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# UNIVERSAL JURISDICTION:

## The duty of states to enact and implement legislation -

### Chapter Eight (State practice at the national level)

As documented below in Section II of this Chapter, at least 60 states have enacted legislation which enables their courts to exercise universal jurisdiction over certain conduct amounting to genocide and national courts in at least 5 states have exercised such jurisdiction, in almost every case without any formal objection by other states to the assertion of jurisdiction, although a few have claimed that the exercise of that jurisdiction in a particular case was not appropriate on other grounds. In addition to the legislation and draft legislation of members of the Southern African Development Community (SADC) discussed below, Angola, Mozambique and Namibia are expected to provide for universal jurisdiction over genocide in their legislation implementing the Rome Statute.<sup>1</sup> In many countries the substantive definition of the crime of genocide is broader than in the Genocide Convention, by including social and political groups as protected groups. However, much of the legislation has procedural and jurisdictional weaknesses. Typical flaws in some of the legislation are that it applies prospectively, even though genocide has been recognized since 1946 as a crime under international law; ancillary crimes are not always included.

#### I. TYPES OF LEGISLATION AND STATE PRACTICE

As with other crimes, legislative provisions permitting universal jurisdiction over genocide fall generally into one of five models, those that provide universal jurisdiction over: (1) genocide expressly; (2) ordinary crimes which could amount to one or more acts of genocide; (3) crimes defined or listed in treaties; (4) crimes under customary international law or general principles of international law; and (5) crimes under international law because the constitution or legislation incorporates international law generally into national law. Many states have a variety of legislative provisions.

##### A. Express universal jurisdiction over genocide

Legislative provisions following this first model fall into two types. First, a number of states, including states parties to the Genocide Convention, such as *Belgium, Canada, Germany, Ghana* and *New Zealand*, have expressly provided for universal jurisdiction over genocide. A second group of states, including *Austria*, have defined genocide as a crime under national law and expressly permit their courts to exercise universal jurisdiction over crimes under national law. In most such legislation, there is no express reference to the ancillary crimes of genocide listed in Article III of the Genocide Convention, and it is not always clear whether these ancillary crimes would be included under national law principles of criminal responsibility. However, some states, such as *Finland* and *Nicaragua*, expressly mention one or more of these ancillary crimes of genocide.

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<sup>1</sup> See discussion of the position of members of SADC in the introduction to Section II of Chapter Four.

## **B. Universal jurisdiction over ordinary crimes which could amount to genocide**

Some states may exercise universal jurisdiction over certain conduct amounting to genocide because their legislation permits the exercise of universal jurisdiction over analogous crimes under national law, such as murder, abduction, assault or rape. The states following this second approach include Chile and Syria. Such legislation is very unsatisfactory for several reasons. First, it does not recognize the gravity of the conduct, since it treats genocide simply as an ordinary crime, thus denying its unique nature. Second, it usually will not permit courts to exercise jurisdiction over all the acts listed in Articles II and III of the Genocide Convention. Third, restrictions that may be appropriate for ordinary crimes, such as statutes of limitations, recognition of amnesties and of official immunities, are contrary to international law when they are applied to genocide.

## **C. Universal jurisdiction over crimes defined or listed in treaties**

Some states have legislative provisions following the third model, which permits their courts to exercise universal jurisdiction over crimes defined in treaties to which the state is a party. Some of these states have defined genocide under national law. States which have enacted such legislation which have signed or ratified the Genocide Convention include *Guatemala, Iran and Ecuador*. Other states using this third model have not defined genocide as a crime under national law or provided for penalties specifically applicable to genocide. For the reasons discussed above, such legislation may not be effective. A number of countries have legislative provisions following this model, but restrict the scope to crimes where the treaty permits or requires the state's courts to exercise universal jurisdiction over crimes committed abroad. A wide variety of formulations are used, some of which could be read to include genocide abroad, but many of these provisions are somewhat ambiguous. Therefore, in the absence of any authoritative jurisprudence or commentary to the contrary, they are not discussed below as providing universal jurisdiction over genocide under the Genocide Convention. Countries that have such ambiguous provisions include *Bolivia, China, Greece, Kazakhstan, Peru*. For the text and scope of the relevant provisions, see Chapter Four, Section II. Nevertheless, it is always possible that a court may conclude that such provisions, read together with the constitution and international obligations, do permit courts to exercise universal jurisdiction over genocide.

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

Some states have legislation or executive decrees employing the fourth model, which takes at least three forms. First, some legislation or decrees provide that courts may exercise universal jurisdiction over crimes under customary international law, including *Ecuador, Ethiopia, Georgia and Honduras*. Second, other legislative provisions or executive decrees have authorized courts to try persons for crimes under general principles of international law, such as *the former Yugoslav Republic of Macedonia and Tadjikistan*. A third type provides for universal jurisdiction over violations of human rights, as in *El Salvador and Honduras*. Legislation following the fourth model would necessarily permit courts to exercise universal jurisdiction over genocide. However, if the state has failed to define genocide as a crime under national law or to

provide for penalties specifically applicable to genocide, courts may be unwilling to enforce international law principles - whether substantive or jurisdictional - directly in a criminal case.

### **E. Constitutional or legislative provisions or jurisprudence incorporating international law**

Another group of states simply provide in their national constitutions that international law, either conventional or customary, is part of national law. In some cases, such legislation may permit courts to apply international law directly, including the exercise of universal jurisdiction and the trial of persons accused of crimes under international law, such as genocide. However, jurisprudence and commentary on such provisions does not always resolve the question of universal jurisdiction. These states include: Argentina and Croatia.

## **II. COUNTRY BY COUNTRY ANALYSIS**

Most of the following states have legislation permitting their courts to exercise universal jurisdiction over genocide or over at least some conduct, such as murder, that may constitute genocide in certain circumstances. Some of the states do not yet have such legislation, but are expected to include it in their legislation implementing the Rome Statute. In one state, a court has recognized that universal jurisdiction over genocide is permissible under international law, although it concluded that this principle had not been adopted in national law. That state, however, is widely expected to provide for universal jurisdiction over genocide in its implementing legislation for the Rome Statute.

· **Argentina:** The government has stated, with respect to the crime against humanity of torture, that Argentina applies the *aut dedere aut judicare* obligation and this principle appears to be incorporated in a law on extradition, which dates to 1885 (see discussion in Chapter Ten, Section II and Chapter Four, Section II).

Argentina has ratified the Genocide Convention and it has given it constitutional status pursuant to Article 75 (22) of the Constitution (for the text and scope of relevant constitutional provisions in Chapter Ten, Section II). Article 118 of the Constitution provides Argentine courts with jurisdiction over violations of international norms outside the national borders. However, Argentina has not made genocide a crime under national law, so any prosecution for acts of genocide might have to for ordinary crimes, such as murder, abduction or assault.

Regarding this, the Supreme Court (*Corte Suprema de Justicia de la Nación*) made several statements in the Priebke case concerning the applicability of the Genocide Convention to the case despite the lack of internal implementation.<sup>2</sup> Similar reasonings were made concerning war crimes which are neither implemented in the internal legislation (see Chapter Four, Section II).

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<sup>2</sup> *Alf the war crimes imputed to the person wanted for extradition under the Extradition Convention between the Argentinian Republic and the Italian Republic (law*

23,719) constitute crimes against humanity combined with elements of genocide, the bringing of criminal action cannot be subject to any statute of limitations. (Opinion of Drs Julio S. Nazareno and Eduardo Molin  O'Connor).

Proceedings: Priebke, Erich *re: extradition request* - case N1 16,063/94. Volume: 318 Page: 2148 dated 02/11/1995.

Spanish original:

*"Si los cr menes de guerra que se imputan al requerido por aplicaci n de la Convenci n de Extradici n entre la Rep blica Argentina y la Rep blica Italiana (ley 23.719) configuran delitos contra la humanidad integrados con elementos de genocidio, la acci n penal es imprescriptible"* (Voto de los Dres. Julio S. Nazareno y Eduardo Molin  O'Connor).

Autos: Priebke, Erich *s/ solicitud de extradici n* - causa n  16.063/94. Tomo: 318 Folio: 2148 del 02/11/1995

It is appropriate to apply Additional Protocol I (law 23,379) to the 1949 Geneva Conventions (decree 14,442) and the Convention on the Prevention and Punishment of the Crime of Genocide (decree-law 6286/56) because the legal precepts which punish attempts on life do not wholly cover the substance of the offence, which is said to have consisted of the murder of 335 members of the civilian population and prisoners of war who were executed using methods of exceptional cruelty combined with elements of selection that were tainted with racial hatred and an unacceptable contempt for human beings. (Opinion of Drs Julio S. Nazareno and Eduardo Molin  O'Connor).

Proceedings: Priebke, Erich *re: extradition request* - case N1 16,063/94. Volume: 318 Page: 2148 Ref: dated 02/11/1995.

Spanish original:

*"Corresponde aplicar el Protocolo Adicional I (ley 23.379) a los Convenios de Ginebra de 1949 (decreto 14.442) y la Convenci n para la Prevenci n y la Sancion del Delito de Genocidio (decreto - ley 6286/56) en tanto los preceptos legales que sancionan atentados contra la vida no abarcan integralmente la "sustancia de la infracci n", que habr a consistido en el asesinato de 335 personas integrantes de la poblaci n civil y prisioneros de guerra en cuya ejecuci n se utilizaron m todos de inusitada crueldad, unidos con elementos de selecci n te idos de odio racial e inadmisibles desprecio por el ser humano"* (Votos de los Dres. Julio S. Nazareno y Eduardo Molin  O'Connor).

Autos: Priebke, Erich *s/ solicitud de extradici n* - causa n  16.063/94. Tomo: 318 Folio: 2148 Ref.: del 02/11/1995

The fact that Additional Protocol I (law 23,379) to the 1949 Geneva Conventions (decree 14,442) has been inserted into art. 85, paragraph 5, does not mean that the same acts cannot also be categorized as crimes against humanity and especially the crime of genocide (art. II of the Convention on the Prevention and Punishment of the Crime of Genocide. Art. 75, sub-section 22 of the National Constitution) in so far as the aggravating circumstance of having acted with cruelty towards the persons in question in relation to the dehumanizing methods by which the slaughter was carried out... is recognized in the actions imputed to the person wanted for extradition (Opinion of Drs Julio S. Nazareno and Eduardo Molin  O'Connor).

Proceedings: Priebke, Erich *re: extradition request* - case N1 16,063/94. Volume: 318



· **Armenia:** Armenian courts may exercise universal jurisdiction over genocide. Article 6 of the Armenian Constitution provides that treaties ratified Armenia form an integral part of its legal system and that treaty provisions prevail over contrary legislative provisions. Article 14 of the 1999 Penal Code provides that foreign citizens or stateless persons who have committed offences outside Armenia are criminally responsible under the Penal Code when they have committed an offence referred to in an international treaty ratified by Armenia, if they have not been tried for that offence in a foreign state (for the text and scope of both provisions, see Part Two, Section I). There appears to be no requirement that the treaty mentioning the offence provide for universal jurisdiction.

Armenia is a party to the Genocide Convention. It has signed the Rome Statute, but it had not yet ratified it as of 1 September 2001.

· **Australia:** Although Australia provided for universal jurisdiction over conduct amounting to genocide that occurred during the Second World War, it still has not enacted legislation providing for universal jurisdiction over genocide. Nevertheless, in a territorial jurisdiction case, *Nulyarimma v.*

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Page: 2148 dated 02/11/1995.

Spanish original:

“El encuadre en el art. 85, apartado 5º, del Protocolo Adicional I (ley 23.379) a los Convenios de Ginebra de 1949 (decreto ley 14.442) no desplaza la concurrencia, respecto de los mismos hechos, de los crímenes contra la humanidad y especialmente del delito de genocidio (art. II de la Convención para la Prevención y la Sanción del delito de Genocidio, art. 75, inc. 22 de la Constitución Nacional), en la medida en que el accionar que se imputa al requerido reconoce “el agravante de haber obrado con crueldad hacia las personas en relación a las modalidades deshumanas con las cuales ha sido cometida la matanza...” (Votos de los Dres. Julio S. Nazareno y Eduardo Moliné O’Connor).

