacturing and trafficking in firearms if the acts took place on the high seas or in international air space, provided that the suspect is on Venezuela territory and was not tried in another country or, if tried, escaped the sentence.

Nuclear terrorism

Venezuela is not a party to the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.¹²³ This treaty requires states parties to define acts of nuclear terrorism as a crime under national law (Arts. 5 and 6), to establish jurisdiction over persons suspected of such financing who are present in its territory if they are not extradited (Art. 9 (4)), to take measures to ensure presence for prosecution or extradition (Art. 10 (1) and (2)) and to submit the cases to the competent authorities if they are not extradited (Art. 11 (1)).

However, Article 7 of the Organic Law against Organized Crime enacted in 2005¹²⁴ punishes financing and committing terrorist acts,¹²⁵ and Article 8 of the Organic Law lists as aggravating circumstance:

“[t]he crimes provided in the previous article being committed with the use of nuclear, biological and bacteriological weapons or similar.”¹²⁶

Pursuant to Article 31 (2) of the Organic Law Venezuelan courts have jurisdiction over

“[t]he suspect or the indictée who is on the territory of the Republic and has committed any of the crimes provided therein ... in the high seas or in international air space. This principle of extraterritorial jurisdiction shall be applicable unless the suspect was tried in another country and fulfilled his sentence.”¹²⁷

Therefore, Venezuelan courts can exercise universal criminal jurisdiction in relation to

¹²² *Supra* note 93.

¹²³ International Convention for the Suppression of Acts of Nuclear Terrorism, 13 April 2005 (http://untreaty.un.org/English/Terrorism/English_18_15.pdf).

¹²⁴ *Supra* note 91.

¹²⁵ *Supra* note 104.

¹²⁶ Original Text: “*Artículo 8 - La pena será aumentada de dieciocho a veinte años de prisión cuando la comisión del delito tipificado en el artículo anterior sea cometido: ... 4. Con el uso de armas nucleares, biológicas, bacteriológicas o similares...*”

¹²⁷ *Supra* note 93.

nuclear terrorism if the acts took place in the high seas or in international air space, provided that the suspect is on Venezuela territory and was not tried in another country or, if tried, escaped the sentence.

4.3 CRIMES UNDER INTERNATIONAL LAW

A small number of provisions in the Criminal Code and in the Code of Military Justice authorize Venezuelan courts to exercise universal jurisdiction over crimes under international law. Venezuelan legislation currently lacks a coordinated and organic framework implementing its obligations under international law. One of the tasks of the Mixed Commission for the Study of the Criminal Procedure Code, the Criminal Code and the Code of Military Justice was to recommend a comprehensive reform of the current national law in order to implement effectively Venezuela's obligations under international human rights law, international humanitarian law and international criminal law. Regrettably, the Mixed Commission was disestablished before it could complete its task. Nevertheless, in several papers and in a 2003 draft different reform options were discussed, including the adoption of a separate code dealing with crimes under international law and implementing the Rome Statute. This paper will refer to the suggestions of the Commission when relevant. In the light of the limited scope of current legislation, there is limited jurisprudence which adds to the difficulties of interpreting Venezuelan law on the subject.

Regrettably the General Prosecutor, in an opinion given in 2008 and without citing the provisions discussed below, stated that Venezuelan courts do not have jurisdiction over the crimes punished in the Rome Statute due to the lack of implementation in the internal legislation of the mechanisms that allow and regulate the application of the universal jurisdiction principle.¹²⁸

4.3.1. WAR CRIMES

Venezuela is a party to the four Geneva Conventions of 1949¹²⁹ and it has ratified both Protocol I¹³⁰ and II¹³¹ to those conventions. Furthermore, on 7 June 2000, Venezuela was

¹²⁸ *Supra* note 61.

¹²⁹ The Geneva Conventions are: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (First Geneva Convention) (<http://treaties.un.org/Pages/showDetails.aspx?objid=0800000280158b1a>), 75 U.N.T.S. 31. (entered into force 21 October 1951); Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 (Second Geneva Convention) (<http://treaties.un.org/Pages/showDetails.aspx?objid=08000002801591b0>), 75 U.N.T.S. 85. (entered into force 21 October 1951); Convention Relative to the Treatment of Prisoners of War, 12 August 1949 (Third Geneva Convention) (<http://treaties.un.org/Pages/showDetails.aspx?objid=0800000280159839>), 75 U.N.T.S. 135. (entered into force 21 October 1951); and Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, (Fourth Geneva Convention) (<http://treaties.un.org/Pages/showDetails.aspx?objid=0800000280158b1a>), 75 U.N.T.S. 287. (entered into force 21 October 1950).

¹³⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, (<http://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f3586>), 1125 U.N.T.S. 3. (entered into force 7 December 1978).

the eleventh state to ratify the Rome Statute,¹³² and the first one in Latin America. The wording of the war crimes included in Article 8 of the Rome Statute, which represents a political compromise, sometimes falls short of customary and conventional international law and, as discussed below, a number of war crimes have been omitted.¹³³ Although there is no provision in the Rome Statute expressly requiring states parties to provide its courts with universal jurisdiction over war crimes listed in Article 8, states parties recognize that they have a complementarity obligation to exercise their jurisdiction – which necessarily includes the jurisdiction that their courts are permitted to exercise under international, as well as national, law - over such crimes. Any state may exercise universal jurisdiction over war crimes in international or non-international armed conflict.¹³⁴

Regrettably, Venezuela's implementation of its obligations has been greatly fragmented. Venezuelan legislation allow national courts to exercise jurisdiction only over some of the crimes penalised in the Geneva Conventions and in the Rome Statute, but does not include an exhaustive list of war crimes nor specific provisions for non-international armed conflict. Furthermore is not clear whether Venezuelan Courts can exercise universal jurisdiction over war crimes.

War crimes in international armed conflict: Grave breaches of the 1949 Geneva Conventions

The four Geneva Conventions of 1949 each contain a list of grave breaches of those conventions prohibiting states parties from committing them against persons protected by those conventions, including wounded and sick members of the armed forces in the field, wounded and sick and shipwrecked members of armed forces at sea, prisoners of war and civilian persons in time of war.¹³⁵ Those breaches, as consolidated without change in

¹³¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, (<http://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f3cb8>), 1125 U.N.T.S. 609. (entered into force 7 December 1978).

¹³² Official Gazette, 13 December 2000.

¹³³ The serious shortcomings of Article 8 of the Rome Statute and its omissions have been identified in a number of publications, including: Roberta Arnold, Elizabeth Bennion, Michel Cottier, Knut Dörmann, Patricia Viseur Sellers and Andreas Zimmermann, 'Article 8 (War crimes)', in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, C. H. Beck, Munich; Hart, Oxford; and Nomos, Baden-Baden, 2nd ed., 2008, p. 275; Michael Bothe, 'War Crimes', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Oxford, Oxford University Press, 2002, p. 379; Anne-Marie LaRosa and Gabriel Chavez Tafur, 'Implementing International Humanitarian Law through the Rome Statute' (forthcoming chapter of book on International Criminal Court edited by Roberto Bellelli); Yves Sandoz, 'Penal Aspects of International Humanitarian Law' in M. Cherif Bassiouni, *International Criminal Law*, Vol.1, Leiden, Martinus Nijhoff Publishers, 2008, p. 293.

¹³⁴ Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation*, Ch. 3, AI Index: IOR 53/005/2001, *supra* note 3.

¹³⁵ First Geneva Convention, art. 50; Second Geneva Convention, art. 51; Third Geneva Convention, art. 130; Fourth Geneva Convention, art. 147.

substance in Article 8 of the Rome Statute, are:

“Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (i) Wilful killing;
- (ii) Torture or inhuman treatment, including biological experiments;
- (iii) Wilfully causing great suffering, or serious injury to body or health;
- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) Unlawful deportation or transfer or unlawful confinement;
- (viii) Taking of hostages.”¹³⁶

Each state party to those conventions undertake in a common article a two-part obligation: to define grave breaches as crimes under national law and then to exercise universal jurisdiction over persons suspected of committing grave breaches, to extradite them to another state party able and willing to do so or to surrender them to an international criminal court with jurisdiction over them.¹³⁷ That common article states in relevant part:

“The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of

¹³⁶ Rome Statute, art. 8 (2) (a).

¹³⁷ Although the Geneva Conventions do not expressly state that a state party may satisfy its obligation to extradite or prosecute persons suspected of grave breaches by surrendering a person to an international criminal court with jurisdiction, the drafters of the Conventions intended this result. The *ICRC Commentary* makes clear that the drafters of the Geneva Conventions envisaged that states could satisfy their duty to bring to justice those responsible for grave breaches by transferring suspects to an international criminal tribunal: “[T]here is nothing in the paragraph (First Geneva Convention, Art. 49, para. 2) to exclude the handing over of the accused to an international penal tribunal, the competence of which is recognized by the Contracting Parties. On this point the Diplomatic Conference declined expressly to take any decision which might hamper future developments of international law”. ICRC, *I Commentary on the Geneva Conventions of 12 August 1949*, 366 (1952). See also *ICRC Commentary on the Protocols* 975 n. 10 (“The Conventions do not exclude handing over the accused to an international criminal court whose competence has been recognized by the Contracting Parties . . .”).

the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case."¹³⁸

Although Venezuela has been a party to the four Geneva Conventions of 1949 since 13 February 1956, it has not defined most of the grave breaches of the Geneva Conventions as crimes in national law. Article 29 of the Venezuelan Constitution lists war crimes among those crimes not subject to statutes of limitations (for the interpretation and scope of this provision see below Section 6(3)).¹³⁹ Nevertheless, neither the Criminal Code nor the Code of Military Justice is clear in defining and penalizing war crimes and neither one provides a clear list of punishable conduct which reflects the list of grave breaches of the 1949 Geneva Conventions. Furthermore, it is unclear whether Venezuelan courts are allowed to exercise universal jurisdiction over war crimes.

Article 155 of the 2005 Criminal Code (156 in the previous version of the Criminal Code), in the Chapter titled 'Crimes against international law', punishes:

“1. ...[F]oreigners 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. ...[F]oreigners 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. ...[F]oreigners who violate covenants or treaties to which Venezuela is party in such a way that they engage its responsibility.”¹⁴⁰

¹³⁸ First Geneva Convention, art. 49; Second Geneva Convention, art. 50; Third Geneva Convention, art. 129; Fourth Geneva Convention, art. 146.

¹³⁹ Original text: “*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.*”

¹⁴⁰ Original text: “*Artículo 155. 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*

This article directly punishes the violations of certain principles of international law or of international humanitarian law, but the vague and general wording, and the non-exclusive character of list provided ('or the principles of war observed by civilized peoples, *such as...*'), leave unclear which war crimes under conventional and customary international humanitarian law are included. It is unclear what is the exact scope and intent of subsection 3, which other conduct falls under this provision, and whether it applies also to non-international armed conflicts (see below in this subsection). The meaning of the phrase 'in such a way that they engage the responsibility of the state' also is unclear, but unfortunately it has not been possible to locate jurisprudence or authoritative commentary on Article 155 (or previous Article 156).

Although war crimes are not expressly listed, Article 4 of the Criminal Code could be interpreted as granting Venezuelan courts universal jurisdiction over such crimes. Subsection 9 of Article 4 allows Venezuelan Courts to exercise jurisdiction over

"... foreigners who have come to the country who, on the high seas, commit piracy or other crimes qualified by International Law as atrocities and crimes against humanity; except when they have already been tried for them in another country and have served their sentence."¹⁴¹

The wording of this provision could result in some confusion and lead to different interpretations, but as far as Amnesty International is aware Article 4 (9) has not been the object of judicial interpretation so far. First of all, 'atrocities' do not represent a recognized category within international criminal law. Recently the concept of 'atrocities crimes' has been popularized by David Scheffer, Ambassador-at-Large for War Crimes Issues under the Clinton administration, and has been the basis of the conceptualisation of the 'responsibility to protect'.¹⁴² According to this theory, 'mass atrocities' and 'mass atrocity crimes' are interchangeable expressions encompassing 'genocide, war crimes, ethnic cleansing and crimes against humanity'.¹⁴³ Amnesty International does not use these term, which suggest that there is a hierarchy of crimes based on the scale of the violation, however, if this can be considered an universally accepted definition, then the term of 'atrocities' in article 4(9) might include war crimes and therefore allowing Venezuela courts to exercise universal

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 ... 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... extranjeros que violen las Convenciones o Tratados celebrados por la República de un modo que comprometa la responsabilidad de ésta."

¹⁴¹ *Supra* note 69.

¹⁴² See Gareth Evans, *The Responsibility to Protect: ending Mass Atrocity Crimes Once for All*, Washington: Brookings Institution Press (2008).

¹⁴³ *Ibid.*, pp. 11-13; see also David Scheffer, "Genocide and Atrocity Crimes," *Genocide Studies and Prevention* 1, no.3 (2006), pp.229-250.

jurisdiction over such crimes as criminalised by Venezuelan law.

A second problem arises from the possibility of a literal interpretation of the provision. Due to its location, the phrase 'on the high seas' could seem to refer not only to piracy, but also to atrocities and crimes against humanity. However, it is extremely rare for crimes against humanity, war crimes or genocide to be committed on the high seas, with few exceptions such as prison ships and torture ships. A teleological interpretation of this provision, which searches for its purpose, suggests choosing among several possible interpretations the one which is most conducive to putting this purpose into practice. It seems extremely unlikely that the writers of the Code wanted to provide Venezuelan courts only with jurisdiction over mass atrocities and crimes against humanity committed on the high seas; it appears more probable that they wanted to grant Venezuelan Courts jurisdiction over the most serious crimes, including the crimes listed in Article 155, regardless where they have been committed. However, as already stated, Amnesty International has not been able to locate any jurisprudence relative to Article 4 (9).

As noted above, the General Prosecutor in its Decision of the on 07 February 2008 (*Decisión de la Fiscalía Sexta del Ministerio Público a Nivel Nacional con competencia Plena a cargo de María Alejandra Pérez G.*, C-115-2008) denied the applicability of universal jurisdiction for war crimes by Venezuelan courts (see introductory paragraph to Section 4.3 above). In response to a request made by lawyer and President of the Association Civil for Citizen Control Rocío San Miguel to initiate the proceedings to request a rogatory letter to investigate the war crimes committee by F.A.R.C. and E.L.N. members in Colombia, the General Prosecutor stressed that:

“Venezuela does not have internal legislation allowing courts to apply universal jurisdiction...Therefore, until legislation regulating the application of the universal jurisdiction principle is introduced in the internal legal system, Venezuelan juridical bodies can not open investigations against individual not present on Venezuelan territory.”¹⁴⁴

Furthermore:

“...the law ratifying the Rome Statute ...has the only effect of executing Venezuela's obligations on the international level, but does not have effects on the internal national level, therefore, Venezuelan courts do not have universal jurisdiction over the crimes listed in the Statute until national legislation provides an internal set of norms or instruments implementing and regulating the application of the principle of universal jurisdiction.”¹⁴⁵

¹⁴⁴ Original text: “...el Estado Venezolano no posee la legislación interna que establezcan los mecanismos que permitan aplica el principio de jurisdicción universal...Es por ello, que hasta tanto no exista en nuestro ordenamiento jurídico interno las leyes que regulen la aplicación del principio de jurisdicción universal, los órganos del sistema de justicia venezolano non pueden iniciar la persecución de ninguna persona que se encuentra fuera de nuestro territorio.”

¹⁴⁵ Original text: “Además de lo ante expresado, es pertinente traer a colación lo anunciado en el artículo

The General Prosecutor failed to distinguish the issue of the implementation of the Rome Statute and introduction of the crimes punished therein within Venezuelan legislation, from the issue of capability of Venezuelan courts to exercise universal legislation. While referring to a general lack of legislation making the offences punished in the Rome Statute also punishable according to national laws, the General Prosecutor failed to highlight the concrete obstacles to the exercise of universal jurisdiction by Venezuelan courts, whether pertinent to the lack of jurisdiction or to the lack of specific provisions defining war crimes, or both.

As regarding the jurisdiction of Venezuelan courts, the 1999 Constitution specifies in Article 261 that the “commission of ordinary crimes, human rights violations and crimes against humanity falls within the competence of ordinary courts” while “[t]he competence of military courts is limited to military crimes.”¹⁴⁶ In addition, Article 155 (1) of the Criminal Code highlights that the criminalization of the conduct described in the section should be applied “without prejudice to the provisions of Military Law, which shall apply especially in this regard.” This wording seems to indicate that the Code of Military Justice shall be considered as *lex specialis* in this regard.

The Venezuelan Code of Military Justice has a specific chapter dedicated to crimes against international law, criminalizing some of the conduct which amount to war crimes according to customary and conventional international humanitarian law. This list contained in Article 474 seems to be exhaustive, leaving uncovered many serious violations of international humanitarian law and grave breaches of the 1949 Geneva Conventions.¹⁴⁷ However through

de la Ley Aprobatoria del estatuto de Roma de la Corte Penal Internacional publicada el 13 de Diciembre 2000, mediante Gaceta Oficial Extraordinaria numero 5.507, la cual admitió el referido instrumento, pero solo a los efectos internacionales en cuanto a Venezuela se refiere, por lo que se infiere que no incluye los efectos en el plano interno del país, es decir, de acuerdo a esta disposición lo Tribunales venezolanos no podrían juzgar los crímenes previstos en dicho Estatuto, en cuanto a la aplicación de la jurisdicción universal hasta tanto nuestra legislación no prevea las normas o instrumentos jurídicos que permitan y regulen la aplicación del principio de jurisdicción universal.”

¹⁴⁶ Original text: “Artículo 261. [...] La comisión de delitos comunes, violaciones de derechos humanos y crímenes de lesa humanidad, serán juzgados por los tribunales ordinarios. La competencia de los tribunales militares se limita a delitos de naturaleza militar.” As noted above in Section 2.3, it is increasingly recognized that military courts should not have jurisdiction over members of the armed forces or civilians in cases involving human rights violations or crimes under international law. See, for example, “The jurisdiction of military courts from the viewpoint of some international bodies”, as contained in the Amnesty International amicus curiae brief in Radilla Pacheco v. Mexico case, p. 28 (<http://www.amnesty.org/en/library/asset/AMR41/036/2009/en/213de56b-c039-4a40-9e26-9fa1bb8c0174/amr410362009en.pdf>); Declaration on the Protection of all Persons from Enforced Disappearance, UN G.A. Res. 47/133, 18 December 1992, art. 16 (2) (“[Persons suspected of responsibility for enforced disappearances] shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts; Inter-American Convention on Forced Disappearance of Persons, Belem do Para, Brazil, 9 September 1994, art. IX (“Persons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions.”); Amnesty International, Fair Trials Manual, AI Index: POL 30/002/1998, 1 December 1998.

¹⁴⁷ Original text: “Artículo 474. Sufrirán la pena de presidio de cuatro a diez años los que: 1°. Incendien, destruyan o ataquen los hospitales terrestres o marítimos y los que ataquen los convoyes de heridos o enfermos. 2°. Los que atentaren gravemente contra los rendidos, contra las mujeres, ancianos o niños de

the vague wording of some provisions, such as “acts of violence against the civilian population”, it might be possible for Venezuelan military courts to have jurisdiction over war crimes that are not listed in Article 474. However, military jurisdiction covers only Venezuelan territory, foreign territory occupied by national forces, members of the national army and assimilated personnel.¹⁴⁸ There is no space, then, for the applicability of universal jurisdiction over the crimes listed in article 474 of the Code of Military Justice.

It has been impossible to locate background papers prepared by the Mixed Commission in relation to war crimes. However, the Commission was opting for defining and criminalizing war crimes in the Code of Military Justice, while crimes against humanity would be dealt with in the Criminal Code. This distinction would be unfortunate as the limits of military jurisdiction stand in the way of the applicability of the principle of universal jurisdiction to war crimes. In addition, the jurisdiction of military courts should be limited to military disciplinary proceedings.

War crimes in international armed conflict: Grave breaches of the 1977 Protocol I

Venezuela has been a party to Protocol I since 23 July 1998. Protocol I applies to international armed conflict and certain non-international armed conflict. Article 85 (2) of Protocol I expands the scope of persons protected by the Geneva Conventions.¹⁴⁹ In addition, Protocol I also lists a number of new grave breaches of that treaty in Articles 11¹⁵⁰ and 85

los lugares ocupados por fuerzas nacionales, entregaren dichas plazas o lugares al saqueo u otros actos de crueldad. 3°. Los que atentaren gravemente contra los miembros de la Cruz Roja o contra el personal del servicio sanitario enemigo o neutral. 4°. Los que negaren u obstaculizaren la asistencia de los heridos o enfermos. 5°. Los que hicieren uso de armas o medios que agraven inútilmente el sufrimiento de los atacados. 6°. Los que destruyan señales o signos necesarios en la navegación marítima, fluvial o aérea. 7°. Los que quebrantaren o violaren tratados, treguas o armisticios. 8°. Los que minen lugares destinados al tráfico internacional, sin darle aviso previo a los neutrales. 9°. Los que destruyan nave enemiga rendida, apresada, sin salvar previamente la tripulación. 10°. Los que bombardeen lugares habitados no fortificados, que no estén ocupados por fuerzas enemigas y que no opongan resistencia. 11°. Los que desnudaren o ultrajaren a los heridos, enfermos o prisioneros de guerra. 12°. Los que desnudaren o profanaren cadáveres y los que no cuidaren de su inhumación, incineración o inmersión. ... 14°. Los corsarios que dispusieren de buques o mercaderías u otros objetos capturados en el mar, sin previa resolución de presas. 15°. Los que obligaren a prisioneros de guerra a combatir contra sus banderas. 16°. Los que destruyan en territorio enemigo o amigo, templos, bibliotecas o museos, archivos, acueductos y obras notables de arte, así como vías de comunicación, telegráficas o de otras clases, sin exigirlo las operaciones de la guerra. 17°. Los militares que, prescindiendo de la obediencia a sus jefes, incendien o destruyan edificios u otras propiedades, saqueen a los habitantes de los pueblos o caseríos, o cometan actos de violencia en las personas...”

¹⁴⁸ Code of Military Justice, Section V, Chapter I.

¹⁴⁹ Article 85 (2) of Protocol I states:

“Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.”

¹⁵⁰ Article 11 of Protocol I provides:

(3) to (5).¹⁵¹ Finally, Protocol I imposes the same two-part obligation on states parties to

“1. The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.

2. It is, in particular, prohibited to carry out on such persons, even with their consent:

(a) physical mutilations;

(b) medical or scientific experiments;

(c) removal of tissue or organs for transplantation, except where these acts are justified in conformity with the conditions provided for in paragraph 1.

3. Exceptions to the prohibition in paragraph 2 (c) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.

4. Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.

5. The persons described in paragraph 1 have the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavour to obtain a written statement to that effect, signed or acknowledged by the patient.

6. Each Party to the conflict shall keep a medical record for every donation of blood for transfusion or skin for grafting by persons referred to in paragraph 1, if that donation is made under the responsibility of that Party. In addition, each Party to the conflict shall endeavour to keep a record of all medical procedures undertaken with respect to any person who is interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1. These records shall be available at all times for inspection by the Protecting Power.”

¹⁵¹ Article 85 (3) of Protocol I states:

“In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

(a) making the civilian population or individual civilians the object of attack;

(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii);

(c) launching an attack against works or installations containing dangerous forces in the knowledge

define these grave breaches of Protocol I as crimes under national law and to try or extradite persons suspected of such grave breaches.¹⁵² As discussed above with regards to the 1949 Geneva Conventions,¹⁵³ Venezuela's obligations under Protocol I to define grave breaches of that treaty as crimes under its national law and to provide universal jurisdiction over such grave breaches to implement the Geneva Conventions and the Additional Protocols have not been fulfilled in a complete and coherent fashion.¹⁵⁴ Although some of the persons protected

that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii);

(d) making non-defended localities and demilitarized zones the object of attack;

(e) making a person the object of attack in the knowledge that he is hors de combat;

(f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.

4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

(a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;

(b) unjustifiable delay in the repatriation of prisoners of war or civilians;

(c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;

(d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;

(e) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.

5. Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes."

¹⁵² Article 85 (1) of Protocol I states that the mandatory "provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section [Repression of breaches of the Conventions and of this Protocol – Articles 85 to 91], shall apply to the repression of breaches and grave breaches of this Protocol."