Autos: Priebke, Erich s/ solicitud de extradición - causa nº 16.063/94. Tomo: 318 Folio: 2148 del 02/11/1995

*The fact that Additional Protocol I (law 23,379) to the 1949 Geneva Conventions (decree 14,442) has been inserted into art. 85, paragraph 5, does not mean that the same acts cannot be categorized as crimes against humanity in so far as it cannot be ruled out that the collective punishment or reprisal was carried out for purposes of racial or religious hatred, as evidenced by the fact that a significant number of the victims belonged to the Hebrew community: art. II of the Convention on the Prevention and Punishment of the Crime of Genocide. Art. 75, sub-section 22 of the National Constitution@ (Opinion of Dr Gustavo A. Bossert)*

Proceedings: Priebke, Erich re: extradition request - case N1 16,063/94. Volume: 318

Page: 2148 Ref: dated 02/11/1995.

Spanish original:

“El encuadre en el art. 85, apartado 5º del Protocolo Adicional I (ley 23.379) a los Convenios de Ginebra de 1949 (decreto - ley 14.442) no desplaza la concurrencia, respecto de los mismos hechos, delitos de lesa humanidad en la medida en que no puede descartarse la satisfacción de un propósito de odio racial o religioso en la ejecución de la sanción colectiva o represalia, evidenciando en que un número significativo de víctimas pertenecían a la comunidad hebrea: art II de la Convención para la Prevención y la Sanción del Delito de Genocidio (decreto - ley 6286/56), art. 75, inc. 22 de la Constitución Nacional” (Voto del Dr. Gustavo A. Bossert).

Autos: Priebke, Erich s/ solicitud de extradición - causa nº 16.063/94. Tomo: 318 Folio: 2148 Ref.: del 02/11/1995

*Thompson*, in which the High Court of Australia held that it did not have jurisdiction of genocide in the absence of implementing legislation, one of the judges recognized that universal jurisdiction over this crime was permissible under international law.<sup>3</sup> In line with that statement, the government has proposed that Australian legislation expressly provide for universal jurisdiction over genocide. The current text of the bill defining crimes within the jurisdiction of the International Criminal Court provides for universal jurisdiction over genocide.<sup>4</sup>

Australia is a party to the Genocide Convention. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it.

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<sup>3</sup> *Nulyarimma v. Thompson*, [1999] FCA 1192, (Merkel, J.), para. 81 (“It was also common ground between the parties, correctly in my view, that . . . the prohibition of genocide is a peremptory norm of customary international law (*jus cogens*) giving rise to non derogable obligations *erga omnes* that is, enforcement obligations owed by each nation State to the international community as a whole . . .”).

<sup>4</sup> International Criminal Court (Consequential Amendments) Bill 2001, A Bill for an Act to amend the *Criminal Code Act 1995* and certain other Acts in consequence of the enactment of the *International Criminal Court Act 2001*, and for other purposes, Exposure Draft, L:\Treaties folder\Treaties reviews\International Criminal Court\Legislation\ex draft CA Bill 220801.doc 30/8/2001 3:29 PM, Schedule 1- Amendment of the Criminal Code Act 1995, § 268.123 (1) (Geographical jurisdiction) (*obtainable from* <http://www.aph.gov.au/house/committee/jsct>). That provision reads: “Section 15.4 (extended geographical jurisdiction - Category D) applies to genocide, crimes against humanity and war crimes.” The current wording of Section 15.4 describes the extended geographical jurisdiction of Category D as follows:

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

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

· **Austria:** Austrian courts may exercise universal jurisdiction over genocide and have done so.<sup>5</sup>

(1) **Legislation.** Although Article 321 of the Austrian *Strafgesetzbuch* (StGB), Penal Code, which makes genocide a crime, does not provide for universal jurisdiction over this crime, other provisions of the Penal Code permit Austrian courts to exercise custodial universal jurisdiction over crimes under national law in certain circumstances. Article 65.1.2 of the Penal Code states that courts may exercise jurisdiction over offences committed outside Austria, provided that the acts are also punishable in the place where they occurred, and provided that alien suspect is present in Austria and cannot be extradited to the place where the crime occurred for reasons other than the nature and characteristics of the offence.

Austria is a party to the Genocide Convention. It has signed the Rome Statute and it is expected to ratify it in 2001.

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<sup>5</sup> Entries on Austria in this memorandum draw upon Luc Reydam's, *Austria*, in his book, *Universal Jurisdiction in International Law* (Oxford: Oxford University Press) (forthcoming).

(2) **Criminal investigation and prosecution.** In July 1994, Dusko Cvjetkovi\_ was charged with genocide and complicity in genocide, murder and arson in Bosnia and Herzegovina. The *Oberster Gerichtshof* (Supreme Court) rejected a challenge to jurisdiction. It held that there was jurisdiction pursuant to Article 65.1.2 of the Penal Code, which provides for universal jurisdiction over offences under Austrian law which are punishable in the place where they were committed, as long as the non-national accused is present in Austria and cannot be extradited to the other state for reasons other than the nature and characteristics of the offence.<sup>6</sup> The Supreme Court stated that Article 6 of the Genocide Convention, which provides that persons charged with genocide “shall be tried by a competent tribunal of the State in the territory of which the act was committed” was predicated on the existence of a functioning legal system in the territorial state. Since the legal system was not functioning in that state, and since there was as yet no permanent international criminal court, then the purpose of the Convention would be thwarted if the Austrian courts did not exercise jurisdiction.<sup>7</sup>

· **Azerbaijan:** Article 12 of the Azerbaijan Criminal Code contains three bases for courts to exercise universal jurisdiction over genocide (for text and scope, see Chapter Three, Section II above).

Azerbaijan is a party to the Genocide Convention. It has not signed the Rome Statute and had not ratified it as of 1 September 2001. However, it has provided that genocide and instigation to commit genocide crimes under national law.<sup>8</sup>

· **Belarus:** Belarus courts can exercise universal jurisdiction over genocide in two circumstances (for the text and scope of the relevant provisions not quoted below, see Chapter Three, Section II).

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<sup>6</sup> The Supreme Court accepted the prosecutor’s arguments that judicial cooperation with Bosnia and Herzegovina was not possible since there were no mail or telephone communications between the judicial authorities of the two states because of the conflict and there was no orderly administration of justice in that state. The prosecutor also argued that the double criminality requirement was satisfied and that Article 7 of the Genocide Convention provided that genocide was not a political crime.

<sup>7</sup> Judgment of the *Oberster Gerichtshof*, 13 July 1994. The *Landesgericht, Salzburg* (District Court of Salzburg) issued an indictment on 27 July 1994 for genocide and murder. Cvjetkovi\_ was acquitted after a trial of all charges on the ground of insufficient evidence. *Republic of Austria v. Cvjetkovi\_*, *Landesgericht, Salzburg*, 31 May 1995. For further information about this case, see Axel Marschik, “The Politics of Prosecution: European National Approaches to War Crimes”, in Timothy L.H. McCormack & Gerry J. Simpson, eds, *The Law of War Crimes*, 65, 79-81 (1997).

<sup>8</sup> Azerbaijan Criminal Code, Art. 103 (Genocide) and Art. 104 (Instigation for the commitment of genocide). See remark following Article 103 stating: “Crimes against humanity means intentional actions, set out in Articles 103-113 of the present section when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” It is not clear whether this phrase limits genocide to cases meeting this high threshold or simply means that when torture meets the threshold in those cases it also constitutes a crime against humanity.

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

Second, Article 6 (4) states that the Criminal Code imposes criminal responsibility on a person for certain crimes listed in Article 6 (3) who has not been tried for those crimes in the territorial state and who is prosecuted in Belarus. Article 6 (3) provides that the present Code applies, independently of criminal legislation in force in the territory where the crime was committed, to genocide, which is defined as a crime in Article 127 in similar terms to the definitions in Article II of the Genocide Convention and Article 6 of the Rome Statute. The wording appears to make all persons suspected of genocide subject to the jurisdiction of national courts in the circumstances identified in Article 6 (4).

Belarus is a party to the Genocide Convention. It has not signed the Rome Statute and as of 1 September 2001 had not yet ratified it.

· **Belgium:** Belgian courts can exercise universal jurisdiction over genocide abroad.

(1) **Legislative provisions.** On 10 February 1999, Belgium adopted *la loi relative à la répression des violations graves du droit international humanitaire*. Article 7 of the 1999 law provides in relevant part:

“The Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed.”<sup>9</sup>

The breaches covered by Article 3 § 1 of the 1999 law include all of the acts of genocide in Article II of the Genocide Convention and Article 6 of the Rome Statute.<sup>10</sup> However, not all

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<sup>9</sup> This law changed the title of the *Loi du 16 juin 1993 relative à la répression des infractions graves aux conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces conventions*, renumbered the articles and amended it to include universal jurisdiction over crimes against humanity and genocide. The English translation of the 1999 law cited in this memorandum is annexed to Stefaan Smis & Kim Van der Borgh, *Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law*, 38 Int'l Leg. Mat. 918 (1999).

<sup>10</sup> Article 3 § 1 is somewhat broader in scope than in the Genocide Convention and Rome Statute in that it covers acts of negligence as well as intentional acts:

“The crime of genocide defined below, committed in peace time or in time of war, shall constitute a crime under international law and be punishable in accordance with the provisions of the present Act. In accordance with the Convention on the Prevention of the Crime of Genocide of 9 December 1948 - without prejudice to the criminal provisions applicable to other breaches committed out of negligence - genocide means any of the following acts committed with the intent to destroy in whole or in part, a national, ethnic[al], religious or racial group, as such:

1° killing members of the group;

2° causing serious bodily or mental harm to members of the group;

3° deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

forms of ancillary crimes of genocide are covered by the 1999 law or the Penal Code (see Chapter Four, Section II for a discussion of principles of criminal responsibility under the 1999 law and the Penal Code). For the history of this legislation, see Chapter Six, Section II.

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- 4° imposing measures to prevent births within the group;  
5° forcibly transferring children of the group to another group.”

The original French text (reproduced from ICRC National Implementation Database) of Article 1 (1) provides:

*“Constitue un crime de droit international et est réprimé conformément aux dispositions de la présente loi, le crime de génocide, tel que défini ci-après, qu’il soit commis en temps de paix ou en temps de guerre. Conformément à la Convention pour la prévention et la répression du crime de génocide du 9 décembre 1948, et sans préjudice des dispositions pénales applicables aux infractions commises par négligence, le crime de génocide s’entend de l’un des actes ci-après, commis dans l’intention de détruire, en tout ou en partie, un groupe national, ethnique, racial ou religieux comme tel :*

- 1° meurtre de membres du groupe;*
- 2° atteinte grave à l’intégrité physique ou mentale de membres du groupe;*
- 3° soumission intentionnelle du groupe à des conditions d’existence devant entraîner sa destruction physique totale ou partielle;*
- 4° mesures visant à entraver les naissances au sein du groupe;*
- 5° transfert forcé d’enfants du groupe à un autre groupe.”*

Independently of this legislation, however, it is generally accepted that Belgian courts have universal jurisdiction over crimes against humanity - which includes genocide - as defined under customary international law.<sup>11</sup>

Belgium is a party to the Genocide Convention and it has ratified the Rome Statute.

(2) **Criminal investigations.** The four Rwandans convicted in April 2001 of war crimes in Rwanda in 1994 were not charged with genocide, because at the time they were charged genocide was not defined as a crime under national law and there was no express legislative provision for universal jurisdiction, although, as indicated above, Belgian courts could have exercised such jurisdiction based on customary international law. However, there has been at least one case in which the prosecutor declared admissible a complaint of genocide.

**Ariel Sharon.** For further details about this case, see Chapter Four, Section II.

· **Bosnia and Herzegovina:** Separate criminal codes apply in the two parts of the country (for the text and scope of the provisions not quoted, see Chapter Three, Section II), but both provide courts with universal jurisdiction over war crimes in international and non-international armed conflict.

Bosnia and Herzegovina is a party to the Genocide Convention. It has not signed the Rome Statute and as of 1 September 2001 it had not yet ratified it.

In the **Federation of Bosnia and Herzegovina**, courts may exercise custodial universal jurisdiction pursuant to Article 133 (2) of the Criminal Code of the Federation of Bosnia and Herzegovina over crimes under the law of the Federation which are punishable in the territorial state by five years' imprisonment or more. Article 153 defines genocide as a crime in terms similar to Article II of the Genocide Convention and Article 6 of the Rome Statute.