¹⁵³ See above pp. 41-45.

¹⁵⁴ Article 85 (1) of Protocol I states that the mandatory "provisions of the Conventions relating to the

by Protocol I are covered to some extents by Article 155 (1) of the Criminal Code,¹⁵⁵ and a number of crimes listed in Article 474 of the Code of Military Justice draw from Article 85 (3) of Protocol I,¹⁵⁶ but the vague wording and the failure to cover the whole spectrum of violation listed in Protocol I are a clear sign that Venezuela failed to fulfil its obligations under Protocol I.

As for the possibility for Venezuelan Courts to exercise universal jurisdiction over the crimes listed in Protocol I see the consideration made above for grave breaches in this subsection.

War crimes in international armed conflict: 1998 Rome Statute and customary international law

In addition to grave breaches of the Geneva Conventions and Protocol I, there are other war crimes, which are defined in the 1998 Rome Statute, an ever-expanding number of international humanitarian law treaties and customary international law.

Rome Statute. Article 8 (2) (b) of the Rome Statute defines a broad range of war crimes in international armed conflict.¹⁵⁷ However, as explained below, there are a number of serious

repression of breaches and grave breaches, supplemented by this Section [Repression of breaches of the Conventions and of this Protocol – Articles 85 to 91], shall apply to the repression of breaches and grave breaches of this Protocol.”

¹⁵⁵ *Supra* note 141.

¹⁵⁶ *Supra* note 148.

¹⁵⁷ Article 8 (2) (b) of the Rome Statute lists the following serious violations of the laws and customs applicable in international armed conflict:

- “(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a

gaps in Article 8 of the Rome Statute.

Other treaties. The Rome Statute leaves out a number of war crimes in international armed conflict listed in treaties, including:

- unjustifiable delay in the repatriation of prisoners of war (Article 118 of the Third Geneva Convention and Article 85 (4) (b) of Protocol I, as well as customary international humanitarian law);¹⁵⁸
- unjustifiable delay in the repatriation of civilians (Article 85 (4) (b) of Protocol, as well as customary international humanitarian law);¹⁵⁹
- launching of an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects (Article 85 (3) (c) and customary international humanitarian law);¹⁶⁰
- practices of apartheid and other inhuman or degrading practices involving outrages upon personal dignity, based on racial discrimination (Article 85 (4) (c) of Protocol I and customary international humanitarian law).¹⁶¹

In addition, there are a number of international humanitarian law treaties applicable during international armed conflict imposing obligations which, if violated, possibly may result in

grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.”

¹⁵⁸ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Geneva, International Committee of the Red Cross and Cambridge University Press, 2005, Rule 156 (Serious violations of international humanitarian constitute war crimes).

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*, Rule 156 (Serious violations of international humanitarian constitute war crimes).

¹⁶¹ *Ibid.*

individual criminal responsibility, either under the conventions or because the prohibitions are recognized as part of customary international law.¹⁶²

Rules of customary international humanitarian law. In addition, there are numerous rules of customary international humanitarian law applicable to international armed conflict not expressly listed in the Rome Statute (in addition to the war crimes listed in Protocol I mentioned above) which, if violated, could lead to individual criminal responsibility, including:

slavery;¹⁶³

deportation to slave labour;¹⁶⁴

collective punishments;¹⁶⁵

¹⁶² These treaties, some of which contain penal provisions, include: Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 June 1925; Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954; Protocol for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Opened for Signature at London, Moscow and Washington, 10 April 1972; Convention on the prohibition of military or any hostile use of environmental modification techniques, 10 December 1976; Final Act of the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980; Protocol on Non-Detectable Fragments (Protocol I), Geneva, 10 October 1980; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Geneva, 10 October 1980; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva, 10 October 1980; Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, Paris 13 January 1993; Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), 13 October 1995; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, 26 March 1999; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980 (Amendment article 1, 21 December 2001); Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), 28 November 2003; Convention on Cluster Munitions, 30 May 2008.

¹⁶³ *Ibid.*, Rule 94 (Slavery and the slave trade in all their forms are prohibited); Rule 156 (Serious violations of international humanitarian constitute war crimes).

¹⁶⁴ *Ibid.*, Rule 95 (Uncompensated or abusive forced labour is prohibited); Rule 156 (Serious violations of international humanitarian constitute war crimes).

¹⁶⁵ *Ibid.*, Rule 103 (Collective punishments are prohibited); Rule 156 (Serious violations of international humanitarian constitute war crimes).

despoliation of the wounded, sick, shipwrecked or dead;¹⁶⁶

attacking or ill-treating a *parlementaire* or bearer of the flag of truce;¹⁶⁷

launching an indiscriminate attack resulting in loss of life or injury to civilians or damage to civilian objects;¹⁶⁸

use of biological weapons;¹⁶⁹

use of chemical weapons;¹⁷⁰

the use of non-detectable fragments; and¹⁷¹

the use of binding laser weapons.¹⁷²

Venezuela has failed to fulfil its complementarity obligations under the Rome Statute to define a broad range of war crimes in international armed conflict listed in Article 8 (2) (b) of that treaty as crimes under national law or to provide universal jurisdiction over them. It has also failed to define a number of other war crimes under customary and conventional international humanitarian law as crimes in its national law.

War crimes in non-international armed conflict: Common Article 3 of the Geneva Conventions and 1977 Protocol II

Venezuela has not yet implemented common Article 3 of the Geneva Conventions, Protocol II, Article 8 (2) (c) and (e) of the Rome Statute in its national legislation. Common Article 3 is a mini-convention that protects persons not taking part in hostilities from a broad range of conduct amounting to inhumane treatment.¹⁷³ Protocol II, “which develops and supplements

¹⁶⁶ *Ibid.*, Rule 156 (Serious violations of international humanitarian constitute war crimes).

¹⁶⁷ *Ibid.*, Rule 67 (*Parlementaires* are inviolable); Rule 156 (Serious violations of international humanitarian constitute war crimes).

¹⁶⁸ *Ibid.*, Rule 11 (Indiscriminate attacks are prohibited); Rule 156 (Serious violations of international humanitarian constitute war crimes).

¹⁶⁹ *Ibid.*, Rule 73 (The use of biological weapons is prohibited).

¹⁷⁰ *Ibid.*, Rule 74 (The use of chemical weapons is prohibited).

¹⁷¹ *Ibid.*, Rule 79 (The use of weapons the primary effect of which is to injure by fragments which are not detectable by X-rays in the human body is prohibited).

¹⁷² *Ibid.*, Rule 86 (The use of laser weapons that are specifically designed, as their combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision is prohibited).

¹⁷³ Common Article 3 provides in part:

Article 3 common to the Geneva Conventions” with respect to non-international armed conflicts which take place in the territory of a state party to the Protocol “between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”,¹⁷⁴ provides a broad range of protections to vulnerable people.¹⁷⁵ Article 8 (2) (c) of the Rome Statute includes most of the war crimes in common Article 3 and Article 8 (2) (d) contains an extensive, but by no means complete, list of war crimes in non-international armed

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. . .”

¹⁷⁴ Protocol II, art. 1.

¹⁷⁵ Protocol II contains fundamental guarantees applicable to all persons who do not take a direct part in hostilities or have ceased to do so (Article 4), protections for persons whose liberty has been restricted for reasons related to the armed conflict (Article 5), provisions requiring prosecution and punishment of criminal offences related to the armed conflict (Article 6), protection and care of wounded, sick and shipwrecked (Article 7), a duty to search for and collect such persons and to protect them (Article 8), protection of medical and religious personnel (Article 9), general protection of persons performing medical duties (Article 10), protection of medical units and transports (Article 11), protection of the red cross emblem (Article 12), protection of the civilian population (Article 13), protection of objects indispensable to the survival of the civilian population (Article 14), protection of works and installations containing dangerous forces (Article 15), protection of cultural objects and places of worship (Article 16), prohibition of forced movement of civilians for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand (Article 17) and the right of relief societies and relief actions to take place (Article 18).

conflict.¹⁷⁶

Gaps in the Rome Statute. Although serious violations of Protocol II are listed as war crimes in the Statute of the International Criminal Tribunal for Rwanda, many of them are not expressly included in Article 8 of the Rome Statute. For example, intentionally starving the

¹⁷⁶ Article 8 (2) (d) of the Rome Statute provides:

“Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict[.]”

civilian population (Article 14 of Protocol II and customary international humanitarian law) is omitted.¹⁷⁷ In addition, there are a number of international humanitarian law treaties applicable during non-national armed conflict imposing obligations which, if violated, possibly may result in individual criminal responsibility, either under the conventions or because the prohibitions are recognized as part of customary international law.¹⁷⁸ Finally, there a number of rules of customary international law applicable to non-international armed conflict which, if violated, could lead to individual criminal responsibility for war crimes, including:

- use of biological weapons;¹⁷⁹
- use of chemical weapons;¹⁸⁰
- the use of non-detectable fragments;¹⁸¹
- the use of blinding laser weapons;¹⁸²

¹⁷⁷ See footnote 176, above. See also Henckaerts and Doswald-Beck, *supra* note 159, Rule 53 (The use of starvation of the civilian population as a method of warfare is prohibited); Rule 156 (Serious violations of international humanitarian constitute war crimes).

¹⁷⁸ These treaties, some of which contain penal provisions, include: Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954; Protocol for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980; Protocol on Non-Detectable Fragments (Protocol I), Geneva, 10 October 1980; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Geneva, 10 October 1980; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva, 10 October 1980; Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, Paris 13 January 1993; Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), 13 October 1995; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, 26 March 1999; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980 (Amendment article 1, 21 December 2001); Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), 28 November 2003; Convention on Cluster Munitions, 30 May 2008.

¹⁷⁹ Henckaerts and Doswald-Beck, *supra*, note 159, Rule 73 (The use of biological weapons is prohibited).

¹⁸⁰ *Ibid.*, Rule 74 (The use of chemical weapons is prohibited).

¹⁸¹ *Ibid.*, Rule 79 (The use of weapons the primary effect of which is to injure by fragments which are not detectable by X-rays in the human body is prohibited).

- launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage;¹⁸³
- making non-defended localities and demilitarized zones the object of attack;¹⁸⁴
- using human shields;¹⁸⁵
- slavery;¹⁸⁶ and
- collective punishments.¹⁸⁷

In addition, there are three weapons (poison, toxic gases and dum-dum bullets) whose use in international armed conflict is a war crime under Article 8 of the Rome Statute, but not if the use is in a non-international armed conflict.¹⁸⁸ However, it is increasingly considered that the use of these weapons in non-international armed conflict is a crime.¹⁸⁹

Non-international armed conflicts are expressly excluded from the scope of application of the first two paragraphs of Article 155 of the Criminal Code,¹⁹⁰ which only applies in case of a war between Venezuela and another nation or in the event of a war between foreign nations.

¹⁸² *Ibid.*, Rule 86 (The use of laser weapons that are specifically designed, as their combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision is prohibited).

¹⁸³ *Ibid.*, Rule 11 (Indiscriminate attacks are prohibited); Rule 156 (Serious violations of international humanitarian constitute war crimes).

¹⁸⁴ *Ibid.*, Rule 36 (Directing an attack against a demilitarized zone agreed upon between the parties to the conflict is prohibited); Rule 37 (Directing an attack against a non-defended locality is prohibited); Rule 156 (Serious violations of international humanitarian constitute war crimes).

¹⁸⁵ *Ibid.*, Rule 97 (The use of human shields is prohibited); Rule 156 (Serious violations of international humanitarian constitute war crimes).

¹⁸⁶ *Ibid.*, Rule 94 (Slavery and the slave trade in all their forms are prohibited); Rule 156 (Serious violations of international humanitarian constitute war crimes).

¹⁸⁷ *Ibid.*, Rule 103 (Collective punishments are prohibited); Rule 156 (Serious violations of international humanitarian constitute war crimes).

¹⁸⁸ Rome Statute, art. 8 (2) (b) (xvii), (xviii) and (xix).

¹⁸⁹ Belgium, Draft Amendments to the Rome Statute on War Crimes, Assembly of States Parties to the Rome Statute, 29 September 2009 (<http://www.icc-cpi.int/NR/rdonlyres/3798777A-F998-4B22-9F3D-5B25940CD299/0/BelgiumCN733EN.pdf>) (proposing to amend Article 8 (2) (e) to make the use of these three weapons in non-international armed conflict war crimes).

¹⁹⁰ *Supra* note 141.

According to Article 123 the Code of Military Justice applies to military crimes perpetrated by military personnel or civilians on Venezuelan territory, ships or aircrafts of the National Army and foreign territory occupied by Venezuela.¹⁹¹ Nevertheless, the Code does not specify where it applies both to international and non-international armed conflict or not. However, due to the strict boundaries of Military Jurisdiction, there seem to be no space, for the applicability of universal jurisdiction to the crimes listed in the Code of Military Justice.

Therefore, Venezuelan courts cannot exercise universal jurisdiction in respect of war crimes committed in non-international armed conflicts. This failure leaves an enormous impunity gap.

4.3.2. CRIMES AGAINST HUMANITY

Venezuela has been a party to the Rome Statute since 7 June 2000. Article 29 of the Venezuelan Constitution refers to crimes against humanity, grave violations of human rights and war crimes, when stating that these are not subject to statutes of limitations (for the interpretation and scope of this provision see below Section 6 (3)).¹⁹² However, as discussed below, Venezuela has not characterized any crimes in its legislation as crimes against humanity.

Although the Criminal Code or special legislation do not define and penalize crimes against humanity, Article 4 (9) of the Criminal Code provides Venezuelan courts with jurisdiction to try and punish

“... foreigners who have come to the country who, on the high seas, commit piracy or other crimes qualified by international law as atrocities and [crimes] against humanity; except when they have already been tried for them in another country and have served their sentence.”¹⁹³

While the reference to crimes against humanity is clear, problems concerning the exercise of universal jurisdiction by Venezuelan courts arise in relation the possibility of a literal interpretation of the provision and to a recent decision of the Office of the General Prosecutor

¹⁹¹ Original text: “Artículo 123. La jurisdicción penal militar comprende: El territorio y aguas territoriales venezolanos; los buques y aeronaves de las Fuerzas Armadas Nacionales; y el territorio extranjero ocupado por fuerzas nacionales; Las infracciones militares cometidas por militares o civiles conjunta o separadamente...”

¹⁹² Original text: “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.”

¹⁹³ Original text: “Artículo 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 República 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 hubieran sido ya juzgados en otro país y cumplido la condena.”

(see above in this section under the discussion on grave breaches).

Article 7 (1) of the Rome Statute defines crimes against humanity as follows:

“For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack,”

followed by a list of prohibited acts.¹⁹⁴

Article 7 (2) (a) defines an attack against a civilian population as follows:

“Attack directed against any civilian population means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”

Article 7 (2) (b) through (k) provides more detailed definitions of some of the enumerated acts.

The Sub-commission for the Criminal Code of the Mixed Commission (*Sub-Comisión del Código Penal*) in a draft dated 21 January 2003 (2003 Draft of the Sub-Commission)¹⁹⁵ essentially suggested introducing crimes against humanity into Venezuelan legislation, as criminalized and defined in the Rome Statute.¹⁹⁶ The Sub-Commission suggested the drafting of an International Criminal Code (*Código de Crímenes Internacionales*) separate from the Criminal Code and implementing the Rome Statute. As of December 2009, no action had been taken to implement this recommendation.

Murder

Article 2 (1) (a) of the Rome Statute identifies, but does not define, murder as a crime against humanity.¹⁹⁷

¹⁹⁴ Rome Statute, art. 7 (1).

¹⁹⁵ Sub-Commission for the Criminal Code, *Cuadro comparativo de los i) crímenes de genocidio y lesa humanidad, ii) delitos contra la justicia penal internacional*, 21 January 2003.

¹⁹⁶ Original text: “Será penado con prisión de veinte a treinta años quien cometa alguno de los crímenes de lesa humanidad al efectuar cualquiera de los actos siguientes, cuando se cometa como parte de un ataque generalizado o sistemático contra una población civil y con conocimiento de dicho ataque. Por “ataque contra una población civil” se entenderá una línea de conducta que implique la comisión múltiple de actos mencionados contra una población civil, de conformidad con la política del Estado o de una organización de cometer esos actos o para promover esa política, mediante...”

¹⁹⁷ Rome Statute of the International Criminal Court. For the scope of this crime against humanity, see Machteld Boot, Rodney Dixon and Christopher K. Hall, “Article 7 (Crimes Against Humanity), in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, C. H. Beck, Munich; Hart, Oxford; and Nomos, Baden-Baden, 2nd ed., 2008, p. 183.

Venezuela has defined murder and manslaughter as crimes,¹⁹⁸ but it has not characterized them as crimes against humanity. Venezuela could prosecute murder as ordinary crime. However, as illustrated below in Section 6.1 regarding the crime of genocide, prosecution of persons for ordinary crimes rather than for crimes under international law does not fully reflect the moral condemnation attached and, in some cases, the punishment. Furthermore, Article 4 does not allow Venezuelan courts to exercise universal jurisdiction over ordinary crimes.

The 2003 Draft of the Sub-Commission defined murder as “the most serious degree of homicide, perpetrated under the circumstances described above [when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack].”¹⁹⁹

Extermination

Articles 7 (1) (b) of the Rome Statute lists and Article 7 (2) (b) defines extermination as follows:

“‘Extermination’ includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.”²⁰⁰

Venezuela has not defined extermination as a crime under national law or provided universal jurisdiction over it. The definition adopted in the 2003 Draft of the Sub-Commission reproduced the one given in the Rome Statute.²⁰¹

Enslavement

Article 7 (1) (c) of the Rome Statute identifies enslavement as a crime against humanity and Article 7 (2) (c) defines enslavement as follows:

“‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of

¹⁹⁸ Articles 405-411 of the Criminal Code.

¹⁹⁹ Original text: “[...] a) *Asesinato*: a los efectos de este Código se entenderá por asesinato a la modalidad más grave del homicidio calificado, efectuado bajo las condiciones específicas de este artículo.”

²⁰⁰ Rome Statute, art. 7 (1) (b) and (2) (b). For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra* note 198, at pp. 190-191, 237-243.

²⁰¹ Original text: “[...] b) *Exterminio*: por exterminio se comprenderá la imposición intencional de condiciones de vida, la privación del acceso a alimentos o medicinas entre otras, encaminadas a causar la destrucción de parte de una población.”

trafficking in persons, in particular women and children.”²⁰²

Although the Venezuelan Criminal Code does not provide a definition of the crime of enslavement, neither does it characterize it as a crime against humanity, Article 173 punishes “anyone who reduces into slavery or similar condition any other individual or takes part in the slave trade.”²⁰³ However, as illustrated below in Section 6.1 regarding the crime of genocide, prosecution of persons for ordinary crimes rather than for crimes under international law does not fully reflect the moral condemnation attached and, in some cases, the punishment. Furthermore, according to Article 4 (10) of the criminal Code, Venezuelan courts can exercise active personality jurisdiction over slave trade, but not universal jurisdiction.

The 2003 Draft of the Sub-Commission reproduced the definition given in the Rome Statute.²⁰⁴

Deportation or forcible transfer of population

Article 7 (1) (d) of the Rome Statute identifies deportation and forcible transfer of population as crimes against humanity and Article 7 (d) defines them as follows:

“‘Deportation or forcible transfer of population’ means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.”²⁰⁵

Venezuela has not defined either deportation or forcible transfer of population as a crime under national law or provided universal jurisdiction over them. The definition adopted in the 2003 Draft of the Sub-Commission reproduced the one given in the Rome Statute²⁰⁶

²⁰² Rome Statute, art. 7 (1) (c) and (2) (c). For the scope of the crime against humanity of enslavement, which includes all forms of contemporary slavery, servitude and forced or compulsory labours, see Boot, Dixon and Hall, *supra* note 198, at pp. 191-194, 244-247.

²⁰³ Original text: “*Artículo 173. Cualquiera que reduzca a esclavitud a alguna persona o la someta a una condición análoga, será castigado con presidio de seis a doce años. En igual pena incurrirán los que intervinieren en la trata de esclavos.*”

²⁰⁴ Original text: “[...] c) *Esclavitud: por esclavitud se entenderá el ejercicio de los atributos del derecho de propiedad sobre una persona, o de algunos de ellos, incluido el ejercicio de esos atributos en el tráfico de personas, en particular mujeres y niños.*”

²⁰⁵ Rome Statute, art. 7 (1) (d) and (2) (d). For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra* note 198, at pp. 194-200, 247-251.

²⁰⁶ Original text: “[...] d) *Deportación o traslado forzoso de población: por deportación o traslado forzoso de población se entenderá el desplazamiento de las personas afectadas, por expulsión u otros actos coactivos, de la zona en que estén legítimamente presentes, sin motivos autorizados por el derecho internacional.*”

Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law

Article 7 (1) (e) of the Rome Statute lists imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, but does not define it.²⁰⁷

Although using a different and broad wording, Article 174 Venezuelan Criminal Code penalizes “anyone who illegitimately deprives an individual of his or her liberty”.²⁰⁸ Nevertheless, the Criminal Code does not define imprisonment or other severe deprivation of physical liberty as a crime against humanity. However, as illustrated below in Section 6.1 in relation to the crime of genocide, prosecution of persons for ordinary crimes rather than for crimes under international law does not fully reflect the moral condemnation attached and, in some cases, the punishment. Furthermore, Article 4 does not allow Venezuelan Courts to exercise universal jurisdiction over ordinary crimes, except in the rare cases under Article 4(5) and 4(13) (see Section 4.1. above).

In the 2003 Draft of the Sub-Commission, kidnapping (penalized in Article 174 of the Criminal Code) is included in the scope of the crime of ‘imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law’.²⁰⁹

Torture

Article 7 (1) (f) of the Rome Statute identifies torture as a crime against humanity and Article 7 (2) (e) defines torture as follows:

“‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.”²¹⁰

Venezuela has defined torture as a crime under national law in Article 181 of the Criminal

²⁰⁷ Rome Statute, art. 7 (1) (e) .For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra* note 198, at pp. 200-205.

²⁰⁸ Original text: “*Artículo 174. Cualquiera que ilegítimamente haya privado a alguno de su libertad personal será castigado con prisión de quince días a treinta meses...*”

²⁰⁹ Original text: “[...] e) *Encarcelación u otra privación grave de la libertad física en violación de normas fundamentales de derecho internacional. A los efectos de este Código se entenderá incluido en este crimen el secuestro ocasionado bajo las condiciones específicas de este artículo.*”

²¹⁰ Rome Statute, art. 7 (1) (f) and (2) (e). The scope of the crime against humanity of torture differs in some respects from torture as a war crime and from torture that is neither a crime against humanity nor a war crime. For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra* note 198, at pp. 205-206, 251-255.

Code (see Section 4.3.4 below), but has not characterized torture as a crime against humanity. Although torture can be prosecuted as an ordinary crime, as illustrated below in Section 6.1 in relation to the crime of genocide, prosecution of persons for ordinary crimes rather than for crimes under international law does not fully reflect the moral condemnation attached and, in some cases, the punishment. Furthermore, Article 4 does not allow Venezuelan Courts to exercise universal jurisdiction over ordinary crimes.

The definition suggested by the Sub-Commission in the 2003 Draft the reproduced the text of the Rome Statute.²¹¹

Rape

Article 7 (1) (g) of the Rome Statute lists rape as a crime against humanity.²¹² The first non-contextual element of this crime, as spelled out in the Elements of Crimes, is:

“The perpetrator invaded [footnote 15] the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.”

Footnote 15 states: “The concept of “invasion” is intended to be broad enough to be gender-neutral.” The second element is:

“The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.” [footnote 16]

Footnote 16 explains:

“It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.”

Venezuelan Criminal Code defines rape as an ordinary crime in Article 374 and takes into account different forms of coercion, including taking advantage of a coercive environment,²¹³

²¹¹ Original text: “[...] f) *Tortura: por tortura se entenderá causar intencionalmente dolor o sufrimiento graves, ya sean físicos o mentales, a una persona que el acusado tenga bajo su custodia o control; sin embargo, no se entenderá por tortura el dolor o los sufrimientos que se deriven únicamente de sanciones lícitas o que sean consecuencia normal o fortuita de ellas.*”

²¹² Rome Statute, Art. 7 (1) (g). For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra* note 198, at pp. 206-211.