In the **Republika Srpska**, Article 123 (2) of the Criminal Code of the Republika Srpska provides for custodial universal jurisdiction over any crime punishable by at least five years' imprisonment, provided the suspect is not extradited to another state. Article 432 of the Criminal Code prohibits genocide.<sup>12</sup>

· **Brazil:** Brazilian civilian and military courts can exercise universal jurisdiction over genocide in certain circumstances.

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<sup>11</sup> David, *Principes de droit des conflits armés, Principes de droit des conflits armés* (Bruxelles: Presses Universitaires de Bruxelles 1994) para. 4.202.

<sup>12</sup> Criminal Code of the Republika Srpska, Art. 432 (Genocide) (defining genocide in similar terms to the definitions in Article II of the Genocide Convention and Article 6 of the Rome Statute). *See also* Art. 437 (Organizing a Group and Instigating the Commission of Genocide and War Crimes) (however, the crimes listed in this article refer to war crimes, slavery and trafficking in persons, not genocide).

Civilian courts can exercise universal jurisdiction pursuant to Article 7 (Part I) (d) of the *Código Penal* (Penal Code) over foreigners domiciled in Brazil who are suspected of genocide abroad.<sup>13</sup> Although this provision is of limited application, it may well apply to persons suspected of genocide who have received asylum in Brazil or are long-term residents, although the scope of the concept of domicile under Article 7 (Part I) (d) is not known.

Article 7 (Part II) (a) of the Brazilian Criminal Code (for the text, see Chapter Four, Section II above) provides that national courts have universal jurisdiction to try crimes which committed abroad which Brazil is obliged to repress under a treaty. It is not clear whether this provision requires that such crimes be punished (independent of jurisdictional provisions) or that the treaty also include an *aut dedere aut judicare* universal jurisdiction provision. The former broad interpretation would be more consistent with the strong support Brazil gave during the drafting of the Genocide Convention, but it has not been possible to locate any definitive jurisprudence or commentary on this point. Under the Penal Code, the suspect must be in Brazil, the act must also be also punishable in the territorial state (double criminality), extradition for the crime be authorized under national law and the suspect must not have been acquitted, have completed a sentence or been pardoned (see Chapter Four, Section II). Genocide is defined as a crime under Brazilian law in a manner similar to that in Article II of the Genocide Convention and Article 6 of the Rome Statute.<sup>14</sup>

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<sup>13</sup> Penal Code, Art. 7 (Part I) (“The following shall be subject to Brazilian law, even though committed abroad: I . . . (d) genocide, when by an agent of Brazil or a person domiciled in Brazil.”) (English translation by Amnesty International). The original text in Portuguese reads:

“*Ficam sujeitos à lei brasileira, embora cometidos no estrangeiro: I . . . (d) de genocídio, quando o agente for brasileiro ou domiciliado no Brasil.*”  
*Código Penal, Art. 7º I (d).*

<sup>14</sup> Law No. 2.889, of October 1956, published in the official gazette on 2 October 1956 [*Lei N.º 2.889, de 1.º De outubro de 1956, publicada no Diário Oficial da União, de 2 de outubro de 1956*].



In addition, the *Código Penal Militar* (Military Penal Code), which prohibits some conduct which could amount to war crimes, applies extraterritorially and to members of foreign armed forces during armed conflict (for the text and scope of these provisions, see Chapter Four, Section II). Article 7 provides that military penal law applies to conduct abroad, when not prohibited by treaties and when the suspect has not previously been tried by a foreign court. Article 11 provides that the Military Penal Code applies to members of foreign armed forces when this is authorized by international treaties or conventions. The crime of genocide in peacetime is a crime under Article 208 of the Military Penal Code.<sup>15</sup> In addition, under Article 10, Part II of the Military Penal Code, during armed conflict, the peacetime crimes are also considered to be military crimes.<sup>16</sup> More specifically, Articles 401 to 402 provide that genocide is a wartime crime.<sup>17</sup>

Brazil has ratified the Genocide Convention. It has signed the Rome Statute, but it had not yet ratified it as of 1 September 2001.

· **Bulgaria:** Bulgarian courts may exercise universal jurisdiction over genocide under 6 (1) of the Bulgarian Penal Code (for the text of provisions not quoted, see Chapter Three, Section II). That article provides that the Penal Code applies to foreign citizens who have committed abroad crimes against peace and humanity, affecting the interests of another state or foreign citizens.<sup>18</sup> Article 416 in Section III (Liquidation of Groups of the Population (Genocide) and Apartheid) of Chapter Fourteen of the Penal Code (Crimes against Peace and Humanity) provides that genocide is a crime.<sup>19</sup>

<sup>15</sup> Military Penal Code, Book I (*Dos crimes militares em tempo de paz*) (Military crimes in peacetime), Title IV (*Dos crimes contra a pessoa*) (Crimes against the person): Chapter I (*Do homicídio*) (Homicide), Arts 205 - 207; Chapter II (*Do genócidio*) (Genocide), Art. 208. The definition is similar to that in Article II of the Genocide Convention and Article 6 of the Rome Statute.

<sup>16</sup> Military Penal Code, Art. 10, Part II. It provides:

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

...

II – military crimes prescribed for times of peace;

The original text in Portuguese reads:

“Consideram-se crimes militares, em tempo de guerra:

....

II - os crimes militares previstos para o tempo de paz . . . .”

*Código Militar Penal, Art. 10º.*

<sup>17</sup> Military Penal Code, Book II (*Dos crimes militares em tempo de guerra*) (Military crimes in war time), Title III (*Dos crimes contra a pessoa*) (Crimes against the person): Chapter II (*Do genócidio*) (Genocide), Arts 401 - 402.

<sup>18</sup> Article 6 (2) of the Penal Code, which states that “[t]he Penal Code shall also apply to other crimes committed by foreign citizens abroad, where this is stipulated in an international agreement, to which the Republic of Bulgaria is a party”, probably requires that the treaty provide for universal jurisdiction, so this may not be a sufficient alternative basis for universal jurisdiction over genocide.

<sup>19</sup> Bulgarian Penal Code, Art. 416 (amended, SG, No. 153/1998) (defining genocide in terms broadly similar to the definitions in Article II of the Genocide Convention and Article 6 of the Rome Statute). That article provides:

Bulgaria is a party to the Genocide Convention. It has signed the Rome Statute, but had not yet ratified it as of 1 September 2001.

· **Burundi:** National courts may exercise universal jurisdiction over conduct which takes place abroad amounting to genocide. Article 4 of the Decree-Law No. 1/6 of 4 April 1981 provides for universal jurisdiction over any conduct abroad which would be a crime under Burundi law with a penalty of two or months' imprisonment, unless the suspect is extradited and provided that the Prosecutor's Office (*Ministère Public*) requests a prosecution (for the text and scope, see Chapter Four, Section II).

Burundi is a party to the Genocide Convention. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. It has not been possible to obtain a copy of the Penal Code to determine whether it provides that genocide is a crime under national law, but the wording of Article 4 makes it clear that it includes any conduct that is a crime under national law, so it would cover conduct such as murder when it amounts to genocide. In addition, a draft law was prepared in 1997 to establish procedures for the prosecution and trial of persons responsible for acts committed since 21 October 1993 that are defined and punishable under the Penal Code and constitute genocide, or are crimes under the Penal Code committed in connection with events related to genocide and crimes against humanity (for the text and scope of this provision, see Chapter Four, Section II). However, as of 1 May 2001, it had not yet been enacted into law.

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“A person who, for the purpose of liquidating, completely or in part, a certain national, ethnic, racial or religious group:

- a) causes death, severe bodily injury or permanent derangement of the consciousness of a person belonging to such a group;
  - b) places the group under living conditions such that lead to its full or partial physical liquidation;
  - c) takes measures aimed at checking the birth rate amid such a group;
  - d) forcefully transfers children from one group to another, shall be punished for genocide by deprivation of liberty for a term of from ten up to twenty years or by life imprisonment without substitution.
- (2) (Former Article 417 - SG, No. 95/1975) A person who commits preparation for genocide shall be punished by deprivation of liberty for one to eight years.
- (3) (Former Article 418 - SG, No. 95/1975) A person who openly and directly incites genocide, shall be punished by deprivation of liberty for one to eight years.”

· **Canada:** Canadian courts may exercise universal jurisdiction over genocide, as recognized in the Rome Statute, in most circumstances. Canada is a party to the Genocide Convention and has ratified the Rome Statute. The Crimes Against Humanity and War Crimes Act of 2000, which was enacted with a view to implementing the Statute, gives its courts universal jurisdiction over genocide as defined in the Statute (the same definition as in Article II of the Genocide Convention and in prior legislation) (for the text and scope of the Act, see Chapter Three, Section II above).<sup>20</sup>

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<sup>20</sup> An Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other Acts (Crimes Against Humanity and War Crimes Act), Bill C-19, 2nd Sess., 36<sup>th</sup> Parl., 48-49 Elizabeth II, 1999-2000, assented to 29 June 2000 (obtainable from: <<http://www.parl.gc.ca>>). Previously, Section 318 of the Criminal Code, R.S.C. 1985, C-46, provided that genocide was a crime.

The Act provides that genocide committed outside Canada is a crime under Canadian law.<sup>21</sup> Section 6 (3) defines crimes against humanity as crimes against humanity under customary international law, conventional international law or general principles of law recognized by the community of nations and Section 6 (4) clarifies that the definition of crimes against humanity in Article 7 of the Rome Statute are, as of 17 July 1998, crimes according to customary international law.<sup>22</sup> Section 6 (5) notes that crimes against humanity were crimes under customary international law or general principles of law recognized by the community of nations before the London Agreement of 8 August 1945 establishing the Nuremberg Tribunal.<sup>23</sup>

Section 8 (b) provides that “[a] person who is alleged to have committed an offence under section 6 or 7 [command and superior responsibility] may be prosecuted for that offence if . . . after the time of the offence is alleged to have been committed, the person is present in Canada.”<sup>24</sup> It is not entirely free from doubt about whether this sub-section provides for custodial universal jurisdiction or not. Several government officials involved in the drafting of this provision said that it meant that neither the police nor a prosecutor could open a preliminary criminal investigation concerning crimes committed abroad defined in sections 6 and 7 or seek extradition of a suspect unless the suspect had been in Canada after the offence. Other experts in Canadian law said that section 8 (b) simply meant that a prosecution pursuant to an indictment could not proceed unless the suspect had been in Canada

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<sup>21</sup> Crimes Against Humanity and War Crimes Act, Sec. 6 (1) (b). That section states: “6. (1) Every person who, either before or after the coming into force of this section, commits outside Canada . . . (b) a crime against humanity . . . is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8.” Section 8 is discussed below.

<sup>22</sup> Section 6 (3) reads:

“The definitions in this subsection apply in this section [Section 6, governing crimes committed outside Canada].

‘crime against humanity’ means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.”

Section 6 (4) states:

“For greater certainty, crimes described in articles 6 and 7 and paragraph 2 of article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law, and may be crimes according to customary international law before that date. This does not limit or prejudice in any way the application of existing or developing rules of international law.”

<sup>23</sup> Section 6 (5) provides:

“For greater certainty, the offence of crime against humanity was part of customary international law or was criminal according to the general principles of law recognized by the community of nations before the coming into force of either of the following:

(a) the Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed at London on August 8, 1945; and  
(b) the Proclamation by the Supreme Commander for the Allied Powers, dated January 19, 1946.”

<sup>24</sup> Crimes Against Humanity and War Crimes Act, Sec. 6 (b).

after the offence, but that it did not prevent a preliminary police or prosecutorial investigation or a request for extradition before entry into Canada. This issue will need to be resolved by a court.

It is not a justification, excuse or defence under the Act if the offence was committed in obedience to or in conformity with the law of the place where it was committed.<sup>25</sup> There is no provision in the Act concerning statutes of limitation and it is not clear if statutes of limitation apply to crimes in the Act. Consent of a political official, the Attorney General or Deputy Attorney General is required to commence proceedings, but no criteria are spelled out to guide the official in making this political decision.<sup>26</sup> In addition, contrary to the principle of international law recognized in the Nuremberg Charter, the 1996 Draft Code of Crimes and the Statutes of the Yugoslavia and Rwanda Tribunals, the Act provides that superior orders are a defence to war crimes in certain circumstances.<sup>27</sup> Section 12 appears to prevent foreign judgments of guilt or innocence and pardons being used as bars to prosecution in Canada for crimes against humanity, but it is silent on whether the Attorney General or Deputy Attorney General in making the political decision whether to prosecute or not for crimes against humanity may take into account foreign amnesties or other measures of impunity.<sup>28</sup>

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<sup>25</sup> Crimes Against Humanity and War Crimes Act, Sec. 13.