²¹³ Original text: “*Artículo 374. Quien por medio de violencias o amenazas haya constreñido a alguna persona, de uno o de otro sexo, a un acto carnal por vía vaginal, anal u oral, o introducción de objetos por alguna de las dos primeras vías, o por vía oral se le introduzca un objeto que simulen objetos sexuales, el responsable será castigado, como imputado de violación, con la pena de prisión de diez años*”

but does not classify it a crime against humanity.²¹⁴ Although rape can be prosecuted as an ordinary crime, as illustrated below in Section 6.1 in relation to the crime of genocide, prosecution of persons for ordinary crimes rather than for crimes under international law does not fully reflect the moral condemnation attached and, in some cases, the punishment. Furthermore, Article 4 does not allow Venezuelan Courts to exercise universal jurisdiction over ordinary crimes, except in the rare cases under Article 4(5) and 4(13) (see Section 4.1. above).

The 2003 Draft of the Sub-Commission listed rape as a crime against humanity.

Sexual slavery

Article 7 (1) (g) of the Rome Statute identifies sexual slavery as a crime against humanity.²¹⁵ The elements of this crime are spelled out in the Elements of Crimes.

Venezuela has expressly defined sexual slavery in Article 47 of the 2007 Organic Law on Women's Right to a Life free from Violence.²¹⁶ Nevertheless, sexual slavery is not categorized

a quince años. Si el delito de violación aquí previsto se ha cometido contra una niña, niño o adolescente, la pena será de quince años a veinte años de prisión.

La misma pena se le aplicará, aun sin haber violencias o amenazas, al individuo que tenga un acto carnal con persona de uno u otro sexo:

1. Cuando la víctima sea especialmente vulnerable, por razón de su edad o situación, y, en todo caso, cuando sea menor de trece años.

2. O que no haya cumplido dieciséis años, siempre que para la ejecución del delito, el responsable se haya prevalido de una relación de superioridad o parentesco, por ser ascendiente, descendiente o hermano, por naturaleza o adopción, o afines con la víctima.

3. O que hallándose detenida o detenido, condenada o condenado, haya sido confiado o confiada la custodia del culpable.

4. O que no estuviere en capacidad de resistir por causa de enfermedad física o mental; por otro motivo independiente de la voluntad del culpable o por consecuencia del empleo de medios fraudulentos o sustancias narcóticas o excitantes de que éste se haya valido.

Parágrafo único: Quienes resulten implicados en cualquiera de los supuestos expresados, no tendrán derecho a gozar de los beneficios procesales de ley, ni a la aplicación de medidas alternativas del cumplimiento de la pena."

²¹⁴ The need for criminal law regarding rape and crimes of sexual violence to ensure "the effective protection of the individual' sexual autonomy" is recognized in *M.C. v. Bulgaria*, Judgment, Appl. No. 39272/98, Eur. Ct. Hum. Rts., 4 December 2003, para. 157.

²¹⁵ Rome Statute, Art. 7 (1) (g). For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra* note 198, at pp. 211-212.

²¹⁶ *Ley Orgánica sobre el Derecho de las Mujeres a una Vida Libre de Violencia*, 23 April 2007. Original text: "Artículo 47 - Quien prive ilegítimamente de su libertad a una mujer con fines de explotarla

as a crime against humanity. Although sexual slavery can be prosecuted as an ordinary crime, as illustrated below in Section 6.1 in relation to the crime of genocide, prosecution of persons for ordinary crimes rather than for crimes under international law does not fully reflect the moral condemnation attached and, in some cases, the punishment. Furthermore, Article 4 does not allow Venezuelan Courts to exercise universal jurisdiction over ordinary crimes, except in the rare cases under Article 4(5) and 4(13) (see Section 4.1. above).

The 2003 Draft of the Sub-Commission listed sexual slavery as a crime against humanity.

Enforced prostitution

Article 7 (1) (g) of the Rome Statute lists enforced prostitution as a crime against humanity.²¹⁷ The elements of this crime are spelled out in the Elements of Crimes.

Venezuela has defined enforced prostitution in Article 46 of the 2007 Organic Law on Women's Right to a Life free from Violence.²¹⁸ Nevertheless, enforced prostitution is not categorized as a crime against humanity. Although enforced prostitution can be prosecuted as an ordinary crime, as illustrated below in Section 6.1 in relation to the crime of genocide, prosecution of persons for ordinary crimes rather than for crimes under international law does not fully reflect the moral condemnation attached and, in some cases, the punishment. Furthermore, Article 4 does not allow Venezuelan Courts to exercise universal jurisdiction over ordinary crimes, except in the rare cases under Article 4(5) and 4(13) (see Section 4.1. above).

The 2003 Draft of the Sub-Commission recognised enforced prostitution as a crime against humanity.

Forced pregnancy

Article 7 (1) (g) of the Rome Statute lists forced pregnancy as a crime against humanity and Article 7 (2) (f) defines it as follows:

“‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any

sexualmente mediante la compra, venta, préstamo, trueque u otra negociación análoga, obligándola a realizar uno o más actos de naturaleza sexual, será sancionado con pena de quince a veinte años de prisión.”

²¹⁷ Rome Statute, Art. 7 (1) (g). For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra* note 198, at pp. 212-213.

²¹⁸ Original text: “Artículo 46. Quien mediante el uso de la fuerza física, la amenaza de violencia, la coacción psicológica o el abuso de poder, obligue a una mujer a realizar uno o más actos de naturaleza sexual con el objeto de obtener a cambio ventajas de carácter pecuniario o de otra índole, en beneficio propio o de un tercero, será sancionado con pena de diez a quince años de prisión.”

way be interpreted as affecting national laws relating to pregnancy.”²¹⁹

Venezuela has not defined forced pregnancy as a crime under national law. The 2003 Draft of the Sub-Commission recognised forced pregnancy as a crime against humanity and defined in accordance to the definition given in the Rome Statute.²²⁰

Enforced sterilization

Article 7 (1) (g) of the Rome Statute lists enforced sterilization as a crime against humanity, but it does not define it.²²¹ The elements of this crime are spelled out in the Elements of Crimes.

Venezuela has expressly defined enforced sterilization in Article 52 of the 2007 Organic Law on Women’s Right to a Life free from Violence.²²² Nevertheless, enforced sterilization is not classified as a crime against humanity. Although it would be possible to prosecute enforced sterilization as an ordinary crime, as illustrated below in Section 6.1 in relation to the crime of genocide, prosecution of persons for ordinary crimes rather than for crimes under international law does not fully reflect the moral condemnation attached and, in some cases, the punishment. Furthermore, Article 4 does not allow Venezuelan Courts to exercise universal jurisdiction over ordinary crimes, except in the rare cases under Article 4(5) and 4(13) (see Section 4.1. above).

The 2003 Draft of the Sub-Commission recognised enforced sterilization as a crime against humanity, but did not define it.

Other forms of sexual violence of comparable gravity

Article 7 (1) (g) of the Rome Statute lists other forms of sexual violence as a crime against humanity, but does not define them.²²³

²¹⁹ Rome Statute, art. 7 (1) (g) and (2) (f). For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra* note 198, at pp. 206-216, 255-256.

²²⁰ Original text: “[...] g) por embarazo forzado se entenderá el confinamiento ilícito de una mujer a la que se ha dejado embarazada por la fuerza, con la intención de modificar la composición étnica de una población o de cometer otras violaciones graves del derecho internacional. En modo alguno se entenderá que esta definición afecta a las normas de derecho interno relativas al embarazo.”

²²¹ Rome Statute, Art. 7 (1) (g). For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra* note 198, at pp. 213-214.

²²² Original text: “Artículo 47. Quien intencionalmente prive a la mujer de su capacidad reproductiva, sin brindarle la debida información, ni obtener su consentimiento expreso, voluntario e informado, no existiendo razón médica o quirúrgica debidamente comprobada que lo justifique, será sancionado o sancionada con pena de prisión de dos a cinco años.”

²²³ Rome Statute, Art. 7 (1) (g). For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra* note 198, at pp. 214-215.

Venezuela has defined other forms of sexual violence, such as carnal acts against particularly vulnerable individuals, in the 2007 Organic Law on Women's Right to a Life free from Violence.²²⁴ Nevertheless these crimes are not characterized as crimes against humanity. Although such acts can be prosecuted as ordinary crimes, as illustrated below in Section 6.1 in relation to the crime of genocide, prosecution of persons for ordinary crimes rather than for crimes under international law does not fully reflect the moral condemnation attached and, in some cases, the punishment. Furthermore, Article 4 does not allow Venezuelan Courts to exercise universal jurisdiction over ordinary crimes, except in the rare cases under Article 4(5) and 4(13) (see Section 4.1. above).

The 2003 Draft of the Sub-Commission listed other forms of sexual violence as a crime against humanity, but did not define them.

Persecution

Article 7 (1) (h) of the Rome Statute lists "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court" as a crime against humanity while Article 7 (2) (g) defines persecution as follows:

"Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;"²²⁵

Venezuela has not defined persecution as a crime under national law. The 2003 Draft of the Sub-Commission listed persecution as a crime against humanity, and defined it according to the text of the Rome Statute.²²⁶

Enforced disappearance of persons

See Section 4.3.6 below.

²²⁴ Chapter VI of the 2007 Organic Law on Women's Right to a Life free from Violence, *supra* note 217.

²²⁵ Rome Statute, Art. 7 (1) (h) and (2) (g). For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra* note 198, at pp. 216-221, 256-263.

²²⁶ Original text: "[...] h) Persecución de un grupo o colectividad con identidad propia fundada en motivos políticos, raciales, nacionales, étnicos, culturales, religiosos, de género, u otros motivos universalmente reconocidos como inaceptables con arreglo al derecho internacional, en conexión con cualquier acto mencionado en el presente párrafo o con cualquier crimen de la competencia de la Corte. Por persecución se entenderá la privación intencional y grave de derechos fundamentales en contravención del derecho internacional en razón de la identidad del grupo o de la colectividad. A los efectos del presente Código se entenderá que el término "género" se refiere a los dos sexos, masculino y femenino, en el contexto de la sociedad. El término "género" no tendrá más aceptación que la que antecede."

Apartheid

Venezuela ratified the 1973 Convention for the Prevention and Punishment of the Crime of Apartheid (Apartheid Convention) on 28 January 1983.²²⁷ That treaty requires states parties to take legislative or other measures necessary to suppress the crime of apartheid as practiced in Southern Africa (Art. IV (a)), obligates them to adopt legislative and judicial measures to bring to justice “in accordance with their jurisdiction” those responsible for this crime whether or not such persons are residents or nationals of the state party or another state or are stateless (Art. IV (b)) and permits the courts of any state party which acquires jurisdiction over a person suspected of this crime to try that person (Art. V).

Apartheid is also listed as a crime against humanity in Article 7 (1) (j) of the Rome Statute and defined, for the purposes of the Statute, in Article 7 (2) (h) as follows:

“‘The crime of apartheid’ means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.”²²⁸

Venezuela has not yet defined the crime of apartheid as a crime under national law. The 2003 Draft of the Sub-Commission qualified apartheid as a crime against humanity, and suggested to adopt the definition given in the Rome Statute.²²⁹

Other inhumane acts

Article 7 (1) (k) of the Rome Statute lists, but does not define, among crimes against humanity “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”²³⁰

Venezuela has not criminalised other inhumane acts as a crime against humanity. The Sub-Commission included an identical provision in the 2003 Draft, but then in the final version

²²⁷ International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted and opened for signature, ratification by General Assembly resolution 3068 (XXVIII) of 30 November 1973 entry into force 18 July 1976 (<http://www.unhchr.ch/html/menu3/b/11.htm>).

²²⁸ Rome Statute, art. 7 (1) (j) and (2) h). For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra* note 198, at pp. 227-229, 263-266.

²²⁹ Original text: “[...] j) *El crimen de apartheid: Por el crimen de apartheid se entenderán los actos inhumanos de carácter similar a los mencionados en este artículo cometidos en el contexto de un régimen institucionalizado de opresión y dominación sistemáticas de un grupo racial sobre uno o más grupos raciales y con la intención de mantener ese régimen.*”

²³⁰ Rome Statute of the International Criminal Court. For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra* note 198, at pp. 227-229, 263-266.

suggested deleting this crime.²³¹

4.3.3 GENOCIDE

Venezuela has been a party to the 1948 Convention for the Prevention and Punishment of the Crime of Genocide since 22 March 1960.²³² Article II of the Genocide Convention defines genocide as follows:

“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”

Article 6 of the Rome Statute contains a virtually identical definition of this crime. In addition, Article III of the Genocide Convention requires states to make both genocide and four ancillary forms of genocide crimes under national law:

“The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.”

Most of these ancillary forms of genocide are also incorporated in Article 25 (Individual responsibility) of the Rome Statute.

²³¹ Original text: “*Otros actos inhumanos de carácter similar que causen intencionalmente grandes sufrimientos o atenten gravemente contra la integridad física o la salud mental o física (eliminar).*”

²³² Convention for the Prevention and Punishment of the Crime of Genocide (http://www.unhcr.ch/html/menu3/b/p_genoci.htm), U.N. G.A. Res. 260 A (III), 9 December 1948.

However, Venezuela has failed to fulfil its obligations under the Genocide Convention to define genocide as a crime under national law, which is an essential step so that it can fulfil its obligations to bring to justice persons responsible for this crime. As discussed above in Section 4.3.1, it would be possible to interpret Article 4 (9) of the Criminal Code as granting universal jurisdiction to Venezuelan courts over genocide once typified. Although some of the acts that constitute genocide according to Article II of the Genocide Convention may be prosecuted as ordinary crimes, there is no reference in the Venezuela legislation to genocidal intent and, as illustrated below in Section 6.1, prosecution of persons for ordinary crimes rather than for crimes under international law does not fully reflect the moral condemnation attached and, in some cases, the punishment. Furthermore, Article 4 does not allow Venezuelan courts to exercise universal jurisdiction over ordinary crimes.

In the 2003 Draft the Sub-Commission suggested inserting in the Criminal Code an article penalizing genocide, and proposed a detailed definition of this crime drawing from the definition given in the 1948 Genocide Convention (see Section 6.1 below).

4.3.4 TORTURE

Venezuela ratified the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 29 July 1991,²³³ the Inter-American Convention to Prevent and Punish Torture (Inter-American Convention) on 25 July 1991²³⁴ and the Rome Statute. The 1984 Convention against Torture requires states parties to define acts of torture as a crime under national law (Art.4), to establish jurisdiction over persons suspected of committing acts of torture who are present in its territory if they are not extradited (Art. 5 (2)), to take measures to ensure presence for prosecution or extradition (Art. 6 (1) and (2)) and to submit the cases to the competent authorities if they are not extradited (Art. 7 (1)).

The Inter-American Convention requires states parties to prevent and punish torture (Art. 1), to ensure that all acts of torture and attempts to commit torture are crimes under their criminal law which are punishable by severe penalties that take into account their serious nature (Art. 6), to take the necessary measures to establish its jurisdiction over torture when the suspect is within the area under its jurisdiction and it is not appropriate to extradite the suspect (Art. 12) and, when it does not grant extradition, to submit the case to its competent authorities as if the crime had been committed within its jurisdiction, for the purposes of investigation, and when appropriate, for criminal action, in accordance with its national law (Art. 14).

The 1999 Constitution of Venezuela includes the prohibition of torture in Article 46. The article states:

“All persons have the right to physical and moral integrity; accordingly:

²³³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ([http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/a3bd1b89d20ea373c1257046004c1479/\\$FILE/G0542837.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/a3bd1b89d20ea373c1257046004c1479/$FILE/G0542837.pdf)), UN GA Res. 39/46, 10 December 1984.

²³⁴ Inter-American Convention to Prevent and Punish Torture (<http://www.oas.org/juridico/English/Treaties/a-51.html>), 9 December 1985.

1. No one can be submitted to punishments, torture or cruel, inhuman or treatment. All the victims of torture or cruel, inhuman or degrading treatment inflicted or tolerated by state agents have a right to rehabilitation.
2. Every individual deprived of its freedom will be treated with the respect and dignity due to human beings.
3. No one will be submitted without its unconditioned consent to scientific experiments, laboratory or medical treatment, except if the individual's life is in danger or in the other circumstances prescribed by the law.
4. Any public employees who, in virtue of its office, ill-treat or submit to mental or physical suffering any individual, or who instigate or tolerate this sort of behaviours, will be punished according to the law."²³⁵

It is not clear whether courts can enforce this constitutional provision, but Article 46 (4) requires implementing legislation which defines and penalizes the offences listed in it.

Although in its 2000 report to the Committee against Torture Venezuela asserted that "sanctions are provided for in cases of torture or cruel, inhuman or degrading treatment or punishment",²³⁶ only some aspects of torture have been penalized in Venezuela since the 1915 Criminal Code. Pursuant to Article 181 of the 2005 Criminal Code:

Any public employee charged with the custody or transport of a detainee or a convicted who commits against the detainee or the convicted arbitrary acts or acts not authorised by the regulations of the circumstances shall be punished with imprisonment from 15 days to 20 months. In the same punishment will incur the public employee who, because of the authority connected with its position, submits the detainee or the convicted to the same acts. Offences to human dignity, molestations, torture or physical or moral abuses committed against detainees by their guardians or jailers or ordering to commit such acts in violation of the individual rights recognised in subsection 2 of article 46 of

²³⁵ Original text: "*Artículo 46. Toda persona tiene derecho a que se respete su integridad física, psíquica y moral; en consecuencia: 1) Ninguna persona puede ser sometida a penas, torturas o tratos crueles, inhumanos o degradantes. Toda víctima de tortura o trato cruel, inhumano o degradante practicado o tolerado por parte de agentes del Estado, tiene derecho a la rehabilitación. 2) Toda persona privada de libertad será tratada con el respeto debido a la dignidad inherente al ser humano. 3) Ninguna persona será sometida sin su libre consentimiento a experimentos científicos, o a exámenes médicos o de laboratorio, excepto cuando se encontrare en peligro su vida o por otras circunstancias que determine la ley. 4) Todo funcionario público o funcionaria pública que, en razón de su cargo, infiera maltratos o sufrimientos físicos o mentales a cualquier persona, o que instigue o tolere este tipo de tratos, será sancionado o sancionada de acuerdo con la ley.*"

²³⁶ Second periodic reports of State parties due in 1996: Venezuela, *supra* note 8, para.59.

the Constitution, will be punished with imprisonment from 3 to 6 years.²³⁷

For the problems concerning this definition of torture see Section 6.1 below.

Although the crime of torture is partially incorporated in national law in Article 46 of the Constitution and Article 181 of the 2005 Criminal Code, there is no special provision authorising Venezuelan courts to exercise universal jurisdiction over the acts described in these provisions. Therefore, Article 4 containing the general rules governing jurisdiction will apply. Article 4 does not authorize Venezuelan courts to exercise universal jurisdiction over ordinary crimes.

4.3.5. EXTRAJUDICIAL EXECUTIONS

Extrajudicial executions, which are “unlawful and deliberate killings, carried out by order of a government or with its complicity or acquiescence”, constitute “fundamental violations of human rights and an affront to the conscience of humanity”.²³⁸ The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions make clear that all states must ensure that all persons found in territory subject to their jurisdiction who are suspected of such crimes are either prosecuted in their own courts or are extradited to face trial elsewhere.²³⁹

In the report to the Committee against Torture of November 2000, Venezuela claimed that “although the Constitution does not expressly condemn extrajudicial, summary or arbitrary

²³⁷ Original text: “*Artículo 181. Todo funcionario público encargado de la custodia o conducción de alguna persona detenida o condenada, que cometa contra ella actos arbitrarios o la someta a actos no autorizados por los reglamentos del caso, será castigado con prisión de quince días a veinte meses. Y en la misma pena incurrirá el funcionario público que investido, por razón de sus funciones, de autoridad respecto de dicha persona, ejecute con ésta alguno de los actos indicados. Se castigarán con prisión de 3 a 6 años los sufrimientos, ofensas a la dignidad humana, vejámenes, torturas o atropellos físicos o morales cometidos en persona detenida por parte de sus guardianes o carceleros, o de quien diera la orden de ejecutarlos en contravención a los derechos individuales reconocidos en el numeral 3 del artículo 60 de la Constitución.*”

²³⁸ Amnesty International, *14-Point Program for the Prevention of Extrajudicial Executions*, AI Index: POL 35/002/1993 (1993); Amnesty International, “*Disappearances*” and *Political Killings – Human Rights Crisis of the 1990s: A Manual for Action*, AI Index: ACT 33/01/94, February 1994, 86. For a discussion of universal jurisdiction over extrajudicial executions, see Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation - Ch. Eleven (Extrajudicial executions)*, AI Index: 53/014/2001, September 2001 (<http://web.amnesty.org/library/index/engior530142001?OpenDocument>).

²³⁹ Principle 18 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions declares:

“Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.”

executions, some of the articles contained in Title III 'On duties, human rights and guarantees' do include a reference to the subject.²⁴⁰ In the report Venezuela recalled Article 22 of the Constitution where it states that:

“The enunciation of the rights and guarantees contained in this Constitution and in the international human rights instruments shall not be understood as negating other rights which, being inherent in the individual, are not expressly contained therein. The absence of any law regulating these rights does not impair their exercise.”²⁴¹

Therefore, Venezuela interpreted this provision “as meaning that ‘all other rights inherent in the individual,’ i.e. all those also contained in the international human rights instruments ratified by Venezuela” – such as extrajudicial executions – “have constitutional rank.”²⁴²

Despite these claims, in contrast to some other countries such as Guatemala, Venezuelan law does not expressly penalize the crime of extrajudicial executions, showing an evident normative gap.

4.3.6 ENFORCED DISAPPEARANCES

Venezuela has signed, but, as of 1 December 2009, had not yet ratified the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (International Convention).²⁴³ The 2006 Convention on Enforced Disappearances requires states parties to define enforced disappearance as a crime under national law (Arts. 3, 4 and 6),²⁴⁴ to establish jurisdiction over persons suspected of enforced disappearance who are present in its territory if they are not extradited (Art. 9 (2)), to take measures to ensure presence for prosecution or extradition (Art. 10 (1) and (2)) and to submit the case to the competent authorities if they are not extradited (Art. 11 (1)).

²⁴⁰ Second periodic reports of State parties due in 1996: Venezuela, *supra* note 8, para.16.

²⁴¹ Original text: “Artículo 22. La enunciación de los derechos y garantías contenidos en esta Constitución y en los instrumentos internacionales sobre derechos humanos no debe entenderse como negación de otros que, siendo inherentes a la persona, no figuren expresamente en ellos. La falta de ley reglamentaria de estos derechos no menoscaba el ejercicio de los mismos.”

²⁴² Second periodic reports of State parties due in 1996: Venezuela, *supra* note 8, para.16.

²⁴³ International Convention for the Protection of All Persons from Enforced Disappearance (<http://www2.ohchr.org/english/law/disappearance-convention.htm>), 20 December 2006.

²⁴⁴ The Convention has defined enforced disappearance in Article 2 as

“the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”.

Venezuela has also been a party to the Inter-American Convention on Forced Disappearance of Persons (Inter-American Convention) since 6 July 1998.²⁴⁵ The Inter-American Convention requires states parties to define and punish enforced disappearance as a crime under national law (Arts. 1 (b), 3 and 4),²⁴⁶ to establish jurisdiction over persons suspected of enforced disappearance when the alleged criminals are within its territory if it does not proceed to extradite them (Art. 4), to take measures to ensure the applicability of the *aut dedere aut judicare* principle and to submit the case to the competent authorities if they are not extradited (Art. 6).

Furthermore, Article 7 (1) (i) of the Rome Statute lists enforced disappearance of persons as a crime against humanity, while Article 7 (2) (i) defines enforced disappearances as

“the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.”

Pursuant to Article 45 of the Venezuela Constitution

“The public authorities, whether military or civilian, even during a state of emergency, exception or restriction of guarantees, are prohibited from practicing, permitting or tolerating the forced disappearance of persons. Any officer receiving an order or instruction to carry it out has the obligation not to obey, and to report the fact to the competent authorities. The mental and physical perpetrators, accomplices and those who acted to cover up crimes of forced disappearance of a person, as well as any attempt to commit such offense, shall be punished in accordance with law.”²⁴⁷

By means of a law adopted in 2000 amending the Criminal Code and implementing the Inter-American Convention on the Forced Disappearances, Venezuela introduced the crime of

²⁴⁵ Convención interamericana sobre desaparición forzada de personas (<http://www.caipe.org.pe/RIJ/BASES/INSTRU/ic4.HTM>), 9 June 1994.

²⁴⁶ The Convention has defined enforced disappearance in Article 2 as

“the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”.

²⁴⁷ Original text: “Artículo 45. Se prohíbe a la autoridad pública, sea civil o militar, aun en estado de emergencia, excepción o restricción de garantías, practicar, permitir o tolerar la desaparición forzada de personas. El funcionario o funcionaria que reciba orden o instrucción para practicarla, tiene la obligación de no obedecerla y denunciarla a las autoridades competentes. Los autores o autoras intelectuales y materiales, cómplices y encubridores o encubridoras del delito de desaparición forzada de personas, así como la tentativa de comisión del mismo, serán sancionados o sancionadas de conformidad con la ley.”

enforced disappearance in its national legislation.²⁴⁸ Article 180-A states that:

“The public authorities, whether military or civilian, or any other person serving the State who unlawfully deprive an individual of his or her freedom and refuse to admit the detention or to give information on the fate or the conditions of the disappeared person, preventing the person detained from exercising his or her constitutional right and guarantees, shall be punished with imprisonment from 15 to 25 years. Members of groups or associations or terrorist, insurgent or subversive groups who, while acting within these groups or associations, carry on enforced disappearances through kidnapping shall be submitted to the same punishment. Whoever acted as accomplice or acted to cover up such a crime shall be punished with imprisonment from 12 to 18 years.”²⁴⁹

However, the crime of enforced disappearances is not qualified as a crime against humanity. As illustrated below in Section 6.1 in relation to the crime of genocide, prosecution of persons for ordinary crimes rather than for crimes under international law does not fully reflect the moral condemnation attached and, in some cases, the punishment. Furthermore, the general rules outlined in Article 4 of the Criminal Code apply, which means that Venezuelan courts are not authorised to exercise universal jurisdiction over enforced disappearances as ordinary crime, except in the rare cases provided in Article 4 (5) and 4 (13) (see Section 4.1 above).

The 2003 Draft of the Sub-Commission listed enforced disappearances of persons among crime against humanity, “without prejudice to what is stated in Article 181-A of the Criminal Code.”²⁵⁰

²⁴⁸ *Ley de Reforma Parcial del Código Penal, Gaceta Oficial Extraordinaria No. 5.494*, 20 October 2000. Venezuela followed the example of other states such as Argentina, Colombia, El Salvador, and Guatemala.

²⁴⁹ Original text: “*Artículo 180-A. La autoridad pública sea civil o militar o cualquier persona al servicio del Estado que ilegítimamente prive de su libertad a una persona y se niegue a reconocer la detención o a dar información sobre el destino o la situación de la persona desaparecida, impidiendo el ejercicio de sus derechos y garantías constitucionales y legales, será castigado con pena de 15 a 25 años de presidio. Igualmente serán castigados miembros e integrantes de grupos o asociaciones con grupos o asociaciones con fines terroristas, insurgentes o subversivos que actuando como miembros o colaboradores de tales grupos o asociaciones desaparezcan forzadamente a una persona mediante plagio o secuestro. Quien actúe como cómplice o encubridor de este delito, será sancionado con pena de 12 a 18 años de presidio*”.

²⁵⁰ Original text: “[...] i) *Desaparición forzada de personas: por desaparición forzada de personas se entenderá la aprehensión, la detención o el secuestro de personas por un Estado o una organización política, o con su autorización, apoyo o aquiescencia, seguido de la negativa a informar sobre la privación de libertad o dar información sobre la suerte o el paradero de esas personas, con la intención de dejarlas fuera del amparo de la ley por un período prolongado. A los efectos de este Código, el crimen especificado en este artículo no se tipifica en menoscabo del que se encuentra ya tipificado en el artículo 181-A del Código Penal bajo reforma.*”

4.3.7. AGGRESSION

The crime under international law of planning, preparing, initiating or waging aggressive war has been recognized as a crime under international law since it was incorporated in the Nuremberg Charter in 1945.²⁵¹ It is expressly listed as a crime in Article 5 of the Rome Statute over which the International Criminal Court shall exercise jurisdiction once a provision is adopted defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.²⁵²

Article 153 of the Criminal Code punishes planning and preparing aggressive war with imprisonment from 3 to 6 years. However, these acts are only punishable if committed by Venezuelans or foreigners in Venezuela. Therefore, courts cannot exercise universal jurisdiction over the crime of aggression.²⁵³

²⁵¹ Charter of the International Military Tribunal, annexed to the London Agreement (Nuremberg Charter), 8 Aug. 1945, Art. 6 (a) (“CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing[.]”)

²⁵² Rome Statute, art. 5 (2).

²⁵³ Original text: “*Artículo 153. Los venezolanos o extranjeros que en Venezuela recluten gente o acopien armas, o formen juntas o preparen expediciones o salgan del espacio geográfico de la República en actitud hostil para acometer o invadir el de una nación amiga o neutral, serán castigados con pena de tres a seis años de arresto en fortaleza o cárcel política. En la misma pena determinada en este artículo incurrirán los venezolanos o extranjeros que en Venezuela construyan buques, los armen en guerra o aumenten sus fuerzas o pertrechos, su dotación o el número de sus marineros para hacer la guerra a una nación con la cual esté en paz la República.*”

5. CIVIL JURISDICTION OVER TORTS

Venezuelan law allows for civil proceeding concerning obligations which can be executed anywhere to be based on universal civil jurisdiction, however the scope of these provisions is not clear. Furthermore, Venezuela permits civil claims to be brought in a criminal court as a supplement to the criminal proceedings, whether they are initiated on the basis of territorial or extraterritorial jurisdiction. In exceptional circumstances victims can delegate the exercise of the civil action to an individual or association representing their interest. There are a number of restrictions on the scope of civil claims, including the condition that the civil claim can be brought before the criminal judge that pronounced the sentence only after the criminal proceedings are over and there is no further possibility of appeal.

A preliminary note on the right to reparations

The right of victims and their families to recover reparations for crimes under international law, whether during peace or armed conflict, has been confirmed in provisions of a number of international instruments adopted over the past two decades since the Convention against Torture was adopted in 1984.²⁵⁴ These instruments do not restrict this right geographically or abrogate it by state or official immunities. They include the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,²⁵⁵ the 1998 Rome Statute of the International Criminal Court²⁵⁶ and two instruments adopted in April 2005 by the

²⁵⁴ Article 14 of the Convention against Torture provides:

“1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.”

This article requires states parties to guarantee the right of all victims of torture to reparations, regardless of nationality and regardless where the torture was committed. Christopher Keith Hall, *The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad*, Eur. J. Int'l L., vol. 18, p. 921 (2007).

²⁵⁵ GA Res. 40/34, 29 Nov 1985.

²⁵⁶ Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference on the Establishment of an International Criminal Court, Rome UN Doc A/CONF.183/9*, 17 July 1998, as corrected by the process verbaux UN Doc C.N.577.1998.TREATIES-8, 10 November 1998, and UN Doc C.N.604.1999.TREATIES-18, 12 July 1999, Art. 75. Its reach is potentially universal as the Security Council can refer a situation involving crimes in any state to the Prosecutor.

Commission on Human Rights, the first of which was adopted subsequently in December of that year by the UN General Assembly, the UN Basic Principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and international humanitarian law (Van Boven-Bassiouni Principles)²⁵⁷ and the UN Updated set of principles for the protection and promotion of human rights through action to combat impunity (Joinet-Orentlicher Principles).²⁵⁸ Both instruments, which were designed to reflect international law obligations, were cited by Pre-Trial Chamber I of the International Criminal Court in its determination that the harm suffered by victims of crimes under international law includes emotional suffering and economic loss.²⁵⁹ Most recently, the UN General Assembly adopted without a vote the International Convention for the Protection of All Persons from Enforced Disappearance with a very broad definition of the right to reparations on 20 December 2006.²⁶⁰ This right is inherent in the right to a remedy, as guaranteed in Article 2 of the International Covenant on Civil and Political Rights (ICCPR), adopted four decades ago in 1966.²⁶¹ Indeed, the international community recognized the rights of victims to civil recovery directly against foreign states for war crimes a century ago in Article 3 of the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.²⁶² Germany, which proposed including Article 3, stated:

“if ... individuals injured by breach of the Regulations, could not ask for compensation from the Government, and instead they had to turn against the officer or soldier responsible, they would, in the majority of cases be denied their right to obtain compensation”[.]²⁶³

²⁵⁷ UN Commission on Human Rights Res. E/CN.4/2005/35, 13 April 2005; GA Res. A/RES/60/147, 16 December 2005.

²⁵⁸ UN Commission on Human Rights Res E/CN.4/2005/81, 15 April 2005.

²⁵⁹ Situation of the Democratic Republic of the Congo, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Case No. ICC-01/04, Pre-Trial Chamber I, 17 January 2006, para. 115.

²⁶⁰ UN GA Res. 61/177, 20 December 2006, Art. 24.

²⁶¹ See Human Rights Committee, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13 (no suggestion that the right to a remedy under the ICCPR is geographically restricted).

²⁶² 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, reprinted in Adam Roberts & Richard Guelff, Documents on the Laws of War 67 (Oxford: Oxford University Press 3rd ed. 2000); Hisakazu Fujita, Isomi Suzuki and Kantato Nagano, War and the Rights of Individuals, Renaissance of Individual Compensation, Nippon Hyoron-sha Co. Ltd. Publishers (1999), expert opinions by Frits Kalshoven 31; Eric David 49; Christopher Greenwood 59.

²⁶³ Hisakazu Fujita, Isomi Suzuki and Kantaro Nagano, *War and the Rights of Individuals, Renaissance of Individual Compensation*, Nippon Hyoron-sha Co. Ltd. Publishers (1999), expert Opinion by David, Eric, p.51.

5.1. LEGISLATION PROVIDING FOR COMPENSATION AND PROTECTION OF VICTIMS AND WITNESSES

Article 118 of the Criminal Code states that the protection of the victim and reparation for the harm suffered are among the goals of the criminal proceedings.²⁶⁴ According to Article 120 of the Criminal Code, victims of an offence have the right to restitution, reparation for the harm caused and compensation for the damages.²⁶⁵ This provision does not limit its application to victims based on their nationality or to criminal proceedings based on any particular form of jurisdiction, so it would permit civil claims for these form of reparations in criminal proceedings based on universal jurisdiction.

With regards to the protection of victims and witnesses, Article 120 (3) of the Organic Code of Criminal procedure provides victims with the possibility to ask for “means of protection in the face of a possible attempt against their lives or those of their relatives.”²⁶⁶ The means of protection available are outlined in Chapter II and II of the 2006 Law on the Protection of Victims, Witnesses and Other Subjects of the Proceedings.²⁶⁷ The present law provides individuals which may be endangered in connection with the criminal proceedings with the possibility to receive any kind of protection that appears necessary under the specific circumstances of the case before, during and after the trial. According to Article 4, the following persons may benefit from the protection provided by the 2006 Law:

1. any individual who is endangered as a result or in occasion of his actual or eventual participation in a criminal proceeding, being a direct or indirect victim, witness, expert, official of the General Prosecutor Office or of the police force, or any other subject intervening in the proceedings.
2. Members of the family, up to the fourth grade of consanguinity and to the second of affinity
3. Any other individual who requests them due to his relationship with the person affected by these measures.²⁶⁸

²⁶⁴ Original text: “*Artículo 118. La protección y reparación del daño causado a la víctima del delito son objetivos del proceso penal...*”

²⁶⁵ Original text: “*Artículo 120. La responsabilidad civil establecida en los artículos anteriores comprende: 1. La restitución. 2. La reparación del daño causado. 3. La indemnización de perjuicios.*”

²⁶⁶ Original text: “*Artículo 120. Quien de acuerdo con las disposiciones de este Código sea considerado víctima, aunque no se haya constituido como querellante, podrá ejercer en el proceso penal los siguientes derechos: ... 3. Solicitar medidas de protección frente a probables atentados en contra suya o de su familia...*”

²⁶⁷ *Ley de Protección de víctimas, testigos y demás sujetos Procesales* No. 58.536, 4 October 2006.

²⁶⁸ Original text: “*Article 4. Son destinatarios de la protección prevista en esta Ley, todas las personas que corran peligro por causa o con ocasión de su intervención actual, o eventual, en el proceso penal, por ser víctima directa o indirecta, testigo, experto o experta, funcionario o funcionaria del Ministerio*

There is no restriction based on the nature of the crime object of the proceedings, but the determination of the appropriateness of the protective measure is made on a case by case basis by the competent judge upon request by prosecutor (Article 17 of the 2006 Law).

5.2. LEGISLATION PROVIDING FOR UNIVERSAL JURISDICTION OVER TORTS IN CIVIL CASES

The main criterion to determine the jurisdiction of Venezuelan courts over torts in civil cases is the domicile of the defendant, this being within the territory of the Republic. Nevertheless the Code of Civil Procedure and the Venezuelan Private International Law list some exceptions that allow court to hear cases against individuals domiciled abroad. Pursuant to Article 53 of the Code of Civil Procedure, Venezuelan courts have jurisdiction over tort cases against people domiciled abroad

- 1) If the goods which are the subject of the dispute are located in Venezuela.
- 2) If the dispute results from obligations that have to be executed in Venezuelan territory or that derive from contracts undertaken or facts that took place in the Venezuelan territory.
- 3) If the parties submit themselves either expressly or tacitly to their jurisdiction.²⁶⁹

The first two paragraphs appear to be limited to torts arising out of contractual disputes. The third paragraph might apply to other torts, but there appears to be no authoritative judicial interpretation of this paragraph. However, Article 54 adds that someone not domiciled in Venezuela who is temporarily present in the territory of the Republic can be brought in front of Venezuela courts "in any instance of dispute arising from personal rights which execution can be demanded anywhere."²⁷⁰ Article 54 is more broadly worded and it is possible that it might be interpreted to apply to torts generally.

Público o de los órganos de policía, y demás sujetos, principales y secundarios, que intervengan en ese proceso. Las medidas de protección pueden extenderse a los familiares, por parentesco dentro del cuarto grado de consanguinidad o segundo de afinidad, y a quienes por su relación inmediata de carácter afectivo, con quienes se señalan en el párrafo anterior, así lo requieran."

²⁶⁹ Original text: "Artículo 53. Además de la competencia general que asignan las Secciones anteriores a los Tribunales venezolanos en los juicios intentados contra personas domiciliadas en el territorio nacional, los Tribunales de la República tendrán competencia para conocer de las demandas intentadas contra personas no domiciliadas en la República, aunque se encuentren en su territorio: 1) Si se tratare de demandas sobre bienes situados en el territorio de la República. 2) Si se tratare de obligaciones provenientes de contratos o hechos verificados en el territorio de la República o que deban ejecutarse en ella. 3) Cuando las partes se sometan expresa o tácitamente a la jurisdicción de los Tribunales de la República."

²⁷⁰ Original text: "Artículo 54. Si quien no tuviere domicilio en la República se encontrare transitoriamente en su territorio, podrá ser demandado ante los Tribunales respectivos, no sólo en los casos expresados en el artículo precedente, sino también cuando el demandado haya sido citado personalmente en el territorio de la República y en cualquier caso de demandas relativas a derechos personales en que la ejecución pueda exigirse en cualquier lugar."

Therefore, in the instances provided for by Article 53 (3) and 54, where no specific link to the forum is required, it might be possible for Venezuelan courts to exercise universal jurisdiction over torts.

Article 51 of the Venezuelan Organic Code of Criminal Procedure specifies that the possibility to present a civil claim in front of the judge that pronounced the criminal sentence is not detrimental to the right of the victim to file a civil lawsuit.²⁷¹ It is not clear, however, whether any amount awarded in the criminal proceedings (see Section 5.3. below) would be deducted from any award in a civil action.

5.3. CIVIL CLAIMS IN CRIMINAL PROCEEDINGS

In Articles 113²⁷² to 127, the Venezuelan Criminal Code set out the principles governing civil responsibility arising from a criminal conduct. Article 120 of the Criminal Code states that civil responsibility arising from the commission of a criminal offence includes three forms of reparation:

- 1) Restitution
- 2) Reparation for the harm caused
- 3) Compensation for the damages.²⁷³

It is not clear, however, whether the term “reparation for the harm caused” includes all forms of reparations to which victims are entitled in addition to restitution and compensation. Victims and their heirs may bring their civil claims as part of criminal proceedings or independently in front of the civil courts (for the latest case see in this sub-section below).

According to Article 49 of the Venezuelan Organic Code of Criminal Procedure, once the sentence has become *res iudicata* (which means that appeal is no longer available), the victim, or whoever has the right to exercise a civil action,²⁷⁴ can demand the reparation for

²⁷¹ Original text: “Artículo 51. La acción civil se ejercerá, conforme a las reglas establecidas por este Código, después que la sentencia penal quede firme; sin perjuicio del derecho de la víctima de demandar ante la jurisdicción civil.”

²⁷² Original text: “Artículo 113. Toda persona responsable criminalmente de algún delito o falta, lo es también civilmente. La responsabilidad civil nacida de la penal no cesa porque se extingan éstas o la pena, si no que durará como las demás obligaciones civiles con sujeción a las reglas del derecho civil. Sin embargo, el perdón de la parte ofendida respecto a la acción penal, produce la renuncia de la acción civil si no se ha hecho reserva expresa. Se prescribirá por diez años la acción civil que proceda contra funcionarios públicos por hechos ejecutados en el ejercicio del cargo.”

²⁷³ Original text: “Artículo 120. La responsabilidad civil establecida en los artículos anteriores comprende: 1. La restitución. 2. La reparación del daño causado. 3. La indemnización de perjuicios.”

²⁷⁴ Original text: “Artículo 49. La acción civil para la restitución, reparación e indemnización de los daños y perjuicios causados por el delito, sólo podrá ser ejercida por la víctima o sus herederos, contra el autor y los partícipes del delito y, en su caso, contra el tercero civilmente responsable.”

the harm cause and the compensation for the damages to the judge that pronounced the criminal sentence.²⁷⁵ The rules for the proceedings in front of the criminal tribunal are outlined in Articles 423 to 431 of the Organic Code of Criminal Procedure. Although some countries permit civil claims to be heard during the course of the criminal proceeding, according to Venezuelan law the judgment being *res iudicata* is a requirement to initiate a civil action in the criminal court that issued it. Therefore, reparation or compensation can be obtained only after the criminal proceedings are over and there is no further possibility of appeal.

However, none of the aforementioned provisions refer specifically to cases where criminal extraterritorial jurisdiction is premised on the basis of active or passive personality, the protective principle or universal jurisdiction. In the absence of an express provision to the contrary, it is possible that whenever Venezuelan courts can exercise extraterritorial criminal jurisdiction (under whichever principle, including universal jurisdiction), they will also have jurisdiction over tort claims brought as part of the criminal proceedings.

5.4. CIVIL CLAIMS PROCEDURES

Any individual criminally responsible for an offence also bears the civil responsibility arising from the same conduct (Article 113 Criminal Code). Civil responsibility does not cease if criminal responsibility or punishment is extinguished. There is no need for approval by a prosecutor to start the civil law suit for the civil responsibility arising from a criminal offence, which follows the standard rules dictated for civil proceedings.²⁷⁶

However, nothing in the Criminal Code limits the applicability of Article 113 to territorial jurisdiction, so it should apply whether criminal proceeding was based on universal jurisdiction. It is not clear whether a civil proceeding would have to be suspended if a criminal proceeding is instituted based on the conduct which is the subject of the civil proceedings.

The scope of remedies that can be awarded to victims according to Venezuela legislation – restitution, reparation for the harm cause and compensation for the damages – may be more limited than the rights of victims under international law and standards to five forms of reparations – restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition. Although some of these forms of reparation could only be provided by the state where the crime occurred or the convicted person's state, and, therefore, not be possible to include in a Venezuelan court judgment in a criminal case, some of these forms of reparations could be provided by the convicted person, such as providing satisfaction in the form of an apology to the victim or to the victim's family.

²⁷⁵ Original text: "*Artículo 422. Firme la sentencia condenatoria, quienes estén legitimados para ejercer la acción civil podrán demandar, ante el Juez unipersonal o el Juez presidente del tribunal que dictó la sentencia, la reparación de los daños y la indemnización de perjuicios.*"

²⁷⁶ Original text: "*Artículo 113. ...La responsabilidad civil nacida de la penal no cesa porque se extingan éstas o la pena, sino que durar como las demás obligaciones civiles con sujeción a las reglas del derecho civil...*"

6. OBSTACLES TO THE EXERCISE OF CRIMINAL OR CIVIL JURISDICTION

Venezuela has failed to define many crimes under international law as crimes under national law. Furthermore, the rules of superior responsibility are inconsistent with international law. In addition, there are a number of defences in Venezuelan law that are broader than defences permitted under international law with respect to crimes under international law or which should be applicable to such crimes. There are also a number of other serious obstacles in Venezuelan law to prosecuting persons suspected of crimes under international law, based on universal jurisdiction, including uncertainties regarding the applicability of statutes of limitations and the requirement of dual criminality.

6.1. FLAWED OR MISSING DEFINITIONS OF CRIMES UNDER INTERNATIONAL LAW, PRINCIPLES OF CRIMINAL RESPONSIBILITY OR DEFENCES

Definitions of crimes - general

Regrettably, many crimes under international law are not defined as crimes under Venezuelan law. As for war crimes and torture, although some conduct is punished as such by the Criminal Code, there are no definitions consistent with international standards. After the amendment of 2000, the Criminal Code defines the crime of enforced disappearances. However, genocide, crimes against humanity and extrajudicial executions are not defined as crimes under Venezuelan law. Accordingly, in Venezuela persons suspected of such crimes can only be prosecuted for ordinary crimes if the conduct amounts to an ordinary crime. Although some of the conduct amounting to crimes under international law can be prosecuted as ordinary crimes, this alternative is not satisfactory as the elements of the crimes are in many instances different, a conviction for an ordinary crime does not convey the same moral condemnation as one for a crime under international law and does not necessarily involve as severe a punishment and, mainly, because apart from a few rare exceptions, there is no provision providing Venezuelan courts with universal jurisdiction over ordinary crimes (see Section 4.1. above).

The fundamental distinction between crimes under international law, which are attacks on the entire international community, and ordinary crimes under national law, which are a concern of the state where the crime was committed, was vividly demonstrated in the decision by the International Criminal Tribunal for Rwanda (ICTR) in 2006, to refuse to transfer a case involving charges of genocide to Norway, where the accused would have faced only a charge of murder as an ordinary crime. The Trial Chamber explained:

“In this case, it is apparent that the Kingdom of Norway does not have jurisdiction

(*ratione materiae*) over the crimes as charged in the confirmed Indictment. In addition, the Chamber recalls that the crimes alleged – genocide, conspiracy to commit genocide and complicity in genocide – *are significantly different in term of their elements and their gravity from the crime of homicide*, the basis upon which the Kingdom of Norway states that charges may be laid against the Accused under its domestic law. The Chamber notes that the crime of genocide is distinct in that it requires the ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’. This specific intent is not required for the crime of homicide under Norwegian criminal law. Therefore, in the Chamber’s view, the *ratione materiae* jurisdiction, or subject matter jurisdiction, for the acts alleged in the confirmed Indictment does not exist under Norwegian law. Consequently, Michel Bagaragaza’s alleged criminal acts cannot be given their full legal qualification under Norwegian criminal law, and the request for the referral to the Kingdom of Norway falls to be dismissed.”²⁷⁷

The Appeals Chamber affirmed, stating that it fully appreciated that

“...Norway’s proposed prosecution of Mr. Bagaragaza, even under the general provisions of its criminal code, intends to take due account of and treat with due gravity the alleged genocidal nature of the acts underlying his present indictment. However, in the end, *any acquittal or conviction and sentence would still only reflect conduct legally characterized as the ‘ordinary crime’ of homicide*. . . . Furthermore, *the protected legal values are different*. The penalization of genocide protects specifically defined groups, whereas the penalization of homicide protects individual lives.”²⁷⁸

In 2000 the Mixed Commission of the Permanent Commission of Internal Affairs of the Parliament was charged with the study of the Code of Criminal Procedure, the Criminal Code and the Code of Military Justice, with a view to their amendment. One of the tasks of the Commission was the study of the existing legislation in order to check its conformity to international law and standards. Although the sub-commission in charge of the revision of the Criminal Code highlighted the need for a reform in order to introduce crimes under international law into Venezuelan legislation and to comply with Venezuela’s international obligations, in December 2004 the Mixed Commission was dissolved and the partial amendment of the existing code adopted in 2005 did not take into account the suggestions of the Mixed Commission. The relevant propositions of the Mixed Commission are discussed below where relevant.