<sup>26</sup> Crimes Against Humanity and War Crimes Act, Art. 9 (3).

<sup>27</sup> Crimes Against Humanity and War Crimes Act, Art. 14 (incorporating the defence of superior orders as defined solely for purposes of proceedings before the International Criminal Court in Article 33 of the Rome Statute).

<sup>28</sup> Section 12 provides:

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

(2) Despite subsection (1), a person may not plead *autrefois acquit*, *autrefois convict* or pardon in respect of an offence under any of sections 4 to 7 if the person was tried in a court of a foreign state or territory and the proceedings in that court

(a) were for the purpose of shielding the person from criminal responsibility; or

(b) were not otherwise conducted independently or impartially in accordance with the norms of due process recognized by international law, and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person to justice.”

After the acquittal of the accused on charges of war crimes and crimes against humanity in the *Finta* case, was upheld on appeal by the Court of Appeal and then in 1994 by the Supreme Court, the government announced a change in January 1995 in approach from emphasizing criminal prosecution to seeking revocation of citizenship, similar to the approach in the United States (see discussion of this case and the policy in Chapter Four, Section II). One case reflecting this new approach is that of Leon Mugesera, the Vice-President of the MRND party in Giseny prefecture of Rwanda and an adviser in the Ministry of the Family and Promotion of Women, who was accused of directly and publicly incited genocide in 1992 through radio broadcasts. An adjudicator of the Canadian Immigration and Refugee Board found that allegations were correct and then stripped him of his permanent resident status on 11 July 1996. The Justice Department did not open a criminal investigation. Instead, on further proceedings were instituted to strip him of his refugee status, with a view to removing him from the country.<sup>29</sup> However, in the autumn of 1997, the government conducted a review of its War Crimes Program and on 21 July 1998 announced that 14 cases from the Second World War would be initiated over the next three years and that additional cases would be developed. As far as is known, however, there is no criminal investigation of Leon Mugesera pending.

· **Chile:** The government and a commission are reported to be studying whether to provide for universal jurisdiction over genocide. Chile is a party to the Genocide Convention and it has signed, but not yet ratified as of 1 September 2001 the Rome Statute.

Chile has not defined genocide as a crime under its national law so prosecutions may have to be for ordinary crimes under national law such as murder.

· **China:** In one autonomous district of China, Macau, courts may exercise universal jurisdiction over genocide. Article 5 (1) (b) of the *Código Penal de Macau* (Penal Code of Macau) states that courts of the territory have universal jurisdiction over genocide, which is made a crime under internal law by Article 230 of the Penal Code, provided that the suspect is in Macau and the suspect's extradition is not sought. Although this section of Article 5 does not apply to ancillary crimes of genocide in Article 231, Article 5 (1) (c) and (2) may provide universal jurisdiction over such conduct in two situations: when a foreign resident of Macau commits a crime abroad that is a crime in the place where it occurred and when anyone commits a crime where Macau is obliged by an international agreement or the dictates of judicial cooperation to apply its law to the crime.

Article 5 states in relevant part:

“1. Unless provided for to the contrary by an international agreement enforceable in Macau or in accordance with the dictates of judicial cooperation, the criminal law of Macau shall also apply to acts committed outside Macau:

....

b) When they constitute the crimes specified in . . . articles . . . 230 . . . , provided that the party is in Macau and cannot be handed over to another Territory or State,

c) By a resident of Macau against a non-resident, or by a non-resident against a resident, provided that:

<sup>29</sup> For a brief account of this case, see William A. Schabas, *Mugasera. Decision of the Immigration and Refugee Board (Appeal Division)*, 6 November 1998, 2 Y.B. Int'l Hum. L. 345 (1999).

- (1) the party is in Macau,
- (2) The act would also be punished by the legislation of the place where it was committed, except where no punitive power acts in that place, and
- (3) It constitutes a crime which permits the handing over of the agent and this cannot be granted, . . . .

2. The criminal law of Macau also applies to acts committed outside Macau provided that the obligation to try them results from an international agreement enforceable in Macau or in accordance with the dictates of judicial cooperation.”<sup>30</sup>

China is a party to the Genocide Convention, but it has not signed the Rome Statute and as of 1 September 2001 had not yet ratified it.

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<sup>30</sup> Macau Criminal Code of 1998, Art. 5 (Acts committed outside Macau) (English translation by Amnesty International). The original text in Portuguese reads:

“Salvo disposição em contrário constante de convenção internacional aplicável em Macau ou de acordo no domínio da cooperação judiciária, a lei penal de Macau é ainda aplicável a factos praticados fora de Macau:

. . . .

b) Quando constituírem os crimes previstos . . . nos artigos . . . 230.º . . . desde que o agente seja encontrado em Macau e não possa ser entregue a outro Território ou Estado;

c) Por residente de Macau contra não-residente, ou por não-residente contra residente, sempre que:

(1) O agente for encontrado em Macau;

(2) Os factos forem também puníveis pela legislação do lugar em que tiverem sido praticados, salvo quando nesse lugar não se exercer poder punitivo; e

(3) Constituírem crime que admita entrega do agente e esta não possa ser concedida . . .

. . . .

2. A lei penal de Macau é ainda aplicável a factos praticados fora de Macau sempre que a obrigação de os julgar resulte de convenção internacional aplicável em Macau ou de acordo no domínio da cooperação judiciária.”

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

· **Colombia:** Article 101 and 102 of the Colombia Penal Code define genocide and defence of genocide as crimes under Colombian law.<sup>31</sup> Article 101 includes political groups as protected

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<sup>31</sup> Penal Code, Art. 101 (Genocide) & Art. 102 (Defence of genocide) (English translation by Amnesty International).

“Article 101 *Genocide*. Whoever, with the intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group acting within the framework of the law, causes the death of its members by reason of their membership of that group, shall incur thirty (30) to forty (40) years’ imprisonment; a fine of between two thousand (2,000) and ten thousand (10,000) current legal monthly minimum salaries and a ban on the exercise of public duties and civil rights for a period of fifteen (15) to twenty (20) years.

The penalty shall be from ten (10) to twenty-five (25) years’ imprisonment, a fine of one thousand (1,000) to ten thousand (10,000) current legal monthly minimum salaries and a ban on the exercise of public duties and civil rights for a period of between five (5) and fifteen (15) years if any of the following acts are committed with the same intent:

1. Causing serious bodily or mental harm to members of the group.
2. Forced pregnancy.
3. Inflicting on members of the group conditions of life calculated to bring about its physical destruction in whole or in part.
4. Imposing measures intended to prevent births within the group.
5. Forcibly transferring children of the group to another group.

Article 102. *Defence of genocide*. Whoever disseminates through any medium ideas or doctrines encouraging or justifying conduct constituting genocide, or aiming to rehabilitate regimes or institutions supporting practices leading to such conduct, shall incur six (6) to ten (10) years’ imprisonment, a fine of between five hundred (500) and one thousand (1,000) current legal monthly minimum salaries, and disqualification from the exercise of public duties and civil rights for a period of between five (5) and ten (10) years.”

The original text in Spanish reads:

“Artículo 101. *Genocidio*. El que con el propósito de destruir total o parcialmente un grupo nacional, étnico, racial, religioso o político que actúe dentro del marco de la ley, por razón de su pertenencia al mismo, ocasionare la muerte de sus miembros, incurrirá en prisión de treinta (30) a cuarenta (40) años; en multa de dos mil (2.000) a diez mil (10.000) salarios mínimos mensuales legales vigentes y en interdicción de derechos y funciones públicas de quince (15) a veinte (20) años.



groups.<sup>32</sup> Although this article does not address the question of jurisdiction, Article 16 (6) of the Penal Code (former Article 15 (6)) (for the text, see Chapter Four, Section II) provides for universal jurisdiction over crimes under Colombian law.

Colombia is a party to the Genocide Convention. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it.

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*La pena será de prisión de diez (10) a veinticinco (25) años, la multa de mil (1.000) a diez mil (10.000) salarios mínimos mensuales legales vigentes y la interdicción de derechos y funciones públicas de cinco (5) a quince (15) años cuando con el mismo propósito se cometiere cualquiera de los siguientes actos:*

1. *Lesión grave a la integridad física o mental de miembros del grupo.*
2. *Embarazo forzado.*
3. *Sometimiento de miembros del grupo a condiciones de existencia que hayan de acarrear su destrucción física, total o parcial.*
4. *Tomar medidas destinadas a impedir nacimientos en el seno del grupo.*
5. *Traslado por la fuerza de niños del grupo a otro grupo.*"

*Artículo 102. Apología del genocidio. "El que por cualquier medio difunda ideas o doctrinas que propicien o justifiquen las conductas constitutivas de genocidio, o pretendan la rehabilitación de regímenes o instituciones que amparen prácticas generadoras de las mismas, incurrirá en prisión de seis (6) a diez (10) años, multa de quinientos (500) a mil (1.000) salarios mínimos legales mensuales vigentes, e inhabilitación para el ejercicio de derechos y funciones públicas de cinco (5) a diez (10) años."*

The *Corte Constitucional* (Constitutional Court) has declared in *SENTENCIA* No.C-177 of 2001 that the restriction of a protected political group to one "which is acting on the legal framework" (*que actúe en el marco de la ley*) is unconstitutional (*obtainable from <http://bib.minjusticia.gov.co/biblioteca/consulta.htm>*).

Between 6 of July of 2000 and 24 of July 2001 a special Law on genocide, enforced disappearance, forced displacement and torture was in force (Ley 589 of 6 July 2000). Political groups as protected groups were included in Law 589. Article 14 of that law stated that the crimes included in the law were not subject to amnesty or pardon. The original Spanish text read: "*Los delitos que tipifica la presente ley no son amnistiabiles ni indultables.*"

<sup>32</sup>Formerly genocide and ancillary crimes were defined in Articles 34 and 35 of the Penal Code and did not include political groups as protected groups:

The original Spanish text read:

*"El que con el propósito de destruir total o parcialmente a un grupo nacional, étnico, racial o religioso y por razón de su pertenencia al mismo diere muerte a cualquiera de sus miembros incurrirá en prisión de cuarenta (40) a sesenta (60) años."*

*Código Penal, Art. 34 (Genocidio).* Article 35 read:

The original text in Spanish reads:

*"El que con el propósito de destruir total o parcialmente a un grupo nacional, étnico, racial o religioso y por razón de su pertenencia al mismo lesione a cualquiera de los miembros del grupo, establezca medidas destinadas a impedir el nacimiento de niños dentro del grupo, realice traslados por la fuerza de niños del grupo a otros grupos o someta a sus miembros a condiciones de existencia que hayan de acarrear su destrucción física, total o parcial, incurrirá en prisión de veinticinco (25) a cuarenta (40) años."*

*Código Penal, Art. 35 (Otros Actos constitutivos de Genocidio).*

· **Costa Rica:** Article 7 of the Costa Rican Penal Code provides for custodial universal jurisdiction over genocide. It states that “[r]egardless of the regulations in force in the place where the punishable act is committed and of the nationality of the perpetrator, punishment under Costa Rican law shall be applicable to anyone who commits acts of . . . genocide”.<sup>33</sup> Article 8 requires that the suspect be present in the territory and provides that a criminal prosecution may only be brought by “the relevant bodies”.<sup>34</sup> (for full text, see Chapter Four, Section II)

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<sup>33</sup> Penal Code, Art. 7 (English translation by Amnesty International). That article states:

The original text in Spanish reads:

*“ARTÍCULO 7º.- “Independientemente de las disposiciones vigentes en el lugar de la comisión del hecho punible y de la nacionalidad del autor, se penará conforme a la ley costarricense a quienes cometan actos de piratería, genocidio, falsifiquen monedas, títulos de crédito, billetes de banco y otros efectos al portador; tomen parte en la trata de esclavos, mujeres o niños; se ocupen del tráfico de estupefacientes o publicaciones obscenas y a quienes cometan otros hechos punibles contra los derechos humanos previstos en los tratados suscritos por Costa Rica, o en este Código.”*

Obtainable from <http://www.poder-judicial.go.cr/salatercera/leyes/cpenal.htm>.