Definitions of crimes - war crimes

There is no crime in the Criminal Code defined as ‘war crime’. Nevertheless, as mentioned

²⁷⁷ *Prosecutor v. Bagaragaza*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway – Rule 11 *bis* of the Rules of Procedure and Evidence, Case No. ICTR-2005-86-11 *bis*, Trial Chamber, 19 May 2006, para. 16 (emphasis added).

²⁷⁸ *Prosecutor v. Bagaragaza*, Decision on Rule 11 *bis* Appeal, Case No. ICTR-05-86- AR11 *bis*, Appeals Chamber, 30 August 2006, para. 16 (emphasis added).

above (see Section 4.3.1), there is a chapter in the Criminal Code titled ‘Crimes against international law’ that punishes some conduct amounting to war crimes. In particular Article 155²⁷⁹ aims to punish violations of certain principles of international law or international humanitarian law. Nevertheless, the vague reference to ‘the principles of war observed by civilized peoples’ and the non-exclusive character of list provided leave unclear which war crimes under conventional and customary international humanitarian law are included. Not only could the application of this provision generate difficulties for judges who are not experts in international humanitarian law, but there is also the possibility that the structure of the provision, containing merely a reference to principles and no express mention of which treaties and rules of customary international law are covered, is at odds with general principles of legal certainty under Venezuelan law. Furthermore, non-international armed conflicts are expressly excluded from the scope of application of the norm. Similar considerations apply to the provisions of the Code of Military Justice (see Section 4.3.1).

It has been impossible to locate drafts of the Mixed Commission concerning war crimes.

Definition of crimes – crimes against humanity

As noted in Section 4.3.2 above, although Article 29 of the Venezuelan Constitution refers to crimes against humanity when stating that these are not subject to statutes of limitations, Venezuela has not defined as such under national law any of the crimes listed in the Rome Statute as against humanity. The lack of such provisions might create problems in the application of Article 4 (9) of the Criminal Code, which seems to provide Venezuelan courts with universal jurisdiction over crimes against humanity.”²⁸⁰ It is true that some crimes against humanity can be prosecuted as ordinary crimes. However, as already discussed, prosecution of persons for ordinary crimes rather than for crimes under international law does not fully reflect the moral condemnation attached and, in some cases, the punishment. Furthermore, this choice would exclude crimes committed by foreigners abroad as there is no provision in the Venezuelan Criminal Code allowing courts to exercise universal jurisdiction over ordinary crimes, apart from a few narrow exceptions (see Section 4.1 above).

In a 2003 draft, the sub-commission for the Criminal Code of the Mixed Commission, suggested the adoption of a comprehensive definition of crimes against humanity which essentially reproduced article 7 of the Rome Statute (see above Section 4.3.2).

Definitions of crimes - genocide

As discussed above in section 4.3.3, Venezuela has failed to define genocide as a crime under national law. In the 2003 Draft the Sub-Commission suggested inserting an article penalizing genocide in the Criminal Code, and proposed a detailed definition of this crime drawing from the definition given in the 1948 Genocide Convention and in the Rome Statute, but expanding the scope of application of the provision. The Sub-Commission proposed new

²⁷⁹ *Supra* note 141.

²⁸⁰ *Supra* note 194.

categories of protected groups including 'groups characterised by sexual orientation, political groups or groups whose members have physical, social or cultural characteristics because of their belonging to that specific group'.²⁸¹

Definitions of crimes - torture

As noted above in Section 4.3.4, Article 46 of the 1999 Constitution of Venezuela guarantees the right of all persons to physical and moral integrity by providing that "no one can be submitted to punishments, torture or cruel, inhuman or degrading treatment" and that "any public employees who, in virtue of its office, ill-treat or submit to mental or physical suffering any individual, or who instigate or tolerate this sort of behaviour, will be punished according to the law."²⁸² Even though the offence of torture is not classified as such in the Criminal Code, Article 181 of the 2005 Criminal Code punishes public employees "who commits against the detainee or the convicted arbitrary acts or acts not authorised by the regulations of the circumstances" and more harshly the commission or the order to commit offences to human dignity, molestations, torture or physical or moral abuses against detainees by their guardians or jailers.²⁸³

²⁸¹ Original text: "*Quien con la intención de destruir total o parcialmente un grupo nacional, étnico, racial, religioso, de orientación sexual, político o cuyos integrantes tengan características físicas, sociales o culturales entre sí por razón de su pertenencia al mismo, ocasionare, ordenare o teniendo autoridad para hacerlo, no impidiere la muerte de alguno o varios de sus miembros, será castigado con pena de prisión de veinticinco a treinta años, multa de doscientas mil unidades tributarias e inhabilitación para ejercer cualquier función pública o representativa por quince años más, luego de cumplida la pena de prisión. Tales conductas son como sigue:*

- a) *Causar la muerte de miembros del grupo;*
- b) *Lesionar gravemente la integridad física o mental de los miembros del grupo;*
- c) *Someter intencionalmente a miembros del grupo a condiciones de existencia que hayan de acarrear su destrucción física, total o parcial;*
- d) *Dictar o ejecutar medidas destinadas a impedir nacimientos en el seno del grupo*
- e) *Trasladar o sustraer por la fuerza a niños del grupo a otro grupo.*

La apología o instigación a cometer este crimen, difundidas por cualquier medio, será castigada con pena de prisión de cinco a diez años, multa de cien mil unidades tributarias e inhabilitación para ejercer funciones públicas o representativas por cinco años más, luego de cumplida la pena de prisión. Asimismo, se castigará a quien pretenda la instauración de regímenes o instituciones que amparen o favorezcan prácticas o ideologías genocidas."

²⁸² *Supra* note 236.

²⁸³ Original text: "*Artículo 182 - Todo funcionario público encargado de la custodia o conducción de alguna persona detenida o condenada, que cometa contra ella actos arbitrarios o la someta a actos no autorizados por los reglamentos del caso, será castigado con prisión de quince días a veinte meses. Y en la misma pena incurrirá el funcionario público que investido, por razón de sus funciones, de autoridad respecto de dicha persona, ejecute con ésta alguno de los actos indicados. Se castigarán con prisión de*

This limited definition of the crime of torture, however, fails to fulfil Venezuela's obligations under Article 4 (1) of the Convention against Torture to "ensure that all acts of torture", as well as "an attempt to commit torture" and "an act by any person which constitutes complicity or participation in torture", "are offenses under its criminal law". The Committee against Torture, the expert body established under the Convention against Torture to monitor implementation of that treaty, in its 2002 Concluding Observation on the periodic report submitted by Venezuela in 2000 highlighted that Venezuela has failed "to classify torture as a specific offence in Venezuelan legislation, in accordance with the definition in article 1 of the Convention."²⁸⁴ The Committee recommended that Venezuela "adopt legislation making torture a punishable offence...[p]ursuant to the fourth transitional provision of the new Constitution,²⁸⁵ which requires a special act or the reform of the Criminal Code within a year of the establishment of the National Assembly"²⁸⁶ - this period had already been greatly exceeded. The definition given in Article 181 fails to satisfy Venezuela's obligations under the Convention against Torture in a number of ways, including the following:

- It does not define the crime describe the provision as torture;
- It does not include all public officials;
- There is no reference to the 'severe pain or suffering, whether physical or mental' which defines the conduct of torture;
- It does not criminalize all acts of torture, including attempt, complicity and participation;
- There is no specification of what amount to "offences to human dignity, molestations, tortures or physical or moral abuses";
- It does criminalize the crimes listed being committed at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity; and
- It does not provide for universal jurisdiction.

3 a 6 años los sufrimientos, ofensas a la dignidad humana, vejámenes, torturas o atropellos físicos o morales cometidos en persona detenida por parte de sus guardianes o carceleros, o de quien diera la orden de ejecutarlos en contravención a los derechos individuales reconocidos en el numeral 3 del artículo 60 de la Constitución."

²⁸⁴ Conclusions and recommendations of the Committee against Torture: Venezuela, UN Doc. CAT/C/CR/29/2, 23 December 2002, para.10 (a).

²⁸⁵ Original text: "*Disposición Transitoria Cuarta - Dentro del primer año, contado a partir de su instalación, la Asamblea Nacional aprobará: 1. La legislación sobre la sanción a la tortura, ya sea mediante ley especial o reforma del Código Penal.*"

²⁸⁶ Conclusions and recommendations of the Committee against Torture: Venezuela, UN Doc. CAT/C/CR/29/2, 23 December 2002, para.11 (a).

The definition given in the Criminal Code fails to implement effectively Venezuelan's obligations under the Inter-American Convention prevent and punish torture and other cruel, inhuman, or degrading treatment or punishment (Art. 1, 2, 7) in a number of ways, including the ones observed above in relation to the Convention against Torture and the following:

- It does not include punishment for the "use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish";
- It does not include punishment for "other cruel, inhuman, or degrading treatment or punishment".

Definitions of crimes - extrajudicial executions

As noted above in Section 4.3.5, Venezuela has not defined extrajudicial execution as a crime in the Criminal Code or additional legislation. Furthermore, there is no reference to this crime in the work of the Mixed Commission.

Definitions of crimes - enforced disappearances

As discussed above (see Section 4.3.6), in 2000 Venezuela adopted a law aimed to amend the Criminal Code in order to implement Venezuela's obligations under the Inter-American Convention on the Forced Disappearances.²⁸⁷ In Article 180-A of the Criminal Code Venezuela introduced the crime of enforced disappearance in its national legislation, defining enforced disappearances as the unlawful deprivation by a civil or military public official of any person of his or her freedom and the refusal to admit the detention or to give information on the fate or the conditions of the disappeared person, preventing the person detained from exercising his or her constitutional right and guarantees.²⁸⁸

Principles of criminal responsibility

Venezuelan Criminal Code and the Code of Military Justice provide the general principles of criminal responsibility. As explained below, the principle of command and superior responsibility falls short of the principles of responsibility required under international law with respect to crimes under international law.

There are a number of differences between the principle of command and superior responsibility in Venezuelan law and in the Rome Statute and other international law. The principle of superior responsibility in Venezuelan law is considerably weaker than the principle in Articles 86 (2) and 87 of Additional Protocol I relating to the Protection of Victims of International Armed Conflicts,²⁸⁹ Article 6 of the International Law Commission's

²⁸⁷ *Ley de Reforma Parcial del Código Penal, Gaceta Oficial Extraordinaria No. 5.494, 20 October 2000.*

²⁸⁸ *Supra* note 249.

²⁸⁹ Paragraph 2 of Article 86 (Failure to act) of Protocol I reads:

1996 Draft Code of Crimes against the Peace and Security of Mankind²⁹⁰ and Article 28 of the Rome Statute, which itself falls short of other international law in some respects.²⁹¹ This

“1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.”

Article 87 (Duty of commanders) of Protocol I reads:

“1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.”

²⁹⁰ Article 6 (Responsibility of superiors) of the Draft Code of Crimes, which was intended to apply both to international and national courts, states:

“The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.”

²⁹¹ Article 28 (Responsibility of commanders and other superiors), which largely reflects customary international law, but falls short by articulating a lesser standard of criminal responsibility for civilian superiors and applies only in trials in the International Criminal Court, provides:

“In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

principle can be found in Article 474 of the Code of Military Justice, which concerns the responsibility of military commanders. After a list of crimes against international law (see Section 4.3.1 above), Article 474 states that:

“the maximum sentence [indicated for the crime committed] applies to anyone who instigates the crime and to the superior commander.”²⁹²

There is no specific reference either to the act or omission that triggers command responsibility, or to the foreseeability of the crime or to the duty of the commander to prevent or punish the crime or to submit the matter to the competent authorities for investigation and prosecution.²⁹³ The failure to incorporate these elements is inconsistent with international law and leaves the provision incomplete and raises concerns about its conformity with the general principles of criminal responsibility listed in Title V of Section I of the Venezuelan Criminal Code.

As for criminal responsibility for civilian superiors, Article 65 (2) of the Venezuela Criminal Code, while exonerating the subordinate from his or her criminal responsibility if the crime was committed in execution of a superior order (see below in this sub-section), shifts the criminal responsibility on the individual who gave the order which resulted in the commission of a crime.²⁹⁴ Civilian superiors, therefore, are only responsible when they issued an actual order and not when they failed to prevent or repress or report the crime as basis for their responsibility.

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”

²⁹² Original text: “Artículo 474. ...A los promotores y al de mayor graduación, les será impuesta al máximo de pena.”

²⁹³ Rome Statute, art.28.

²⁹⁴ Original text: “Artículo 65. [...] En este caso, si el hecho ejecutado constituye delito o falta, la pena correspondiente se le impondrá al que resultare haber dado la orden ilegal.”

Venezuelan Courts have jurisdiction over persons under the age of 18 but older than 15, or 12 if they acted with discernment.²⁹⁵

Defences

As discussed below, there are a number of defences in Venezuelan law that are broader than defences permitted under international law with respect to crimes under international law, such as the defences of superior orders, duress and necessity which could lead to impunity for the worst imaginable crimes.²⁹⁶

Defences – superior orders

Following the order of a superior is a defence under Venezuelan law. Article 65 (2) of the Criminal Code states that a person cannot be punished if that person “acted following legitimate and due obedience.”²⁹⁷ This defence has been contrary to international law since Nuremberg, although it may properly be taken into account in mitigation of punishment.²⁹⁸ This defence has been excluded in numerous international instruments for more than half a century, including the Nuremberg Charter, Allied Control Council Law No. 10, the ICTY Statute, the ICTR Statute, the Regulation establishing the Special Panels for East Timor, the Statute of the Special Court for Sierra Leone and the Cambodian Law establishing the Extraordinary Chambers.²⁹⁹

²⁹⁵ Original text: “*Artículo 69. No es punible: el menor de doce años, en ningún caso, ni el mayor de doce y menor de quince años, a menos que aparezca que obró con discernimiento.*”

²⁹⁶ This section is not intended to cover the full range of defences to criminal charges under Venezuelan law, but simply to discuss some of the most significant features regarding defences that have implications for prosecutions for crimes under international law based on universal jurisdiction.

²⁹⁷ Original text: “*Artículo 65. No es punible: ...2. El que obra en virtud de obediencia legítima y debida.*”

²⁹⁸ Amnesty International, *The international criminal court: Making the right choices – Part I: Defining the crimes and permissible defences*, AI Index: IOR 40/01/1997, 1 January 1997, Sect. VI.E.6.

²⁹⁹ Charter of the International Military Tribunal, annexed to the London Agreement (Nuremberg Charter), 8 Aug. 1945, Art. 8 (“The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”); Allied Control Council Law No. 10, Punishment of persons guilty of war crimes, crimes against peace and against humanity (Allied Control Council Law No. 10), 20 Dec. 1945, Art. II (4) (b) (“The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.”), (published in the Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 Jan. 1946); Charter of the International Military Tribunal for the Far East (Tokyo Charter), art. 6 (“*Responsibility of Accused.* Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”); ICTY Statute, Art. 7 (4) (“The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of

The defence provided in article 65 (2) of the Venezuelan Criminal Code is much broader than the provision of Article 33 of the Rome Statute, as there is no general exception made. Therefore it applies to all sorts of crimes. Furthermore, for the defence to apply there is no need to prove that the order was 'manifestly unlawful' or that the person did not know the unlawfulness of the order. Thus, individuals on trial in Venezuela could be granted impunity for the worst imaginable crimes in the world based on a claim that they merely were following superior orders.

Article 180-A of the Criminal Code, introduced in 2000 to implement the Inter-American Convention on the Forced Disappearances, expressly forbids this defence for the crime of enforced disappearances. After having defined the crime, Article 18-A states that

“...no order or instruction of a public authority, civil, military or of any other nature...could be invoked as a defence for the crime of enforced disappearance.”³⁰⁰

Such a provision is in line with international law since Nuremberg, and similar provisions should be introduced in the Venezuelan Criminal Code with respect to all the other crimes against international law.

Defences – mistake of fact

Regarding mistake of fact, there is no particular rule in Venezuelan law.

However, Article 61 of the Venezuelan Criminal Code requires “the intention to realize the fact that constitutes the crime”.³⁰¹ Therefore, if the crime can not be punished as result of negligent action or omission, ‘intention’ is the mental requirement necessary. Therefore, when the mistake of fact negates the mental element of the crime there might be grounds for excluding criminal responsibility. This appears to be line with the provision of Article 32 (1)

punishment if the International Tribunal determines that justice so requires.”); ICTR Statute, Art. 6 (4) (“The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.”); Draft Code of Crimes against the Peace and Security of Mankind, Art. 5; UNTAET Regulation 2000/15 (establishing the Special Panels for Serious Crimes, Dili, East Timor), 6 June 2000, Sect. 21; Statute of the Special Court for Sierra Leone (Sierra Leone Statute), Art. 6 (4); Cambodian Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 Oct. 2004 (NS/RKM/1004/006), Art. 29.

Article 33 of the Rome Statute permits the defence of superior orders to war crimes, but it is narrowly circumscribed, applicable only to trials in the International Criminal Court and contrary to every other international instrument adopted concerning crimes under international law, including instruments subsequently adopted, such as the Statute of the Special Court for Sierra Leone and the Cambodian Extraordinary Chambers Law.

³⁰⁰ Original text: “Artículo 180-A. [...] Ninguna orden o instrucción de una autoridad pública, sea esta civil, militar o de otra índole,...podrá ser invocada para justificar la desaparición forzada.”

³⁰¹ Original text: “Artículo 61. Nadie puede ser castigado como reo de delito no habiendo tenido la intención de realizar el hecho que lo constituye...”

of the Rome Statute which states that:

“A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.”³⁰²

Defences – ignorance of the law

Article 60 of the Venezuelan Criminal Code contains the rule that *Ignorantia legis neminem excusat* (the ignorance of law does not exclude criminal responsibility).³⁰³

However, Article 61 of the Venezuela Criminal Code requires “the intention to realize the fact that constitutes the crime”.³⁰⁴ Therefore, if the crime can not be punished as result of negligent action or omission, “intention” is the mental requirement necessary. Therefore, when the mistake of law negates the mental element of the crime there might be grounds for excluding criminal responsibility. This appears to be line with Article 32 (1) of the Rome Statute which excludes the defence of mistake of law, except to the extent that it negates the mental element of the crime:

“A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime or as provided for in article 33”.³⁰⁵

Defences – insanity and mental disease or defect

The defence of mental illness in Article 62 of the Venezuelan Criminal Code is essentially the same as this defence in the Rome Statute. Article 31 (1) (a) of the Rome Statute states:

“[i]n addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:

(a) The person suffers from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to

³⁰² For Amnesty International’s view on the scope of this defence, see *Making the Right Choices – Part I*, *supra*, note 299, Sect. VI.E.6.

³⁰³ Original text: “Artículo 60 - La ignorancia de la ley no excusa ningún delito ni falta.”

³⁰⁴ Original text: “Artículo 61 - Nadie puede ser castigado como reo de delito no habiendo tenido la intención de realizar el hecho que lo constituye...”

³⁰⁵ See discussion of Article 33 in footnote 300.

control his or her conduct to conform to the requirements of law[.]”³⁰⁶

According to Article 62 of the Venezuelan Criminal Code, a person is not criminally responsible if

“he or she commits the crime while asleep or in such a state of mental illness that he or she is deprived of the awareness or control over his or her own actions.”³⁰⁷

The chance of a person committing a crime under international law while asleep is slim, but this defence is consistent with the requirement in Article 30 of the Rome Statute that the perpetrator act with intent and knowledge. The second part of Article 62 of the Venezuela Criminal Code appears to be essentially the same as Article 31 (1) (a) of the Rome Statute.

Defences – intoxication

Intoxication does not constitute a defence under Venezuelan law; therefore, there cannot be any exemption from criminal responsibility in case of intoxication as provided by Article 31 (1) (b) of the Rome Statute.³⁰⁸

Nevertheless, intoxication can be both a mitigating and an aggravating circumstance under Venezuelan law. According to Article 64 of the Venezuelan Criminal Code, if the state of mental illness of the accused at the time of the crime is caused by intoxication, the following rules apply:

³⁰⁶ Article 31 (1) (a) of the Rome Statute provides that

“[i]n addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:

(a) The person suffers from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law[.]”

³⁰⁷ Original text: “*Artículo 62. No es punible el que ejecuta la acción hallándose dormido o en estado de enfermedad mental suficiente para privarlo de la conciencia o de la libertad de sus actos.*”

³⁰⁸ Article 31 (1) (b) of the Rome Statute states that

“[i]n addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:

... (b) The person is in a state of intoxication that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court[.]”

- “1. If it is proved that the accused had took in alcohol to facilitate the commission of the crime or provide him or her with an excuse, the sentence will be increased by 1/5 to 1/3...
2. If it is proved that the accused was aware and it was notorious that intoxication would make him or her provocative and quarrelsome, there would be no reduction of the sentence.
3. If the circumstances above are not proved and the state of mental illness due to intoxication is ascertained, the sentence will be reduced by 2/3...
4. If the intoxication is indication of an addiction, the sentence can be served in a rehabilitation institute.
5. If the intoxication is entirely casual or exceptional, and does not have precedents, the sentence is reduced by 1/2 to 1/4...”³⁰⁹

Although Article 64 (1) and (2) are in line with what stated in the Rome Statute, and go beyond that treaty by providing that intoxication with intent to facilitate the crime or to secure an excuse will result in an increase in the sentence, the application of Article 64 (3) and (5) to crimes against international law could result in a significant reduction of the sentence despite the gravity of the crimes committed.

Defences – compulsion, duress and necessity

As Amnesty International has argued, compulsion, duress and necessity should not be defences to crimes under international law, but should simply be grounds for mitigation of punishment.³¹⁰ However, in a regrettable political compromise, Article 31 (1) (d) of the Rome Statute permits, in strictly limited circumstances and only in trials before the International Criminal Court, defences of duress in response to threats from another person and of necessity (called “duress”) in response to threats from circumstances beyond a

³⁰⁹ Original text: “Artículo 64 - Si el estado de perturbación mental del encausado en el momento del delito proviniera de embriaguez, se seguirán las reglas siguientes: 1. Si se probare que, con el fin de facilitarse la perpetración del delito, o preparar una excusa, el acusado había hecho uso del licor, se aumentará la pena que debiera aplicársele de un quinto a un tercio, con tal que la totalidad no exceda del máximo fijado por la ley a este género de pena. Si la pena que debiere imponérsele fuere la de presidio, se mantendrá esta. 2. Si resultare probado que el procesado sabía y era notorio entre sus relaciones que la embriaguez le hacia provocador y pendenciero, se le aplicarán sin atenuación las penas que para el delito cometido establece este Código. 3. Si no probada ninguna de las dos circunstancias de los dos numerales anteriores, resultare demostrada la perturbación mental por causa de la embriaguez, las penas se reducirán a los dos tercios, sustituyéndose la prisión al presidio. 4. Si la embriaguez fuere habitual, la pena corporal que deba sufrirse podrá mandarse cumplir en un establecimiento especial de corrección. 5. Si la embriaguez fuere enteramente casual o excepcional, que no tenga precedente, las penas en que haya incurrido el encausado se reducirán de la mitad a un cuarto, en su duración, sustituyéndose la pena de presidio con la de prisión.”

³¹⁰ *Making the right choices*, supra note 299, Sect. VI.E.3 and 4.

person's control.³¹¹

Duress, necessity and compulsion are not defences under Venezuela law. Nevertheless, Article 74 (3) of the Criminal Code considers as a ground for mitigation of punishment the crime having been committed in response to threats.³¹² This provision applies when the crime has not met the threshold of Article 67.³¹³ None of these factors, however, are expressly listed as mitigating factors in Rule 145 (2) (a) of the Rome Statute.