<sup>34</sup> Penal Code, Art. 8 (English translation by Amnesty International). That article states:

The original text in Spanish reads:

*“Para que los delitos a que se contrae el artículo 5º sean perseguibles en Costa Rica, se requiere únicamente la acción del Estado.*

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

*Además en los casos del artículo 6º, se precederá con la simple querrela del ofendido y en los del artículo 7º sólo podrá iniciarse la acción penal, mediante instancia de los órganos competentes.”*

*Código Penal, Art. 8º.*

Costa Rica has ratified the Genocide Convention. It has ratified the Rome Statute, but as of 1 September 2001 had not yet enacted implementing legislation. Genocide is a crime under national law.<sup>35</sup>

· *Côte d'Ivoire*: Military courts can exercise jurisdiction over certain conduct that may amount to genocide, such as murder, but only when committed in a zone of military operations against stateless persons and refugees.

Article 11 of the Military Penal Code (Law No. 74-350) of 26 November 1974 extends the jurisdiction of military courts to felonies (*crimes*) and misdemeanours (*délits*) committed anywhere by enemy nationals or their agents against stateless persons and refugees on the territory of the Republic or in any zone of military operations (for the text and scope of this article, see Chapter Four, Section II). Despite its limited scope, this article would appear to include areas in which Ivoirian troops were operating during a peace-keeping mission, which might well take place in a situation in which genocide was or had occurred.

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<sup>35</sup> Penal Code, Art. 375 (English translation by Amnesty International). That article defines the crime of genocide more broadly than Article II of the Genocide Convention by protecting political groups:

“A sentence of imprisonment for a period of ten to twenty-five years shall be imposed on anyone who participates with murderous intent in the destruction, in whole or in part, of any specific group of human beings on grounds of nationality, race, or religious or political belief. The same sentence shall be applicable to anyone who:

- 1) Causes serious bodily or mental harm to members of such groups;
- 2) Places such groups in living conditions which are so precarious that they put at risk the lives of all or some of the individuals who make up such groups;
- 3) Imposes measures intended to prevent births within the group; and
- 4) Transfers, by use of force or intimidation, children from one of these groups to groups of a different kind.

The original Spanish text reads:

“Se impondrá prisión de diez a veinticinco años, a quien tome parte con propósito homicida, en la destrucción total o parcial de un determinado grupo de seres humanos, por razón de su nacionalidad, raza, o creencia religiosa o política. Con idéntica pena será sancionado quien:

- 1) Causare a los miembros de esos grupos graves daños corporales o psíquicos;
- 2) Colocare a dichos grupos en condiciones de vida tan precaria, que haga posible la desaparición de todos o parte de los individuos que los constituyen;
- 3) Tomare medidas destinadas a impedir los nacimientos dentro de esos grupos; y
- 4) Traslada, por medio de fuerza o intimidación, niños de uno de esos grupos a otros distintos.”

(Así modificada la numeración de este artículo por el numeral 185, inciso a), de la ley No.7732 de 17 de diciembre de 1997, que lo traspasó del 373 al 375).

The Côte d'Ivoire is a party to the Genocide Convention. It has signed the Rome Statute, but it had not yet ratified it as of 1 September 2001. Certain acts constituting genocide within the definitions in Article II of the Genocide Convention and Article 6 of the Rome Statute are defined as crimes in the *Code Pénal* (Penal Code) and it also protects political groups.<sup>36</sup>

· **Croatia:** Croatian courts may exercise universal jurisdiction over genocide committed abroad under two legislative provisions (for the history, text and scope of these provisions, see Chapter Four, Section II).

First, under Article 14 (1) of the Criminal Code, Croatian courts may exercise universal jurisdiction over anyone who commits a crime which Croatia is required to punish under customary or conventional international law. Second, Article 14 (4) and (5) impose an *aut dedere aut judicare* obligation on its courts to exercise custodial universal jurisdiction over persons found in Croatia who are suspected of committing crimes under national law abroad which are punishable by at least five years' imprisonment in the territorial state in cases where the foreigner is not extradited.

Croatia is a party to the Genocide Convention. It has ratified the Rome Statute, but as of 1 September 2001, it had not yet enacted implementing legislation. Genocide is a crime under Croatian law punishable by at least ten years' imprisonment.<sup>37</sup>

· **Czech Republic:** It appears that Czech courts may exercise universal jurisdiction over genocide under one or more legislative provisions.

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

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<sup>36</sup> Penal Code, Law No. 81-640, Art. 137. The original text in French provides:

*“Art. 137. Est puni de la peine de mort quiconque, dans le dessein de détruire totalement ou partiellement un groupe national, ethnique, confessionnel ou politique, organise, ordonne ou pratique en temps de guerre comme en temps de paix :*

*1° Des homicides, des lésions corporelles ou des atteintes graves à la santé physique ou mentale des membres du groupe, sous quelque forme que ce soit ;*

*2° Des mesures en vue d'empêcher la procréation ou la survie de la descendance de ses membres ;*

*3° Le déplacement ou la dispersion forcée de populations ou d'enfants ou leur placement dans des conditions de vie telles qu'elles doivent aboutir à leur mort ou à leur disparition.*

(the original French text is obtainable from <<http://www.preventgenocide.org>>).

<sup>37</sup> Criminal Code, Art. 156 (English translation in ICRC IHL database, obtainable from <<http://www.icrc.org/ihl-nat>>). That article defines genocide in a manner similar to that in Article II of the Genocide Convention and in Article 6 of the Rome Statute:

“Whoever should order, with an aim to completely or partially destroy a national, ethnic, racial or religious group, that members of such group be killed or severely injured or that their physical or psychological health be severely damaged or that civilians be forcibly displaced or that a group be put in such life conditions which would lead to its complete or partial extermination, or that measures be taken to prevent procreation among members of such group or that children be forcibly moved to another group, or whoever with the same goal commits any of the above-mentioned acts[] shall be punished with at least ten years' imprisonment or with long-term imprisonment.”

“The Czech law shall apply when determining liability to punishment for . . . genocide (section 259) . . . even if such a crime was committed abroad by a foreign national (an alien) or a stateless person who does not reside (i.e. has no permanent permit to reside) on the territory of the Czech Republic.”<sup>38</sup>

In addition, Section 20 (1) of the Criminal Code requires courts to exercise custodial universal jurisdiction over crimes committed abroad by aliens or stateless persons not resident in the Czech Republic, provided that the act is criminal in the place where it occurred and the suspects are not extradited (for the text and scope of this and other legislative provisions not quoted, see Chapter Four, Section II). Section 18 (1) (b) provides that Czech law shall be applied to determine the punishability of an act committed abroad by a stateless resident of the Republic.

In addition to other provisions giving courts custodial universal jurisdiction over analogous crimes, Section 20a (1) of the Criminal Code provides that Czech law shall also be applied to determine the punishability of an act when this is provided by a promulgated international treaty by which the Czech Republic is bound and Section 20a (2) provides that sections 17 to 20 do not apply if this is not provided under a treaty binding on the Czech Republic. However, it is not clear whether the punishability of the act means only that under substantive law the act is punishable or whether the treaty must also expressly provide for universal jurisdiction. If the latter, then none of the universal jurisdiction provisions would provide universal jurisdiction over genocide. However, such a restrictive interpretation would mean that the express provision for universal jurisdiction over genocide in Section 19 would serve no purpose and such a reading of a legislative provision is not favoured.

The Czech Republic is a party to the *Apartheid* Convention and the Convention against Torture. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. Genocide is a crime under national law.<sup>39</sup>

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<sup>38</sup> Criminal Code, No. 140/1961, § 19 (English translation in *Criminal Code “Trestní zákon”* (Prague: Trade Links June 1999).

<sup>39</sup> Criminal Code, § 259.

· **Denmark:** Danish courts may be able to exercise universal jurisdiction over genocide in certain circumstances.<sup>40</sup> Article 8 (6) of the Danish Penal Code provides for universal jurisdiction over certain conduct, but only if another state has requested extradition of the suspect, extradition has been refused and the conduct alleged is criminal under Danish law and the law of the territorial state (for the text and scope of this provision, see Chapter Four, Section II above). Some of the criticisms of this legislation with respect to war crimes, including grave breaches, made by the Danish Red Cross apply with equal force to genocide (see discussion above in Chapter Four, Section II).

Denmark is a party to the Genocide Convention. It has ratified the Rome Statute, but it has not yet enacted implementing legislation as of 1 September 2001 and it is expected to ratify it in 2001. Genocide is a crime under Danish law.<sup>41</sup>

· **East Timor:** Special panels of the District Court in Dili, East Timor, which is expected to become independent in 2002 (see Chapter Four, Section II), have universal jurisdiction over genocide.

Section 2.1 in Section 2 (Jurisdiction) of United Nations Transitional Administration in East Timor (UNTAES) Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences provides for universal jurisdiction over genocide (for the text and scope, see Chapter Four, Section II). The definition of genocide is the same as in Article II of the Genocide Convention and in Article 6 of the Rome Statute. The Special Panel for Serious Crimes of the Dili District Court has stated that “genocide . . . deserve[s] universal jurisdiction due [to] international customary laws and (more recently) international laws”.<sup>42</sup>

· **Ecuador:** Article 5(5a) of the Ecuadoran Penal Code provides that national courts have custodial universal jurisdiction over crimes under international law, and other crimes for which it has been determined by special laws or treaties that Ecuadoran law should apply (for the text, see Chapter Four, Section II above). Therefore, national courts could exercise universal jurisdiction over genocide as part of customary law.

Ecuador is a party to the Genocide Convention. It has signed the Rome Statute and it is expected to ratify it in 2001. It has not been possible to locate any legislation defining genocide

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<sup>40</sup> Article 8 (5) of the Danish Penal Code does not appear to provide Danish courts with jurisdiction over genocide, since it seems to apply only to crimes under international law committed abroad when Denmark is required by an international treaty to prosecute such crimes. Although a convincing argument can be made based on the framework of obligations in the Genocide Convention that states parties may not harbour persons suspected of genocide if they do not extradite them, but must instead submit the cases for prosecution in their own courts, the Convention does not *expressly* require this result.

<sup>41</sup> Bkg. No. 21 of 26 May, 1952 (Law No. 132 of 29 April 1955) (English translation and original Danish text *obtainable from* <<http://www.preventgenocide.org/dk/folkedrab1955.htm>>).

<sup>42</sup> *Prosecutor v. Kasa*, Judgement, Case No. 11/CG/2000, Special Panel for Serious Crimes, Dili District Court, 9 May 2001.

as a crime under national law, so a prosecution may have to be based on ordinary crimes, such as murder, abduction, assault or rape.

· **El Salvador:** Article 10 of the 1998 Penal Code of El Salvador provides courts with universal jurisdiction over crimes in national criminal law that affect “property internationally protected by specific agreements or rules of international law or seriously undermine universally recognized human rights” (for the text of this provision and its scope, see Chapter Four, Section II).

El Salvador is a party to the Genocide Convention and Article 361 of the Penal Code defines genocide as a crime under national law.<sup>43</sup> It has not signed the Rome Statute and as of 1 September 2001 it had not yet ratified it.

According to Article 99 of the Penal Code statutes of limitation do not apply to the crime of genocide:

“Offences shall not be time-barred in the following cases: torture, acts of terrorism, kidnapping, genocide, violations of the laws and customs of war, enforced disappearance of persons, political, ideological, racial, sexual or religious persecution, provided that the acts in question were committed after the entry into force of this Code.”<sup>44</sup>

· **Estonia:** Estonian courts can exercise universal jurisdiction over genocide under several provisions of the current Criminal Code of 1992 and the new Penal Code, which enters into effect in 2002. Both legislative provisions are reinforced by the Constitution.

<sup>43</sup> Penal Code, Art. 361. The original text in Spanish reads:

*“El que con el propósito de destruir parcial o totalmente un determinado grupo humano, por razón de su nacionalidad, raza o religión, cometiere homicidios u ocasionare daños corporales o psíquicos a miembros del grupo o los sometiere a condiciones que hicieren difícil su subsistencia o les impusiere medidas destinadas a impedir su reproducción o realizare el desplazamiento violento de personas hacia otros grupos, será sancionado con prisión de diez a veinticinco años.*

*La sanción podrá aumentarse hasta treinta años si el directamente responsable de cualquier acto de genocidio fuere un funcionario civil o militar.*

*La proposición y la conspiración para actos de genocidio, serán sancionados con prisión de seis a doce años; y la incitación pública para cometer genocidio, será sancionada con prisión de cuatro a ocho años.”* Código Penal, Art. 361 (Genocidio).

<sup>44</sup> Spanish text reads: “No prescribe la pena en los casos siguientes: tortura, actos de terrorismo,

*secuestro, genocidio, violación de las leyes o costumbres de guerra, desaparición forzada de personas, persecución política, ideológica, racial, por sexo o religión, siempre que se tratara de hechos cuyo inicio de ejecución fuese con posterioridad a la vigencia del presente Código.”* (English translation in CAT/C/37/Add.4 p.29)

Article 123 of the Constitution provides that “[i]f Estonian laws or other acts contradict foreign treaties ratified by the *Riigikogu*, the provisions of the foreign treaty shall be applied.”<sup>45</sup>

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

“(1) A citizen of the Republic of Estonia, a citizen of a foreign country or a stateless person can be prosecuted under the present code for the act committed outside of Estonia:

1) if under an international treaty there has been presented a request to prosecute the offender and the act is punishable as a criminal offence in the place where it was committed or no criminal law of any country is in force in that place;

.....

(2) This code is in force in respect of acts committed outside the reach of the present code that are offences under the present code and the act is punishable as a criminal offence according to criminal law of the place it was committed or no criminal law of any country is in force in that place:

1) if the offender was a citizen of the Republic of Estonia or became a citizen of the Republic of Estonia after committing that act, or

2) if the offender was a citizen of a foreign country or a stateless person and detained in Estonia and shall not be extradited to any other country.

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<sup>45</sup> Constitution of the Republic of Estonia, 3 July 1992, Art. 123 (English translation in Jefri Jay Ruchti, *Estonia*, in Albert P. Blaustein & Gisbert H. Flanz, eds, *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. March 1994) (Release 94-2).



3) Regardless of the law of the place where the act was committed, this code is in force in respect of acts which are punishable as criminal offences under an international treaty concluded by the Republic of Estonia even if the act is committed outside the borders of the Republic of Estonia.”<sup>46</sup>

Genocide is defined as a crime under the Criminal Code.<sup>47</sup> However, the *ne bis in idem* principle appears to apply to prosecutions based on this article. Superior orders are not a defence, but may only be taken into account in mitigation of punishment. Decisions to investigate or prosecute are taken by a prosecutor, not by a political official.

**(2) New Penal Code.** A recently adopted new Penal Code, which will replace the current Penal Code when it enters into effect on 1 March 2002, and it appears that it will continue to provide for universal jurisdiction over genocide.

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

“Irrespective of the law of the place an act was committed Estonian penal law is in force in respect of the act committed outside Estonian territory if the punishability of the act derives from the international treaty binding for Estonia.”<sup>48</sup>

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<sup>46</sup> Estonian Criminal Code of 1992, § 5 (English translation of Section 5 provided by the Legal Department of the Ministry of Foreign Affairs).

<sup>47</sup> Criminal Code, Art. 92 (original text in Estonian obtainable from <http://www.preventgenocide.org/law/domestic/estonia.htm>).

<sup>48</sup> Penal Code, effective 1 March 2002, § 8.

Since the punishability of the crime of genocide appears to apply to the question whether the conduct was subject to individual criminal responsibility, rather than to the question of jurisdiction, it would appear that Section 8 would permit an Estonian court to exercise universal jurisdiction over genocide committed abroad. However, the matter is not entirely free from doubt. Genocide will be defined as a separate crime under the new Penal Code.<sup>49</sup>

Estonia is a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and Section 53 (5) of the current Criminal Code provides that statutes of limitation do not apply to war crimes and crimes against humanity. This prohibition will be continued in the new Penal Code and will also be applicable to offences that are subject to life imprisonment (crimes against humanity and genocide).<sup>50</sup> The new Penal Code will provide for command and superior responsibility for genocide and exclude superior orders as a defence.<sup>51</sup>

Estonia is a party to the Genocide Convention. It has signed the Rome Statute but it had not yet ratified it as of 1 September 2001.

· **Ethiopia:** Article 17 of the Ethiopian Penal Code provides for universal jurisdiction over “an offence against international law or an international offence specified in Ethiopian legislation, or an international treaty or a convention to which Ethiopia has adhered” (for the full text, see Chapter Four, Section II above). Article 281 (Genocide, Crimes against Humanity) of the Ethiopian Penal Code prohibits conduct amounting to genocide. The scope of Article 281 is broader than Article II of the Genocide Convention in that it covers political groups and “disappearances”.

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<sup>49</sup> *Ibid.*, § 90 (Genocide). The definition is broader than in Article II of the Genocide Convention and in Article 6 of the Rome Statute with respect to the protected groups, but appears to be narrower in terms of the prohibited acts, although the translation may be inaccurate. This section reads:

“Killing, torturing, causing bodily harm, imposing measures intended to prevent births within the group or forcibly depriving children of a national, ethnic, racial, religious group, of a group offering resistance to the occupying regime or of other social group or its member, with intent to destroy the group, in whole or in part, also putting members of a group to living conditions that have caused a danger to bring about destructio of the group, in whole or in part, is punishable by ten to twenty years’ imprisonment or life imprisonment.”

It is not clear to what extent command responsibility for genocide has been retained in the new Penal Code.

<sup>50</sup> Estonian Penal Code, entry into effect 1 March 2002, § 81 (2).

<sup>51</sup> *Ibid.*, § 88 (Punishment for the offences prescribed in this chapter [Chapter 8 - Offences (Crimes) against the humanity and international security). This chapter includes the crime of genocide (Section 90). The first paragraph of this section defines the principle of command and superior responsibility in more detail than in the current Criminal Code and the second paragraph excludes superior orders as a defence:

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

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

Ethiopia is a party to the Genocide Convention. It has not signed the Rome Statute and it had not yet ratified it as of 1 September 2001. In addition, the Federal Courts Proclamation No. 25 of 1996 gives Federal Courts jurisdiction over criminal offences against the law of nations (for the text, see Chapter Four, Section II). The Constitution provides that statutes of limitation do not apply to genocide.<sup>52</sup>

· **Federal Republic of Yugoslavia:** National courts may exercise universal jurisdiction over genocide committed abroad. Article 107 (2) of the Criminal Code of Yugoslavia of 1976 provides for custodial universal jurisdiction over any crime punishable by at least five years' imprisonment (for the text and scope, see Chapter Four, Section II).

The Federal Republic of Yugoslavia is a party to the Genocide Convention. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. Article 141 of the Criminal Code prohibits genocide and Article 145 prohibits the organization of a group to commit genocide and to instigate genocide.<sup>53</sup> Statutes of limitation do not apply to genocide.<sup>54</sup>

· **Finland:** Finnish courts may exercise universal jurisdiction over certain genocide under several provisions.

First, Section 7 (International offence) of Chapter 1 (Scope of application of the criminal law of Finland) of the Finnish Penal Code provides that Finnish law applies to crimes committed abroad where the punishability of the act, regardless of the law of the place of commission, is based on an international agreement binding on Finland or on another statute or regulation binding on Finland (*international offence*). Further provisions on the application of this section may be governed by decree. A decree has provided that genocide is an international offence.<sup>55</sup> Section 7 applies to anyone, whether a citizen of Finland or not. Its broad wording would suggest that punishable acts include crimes listed in the Rome Statute, although this is not expressly stated.

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<sup>52</sup> Constitution, Art. 28 (1). *That article states:*

“Criminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture shall not be barred by statute of limitation. Such offences may not be commuted by amnesty or pardon of the legislature or any other state organ.”

<sup>53</sup> Criminal Code, Art. 141 (Genocide) (defining the crime in a similar fashion to the definition in Article II of the Genocide Convention and Article 6 of the Rome Statute); Art. 145 (Organizing a group and instigating the commission of genocide and war crimes) (English translation *obtainable from* <http://www.preventgenocide.org/law/domestic/yugoslavia.htm>).

<sup>54</sup> Criminal Code, Art. 100.

<sup>55</sup> Decree on the application of Chapter 1, section 7 of the Penal Code (627/1996). Section 1 provides: “For the purposes of Chapter 1, section 7 of the Penal Code, the following offences shall be considered international crimes: . . . 3) Commission and preparation of the crime of genocide referred to in the Convention on the Prevention and Punishment of the Crime of Genocide (FTS) 5/1960.” (English translation *obtainable from* <http://www.icrc.org/ihl-nat/ihl-nat>).

Paragraphs 1 and 3 of Section 6 (Offence committed by a Finn) of Chapter 1 provide that Finnish law applies to persons resident in Finland at the time of offence or at the beginning of the trial and to persons found in Finland who are citizens or permanent residents of Nordic countries.

Section 8 (Other offence committed outside of Finland) of this chapter states that Finnish law applies to offences carrying a penalty of more than six months if the territorial state has requested prosecution or requested extradition and it was refused. It reads:

“Finnish law shall apply to an offence committed outside of Finland which, under Finnish law, may be punishable by imprisonment for more than six months, if the State in whose territory the offence was committed has requested that charges be brought in a Finnish court or that the offender be extradited because of the offence, the extradition request has not been granted.”<sup>56</sup>

Finland is a party to the Genocide Convention. It has ratified the Rome Statute and enacted implementing legislation on 28 December 2000.<sup>57</sup> Finland has provided in its Penal Code that genocide is a crime under national law, defined somewhat more broadly than Article II of the

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<sup>56</sup> Finnish Penal Code, Ch. 1, Sec. 8.

<sup>57</sup> The Act to implement and apply the Rome Statute of the International Criminal Court (Nr. 1284/2000) (An unofficial English translation by Prof. Ari-Matti Nuutila of the University of Turku, Finland is *obtainable from* <<http://iccnw.org>>).

Genocide Convention and Article 6 of the Rome Statute.<sup>58</sup> There is no statute of limitations for genocide, although there is a ten-year period of limitations for preparation of genocide.<sup>59</sup>

· **France:** French courts can exercise universal jurisdiction over genocide abroad, if it took place in the former Yugoslavia since 1961 and in Rwanda or by Rwandan citizens in neighbouring countries in 1994. They can also exercise universal jurisdiction over persons suspected of genocide abroad, at least since 1993, who subsequently become French citizens.

(1) **Legislation.** There are two situations in which French courts can exercise universal jurisdiction over the crime of genocide.

**Genocide in the former Yugoslavia and in Rwanda.** Law 95-1 of 2 January 1995, which implements Security Council Resolution 827 establishing the Yugoslavia Tribunal, gives French courts jurisdiction over genocide committed in the former Yugoslavia since 1991 and Law 96-432 of 22 May 1996, which implements Security Council Resolution 955 establishing the Rwanda Tribunal, provides jurisdiction over genocide committed in Rwanda during 1994, and by Rwandans during that year in neighbouring countries (for the text of these laws and for the 1998 decision by the *Cour de cassation* (Court of Cassation) in the *Munyeshyaka* case concerning the law for Rwanda, see Chapter Four, Section II).

<sup>58</sup> Section 6 (Genocide) of Chapter 11 (War crimes and crimes against humanity) of the Penal Code, Law 578/1995, provides:

“(1) A person who for the purpose of entirely or partially destroying a race, a national, ethnic or religious group or another comparable group

- (1) kills members of the group;
- (2) inflicts grievous bodily or mental damage or illness to members of the group;
- (3) takes forcible measures to prevent procreation among the group;
- (4) forcibly moves children from one group to another; or
- (5) in another comparable manner essentially impairs the survival of the group

shall be sentenced for *genocide* to imprisonment for at least four years or for life.

(2) An attempt is punishable.”

Section 7 (Preparation of genocide) of Chapter 11 provides:

“A person who for the purpose referred to in section 6

- (1) conspires with another to commit genocide; or
- (2) makes a plan for genocide

shall be sentenced for *preparation of genocide* to imprisonment for at least four months and at most four years.”

A different English translation and the original text in Finnish is *obtainable from* <<http://www.preventgenocide.org/fi/rikoslaki.htm>>).

<sup>59</sup> There is no statute of limitations for crimes with a maximum penalty of life imprisonment. Penal Code, Ch. 8, § 2. There is a statute of limitations for crimes with a maximum penalty of five years' imprisonment. Penal Code, Ch. 8, § 1 (2).