Defences – defence of person or property

As Amnesty International has explained, self-defence and defence of others can be defences to crimes under international law in certain limited circumstances, but only when the response is reasonable and proportionate and, if deadly force is used, only when retreat is not possible.³¹⁴ Unfortunately, in another political compromise, the Rome Statute provides very broad defences of self, others and property, but these defences apply only in trials before the International Criminal Court.³¹⁵

³¹¹ Article 31 (1) (d) of the Rome Statute provides that

“[i]n addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

...

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

- (i) Made by other persons; or
- (ii) Constituted by other circumstances beyond that person's control.”

³¹² Original text: “*Artículo 74. Se consideraran circunstancias atenuantes que, salvo disposiciones especiales de la ley, no dan lugar a rebaja especial de pena, sino a que se las tome en cuenta para aplicar ,esta en menos del término medio, pero sin bajar del límite inferior de la que al respectivo hecho punible asigne la ley, las siguientes:...* 3. *Haber precedido injuria o amenaza de parte del ofendido, cuando no sea de tal gravedad que de lugar a la aplicación del artículo 67.*”

³¹³ Article 67 provides for a greater mitigation of the punishment, up to half of the sentence, depending in the gravity of the instigation, if the crime was committed in a moment of rage or intense pain determined by unlawful provocation. Original text: “*Artículo 67. El que cometa el hecho punible en un momento de arrebató o de intenso dolor, determinado por injusta provocación, será castigado, salvo disposición especial, con la pena correspondiente disminuida desde un tercio hasta la mitad, según la gravedad de la provocación.*”

³¹⁴ Amnesty International, *Making the right choices*, supra, n. 299, Sect. VI.E.5.

³¹⁵ Article 31 (1) (c) of the Rome Statute provides that

“[i]n In addition to other grounds for excluding criminal responsibility provided for in this Statute, a

Venezuelan law does not consider acting in defence of property as a ground for the exclusion of criminal responsibility. As for the defence of self and others, Article 65 (3) of Venezuelan Criminal Code contains a narrower notion of self-defence and defence of others than the one given in the Rome Statute. According to Article 65 (3) no one can be punished if he or she acted in self-defence or in defence of his or her rights, when the following circumstances occur:

- “1. Unlawful aggression by the individual affected by the act of defence.
2. Necessity to have recourse to the means used to avoid or repel the aggression.
3. Lack of provocation by the individual who claims to have acted in self-defence.
4. The person acts in self-defence, or in defence of others, from a serious and immediate danger, which was not voluntarily caused by him or her, and that is not preventable in any other way.”³¹⁶

6.2. PRESENCE REQUIREMENTS IN ORDER TO OPEN AN INVESTIGATION OR REQUEST EXTRADITION

There appears to be no provision requiring the presence of the suspect in Venezuela in order to open an investigation. Furthermore, there is no requirement that the suspect ever have been present in Venezuela for an extradition request (See Section 7.1.1.2 below).

A prosecutor can initiate an investigation whenever he or she becomes aware of the alleged commission of a punishable act for which it is not necessary to have a complaint from the victim in order to proceed (these are generally minor offences, i.e. defamation).³¹⁷

person shall not be criminally responsible if, at the time of that person's conduct:

...

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph[.]”

³¹⁶ Original text: “Artículo 65. No es punible: ...3. El que obra en defensa de su propia persona o derecho, siempre que concurren las circunstancias siguientes: a. Agresión ilegítima por parte del que resulta ofendido por el hecho. b. Necesidad del medio empleado para impedirlo o repelerlo. c. Falta de provocación suficiente de parte del que pretenda haber obrado en defensa propia. Se equipara a la legítima defensa el hecho con el cual el agente, en el estado de incertidumbre, temor o terror traspasa los límites de la defensa. d. El que obra constreñido por la necesidad de salvar su persona, o la de otro, de un peligro grave e inminente, al cual no haya dado voluntariamente causa, y que no pueda evitar de otro modo.”

³¹⁷ Original text: “Artículo 283. El Ministerio Público, cuando de cualquier modo tenga conocimiento de la perpetración de un hecho punible de acción pública, dispondrá que se practiquen las diligencias tendientes a investigar y hacer constar su comisión, con todas las circunstancias que puedan influir en

Thus, a Venezuelan prosecutor would be able to open an investigation immediately as soon as he or she learns that a person suspected of crimes under international law for which Venezuela can exercise universal jurisdiction is on his or her way to Venezuela or about to change planes at a Venezuelan airport. There is no need to wait until the suspect has entered the country on a visit that could be too short to permit an investigation to be completed and an arrest warrant issued and implemented. The absence of a presence requirement also means that Venezuela can accept cases transferred by the ICTY or ICTR more easily by completing an investigation before the transfer and issuing an arrest warrant before the transfer. If Venezuela were able to request extradition of a person suspected of a crime committed abroad (see below in Section 7), the absence of a presence requirement would mean that it could also help shoulder the burden when other states fail to fulfil their obligations to investigate and prosecute crimes under international law. Indeed, this possibility was envisaged as an essential component of the enforcement provisions of the four 1949 Geneva Conventions, each of which provide that any state party, regardless whether a suspect had ever been in its territory, as long as it “has made out a *prima facie* case”, may request extradition of someone suspected of grave breaches of those Conventions.³¹⁸ If the presence of the suspected perpetrator were to be necessary for an effective investigation in a particular case and the person cannot be extradited to Venezuela, it is very unlikely that a prosecutor would decide to open an investigation.

6.3. STATUTES OF LIMITATION APPLICABLE TO CRIMES UNDER INTERNATIONAL LAW

The Venezuelan Constitution states that statutes of limitations do not apply to serious violation of human rights, crimes against humanity and war crimes. There are several problems with these provisions as Venezuelan legislation does not define serious violation of human rights or crimes against humanity and war crimes are defined partially and in a manner which is not consistent fashion with customary international law or treaties. Furthermore, the Criminal Code makes a specific exception to the statutes of limitations only for the crime of enforced disappearances. Statutory limitations apply to civil claims in criminal proceedings.

Statutes of limitations applicable to crimes

Statutes of limitations for crimes under international law are prohibited under customary international law.³¹⁹ Venezuela is not a party to the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (UN Convention on

su calificación y la responsabilidad de los autores y demás partícipes, y el aseguramiento de los objetos activos y pasivos relacionados con la perpetración.”

³¹⁸ First Geneva Convention, Art. 49; Second Geneva Convention, Art. 50; Third Geneva Convention, Art. 129; Fourth Geneva Convention, Art. 146.

³¹⁹ See, for example, Ruth Kok, *Statutory Limitations in International Criminal Law* (TMC Asser Press, The Hague, 2007); Amnesty International, *The Prohibition of Statutory Limitations for Crimes under International Law* (forthcoming 2010).

Statutory Limitations).³²⁰ However, Article 29 of the Venezuelan Constitution – after having highlighted that the state is obliged to investigate and to prosecute offenses against human rights committed by its authorities – states that

“actions to penalize crimes against humanity, serious human rights violations and war crimes shall not be subject to statute of limitation...These offenses are excluded from any benefit that might render the offenders immune from punishment, including pardons and amnesty.”³²¹

First of all, it is not clear, whether this paragraph refers only to crimes committed by Venezuelan governmental authorities, which are the object of the first part of Article 29. or to crimes committed by any individual. Secondly, this provision causes several problems as Venezuelan Criminal Code does not define violations of human rights or crimes against humanity. The Code of Military Justice defines only partially war crimes and it is not consistent with international customary law or treaties. The constitutional provision, therefore, is difficult to apply and it has been impossible to locate relevant jurisprudence on this matter. An express exception to the statutes of limitations is made in the Criminal Code in relation to the crime of enforced disappearances. Article 180-A introduced in the Criminal Code in 2000 specifies that:

“the criminal action stemming from this crime and its punishment are not subject to statutory limitations, and the persons responsible for its commission can not enjoy any benefit, included pardon or amnesty.”³²²

As the Constitution is the higher source of law within Venezuelan legal system, it appears that enforced disappearances, crimes against humanity, serious violations of human rights and war crimes are not subject to statutory limitations with regard to criminal prosecutions, even in the absence of further specifications in the Criminal Code.

Statutes of limitation applicable to torts

Venezuela has a general statute of limitations applicable to torts, spelled out in Article 113 of the Criminal Code, according to which civil responsibility arising from criminal

³²⁰ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968 (http://www.unhchr.ch/html/menu3/b/p_limit.htm).

³²¹ Original text: “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 de los derechos humanos y los crímenes de guerra son imprescriptibles...Dichos delitos quedan excluidos de los beneficios que puedan conllevar su impunidad, incluidos el indulto y la amnistía.”

³²² Original text: “Artículo 180ª. [...] Ninguna orden o instrucción de una autoridad pública, sea esta civil, militar o de otra índole, ni estado de emergencia, de excepción o de restricción de garantías, podrá ser invocada para justificar la desaparición forzada. La acción penal derivada de este delito y su pena serán imprescriptibles, y los responsables de su comisión no podrán gozar de beneficio alguno, incluidos el indulto y la amnistía.”

responsibility does not expire if the criminal responsibility or the punishment extinguish and is subject to the general rules for civil obligations.”³²³ Title XXIV of the Civil Code contains the general statute of limitations applicable to civil obligations. According to Article 1977 of the Civil Code, civil claim arising from torts are time-barred ten years after the claim arose.³²⁴ Article 113 expressly provides that actions against public officials for acts committed while carrying out their duties are subject to the same ten-year statutory limit.³²⁵ As with crimes, there appears to be no relevant tolling principle with regard to civil claims.

6.4. DOUBLE CRIMINALITY

As there is no general provision providing Venezuelan courts with universal jurisdiction, dual criminality (a requirement that the act be subject to criminal responsibility both under the law of the place where it was committed and under Venezuelan law) is not discussed in the Venezuelan Criminal Code. Nevertheless, when Venezuelan courts are allowed to exercise universal jurisdiction, there is no requirement that the conduct have been a crime under the law of the place where it was committed. Therefore, in universal jurisdiction cases, the determination whether a crime occurred or not is left solely to Venezuela law.

Whatever the merits may be for requiring double criminality with respect to conduct that only amounts to an ordinary crime, it has no merit when the conduct amounts to a crime under international law, even if the requesting state is seeking extradition to prosecute the person for an ordinary crime when its legislation does not characterize the conduct as a crime under international law. All states have a shared obligation to investigate and prosecute conduct that amounts to crimes under international law, either by doing so in their own courts or by extraditing the suspect to another state or surrendering that person to an international criminal court, and they cannot escape this obligation by refusing to extradite on the basis of double criminality.

6.5. IMMUNITIES

Article 1 of the Venezuelan Constitution lists ‘immunity’ as an inalienable right of the nation.³²⁶ Furthermore, According to Articles 200 and 282 of the Venezuelan Constitution, members of the Venezuelan Congress and the Ombudsman enjoy immunity from criminal prosecution in Venezuelan courts for the acts committed while in office. No exclusion is mentioned for crimes under international law, but these immunities apply only to Venezuela

³²³ Original text: “Artículo 111. La responsabilidad civil nacida de la penal no cesa porque se extingan éstas o la pena, sino que durar como las demás obligaciones civiles con sujeción a las reglas del derecho civil...”

³²⁴ Original text: “Artículo 1.977. Todas las acciones reales se prescriben por veinte años y las personales por diez, sin que pueda oponerse a la prescripción la falta de título ni de buena fe, y salvo disposición contraria de la Ley.”

³²⁵ Original text: “Artículo 111.[...] Se prescribirá por diez años la acción civil que proceda contra funcionarios públicos por hechos ejecutados en el ejercicio del cargo.”

³²⁶ Original text: “Artículo 1. [...] Son derechos irrenunciables de la Nación la independencia, la libertad, la soberanía, la inmunidad, la integridad territorial y la autodeterminación nacional.”

officials and would not be relevant to universal jurisdiction unless those officials were non-nationals.

The Law on Immunities and Privileges of Foreign Diplomatic Personnel spells out the details of the status reserved to foreign diplomatic officials present on Venezuelan territory.³²⁷ According to Article 5 of the Law on Immunities, foreign diplomatic officials are exempt from civil or criminal jurisdiction exercised by Venezuelan courts.³²⁸

Amnesty International believes that the judgment in the *Arrest Warrant* case, which concluded that serving heads of state, heads of government and foreign ministers were immune from prosecution in foreign courts, is based on incorrect notions of law. Therefore, Amnesty International has urged that this ruling should be reversed and hopes that this will be done in the future, as immunity should not be granted in the case of the worst possible crimes ever to be committed. As explicated elsewhere,³²⁹ Amnesty International has explained in detail that there is no convincing basis in customary international law to accord immunity of state officials while in office when committing genocide, crimes against humanity and war crimes. It has further noted that the International Court of Justice's reasoning in the *Arrest Warrant* case failed to cite any state practice or *opinio iuris* in this respect.

Instruments adopted by the international community show a consistent rejection of immunity from prosecution for crimes under international law for any government official since the Second World War. Those instruments articulated a customary international law rule and general principle of law. Indeed, several of the international instruments adopted over the past half century were expressly intended to apply to national courts, including the 1945 Allied Control Council Law No. 10, the 1946 General Assembly resolution on the affirmation of the principles of international law recognized by the Charter of the Nuremberg Tribunal, the 1950 Nuremberg Principles prepared by the International Law Commission, the Draft Code of Offences against the Peace and Security of Mankind of 1954 and the 1991 and 1996 Draft Codes of Crimes against the Peace and Security of Mankind. Moreover, even the international instruments establishing international criminal courts envisaged that the same rules of international law reiterated in those instruments applied with equal force to prosecutions by national courts.³³⁰

³²⁷ *Ley de inmunidades y prerrogativas de los funcionarios diplomáticos extranjeros*, 17 August 1945 (<http://www.gobiernoenlinea.ve/legislacion-view/sharedfiles/126.pdf>).

³²⁸ Original text: "Artículo 5. Los funcionarios diplomáticos extranjeros están exentos de toda jurisdicción civil o criminal de los Tribunales de la República y por tanto no pueden ser procesados sino por los Tribunales de su Estado, salvo el caso en que debidamente estén autorizados por su Gobierno renuncien a la inmunidad."

³²⁹ UNIVERSAL JURISDICTION: *Belgian prosecutors can investigate crimes under international law committed abroad*, AI Index: IOR 53/001/2003 (http://www.amnesty.org/en/alfresco_asset/a50d5cdf-a508-11dc-a92d-271514ed133d/ior530012003en.html) (last visited 12 June 2008), p. 10.

³³⁰ For further analysis on this point, see Amnesty International, *Universal Jurisdiction: Belgian court has*

6.6. BARS ON RETROSPECTIVE APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL LAW OR OTHER TEMPORAL RESTRICTIONS

States have recognized for more than six decades since the adoption of the Universal Declaration of Human Rights in 1948 that the prohibition of retroactive criminal laws does not apply to national criminal legislation enacted after that conduct became recognized as criminal under international law.³³¹ Article 15 of the ICCPR, which Venezuela has ratified, contains a similar provision.³³²

Article 24 of the Venezuelan Constitution³³³ and Article 1 of the Criminal Code³³⁴ incorporate the principle of non-retroactivity of criminal legislation. Nevertheless, as highlighted above (see Section 2.2 above), according to Article 23 of the Venezuelan Constitution human rights treaties when duly ratified acquire constitutional status. In a 2002 report, the sub-commission for the Criminal Code of the Mixed Commission considered the Rome Statute, for instance, as a human rights treaty to this extent.³³⁵ Therefore, in principle, prosecution is

jurisdiction in Sharon case to investigate 1982 Sabra and Chatila killings, AI Index: EUR 53/001/2002, 1 May 2002.

³³¹ Article 11 (2) of the Universal Declaration of Human Rights declares:

“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”

³³² Article 15 of the ICCPR reads:

“(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

³³³ Original text: “*Artículo 24. Ninguna disposición legislativa tendrá efecto retroactivo, excepto cuando imponga menor pena...*”

³³⁴ Original text: “*Artículo 1. Nadie podrá ser castigado por un hecho que no estuviere expresamente previsto como punible por la ley, ni con penas que ella no hubiere establecido previamente.*”

³³⁵ Report of the Sub-commission for the Criminal Code of the Mixed Commission, *Hacia un nuevo Código Penal*, original text: “*Obligados por los compromisos contraídos internacionalmente al ratificar ante la Organización de las Naciones Unidas y aprobar entre otros, mediante la respectiva Ley, el Estatuto de Roma de la Corte Penal Internacional el cual compromete a la República a tipificar el genocidio, crímenes de lesa humanidad, así como por la inserción de Venezuela en el contexto internacional de protección de los derechos humanos y en relación con el artículo 23 constitucional que*

permitted for those crimes committed prior to the legislation enactment, but after they were recognized in “human rights treaties” that Venezuela has ratified. However, there is no definitive ruling by a Venezuelan court on this issue.

6.7. *NE BIS IN IDEM*

The principle of *ne bis in idem* (that one cannot be tried twice for the same crime) is a fundamental principle of law recognized in international human rights treaties and other instruments, including the ICCPR, the American Convention on Human Rights, Additional Protocol I and constitutive instruments establishing the ICTY, ICTR and the Special Court for Sierra Leone.³³⁶ However, apart from the vertical exception between international courts and national courts, the principle only prohibits retrials after an acquittal by the same jurisdiction.³³⁷ This limitation on the scope of the principle can serve international justice by permitting other states to step in when the territorial state or the suspect’s state conducts a sham or unfair trial.

The principle of *ne bis in idem* is spelled out by Venezuelan law in Article 20 of the Venezuelan Code of Criminal Procedure.³³⁸ Article 5 of the Criminal Code clarifies that the *ne*

señala la importancia de los tratados internacionales sobre derechos humanos en el ámbito interno”, 13 March 2002.

³³⁶ ICCPR, art. 14 (7); American Convention on Human Rights, art. 8 (4); Additional Protocol I, art. 75 (4) (h); ICTY Statute, art. 10 (1); ICTR Statute, art. 9 (1); Statute of the Special Court for Sierra Leone, art. 9.

³³⁷ The Human Rights Committee has concluded that Article 14 (7) of the ICCPR “does not guarantee *non bis in idem* with regard to the national jurisdictions of two or more States. The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State.” *A.P. v. Italy*, No. 204/1986, 2 November 1987, 2 Selected Decisions of the Human Rights Committee under the Optional Protocol 67, UN Doc. CCPR/C/OP/2, UN Sales No. E.89.XIV.1. This was also recognized during the drafting of Article 14 (7) of the ICCPR. See Marc J. Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff 1987), pp. 316-318; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: N.P. Engel 1993), pp. 272-273; Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press 1991).

The Trial Chamber in the *Tadić* case reached the same conclusion:

“The principle of *non-bis-in-idem*, appears in some form as part of the international legal code of many nations. Whether characterized as *non-bis-in-idem*, double jeopardy or *autrefois acquit*, *autrefois convict*, this principle normally protects a person from being tried twice or punished twice for the same acts. This principle has gained a certain international status since it is articulated in Article 14 (7) of the International Covenant on Civil and Political Rights as a standard of fair trial, but it is generally applied so as to cover only double prosecution in the same State.”

Prosecutor v. Dusko Tadic, Case No IT-94-1-A, July 15, 1999.

³³⁸ Original text: “*Artículo 20. Única persecución. Nadie debe ser perseguido penalmente más de una vez por el mismo hecho.*”

bis in idem principle applies to the rulings of international courts and courts of foreign countries. According to Article 5, when Venezuelan courts are exercising extraterritorial jurisdiction over an individual who has already been sentenced in a foreign country, the part of sentence he has served abroad will be taken into account in the calculation of the sentence to be imposed if he or she is found guilty.³³⁹

6.8. POLITICAL CONTROL OVER DECISIONS TO INVESTIGATE AND PROSECUTE

In Venezuela, the decision to investigate and prosecute is prerogative of the prosecutor who is also responsible for directing and supervising the activities of the investigating bodies of the police.³⁴⁰

Article 254 of the Venezuela Constitution states that the Judiciary is independent, and Chapter 3, among others, contains rules guaranteeing independence and impartiality of prosecutors and investigating bodies. Furthermore, Article 2 of the Organic law governing the Office of the General Prosecutor reiterates that the Office is independent and autonomous and no other authority can interfere or hinder the exercise of its functions.³⁴¹ These provisions indicate that there is no direct political control over decisions to investigate and prosecute and these decisions cannot be overruled by political actors.

6.9. RESTRICTIONS ON THE RIGHTS OF VICTIMS AND THEIR FAMILIES

Victims cannot initiate investigations and prosecutions, except for certain minor crimes, which do not amount to crimes under international law. However, victims have a number of rights with respect to participation in criminal proceedings. Article 188 of the Code of Criminal Procedure declares the centrality of the victim's interest throughout criminal proceedings,³⁴² and Article 120 lists the rights of the victim, among which there is the right to be informed of the status of the proceedings and the right to challenge the dismissal of the proceedings.³⁴³

³³⁹ Original text: "*Artículo 5. En los casos previstos en el artículo anterior, cuando se condene de nuevo en la República a una persona que haya sido sentenciada en el extranjero, se computará la parte de pena que haya cumplido en el otro país y el tiempo de la detención, conforme a la regla del artículo 40.*"

³⁴⁰ Article 118, Venezuelan Criminal Code.

³⁴¹ *Ley Orgánica del Ministerio Público*, 19 March 2007 (<http://www.fiscalia.gov.ve/leyes/2-LEYMP.pdf>). Original text: "*Artículo 2. El Ministerio Público es autónomo e independiente de los demás órganos del Poder Público y en consecuencia, no podrá ser impedido ni coartado en el ejercicio de sus funciones por ninguna otra autoridad.*"

³⁴² Original text: "*Artículo 118. Víctima. La protección y reparación del daño causado a la víctima del delito son objetivos del proceso penal. El Ministerio Público está obligado a velar por dichos intereses en todas las fases. Por su parte, los jueces garantizarán la vigencia de sus derechos y el respeto, protección y reparación durante el proceso. Asimismo, la policía y los demás organismos auxiliares deberán otorgarle un trato acorde con su condición de afectado, facilitando al máximo su participación en los trámites en que deba intervenir.*"

³⁴³ Original text: "*Artículo 120. Derechos de la víctima. Quien de acuerdo con las disposiciones de este Código sea considerado víctima, aunque no se haya constituido como querellante, podrá ejercer en el*

The rights of the victims or their families are not limited with regard to their civil claims for crimes arising from criminal offences. As noted above in Section 5.2, in addition to the possibility of initiating a civil proceeding, victims can bring a private civil claim against the suspect based on the conduct which is the subject of a criminal proceeding. However, victims are not able to obtain the full range of reparations against convicted persons to which they are entitled under international law (see Section 5.3 above).

6.10. AMNESTIES

Amnesties and similar measures of impunity for crimes under international law are prohibited under international law.³⁴⁴ The Venezuelan Constitution expressly prohibits a pardon or amnesty for crimes against humanity and serious human rights violations.³⁴⁵ This prohibition can also be found in the Criminal Code in relation to the crime of enforced disappearances.³⁴⁶ Person responsible for crimes against humanity, serious human rights violations and war crimes were, accordingly, explicitly excluded from the benefits of the

proceso penal los siguientes derechos:

1. *Presentar querrela e intervenir en el proceso conforme a lo establecido en este Código;*
2. *Ser informada de los resultados del proceso, aun cuando no hubiere intervenido en él;*
3. *Solicitar medidas de protección frente a probables atentados en contra suya o de su familia;*
4. *Adherirse a la acusación del Fiscal o formular una acusación particular propia contra el imputado en los delitos de acción pública; o una acusación privada en los delitos dependientes de instancia de parte;*
5. *Ejercer las acciones civiles con el objeto de reclamar la responsabilidad civil proveniente del hecho punible;*
6. *Ser notificada de la resolución del Fiscal que ordena el archivo de los recaudos;*
7. *Ser oída por el tribunal antes de decidir acerca del sobreseimiento o antes de dictar cualquier otra decisión que ponga término al proceso o lo suspenda condicionalmente;*
8. *Impugnar el sobreseimiento o la sentencia absolutoria.”*

³⁴⁴ See, for example, Amnesty International, *Sierra Leone: Special Court for Sierra Leone: denial of right to appeal and prohibition of amnesties for crimes under international law*, AI Index: AFR/012/2003, 31 October 2003.

³⁴⁵ Original text: “*Artículo 29. Las violaciones de derechos humanos y los delitos de lesa humanidad... quedan excluidos de los beneficios que puedan conllevar su impunidad, incluidos el indulto y la amnistía.*”

³⁴⁶ Original text: “*Artículo 180-A. La acción penal derivada de este delito y su pena serán imprescriptibles, y los responsables de su comisión no podrán gozar de beneficio alguno, incluidos el indulto y la amnistía.*”

Amnesty Law passed in 2000.³⁴⁷

³⁴⁷ *Ley de Amnistía Política General*, Gaceta Oficial No. 36.934, 17 April 2000. Original text: “*Artículo 4 - De conformidad con lo dispuesto en los artículos anteriores, las autoridades 29 de la Constitución Bolivariana de la República, no serán beneficiadas por la presente Ley, aquella personas que hubieren incurrido en delitos de lesa humanidad, violaciones graves a los derechos humanos y crímenes de guerra.*”

7. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

7.1 EXTRADITION

Venezuelan courts have held that Venezuelan law regarding extradition is consistent with the principles of international law.³⁴⁸ In Venezuela extradition is recognized and regulated by the Criminal Code and the Organic Code of Criminal Procedure, and by international treaties signed by the Republic with various countries in the international community.³⁴⁹ In Venezuela extradition is not dependent on the existence of a treaty. Nevertheless, extradition requests to or from Venezuela are generally regulated by bilateral or multilateral treaties. However, Venezuelan law also contains a number of significant obstacles to extradition and to mutual legal assistance that may limit Venezuela's ability to provide effective cooperation with other states in the investigation and prosecution of crimes under international law.

Extradition to Venezuela

Extradition to Venezuela from another country is regulated as a special procedure (*Procedimiento de Extradición*) under Title VII of the Code of Criminal Procedure. Article 391 provides that the sources of this procedure consist of "the provisions of this Section, and international treaties, conventions, and agreements signed by Venezuela."³⁵⁰

In relation to active extradition (when Venezuela seeks the extradition of an individual), Article 392 of the Criminal Code provides that when notice is received that a person charged with a crime by a Venezuelan prosecutor, and for whom the judge in charge of supervision (*Juez de control*) has issued a preventive measure of deprivation of freedom, is in a foreign country, that judge will communicate with the Criminal Appellate Chamber of the Supreme Court of Justice to solicit a request for extradition and provide copies of the relevant

³⁴⁸ Original text: "En Venezuela la institución extraditacional es...reconocida conforme a los principios de derecho internacional." Criminal Appellate Chamber of the Supreme Court of Justice, Judgment No. 333 of March 22, 2000. This seems to suggest that they will interpret extradition in conformity to these principles.

³⁴⁹ Original text: "En Venezuela la institución extraditacional es reconocida y regulada por el Código Penal, Código Orgánico Procesal Penal, tratados internacionales suscritos por la República con distintos países de la comunidad internacional..." Criminal Appellate Chamber of the Supreme Court of Justice, Judgment No. 333 of March 22, 2000.

³⁵⁰ Original text: "Artículo 391. La extradición se rige por las normas de este Título, los tratados, convenios y acuerdos internacionales suscritos por la República."

documents supporting his request.³⁵¹

The Supreme Court of Justice has 30 days to decide, after it has heard the views of the General Prosecutor,³⁵² whether or not it is appropriate to request extradition. In the event that the Supreme Court of Justice determines that extradition is permitted under Venezuelan law, it will refer the matter to the Executive.³⁵³ The Ministry of Foreign Affairs, a political body, is responsible for sending the extradition request within sixty days to the authorities of the foreign country where the requested person is located, providing all the certifications and translations required.³⁵⁴ The Executive may ask the requested country, within the period provided in international treaties or other applicable international law, to place the requested person in preventive detention, and to retain any objects related to the crime.³⁵⁵

Venezuela does not require that there be a treaty with another state for it to extradite a person to that state. However, as many other states have such a requirement for the extradition of persons to Venezuela, it is a party to several extradition treaties, such as the Inter-American Convention on Extradition,³⁵⁶ and bilateral treaties with the USA, Cuba, Mexico and other Latin American countries,³⁵⁷ as well as numerous multilateral treaties containing extradition and mutual legal assistance provisions.

³⁵¹ Original text: “Artículo 392. Cuando se tuviere noticias de que un imputado respecto del cual el Ministerio Público haya presentado la acusación y el juez de control haya dictado una medida cautelar de privación de libertad, se halla en país extranjero, el juez de control se dirigirá a la Corte Suprema de Justicia con copia de las actuaciones en que se funda. En caso de fuga de quien esté cumpliendo condena, el trámite ante la Corte le corresponderá al Ministerio de Justicia...”

³⁵² Article 108(16) of the Code of Criminal Procedure.

³⁵³ Original text: “Artículo 392. [...] La Corte Suprema de Justicia, dentro del lapso de treinta días contados a partir del recibo de la documentación pertinente, declarará si es procedente o no solicitar la extradición, y, en caso afirmativo, remitirá copia de lo actuado al Ejecutivo Nacional.”

³⁵⁴ Original text: “Artículo 393. El Ministerio de Relaciones Exteriores certificará y hará las traducciones cuando corresponda, y presentará la solicitud ante el gobierno extranjero en el plazo máximo de sesenta días.”

³⁵⁵ Original text: “Artículo 394. El Ejecutivo Nacional podrá requerir al país donde se encuentra la persona solicitada, su detención preventiva y la retención de los objetos concernientes al delito, con fundamento en la solicitud hecha ante la Corte Suprema de Justicia por el juez competente, según lo establecido en el artículo 395. Cuando se efectúen dichas diligencias el órgano al que corresponda deberá formalizar la petición de extradición dentro del lapso previsto en la convención, tratado o normas de derecho internacional aplicables.”

³⁵⁶ Inter-American Convention on Extradition, 25 February 1981, entered into force 28 March 1992 (<http://www.oas.org/juridico/English/treaties/b-47.html>).

³⁵⁷ For a list of the bilateral and multilateral treaties signed by Venezuela see the Report submitted by Venezuela to the Committee against Torture in 2000, paras. 88-90.

Extradition from Venezuela

With regard to passive extradition (when Venezuela is asked to extradite an individual), Article 395 of the Code of Criminal Procedure establishes that when a foreign government requests the extradition of a person who is on Venezuelan territory, the Executive, a political body, will forward the request to the Supreme Court of Justice, along with the documentation received.³⁵⁸

If the relevant request is presented without the necessary documentation, but with the offer to produce it subsequently, and with the request that in the meantime the accused be apprehended, the Executive, depending on the gravity and urgency of the case, can order a preventive measure against the accused, and set a firm time period for presentation of the required documents, which may be no longer than sixty days.³⁵⁹ Once the sixty-day period has elapsed and the documents are not produced, the Executive is required to order the detainee to be released, without prejudice to ordering his or her detention again, if the documents are received subsequently.³⁶⁰ Foreign governments have the right to designate an attorney to defend their interests during special extradition proceedings.³⁶¹

Finally, the Supreme Court of Justice must, within thirty days of notification of the request, convene a hearing to be attended by a representative of the Executive, the accused, his attorney, and a representative appointed by the requesting government, who will all present their arguments. Once the hearing has concluded, the Supreme Court of Justice is required to issue its decision within fifteen days.³⁶²

7.1.1. INAPPROPRIATE LIMITS ON VENEZUELAN EXTRADITION REQUESTS

There appear to be no inappropriate limits on the making of extradition requests in Venezuelan law.

³⁵⁸ Original text: “Artículo 395. Si un gobierno extranjero solicita la extradición de alguna persona que se halle en territorio de Venezuela, el Poder Ejecutivo remitirá la solicitud a la Corte Suprema de Justicia con la documentación recibida.”

³⁵⁹ Original text: “Artículo 396. Si la solicitud de extradición formulada por un gobierno extranjero se presenta sin la documentación judicial necesaria, pero con el ofrecimiento de producirla después, y con la petición de que mientras se produce se aprehenda al imputado, el Poder Ejecutivo podrá ordenar, según la gravedad, urgencia y naturaleza del caso, la aprehensión de aquél, señalando un término perentorio para la presentación de la documentación, que no será mayor de sesenta días continuos.”

³⁶⁰ Original text: “Artículo 397. Vencido el lapso, el Poder Ejecutivo ordenará la libertad del aprehendido si no se produjo la documentación ofrecida, sin perjuicio de acordar nuevamente la privación de libertad si posteriormente recibe dicha documentación.”

³⁶¹ Original text: “Artículo 398. Los gobiernos extranjeros podrán designar un abogado para que defienda sus intereses en este procedimiento.”

³⁶² Original text: “Artículo 399. La Corte Suprema de Justicia convocará a una audiencia oral dentro de los treinta días siguientes a la notificación del solicitado. A esta audiencia concurrirán el imputado, su defensor y el representante del gobierno requirente quienes expondrán sus alegatos. Concluida la audiencia, la Corte Suprema de Justicia decidirá en un plazo de quince días.”

7.1.1.1. Political control over Venezuela extradition requests

It appears that, according to the regulations regarding the making of extradition requests (see Section 7.1 above), there can be no political interference in the question of whether to make an extradition request, which is prerogative of the Supreme Court upon request of the judge of supervision.

7.1.1.2. Presence and requests by Venezuela for extradition

There is no requirement under Venezuela law that an accused has ever been in Venezuela at any point before the extradition request can be made (see Section 6.2 above). Nevertheless, a recent decision of the Office of the General Prosecutor, without citing any authority, has stated that

“...until legislation regulating the application of the universal jurisdiction principle is introduced in the internal legal system, Venezuelan juridical bodies cannot open investigations against individual not present on Venezuelan territory.”³⁶³

7.1.2. INAPPROPRIATE BARS TO GRANTING EXTRADITION REQUESTS

There are a number of bars to the granting of an extradition (or surrender) request according to Venezuelan law and to the bilateral and multilateral treaties Venezuela has signed. Perhaps, the most important bar is the prohibition against extraditing Venezuelan nationals included in the Venezuelan Constitution. There is also a requirement of dual criminality. Despite these bars, it should be noted that Article 271 of the Venezuelan Constitution prohibits the refusal of extradition when the crime committed by a foreigner involved a violation of human rights.³⁶⁴

7.1.2.1. Political control over the granting of extradition requests

As explained above (Section 7.1), the ultimate decision on the granting of an extradition is solely that of the Supreme Court of Justice. The decision is taken pursuant to a special procedure where all the parties (the Executive, the accused, his attorney, and a representative appointed by the requesting government) have the right to present their arguments, without any sort of political control.

³⁶³ *Supra* note 61. Original text: “...que hasta tanto no exista en nuestro ordenamiento jurídico interno las leyes que regulen la aplicación del principio de jurisdicción universal, los órganos del sistema de justicia venezolano no pueden iniciar la persecución de ninguna persona que se encuentra fuera de nuestro territorio.”

³⁶⁴ Original text: “Artículo 271. En ningún caso podrá ser negada la extradición de los extranjeros o extranjeras responsables de los delitos de deslegitimación de capitales, drogas, delincuencia organizada internacional, hechos contra el patrimonio público de otros Estados y contra los derechos humanos.” There is no indication in the constitution on how to act when the provision of Article 271 is in conflict with the principle of dual criminality (Article 49 (6) of the Venezuelan Constitution), i.e. when the crime that involves a violation of human right is not recognised under Venezuelan law.

7.1.2.2. Nationality

Article 69 of the 1999 Venezuelan Constitution prohibits the extradition of Venezuelan nationals.³⁶⁵ Before it was embodied in the Constitution, this principle was already present in Article 6 of the Criminal Code, which states that “the extradition of a Venezuelan citizen can not be granted under any circumstances”.³⁶⁶

Since the application of the principle of non-surrender of nationals is not intended to allow for the impunity of the national of the requested state, but rather to validate the right of all states to impose their own punishment on their nationals, Article 6 of Venezuelan Criminal Code incorporates, in part, the *aut dedere aut judicare* (extradite or prosecute) principle (subject to dual criminality) by saying that a national requested for extradition “must be tried in Venezuela, at the request of the injured party or of the General Prosecutor, if the crime with which he is charged is punishable under Venezuelan law.”³⁶⁷ Also Article 345 of the Code of Private International Law (Bustamante Code)³⁶⁸ and Article 7 of the Inter-American Convention on Extradition,³⁶⁹ of whom Venezuela is a state party, contain similar provisions.

The principle of non-surrender of nationals extends to naturalized foreigners, since the Venezuelan Constitution confers to Venezuelans by naturalization the same rights enjoyed by Venezuelans by birth, except for restrictions established in it and in Venezuelan laws. This exception, however, is not retroactive, therefore it cannot be extended to cover those cases in which the date of commission of the punishable act occurs prior to the naturalization of its perpetrator.

7.1.2.3. Double criminality and territorial jurisdiction

According to Venezuelan law, it is essential that the act underlying the foreign state’s request be regarded as a criminal offense in Venezuelan national legislation. On this point, Article 6 of the Criminal Code provides that “extradition shall not be granted to a foreigner for any act that is not qualified as a crime under Venezuelan law.”³⁷⁰ This provision is directly related to

³⁶⁵ Original text: “*Artículo 69. [...] Se prohíbe la extradición de venezolanos y venezolanas*”

³⁶⁶ Original text: “*Artículo 6. La extradición de un venezolano no podrá concederse por ningún motivo...*”

³⁶⁷ Original text: “*Artículo 6. [...] pero deberá ser enjuiciado en Venezuela, a solicitud de parte agraviada o del Ministerio Público, si el delito que se le Imputa mereciere pena por la ley venezolana...*”

³⁶⁸ Code of Private International Law, ratified by Venezuela on 23 December 1931 and published in the Official Extraordinary Gazette on 9 April 1932, (<http://www.oas.org/juridico/spanish/tratados/a-31.html>). Official text: “*Artículo 345 - Los Estados contratantes no están obligados a entregar a sus nacionales. La nación que se niegue a entregar a uno de sus ciudadanos estará obligada a juzgarlo.*”

³⁶⁹ Original text: “1. The nationality of the person sought may not be invoked as a ground for denying extradition, except when the law of the requested State otherwise provides. 2. In the case of convicted persons, the States Parties may negotiate the mutual surrender of nationals so that they may serve their sentences in the States of which they are nationals.”

³⁷⁰ Original text: “*Artículo 6. [...] La extradición de un extranjero no podrá concederse...por ningún*

Article 49 (6) of the Venezuelan Constitution, which states that “no persons may be punished for acts or omissions that were not stipulated as crimes, violations, or offenses in pre-existing laws.”³⁷¹

Although Venezuelan national legislation is silent on the matter, Article 351 of the Bustamante Code also lists as a requirement for extradition to be granted that the crime be committed in the territory of the state requesting the extradition,³⁷² or that its criminal law be applicable to the suspect in accordance with the provisions of the Title III of the Code which provides for extraterritorial criminal jurisdiction based on the protective principle³⁷³ and universal jurisdiction for certain crimes under international law including piracy, slavery and slave trade.³⁷⁴ Territoriality is also the criteria to decide which state should be granted extradition when the individual is requested by more than one state.³⁷⁵

7.1.2.4. Political offence

Pursuant to Article 6 of the Criminal Code, extradition of a foreigner may not be granted for political crimes or related offenses.³⁷⁶ A similar provision is present also in Article 355 of the Bustamante Code.³⁷⁷

Nevertheless, it is not clear what constitutes a political crime according to Venezuelan law. The failure to define a political crime is unfortunate since there is no internationally agreed

hecho que no este calificado de delito por la ley venezolana...”

³⁷¹ Original text: “Artículo 49. [...] 6. Ninguna persona podrá ser sancionada por actos u omisiones que no fueren previstos como delitos, faltas o infracciones en leyes preexistentes.”

³⁷² Original text: “Artículo 351. Para conceder la extradición, es necesario que el delito se haya cometido en el territorio del Estado que la pida o que le sean aplicables sus leyes penales de acuerdo con el libro tercero de este Código.”

³⁷³ Article 305, original text: “Están sujetos en el extranjero a las leyes penales de cada Estado contratante, los que cometieren un delito contra la seguridad interna o externa del mismo o contra su crédito público, sea cual fuere la nacionalidad o el domicilio del delincuente”; and Article 306, original text: “Todo nacional de un Estado contratante o todo extranjero domiciliado en él, que cometa en el extranjero un delito contra la independencia de ese Estado, queda sujeto a sus leyes penales.”

³⁷⁴ Article 308, original text “La piratería, la trata de negros y el comercio de esclavos, la trata de blancas, la destrucción o deterioro de cables submarinos y los demás delitos de la misma índole contra el derecho internacional, cometidos en alta mar, en el aire o en territorios no organizados aún en Estado, se castigarán por el captor de acuerdo con sus leyes penales.”

³⁷⁵ Article 15 of the Inter-American Convention on Extradition and Article 347, 348 and 349 of the Bustamante Code.

³⁷⁶ Original text: “Artículo 6. [...] La extradición de un extranjero no podrá tampoco concederse por delitos políticos ni por infracciones conexas con estos delitos...”

³⁷⁷ Original text: “Artículo 355. Están excluidos de la extradición los delitos políticos y conexas, según la calificación del Estado requerido.”

definition of this term or of political offences.³⁷⁸ Some guidance is provided by treaties such as the Genocide Convention, which expressly states that genocide is not a political crime for the purposes of extradition, and the 1997 International Convention for the Suppression of Terrorist Bombings and the 1999 International Convention for the Suppression of the Financing of Terrorism, both of which exclude the crimes listed in those treaties from the definition of political offence. In addition to genocide, it can be argued that when the political offence is also a crime under international law, it fits the exception for offences that are non-political. Moreover, other treaties implicitly exclude this possibility by imposing a try or extradite obligation with respect to the crime.³⁷⁹ Although not directly addressing this question, the 1950 Convention relating to the Status of Refugees (Article 1F) excludes from its application persons suspected of crimes under international law.³⁸⁰

In the third report submitted to the Security Council Counter-Terrorism Committee Venezuela stressed that this exception does not represent a bar to the extradition of a person for terrorist acts which he or she claims were politically motivated.³⁸¹ Accordingly, the Supreme Court of

³⁷⁸ There is no internationally accepted definition of the term. A leading authority on extradition has stated:

'Even though widely recognized, the very term 'political offence' is seldom defined in treaties or national legislation, and judicial interpretations have been the principle source for its meaning and its application. This may be due to the fact that whether or not a particular type of conduct falls within that category depends essentially on the facts and circumstances of the occurrence. Thus, by its very nature it eludes a precise definition, which could constrict the flexibility needed to assess the facts and circumstances of each case.'

M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, Oxford University Press – Oceana, 5th ed. 2007, p.653 (footnotes omitted).

³⁷⁹ Genocide Convention, art. VII ('Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.'). Other treaties implicitly do so by imposing an extradite or try obligation (see treaties discussed in Section 4.2 above.).

³⁸⁰ Article 1.F reads:

'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.'

³⁸¹ Letter dated 25 July 2003 from the Permanent Representative of Venezuela to the United Nations addressed to the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism, S/2003/774, 30 July 2003, para. 1.12.

Justice granted the extradition of the dissident José María Ballestas in 2001 because “terrorism is made up of a series of atrociously inhumane acts, which are not political offences and should therefore always lead to extradition. It is inadmissible for a political motive to be enough to justify any sort of crime.”³⁸²

7.1.2.5. Military offence

There is no bar on extradition for military offences in Venezuelan law.

7.1.2.6. *Ne bis in idem*

The *ne bis in idem* principle informs Venezuelan criminal legislation in general, see Section 6.7 above. As for its application in the extradition context, according to Article 4 (1) of the Inter-American Convention on Extradition, extradition cannot be granted if the requested person has already served the sentence for the offence on which the extradition request is based.³⁸³ The reference to a general “sentence” does not consider the eventuality that the sentence served for the commission of a crime under international law was not in accordance to international recognised standards.

7.1.2.7. Non-retroactivity

As discussed above (see Section 6.6) the Venezuelan Constitution and the Criminal Code incorporate the principle of non-retroactivity of criminal legislation. Nothing in Venezuelan national law, in the Inter-American Convention on Extradition or on the Bustamante Code expressly prohibits extradition when the conduct in the extradition request, although criminal under Venezuelan law at the time of the request, was not criminal under Venezuelan law when it occurred.

7.1.2.8. Statutes of limitation

As specified by Venezuela in its submission to the Committee against Torture in November 2000, “extradition will be refused if the time limit for the action has expired”.³⁸⁴ This is in line with the provision of Article 4 (2) of the Inter-American Convention on Extradition.³⁸⁵

³⁸² Tribunal Supremo de Justicia, Sala de Casación Penal, No. 01-847, 10 December 2001. Original text: “*El Terrorismo está constituido por una serie de conductas de atroz inhumanidad, que no son delitos políticos y que por esto siempre deben dar lugar a la extradición: es inadmisibile que baste un móvil político para justificar cualquier clase de crimen. El fin político no debe justificar ciertos medios de lucha.*”

³⁸³ Original text: “*Artículo 4. La extradición no es procedente: 1. Cuando el reclamado haya cumplido la pena correspondiente...*”

³⁸⁴ CAT/C/33/Add.5, p.18, para. 65 (c).

³⁸⁵ Original text: “*Artículo 4. La extradición no es procedente: ...2.Cuando esté prescrita la acción penal o la pena, sea de conformidad con la legislación del Estado requirente o con la del Estado requerido, con anterioridad a la presentación de la solicitud de extradición.*”

However, this should be seen in light of the constitutional provision that affirms the inapplicability of statutory limitations to violation of human rights and crimes against humanity (see Section 6.3 above).

7.1.2.9. Amnesties, pardons and similar measures of impunity

According to Article 4 (1) of the Inter-American Convention on Extradition, extradition cannot be granted if the requested has benefited from an amnesty or a pardon for the offence on which the extradition request was based, or the requested has been absolved or the case has been definitively dismissed.³⁸⁶ However, this should be seen in light of the constitutional provision that forbids the application of pardon or amnesty for crimes against humanity and serious human rights violations (see Section 6.10 above). It is not clear, however, whether this prohibition applies to foreign measures.

7.1.3. SAFEGUARDS

There are several provisions in Venezuelan law that are intended to protect the rights of the suspects, including the right to be free from torture or other ill-treatment and the right to life, as well as provisions regarding humanitarian concerns and ensuring that only the crimes mentioned in the extradition request are prosecuted. However, there is no bar to extradition on the ground that the person would face an unfair trial.

7.1.3.1. Fair trial

Nothing in Venezuelan national law, in the Inter-American Convention on Extradition or on the Bustamante Code expressly states that extradition may be refused if the rights in the judicial proceedings under international law of the person whose extradition is requested will not be guaranteed in the requesting country.