When French courts try cases pursuant to Law 96-432 and Law 95-1, they appear to apply the definition of genocide in the Statutes of the Yugoslavia and Rwanda Tribunals, which is the same as the definition in Article II of the Genocide Convention and Article 6 of the Rome Statute.

However, the definition of genocide in other situations is inconsistent with the definition in international law. Article 211-1 of the Penal Code (*Code Pénal*), added in 1993, prohibits genocide.<sup>60</sup> In addition, except when the conduct can also be prosecuted as a crime against humanity (and possibly only during a period of armed conflict), genocide is subject to a ten year statute of limitations.<sup>61</sup>

**Genocide after 1993 committed by a person who subsequently becomes a French citizen.** Article 113-6 of the Penal Code (*Code pénal*) permits French courts to exercise universal jurisdiction over persons who commit felonies (*crimes*) or misdemeanours (*délits*) abroad who subsequently become French citizens (for the text of this provision, see Chapter Four, Section II). This article would apply to crimes committed after 1993, the date that genocide became a crime under French law, unless that law is interpreted to apply retrospectively.

**(2) Investigations, prosecutions and jurisprudence.** At least two courts have addressed the question of universal jurisdiction over genocide.

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<sup>60</sup> The definition in French law is more restrictive than the definition in Article II of the Genocide Convention and in Article 6 of the Rome Statute, since it requires proof of a prearranged plan, and more liberal in others, such as including as a protected group “a group established by reference to any other arbitrary criterion”. Penal Code, Art. 211-1 (“*d’un groupe déterminé à partir de tout autre critère arbitraire*”) (English translation in *The French Penal Code of 1994 as amended as of January 1, 1999* (Littleton, Colorado: Fred B. Rothman & Co. 1999) (Edward A. Tomlinson trans.)).

<sup>61</sup> Criminal Procedure Code, Art. 7 (*Code de procédure pénal* (Paris: Litec 9e ed. 1996/1997), art. 7 (L.n. 92-1336, 16 déc. 1992, art. 7, L.n. 93-913, 19 juill. 1993)).

**Javor and Zigiranyirazo.** The first French court decisions concerning genocide held that French courts may not exercise universal jurisdiction over genocide. On 6 May 1994, an investigating judge (*juge d'instruction*), Getti, of the *Tribunal de grande instance de Paris* held in the *Javor* case that a French court could not exercise universal jurisdiction over a person suspected of genocide in the former Yugoslavia. He stated that Article VI of the Genocide Convention provided for territorial jurisdiction or jurisdiction by an international criminal court, but not universal jurisdiction.<sup>62</sup> This ruling was upheld by the *Cour d'appel* (Court of Appeal) and the *Cour de cassation* (Court of Cassation).<sup>63</sup>

**Munyeshaka.** An investigating magistrate opened a criminal investigation against a Rwandan priest, Wenceslas Munyeshyaka, for genocide and other crimes against humanity committed in Rwanda in 1994. On 6 January 1998, the *Cour de cassation* reversed a decision by the *Cour d'appel* (Court of Appeal) on 20 March 1996 that had upheld a challenge to the investigating magistrate's jurisdiction. The *Cour de cassation* held that the investigating magistrate had jurisdiction over the crime of genocide under Article 211-1 of the *Code pénal* and

<sup>62</sup> *In re Javor, ordonnance*, N. Parquet 94 052 2002/7, *Tribunal de grande instance, Paris*, 6 May 1994, 2. The court said:

“Article 6 of that Convention provides that those responsible for these deeds will be brought before the competent courts of the State on whose territory the act was committed or before the International Criminal Court, a jurisdiction not yet established today. As a result, it is necessary to note that French courts would not have jurisdiction over the acts alleged in the present complaint, these having been committed outside French territory.” (English translation by Amnesty International).

The original French text reads:

“L'article 6 de cette Convention dispose que les auteurs des faits seront traduits devant les Tribunaux compétents de l'Etat sur le territoire duquel l'acte a été commis ou devant la Cour Criminelle Internationale, Juridiction non encore constituée à ce jour. En conséquence, il convient de constater que les Tribunaux Français ne sauraient être compétents à l'égard des faits dénoncés par la présente plainte, ceux ci ayant été perpétrés hors du territoire Français.”

For a report of this case, see Chapter Four, Section II.

Another judge in the same court issued a similar decision the following year. *Dupacquier et Gatari contre Zigiranyirazo et Nahimana, Ordonnance d'incompétence*, N.Parquet 943252005/6, *Tribunal de grande instance de Paris*, 23 février 1995 (Hervé Stephan, J.). He stated that Article VI set out an exclusive jurisdictional regime for states parties:

“Whereas it clearly appears that the jurisdiction of courts of the State is, not one of prior concurrent jurisdiction, but exclusive jurisdiction, subject to the eventual establishment of an international court that has not been set up to this day with respect to the acts committed on the territory of Rwanda; whereas, apart from this, French courts have no jurisdiction over the crimes condemned by the Convention cited.” (English translation by Amnesty International).

The original French text reads:

“Qu'il apparait nettement que la compétence des juridictions de l'Etat concerné est, non pas prioritaire, mais exclusive, sous réserve de la constitution éventuelle d'une juridiction internationale qui n'a toutefois pas été mise en place é ce jour en ce qui concerne les faits commis sur le territoire du RWANDA; Que, dès lors, les juriditions françaises sont incompétentes pour connaître des crimes dénoncés sur le fondement de la convention invoquée[.]”

<sup>63</sup> The *Cour d'appel*, No. A 94/02071, 24 novembre 1994, affirmed. So did the *Cour de Cassation* (Court of Cassation). *Javor, Arrêt, no. 132, Cour de cassation, chambre criminelle, 26 mars 1996, 1996 Bulletin des Arrêts de la Cour de Cassation, Chambre Criminelle, nos. 1-6, 379.*

universal jurisdiction based on Law 96-432 of 22 May 1996, enacted after the decision by the *Cour d'appel*. It stated that

“according to articles 1 and 2 of the above-mentioned act of 22 May 1996, the offenders or the accomplices of the acts that constitute, under articles 2 to 4 of the Statute of the International Tribunal, grave transgressions against the Conventions of Geneva of 12 August 1949, violations of the laws or customs of war, genocide or crimes against humanity, can, when they are found in France, be prosecuted and judged by the French jurisdictions, while applying French law[.]”<sup>64</sup>

The decision necessarily applies to genocide committed in the former Yugoslavia under Law 95-1.

France is a party to the Genocide Convention and it has ratified the Rome Statute. Unfortunately, France has not yet decided whether to give its courts universal jurisdiction over genocide when it enacts legislation implementing its obligations under the Rome Statute. If it does not, French legislation providing for universal jurisdiction over genocide will continue to be limited to war crimes in the former Yugoslavia since 1991 and in Rwanda in 1994, and genocide committed by Rwandan citizens in neighbouring countries, and the rare case when a foreigner suspected of genocide abroad after 1993 subsequently becomes a French citizen. It is also not clear whether France intends to amend its definition of genocide so that it covers all the cases covered by the definition in Article 6 of the Rome Statute, as well as the additional situations now covered.

· **Georgia:** Georgian courts may exercise universal jurisdiction over conduct amounting to genocide under at least one, and, possibly, three provisions (for the text and scope of these provisions, see Chapter Four).

First, paragraph 1 of Article 5 (Criminal responsibility for a crime committed overseas) of the Criminal Code of Georgia provides universal jurisdiction over aliens permanently resident in Georgia who commits acts abroad which are crimes under the Code, as well as crimes under the law of the territorial state .

Second, Article 5 (2) permits national courts to exercise universal jurisdiction over aliens permanently resident in Georgia who commit acts abroad which are crimes under the Code and under international undertakings, even if not crimes under the law of the territorial state.

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<sup>64</sup> *Munyeshyaka, Jugement, Cour de cassation, Chambre criminelle, No. 96-82.491 PF, 6 January 1998, Bulletin des Arrêts de la Cour de Cassation, N°1, Chambre Criminelle, janvier 1998, reprinted in 102 Revue générale de Droit international public 825 (1998/3); English translation by Louise Wesseling Plug in 1 Y.B. Int'l Hum. L. 598, 599 (1998). The original French text reads:*

*“Attendu que, selon les articles 1er et 2 de la loi du 22 mai 1996 précitée, les auteurs ou complices des actes qui constituent, au sens des articles 2 à 4 du statut du tribunal international, des infractions graves aux Conventions de Genève du 12 août 1949, des violations des lois ou coutumes de guerre, un génocide ou des crimes contre l'humanité, peuvent, s'ils sont trouvés en France, être poursuivis et jugés par les juridictions françaises, en application de la loi française[.]”*



Third, Article 5 (3) provides universal jurisdiction over foreigners and stateless persons not permanently resident in Georgia who have committed a serious crime within the meaning of Georgia's international undertakings.

Georgia is a party to the Genocide Convention. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. Genocide is a crime under national law.<sup>65</sup>

· **Germany:** German courts can exercise universal jurisdiction over genocide.<sup>66</sup>

(1) **Legislation.** Section 6 (1) of the *Strafgesetzbuch* (StGB), Penal Code, provides that “[r]egardless of the law of the place of commission, the German criminal law is also applicable to the following acts committed outside Germany: 1. Genocide (§ 220a) . . .”. Germany is a party to the Genocide Convention and to the Rome Statute. Genocide is a crime under national law.<sup>67</sup> For relevant constitutional provisions, statutory restrictions on the scope of crimes under international law and on universal jurisdiction over such crimes and the proposed amendments in the draft implementing legislation for the Rome Statute, see Chapter Four, Section II.

(2) **Criminal investigations and jurisprudence.** As of 1 September 2001, there had been at least six criminal investigations or prosecutions of persons charged with genocide committed in the territory of the former Yugoslavia (for a brief overview of the German criminal court system, see Chapter Four, Section II). Although Section 6 (1) of the Penal Code does not require a link between Germany and the crime of genocide, courts in several cases have required such a link (*legitimieren der Anknüpfungspunkte*), although this judicially created link may now be in doubt (for a discussion of this judicially created link, see Chapter Four, Section II). In addition, the definition of genocide reportedly has been interpreted restrictively in some of the cases.<sup>68</sup>

**Tadi.** In the case of *Prosecutor v. Duško Tadi*, the Federal Supreme Court (*Bundesgerichtshof*) on 13 February 1994 held that a person could be prosecuted in Germany for genocide committed in Bosnia and Herzegovina. It held that

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<sup>65</sup> Criminal Code of Georgia, Art. 407 (Genocide). The definition is similar to the definition in Article II of the Genocide Convention and Article 6 of the Rome Statute, but includes a broader range of protected groups.

<sup>66</sup> Parts of the analysis of German legislation and jurisprudence in this memorandum draw upon two unpublished papers: Luc Reydam, *Germany*, a draft chapter of his book, *Universal Jurisdiction in International Law* (Oxford: Oxford University Press 2001) (forthcoming), and Robert Roth & Yvan Jeanneret, *Rapport sur le droit allemand, 22 juin 2001*, unpublished draft manuscript submitted for discussion at the *Etude comparée des critères de compétence juridictionnelle en matière de crimes internationaux (crimes contre l’humanité, génocide, torture, crimes de guerre, terrorisme)*, Paris, 2 to 3 July 2001.

<sup>67</sup> Penal Code, § 220 (English translation and the original German text *obtainable from* <<http://www.preventgenocide.org/de/recht/strafgesetzdeutschland.htm>>). The definition is almost the same as the definition in Article II of the Genocide Convention and Article 6 of the Rome Statute.

<sup>68</sup> Roth & Jeanneret, *supra*, n.66, 5 (citing critical commentary on this jurisprudence).

“German penal law applies by virtue of § 6 (1) to genocide committed abroad independently from the law of the territorial State (so-called universality principle). Prerequisites, however, are that international law does not forbid this and that there is a legitimate link (*ein legitimierender Anknüpfungspunkt*) in the concrete case; only then is the application of German penal law to extraterritorial conduct by foreigners justified. Absent such a link the forum State violates the non-interference principle which requires States to respect the sovereignty of other States. [...]

After finding such a link in his residence in Germany for several months, which he made the center of his activities, and his arrest in Germany (for a discussion of the judicially created requirement of a link, see Chapter Four, Section II), the court added:

“The crime of aiding and abetting to genocide coincides *in casu* with other serious offences which Germany is obliged to repress on the basis of international conventions. This circumstance has mediate legal effect also for the content of § 220a StGB at any rate with regard to the application of the universality principle.