7.1.3.2. Torture and other cruel, inhumane or degrading treatment or punishment

Article 6 of the Venezuelan Criminal Code prohibits the extradition of foreigners “accused of a crime that is punishable...by life sentence according to the legislation of the requesting country.”³⁸⁷ Article 9 of the Inter-American Convention on Extradition extends the prohibition also to offences punishable in the requesting State by life imprisonment, or by degrading punishment, “unless the requested state has previously obtained from the requesting state, through a diplomatic channel, sufficient assurances that none of the above-mentioned penalties will be imposed on the person sought or that, if such penalties are imposed, they will not be enforced.”³⁸⁸

³⁸⁶ Original text: “*Artículo 4. La extradición no es procedente: 1. Cuando el reclamado...haya sido amnistiado, indultado o beneficiado con la gracia por el delito que motivo la solicitud de extradición, o cuando haya sido absuelto o se haya sobreseído definitivamente a su favor por el mismo delito.*”

³⁸⁷ Original text: “*Artículo 6. [...] No se acordará la extradición de un extranjero acusado de un delito que tenga asignada en la legislación del país requirente...una pena perpetua.*”

³⁸⁸ Article 9 of the Inter-American Convention on Extradition, complete text: “The States Parties shall not

This denial is based on the constitutional ban on life or offensive or degrading sentences established in Article 44(3) of the Constitution,³⁸⁹ and on Article 94 of the Criminal Code which sets 30 years as maximum limit for sentences.³⁹⁰

7.1.3.3. Death penalty

Article 6 of the Venezuelan Criminal Code prohibits the extradition of foreigners “accused of a crime that is punishable by the death penalty...under the legislation of the requesting country.”³⁹¹ The same exception to extradition is made in Article 9 of the Inter-American Convention on Extradition, unless the requested state has previously obtained from the requesting State, through a diplomatic channel, sufficient assurances that the death penalty will not be imposed on the person sought or that, if it is imposed, it will not be enforced.³⁹²

This denial is based on the constitutional guarantee of the inviolability of life and the prohibition on death penalty established in Article 43 of the Venezuelan Constitution.³⁹³

7.1.3.4. Humanitarian concerns

No provision in Venezuelan legislation, in the Inter-American Convention on Extradition or on the Bustamante Code expressly bars extradition based on humanitarian concerns.

grant extradition when the offense in question is punishable in the requesting State by the death penalty, by life imprisonment, or by degrading punishment, unless the requested State has previously obtained from the requesting State, through the diplomatic channel, sufficient assurances that none of the above-mentioned penalties will be imposed on the person sought or that, if such penalties are imposed, they will not be enforced.”

³⁸⁹ Original text: “*Artículo 44. [...] 3. La pena no puede trascender de la persona condenada. No habrá condenas a penas perpetuas o infamantes. Las penas privativas de la libertad no excederán de treinta años.*”

³⁹⁰ Original text: “*Artículo 94. En ningún caso excederá del límite máximo de treinta años la pena restrictiva de libertad que se imponga conforme a la ley.*”

³⁹¹ Original text: “*Artículo 6. [...] No se acordará la extradición de un extranjero acusado de un delito que tenga asignada en la legislación del país requirente la pena de muerte o una pena perpetua.*”

³⁹² Article 9 of the Inter-American Convention on Extradition, complete text: “The States Parties shall not grant extradition when the offense in question is punishable in the requesting State by the death penalty, by life imprisonment, or by degrading punishment, unless the requested State has previously obtained from the requesting State, through the diplomatic channel, sufficient assurances that none of the above-mentioned penalties will be imposed on the person sought or that, if such penalties are imposed, they will not be enforced.”

³⁹³ Original text: “*Artículo 43. El derecho a la vida es inviolable. Ninguna ley podrá establecer la pena de muerte, ni autoridad alguna aplicarla...*”

7.1.3.5. Specialty

According to the speciality principle, the requesting state cannot detain, judge or punish the requested person for a crimes that has been committed before the extradition and which is different from the crime for which extradition was granted. This principle is spelled out in Article 13 of the Inter-American Convention on Extradition.³⁹⁴

7.2. MUTUAL LEGAL ASSISTANCE

According to Article 108 (17)³⁹⁵ and Article 201³⁹⁶ of the Code of Criminal Procedure, the Office of the General Prosecutor is responsible for issuing and executing letters rogatory on criminal matters and arrest warrants. Within the General Directory for Legal Support (*Dirección General de Apoyo Jurídico*) of the Office of the General Prosecutor was created, a specialized unit with responsibility for the procedures of mutual legal assistance, the Coordination for International Affairs (*Coordinación de Asuntos Internacionales*).

Venezuela has also appointed a contact point according to the guidelines of the Inter-American Network for International Judicial Cooperation (Red Iberoamericana de Cooperación Jurídica Internacional), Iber-Red, of which Venezuela is a party.³⁹⁷ Iber-Red was founded in Cartagena de Indias (Colombia) in October 2004, and constitutes of a network of contact points belonging to the Ministries of Justice, Public Prosecutors' offices and Judicial Powers of the 23 countries which are members of the Ibero-American Community of Nations (*Comunidad Iberoamericana de Naciones*). The purpose of Inter-Red is to optimize judicial cooperation on civil and criminal matters, to strengthen cooperation between Ibero-American countries and to create an Ibero-American Judicial Space (*Espacio Judicial Iberoamericano*) where the mechanism of judicial cooperation are simplified, dynamic and effective.

Venezuela is party to a number of multilateral³⁹⁸ and bilateral³⁹⁹ treaties relating to mutual

³⁹⁴ Original text: “Artículo 13. 1. Ninguna persona extraditada conforme a esta Convención será detenida, procesada o penada en el Estado requirente por un delito que haya sido cometido con anterioridad a la fecha de la solicitud de su extradición y que sea distinto del propio delito por el cual se ha concedido la extradición, a menos que: a. La persona abandone el territorio del Estado requirente después de la extradición y luego regrese voluntariamente a él; o b. La persona no abandone el territorio del Estado requirente dentro de los treinta días de haber quedado en libertad para abandonarlo; o c. La autoridad competente del Estado requerido dé su consentimiento a la detención, procesamiento o sanción de la persona por otro delito; en tal caso, el Estado requerido podrá exigir al Estado requirente la presentación de los documentos previstos en el artículo 11 de esta Convención.”

³⁹⁵ Original text: “Artículo 108. Corresponde al Ministerio Público en el proceso penal: ...17. Solicitar y ejecutar exhortos o cartas rogatorias...”

³⁹⁶ Original text: “Artículo 201. Corresponde al Fiscal del Ministerio Público solicitar y ejecutar exhortos o cartas rogatorias, lo cual realizará conforme a las previsiones del Código de Procedimiento Civil, y de los tratados y convenios internacionales suscritos y ratificados por la República.”

³⁹⁷ <http://www.iberred.org/presentacion/>.

³⁹⁸ These include: Convención Interamericana sobre Exhortos o Cartas Rogatorias, Panama 30 January 1975, published in the Official Extraordinary Gazette No. 33.033 of 3 August 1984; Protocolo Adicional a la Convención Interamericana sobre Exhortos o Cartas Rogatorias, Montevideo 8 May 1979, published

legal assistance. However, there is no specific act regulating Venezuela's cooperation with international courts. There is no specialized unit within the Office of the General Prosecutor appointed to cooperate with the International Criminal Court in cases of international assistance.

According to Article 201 of the Criminal Code, letters rogatory are issued according to the requirements stated in the Code of Civil Procedure. Article 188 of the Civil Procedure Code states that letters rogatory and other requests of legal assistance to a third country will be sent through diplomatic or consular channels, a more cumbersome method than direct state-to-state contacts between police and prosecutors.⁴⁰⁰ No other procedure or requirement is

in the Official Extraordinary Gazette No. 33.171, of 25 February 1985; Convención sobre Recepción de Pruebas en el Extranjero, Panama, 30 January 1975, published in the Official Extraordinary Gazette No. 33.170 of 22 February 1985; Protocolo Adicional a la Convención Interamericana sobre Recepción de Pruebas en el Extranjero, La Paz 24 May 1984, published in the Official Extraordinary Gazette No. 4.580 of 21 May 1993; Convención Interamericana contra la Corrupción, Caracas 29 March 1996, published in the Official Extraordinary Gazette No. 36.211 of 22 May 1997; Convención Interamericana sobre Asistencia Legal Mutua en Materia Penal, Washington 27 August 1992, published in the Official Extraordinary Gazette No. 4.999, 3 November 1995; and Convención Interamericana Contra el Terrorismo, Bridgetown 3 June 2002, published in the Official Extraordinary Gazette No. 37.841 of 17 December 2003.

³⁹⁹ These include: Acuerdo de Cooperación y Asistencia Judicial en Materia Penal entre el Gobierno de la República de Venezuela y el Gobierno de la República de Colombia, Caracas 20 February 1998, published in the Official Extraordinary Gazette No. 5.506 of 13 December 2000; Tratado de Cooperación entre el Gobierno de la República de Venezuela y el Gobierno de los Estados Unidos Mexicanos sobre Asistencia Jurídica Mutua en Materia Penal, Mexico City 6 February 1997, published in the Official Extraordinary Gazette No. 5.241 of 6 July 1998; Convenio entre la República de Venezuela y la República Dominicana sobre Asistencia Mutua en Materia Penal, Caracas 31 January 1997, published in the Official Extraordinary Gazette No. 5.274 of 12 November 1998; Acuerdo entre la República de Venezuela y la República de Paraguay sobre Asistencia Judicial en Materia Penal, Caracas 5 September 1996, published in the Official Extraordinary Gazette No. 5.274 of 5 August 1998; Convenio entre el Gobierno de la República de Venezuela y el Gobierno de los Estados Unidos de América sobre Asistencia Legal Mutua en Materia Penal, Caracas 12 October 1997, published in the Official Extraordinary Gazette No. 37.884 of 20 February 2004; Convenio entre el Gobierno de la República de Venezuela y el Gobierno de Cuba sobre Asistencia Jurídica en Materia Penal, published in the Official Extraordinary Gazette No. 38.092 of 22 December 2004; Tratado entre la República de Venezuela y la República Popular China sobre Asistencia Legal Mutua en Materia Penal, published in the Official Extraordinary Gazette No. 39.122 of 17 February 2009.

⁴⁰⁰ Original text: "*Artículo 188 – [...] Las ejecutorias y las rogatorias que se dirijan a los tribunales o funcionarios extranjeros y las suplicatorias, exhortos o despachos que se envíen a otras autoridades venezolanas, se encabezarán "En nombre de la República de Venezuela". Las rogatorias para el extranjero se dirigirán por la vía diplomática o consular, y las demás, por la vía ordinaria, sin necesidad de legalización. Estos documentos deberán llevar el sello del Tribunal, sin lo cual no tendrán autenticidad.*" When during the course of an investigation a Venezuelan prosecutor necessitate a rogatory letter or other request for mutual legal assistance he or she will have to address the request to the Coordination for International Affairs of the Office of the General Prosecutor. The Coordination for International Affairs will then prepare the letter rogatory and or the other request for mutual legal assistance to the Ministry of External relation for it to forward it through a diplomatic channel to the requested state. When the Ministry of external relations receives a letter rogatory or other request for mutual legal assistance it forwards it to the Office of the General Prosecutor. After having received the request, the Coordination for International Affairs according to the nature of the acts requested refers the request to the competent Directory or to the Higher Prosecutor (*Fiscal Superior*) of the competent federal entity. The Directory or

specified.

7.2.1 UNAVAILABLE OR INADEQUATE PROCEDURES

The procedures for mutual legal assistance are not spelled out in Venezuelan legislation, which only provides that mutual legal assistance is requested or granted through diplomatic channels.

7.2.2 INAPPROPRIATE BARS TO MUTUAL LEGAL ASSISTANCE

Grounds to refuse mutual legal assistance can be found in most of the bilateral treaty relating to mutual legal assistance that Venezuela has signed. Some of these grounds can be inappropriate, especially in relation to crimes under international law.

For instance, Article 3 of the Treaty between Venezuela and the United States on Mutual Legal assistance on Criminal Matters⁴⁰¹ allows the requested state to deny mutual legal assistance if it is relative to a political crime or to a military crime or if it would affect public order, security or fundamental public interest of the requested state.⁴⁰² Some of these provisions appear to be very broad and, therefore, susceptible to misuse. Furthermore, Article 3 of the Treaty between Venezuela and China⁴⁰³ allow the requested state to refuse a request for assistance based on the dual criminality principle.⁴⁰⁴

7.2.3. SAFEGUARDS

There appear to be no express general safeguards in Venezuelan legislation that would prohibit the provision of mutual legal assistance, for example, where it could lead to the imposition of the death penalty, torture or ill-treatment or unfair trial.

the Office of the Higher Prosecutor will nominate a prosecutor to execute the requested acts. The results of the requested actions will be forwarded to the Coordination for International Affairs which will provide to refer them to the Ministry of External Relations for their transmission by diplomatic channel to the requesting state. This information is taken from the Organisation of American States (OAS) website, <http://www.oas.org/juridico/mla/en/ven/index.html#last%20updated>.

⁴⁰¹ Convenio entre el Gobierno de la República de Venezuela y el Gobierno de los Estados Unidos de América sobre Asistencia Legal Mutua en Materia Penal, published in the Official Gazette No. 37.884, on 20 February 2004.

⁴⁰² Original text: "*Artículo 3. La Autoridad Central del Estado requerido podrá denegar asistencia si: a) la solicitud se refiere a un delito político, b) la solicitud se refiere a un delito militar, salvo que éste constituya violación al derecho penal común, c) el cumplimiento de la solicitud afectara el orden público, la seguridad, o intereses públicos fundamentales del Estado requerido...*" A similar provision is contained in Article 2 of the Treaty between Venezuela and Mexico.

⁴⁰³ Tratado entre la República de Venezuela y la República Popular China sobre Asistencia Legal Mutua en Materia Penal, published in the Official Extraordinary Gazette No. 39.122 of 17 February 2009.

⁴⁰⁴ Original text: "*Artículo 3. La Parte Requerida podrá negar la asistencia en los siguientes casos: a) si la solicitud se refiere a una conducta que no es considerada un delito de acuerdo a las leyes de la Parte Requerida...*"

8. SPECIAL POLICE OR PROSECUTOR UNIT

Special police or prosecution units

Venezuela does not have a special police unit, prosecution unit or a special police and prosecution unit with a mandate to investigate and prosecute crimes under international law.

The Scientific and Criminal Investigation Body (*Cuerpo de Investigaciones Científicas, Penales y Criminalísticas*) is the principal organ of criminal investigation.⁴⁰⁵ Therefore it is responsible for the investigation of crimes under international law. Certain Venezuelan bodies have special competence in criminal investigations: these are the National Armed Forces for crimes within their jurisdiction, and any other organ which is given such competence by law.⁴⁰⁶

Special immigration units

Venezuela does not have any special immigration units designed to screen persons suspected of crimes under international law with a view, not merely to exclude such persons (either when seeking a visa abroad or when arriving at the border), but also to refer their files to police or prosecution authorities for investigation and, where there is sufficient admissible evidence, to prosecute.

⁴⁰⁵ *Ley de los Órganos de Investigaciones científicas, Penales y Criminalísticas*, Decree No. 1.511 of 2 November 2001, Official Gazette No. 5.551 of 9 November 2001.

⁴⁰⁶ *Ibid.*, art. 12

9. JURISPRUDENCE

There appears to be no relevant jurisprudence by Venezuelan courts interpreting Article 4 (9) of the Criminal Code (see Section 4.3 above) and other provisions providing for universal jurisdiction, or relevant jurisprudence involving extraterritorial jurisdiction. However, in a recent extradition case the Supreme Court of Justice has recognised the existence of the principle of universal jurisdiction.

Case of Carlos Ojeda Herrera

In at least one instance the Venezuelan Supreme Court has recognized the existence of the principle of universal Jurisdiction. The Criminal Chamber of the Supreme Court, in a decision rendered by Justice Eladio Ramon Aponte Aponte on 13 July 2006 in the extradition case of Carlos Ojeda Herrera,⁴⁰⁷ stated:

“The traffic and illicit sale of narcotic and psychotropic drugs, are considered by this Chamber, as crimes against humanity, whose impunity must be avoided according to the principles and declarations contained in the United Nations Single Convention on Narcotic Drugs of 1961; Convention on Psychotropic Substances of 1971 and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

Article 16.10 of the United Nations Convention Against Transnational Organized Crime, ratified by the Bolivarian Republic of Venezuela and the United States of America, in accordance with article 6 of the Criminal Code, provides for the application of the Principle of universal jurisdiction, according to which a State may follow, investigate and prosecute the authors of crimes against humanity, irrespective of their nationality or where the crime was committed, when extradition is not possible...”⁴⁰⁸

⁴⁰⁷ Tribunal supremo de Justicia, Sala de Casacion Penal No. 322, Case No. E00-0945, 13 July 2006.

⁴⁰⁸ Original text: “...3) *Que el tráfico y venta ilícita de sustancias estupefacientes y psicotrópicas, son considerados por la Sala, como delitos de lesa humanidad, cuya impunidad debe evitarse conforme a los principios y declaraciones contenidas en la Convención de las Naciones Unidas, Única de 1961 Sobre Estupefacientes; Convenio de 1971 Sobre Sustancias Psicotrópicas, Convención de 1988 contra el Tráfico Ilícito de Estupefacientes y Sustancias Psicotrópicas.* 4) *Que del artículo 16.10 de la Convención de las Naciones Unidas contra la Delincuencia Organizada Transnacional, ratificada por la República Bolivariana de Venezuela y los Estados Unidos de América, en concordancia con el artículo 6 del Código Penal, se desprende la aplicación del principio de la jurisdicción universal, según el cual un Estado puede perseguir, investigar y juzgar a los autores de delitos cometidos de lesa humanidad,*

Despite the erroneous qualification of drug crimes as crimes against humanity and the overlapping between the concept of universal jurisdiction and the *aut dedere aut judicare* principle, Venezuela's Supreme Court recognized to a certain extent the existence of the principle of universal jurisdiction for crimes against humanity.

Despite this step forward made by the Supreme Court, it is worth recalling here the decision of February 2008 (see prelude of Section 4 above) where the General Prosecutor recognised the existence of the universal jurisdiction principle, but concluded that the principle is not applicable in Venezuela due to a lack of implementing legislation to give effectiveness to such principle.⁴⁰⁹

independientemente de cual sea su nacionalidad y donde se haya cometido el hecho punible, cuando no proceda la extradición..."

⁴⁰⁹ *Supra* note 61.

RECOMMENDATIONS

Venezuela should take the following steps to ensure that it is not a safe haven for persons responsible for the worst possible crimes in the world, both through enhancing and strengthening its cooperation on criminal matters with other states and international courts and through expanding the jurisdiction of its courts to cover such crimes even when they have been committed by foreigners outside Venezuelan territory.

Substantive law:

Ratify, without any limiting reservations, all treaties defining crimes under international law or requiring states to extradite or prosecute crimes under international law, including:

Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes against Humanity; and

International Convention for the Protection of All Persons from Enforced Disappearance.

Define crimes under conventional and customary international law, where this has not yet been done, as crimes under national law, including:

genocide;

crimes against humanity;

war crimes in both international and non-international armed conflict;

torture; and

extrajudicial executions,

in accordance with the strictest standards of international law.

Define principles of criminal responsibility in accordance with the strictest standards of international law and, in particular, ensure that the same strict standards of criminal responsibility apply both to commanders and to other superiors.

Define defences in accordance with the strictest standards of international law and, in particular, amend the Criminal Code in order to exclude as permissible defences superior orders, duress and necessity, but permit them to be taken into account in mitigation of punishment.

Jurisdiction:

Provide that courts have universal criminal jurisdiction over conduct amounting to crimes under international law, whether that conduct is currently labelled in Venezuelan law as an ordinary crime or as a crime under international law.

Provide that Venezuela has an *aut dedere aut judicare* obligation to extradite a suspect in territory subject to its jurisdiction (unless that person would face risk of the death penalty, torture or other ill-treatment or unfair trial) or submit allegations to the prosecution authorities for courts to exercise universal criminal and civil jurisdiction over that conduct.

Ensure that legislation provides that the first state to exercise jurisdiction, whether universal or territorial, to investigate or prosecute a person has priority over other states with regard to the crimes unless a second state can demonstrate that it is more able and willing to do so in a prompt and fair trial without the death penalty or other serious human rights violations.

Procedure related to suspects and accused:

Establish rapid, effective and fair arrest procedures to ensure that anyone arrested on suspicion of committing crimes under international law will appear for extradition, surrender or criminal proceedings in Venezuela.

Ensure that the rights of suspects and accused under international law and standards related to a fair trial are fully respected by incorporating all internationally recognized fair trial guarantees in national law.

Amend Venezuelan law in order to provide for the exclusive jurisdiction of civilian courts over all crimes under international law, including crimes committed by members of the armed forces which are now subject under the Code of Military Justice to the jurisdiction of military courts.

Ensure that suspect and accused are not extradited to states where they risk death penalty, torture or other cruel, inhuman or degrading treatment or punishment.

Procedure related to victims:

Strengthen the provisions in the Criminal Code and Criminal Procedure Code regarding private prosecutions to ensure that victims and their families are able to institute criminal proceedings based on universal jurisdiction over crimes under international law through private prosecutions.

Ensure that victims and their families are able to file civil claims for all five forms of reparations (restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition) in civil and in criminal proceedings based on universal jurisdiction over crimes under international law.

Ensure that victims and their families are fully informed of their rights and of developments in all judicial proceedings based on universal jurisdiction concerning crimes under

international law.

Removal of legal, practical and political obstacles:

Legal -

Provide that any claimed state or official immunities will not be recognized with regard to crimes under international law or to torts amounting to such crimes or to other human rights violations.

Provide that the principle of *ne bis in idem* does not apply to proceedings in a foreign state concerning crimes under international law.

Ensure that courts can exercise jurisdiction over all conduct that was recognized under international law as a crime at the time that it occurred even if it occurred before it was defined as crime under national law.

Expressly provide that amnesties and similar measures of impunity granted by a foreign state with regard to crimes under international law have no legal effect with respect to criminal or civil proceedings.

Political -

Ensure that the criteria for deciding whether to investigate or prosecute crimes under international law are developed in a transparent manner in close consultation with civil society, made public, are neutral and exclude all political considerations.

Practical -

Improvements in investigation and prosecution in the forum state

Create a special unit of police and prosecutors with responsibility for investigating and prosecuting crimes under international law committed abroad.

Ensure that such a unit:

- has sufficient financial resources, which should be comparable to the resources devoted to other serious crimes, such as “terrorism”, organized crime, trafficking in persons, drug trafficking, cyber crimes and money laundering;
- has sufficient material resources;
- has sufficient, experienced, trained personnel; and
- provides effective training on a regular basis of all staff in all relevant subjects, including international criminal law, human rights and international humanitarian law

Establish a special immigration unit for screening foreigners seeking to enter Venezuela, including immigrants, visa applicants and asylum seekers, to determine whether they are suspected of crimes under international law.

Ensure that such an immigration unit keeps police and prosecuting authorities promptly and fully informed in a manner that fully respects the rights of all persons to a fair trial.

Ensure that all judges, prosecutors, defence lawyers and others in the criminal and civil justice systems are effectively trained in relevant subjects.

Establish an effective victim and witness protection and support unit, based on the experience of such units in international criminal courts and national legal systems able to protect and support victims and witnesses involved in proceedings in Venezuela, in foreign states and in international criminal courts, including through relocation.

Improvements in cooperation with investigations and prosecutions in other states

Ensure that foreign requests from foreign states for mutual legal assistance, including *commissions rogatoires* (commissions rogatory), in investigating and prosecuting crimes under international law and in seeking civil reparations for torts amounting to such crimes or to other human rights violations do not face unnecessary obstacles or delays, provided that the procedures are fully consistent with international law and standards concerning the right to a fair trial and that cooperation is not provided when there is a risk that it could lead to the imposition of the death penalty, torture or other cruel, inhuman or degrading treatment or punishment or an unfair trial.

Ensure that other requests for mutual legal assistance by foreign states can be transmitted directly to Venezuelan police or prosecutor directly, without going through cumbersome diplomatic channels, but ensure that such requests are not complied with when there is a risk that it could lead to the imposition of the death penalty, torture or other cruel, inhuman or degrading treatment or punishment or unfair trial.

Improve procedures in Venezuela for conducting investigations abroad, including through the use of joint international investigation teams, with all the necessary areas of expertise, and seek to enter into effective extradition and mutual legal assistance agreements with all other states, subject to appropriate safeguards.

Eliminate in law and practice any unnecessary procedural obstacles for foreign states seeking to gather information in territory subject to the forum state's jurisdiction concerning crimes under international law.

Eliminate in law and practice any unnecessary procedural obstacles that would delay or prevent the introduction of admissible evidence from abroad. Exclude any evidence that cannot be demonstrated as having been obtained without the use of torture or other cruel, inhuman or degrading treatment.

Cooperate with Interpol in the maintenance of the database on crimes under international law.

Take steps, in cooperation with other states, to draft, adopt and ratify promptly a new multilateral treaty under OAS or UN auspices providing for extradition of persons suspected of crimes under international law and mutual legal assistance with regard to such crimes,

excluding inappropriate grounds for refusal and including bars on extradition and mutual legal assistance where there is a risk of the death penalty, torture or other ill-treatment, unfair trial or other human rights violations.

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