Furthermore, the prosecution of murders in Bosnia-Herzegovina by national courts fits in with numerous political, military and humanitarian measures of the international community, including Germany, aimed at countering the expansion and dominance policies in the former Yugoslavia, in particular in Bosnia-Herzegovina, and at protecting the civilian Muslim population from persecution, decimation and deportation. In those circumstances, there can be no question of an unlawful interference in the affairs of Bosnia-Herzegovina or of the present Republic of Yugoslavia. On the contrary, it would be inconceivable that Germany, in spite of the allegations and the provisions of § 6(1), would leave in peace a person who is suspected of having committed the worst possible crimes in the conflict in Bosnia-Herzegovina and who has come voluntarily to Germany.”<sup>69</sup>

He was subsequently surrendered to the Yugoslavia Tribunal and convicted on charges other than genocide.<sup>70</sup>

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<sup>69</sup> *Re: Tadi\_*, Judgment, Federal Supreme Court, 13 February 1994 [*BGH-Ermittlungsrichter, Beschluß vom 13. Februar 1994, 1 BGs 100/94*] (abstract of this case in English *obtainable from <http://www.icrc.org/ihl-nat/ihl-nat>*. The English translation is based on the translation in Reydams, *supra*, n. 66. A note on this decision by Dietrich Oehler is in NSfZ 485 (1994).

<sup>70</sup> *Prosecutor v. Tadi\_*, Opinion and Judgment, Trial Chamber, Case No. IT-94-1, 7 May 1997. His conviction was upheld on appeal. *Prosecution v. Tadi\_*, Judgment, Case No. IT-94-1-A (Appeals Chamber, 15 July 1999).

*Djaji\_*. In the *Djaji\_* case, the accused was acquitted on charges of genocide and attempted genocide on 23 May 1997 by the *Bayerisches Oberlandesgericht* (Bay OLG), Higher Regional Court of Bavaria, at Munich, although he was convicted of committing grave breaches of the Fourth Geneva Convention and Protocol I in Bosnia and Herzegovina and sentenced to five years in prison.<sup>71</sup> He had been charged with murder under Section 211 of the Penal Code, genocide under Section 220a, unlawful deprivation of liberty under Section 239, violations of Article 3 (common Article 3) of the Fourth Geneva Convention and, based on Articles 146 and 147 of that treaty, grave breaches. The court held that it had jurisdiction over genocide under Section 6 (1) of the Penal Code.

*Jorgi\_*. On 26 September 1997, Nikolai Jorgi\_ was convicted of 11 counts of genocide and 30 counts of murder in Bosnia and Herzegovina amounting to grave breaches of the Fourth Geneva Convention by the *Oberlandesgericht Düsseldorf* (OLG Düsseldorf), Higher Regional Court at Düsseldorf and sentenced to life imprisonment.<sup>72</sup> He had been charged with murder, genocide, unlawful deprivation of liberty, bodily injury, robbery and receiving stolen goods, under Sections 211, 220a, 223, 223a, 239, 249, 250 and 255 of the Penal Code and of violations of Article 3 (common Article 3) of the Fourth Geneva Convention and, based on Articles 146 and 147, of grave breaches of that treaty. The court reportedly stated that it had jurisdiction over genocide under Article 6 (1) and over the ordinary crimes amounting to grave breaches pursuant to Article 6 (9) of the Penal Code.<sup>73</sup>

The conviction was upheld on appeal by the *Bundesgerichtshof* (BGH), Federal Supreme Court. In the light of doubts that have been expressed by some scholars about whether states parties to the Genocide Convention can exercise universal jurisdiction over genocide (see Chapter Seven, Section II.C), its explanation of why a national court could exercise universal jurisdiction over genocide deserves to be set out at length:

“The conviction of the accused by a German court on the basis of the universality principle is not forbidden under international law.

Such a prohibition cannot be derived from Art. VI of the Genocide Convention. To be sure, the Convention does not incorporate the universality principle – whereas the draft did – but this is because a few countries were opposed to any international jurisdiction given the political character of the protected right. However, this did not lead to the inclusion of a prohibition. The view that the provisions [of Art. VI] are not

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<sup>71</sup> *Public Prosecutor v. Djaji\_*, Judgment, No. 20/96 (Higher Regional Court of Bavaria 23 May 1997) [*Bayerisches Oberlandesgericht, Urteil vom 23. Mai 1997 - 3 StR 20/96*]. See Christoph Safferling, *Public Prosecutor v. Djaji\_*, 92 Am. J. Int'l L. 528 (1998). A comment on the case by Kai Ambos is in *Neue Zeitschrift für Strafrecht* (NSStZ) 138 (1998).

<sup>72</sup> *Public Prosecutor v. Jorgi\_*, Judgment, Higher Regional Court at Düsseldorf, 26 September 1997 [*Oberlandesgericht Düsseldorf, StE 8/96, 26 September 1997*] (abstract in English *obtainable from* <http://www.icrc.org/ihl-nat/ihl-nat>).

<sup>73</sup> *Ibid.*

exhaustive is not only based on the drafting history; the opinion that genocide can only be punished by a court of the territorial State or by an international tribunal is irreconcilable with the obligation imposed by Art. I on all States to repress the international crime of genocide. Since genocide is most of the time condoned, if not committed, by the authorities, effective repression by the territorial State cannot be expected. An international tribunal envisaged by the Genocide Convention did not exist until the creation of the ICTY in 1993, the ICTR in 1994, and the ICC by the not yet entered into force Rome Statute. The ICTY can at this moment dispose of maximum ten cases per year. Therefore, the repression of the many crimes committed in execution of the policy of 'ethnic cleansing' urges itself upon national courts.

This construction of the Genocide Convention is also supported by Art. 9(1) of the ICTY Statute which, independently of Art. VI of the Convention, provides for concurrent jurisdiction of national courts over genocide. The Prosecutor of the ICTY, who together with the Trial Chambers has authority to interpret the Statute, understands under 'national courts' not only courts of the territorial State but courts of all other States. This follows from the fact that the Prosecutor of the ICTY in this and other cases declined to take over the proceedings and applauded the prosecution by German authorities. If the international community of States was of the opinion that the provisions of Art. VI of the Genocide Convention were exhaustive, it would have made this clear in Art. 9 of the Statute by limiting concurrency of jurisdiction to the courts of Bosnia and Herzegovina, or better to the courts of the States of the former Yugoslavia. Further, the International Court of Justice in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime Genocide (Bosnia and Herzegovina v. Yugoslavia)* has held that Convention's right and obligations apply *erga omnes* and that the conventional obligation to prevent and repress genocide has no territorial limits.

From the absence of the universality principle in the Genocide Convention follows only that State parties are not obliged to adopt this principle and prosecute a foreigner for acts of genocide committed abroad. When it comes to the repression of genocide, a crime under customary and conventional international law, no international norm prohibits State parties to do more than the conventional minimum."<sup>74</sup>

A subsequent constitutional challenge arguing that customary international law and Article VI of the Genocide Convention prohibited the exercise of universal jurisdiction over genocide was rejected by the *Bundesverfassungsgericht* (BverfG), German Constitutional Court, in 2001. First, the court held that a customary international law prohibition on the exercise of universal jurisdiction would be contrary to the obligations of Germany under Article I of the Genocide Convention, a derogation that would be impermissible since the prohibition of genocide is part of *jus cogens*.<sup>75</sup> Second, it reaffirmed the Federal Supreme Court's conclusion that Article VI did not prohibit states parties from exercising universal jurisdiction over genocide:

<sup>74</sup> *Public Prosecutor v. Jorgi*, Judgment, Federal Supreme Court, 30 April 1999 [*Bundesgerichtshof, Urteil vom 30. April 1999 - 3 StR 215/98*]. The English translation is based on the translation in Reydams, *supra*, n. 66. A comment on the case by Kai Ambos is in *Neue Zeitschrift für Strafrecht* (NStZ) 404, Heft 8 (1999).

<sup>75</sup> *Jorgi* case, Judgment, Constitutional Court, 12 December 2000 (as summarized in Reydams, *supra*, n. 66), para. 16. [*Bundesverfassungsgericht* (BverfG), 2 BvR 1290/99 vom 12.12.2000, Absatz Nr. (1-49) (obtainable

“The universality principle applies to certain acts that endanger the legal interests of the international community of States. It differs from the representation principle codified in § 7 (2) (2) StGB in that it does not require double criminality and non-extradition (para. 37).

.....

Whether the Genocide Convention contains a provision on universal jurisdiction has to be examined through interpretation. International conventions are to be interpreted from their text in accordance with their object and purpose with due regard to general international law. The lower courts’ interpretation of § 6 (1) StGB in conjunction with Art. VI of the Genocide Convention regarding the scope application of German law is at any rate neither manifestly untenable, nor impossible to maintain under no imaginable circumstances and hence arbitrary (para. 38).

.....

According to a textual interpretation the lower courts have constitutionally correctly determined that Art. VI of the Genocide Convention in any event does not contain a prohibition on German criminal jurisdiction. On the other hand, the Convention does clearly not regulate the question of jurisdiction exclusively, because, for example, the active or passive universality principle are not mentioned. The courts have thereupon interpreted Art. I of the Genocide Convention according to its object and purpose that the Convention intended effective punishment; consequently, the fact that there is no mention of the universality principle only means that the contracting Parties are not obliged to prosecute, although they are competent on the basis of this principle. It does not invite objections to prefer in some cases a ‘systematic-teleological’ interpretation above a textual interpretation of treaties. This applies in particular in the field of criminal jurisdiction over extraterritorial conduct on the basis of international conventions, because they are often vague on the issue of jurisdiction. Genocide, the most grave violation of human rights, is the classical example of the universality principle, whose function precisely is to close all loopholes in the prosecution of crimes against the fundamental legal interests of the community of States (para. 38).

.....

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from <http://www.bverfg.de>].

Yet, the drafting history of the Genocide Convention indicates that was deliberately not included. Art. VII of the initial draft contained the universality principle. In the draft of the Ad Hoc Committee, however, the universality principle was abandoned in favor of the territoriality principle. Sovereignty concerns and considerations of accession influenced that decision. There are, however, no constitutional objections against the decision of the lower courts not to attribute decisive importance to the drafting history. The preparatory work of a treaty is, according to Art. 32 of the Vienna Convention of the Law of Treaties, only a 'supplementary means of interpretation', to which recourse may only be had when the interpretation of according to Art. 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. None of these alternatives is present in this case. The interpretation according to Art. 31 clearly leads the courts the conclusion that Convention allows prosecution on the basis of the universality principle. This result is not manifestly absurd or unreasonable (para. 41).<sup>76</sup>

The Constitutional Court left open the question whether a link to Germany was required in universal jurisdiction case (for a discussion of this doctrine, see Chapter Four, Section II).

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<sup>76</sup> *Ibid.*, paras 37, 38, 39 and 41. English translation based on translation in Reydams, *supra*, n. 66.

**Maksim Sokolovi\_**. The Federal Prosecutor in Karlsruhe stated on 8 December 1997 that charges were being pressed against Maksim Sokolovi\_ for crimes of genocide, murder, rape and torture of Bosnian Muslims in former Yugoslavia. On 29 November 1999, the *Oberlandesgericht Düsseldorf* (OLG Düsseldorf), Higher Regional Court at Düsseldorf, convicted the accused inflicting physical injuries on Muslim civilians in five cases in May 1992 in Bosnia and Herzegovina and unlawfully detaining Muslim civilians in 56 cases, conduct amounting to grave breaches of the Fourth Geneva Convention, and genocide and abetting genocide in these cases and sentenced him to nine years in prison.<sup>77</sup> He had been a resident of Germany for twenty years and received a pension from the German government. On 21 February 2001, the *Bundesgerichtshof* (BGH), Federal Supreme Court, confirmed the judgment.<sup>78</sup> For the question of any link, see discussion of this case in Chapter Four, Section II.

**Kuslji\_**. On 15 December 1999, two weeks after the conviction of Maksim Sokolovi\_, the *BayObLG* convicted Kjuradj Kuslji\_, the former police commander of Vrbnica, 40 kilometers south of Banja Luka in Bosnia and Herzegovina, of genocide and six murders constituting grave breaches of the Fourth Geneva Convention. He had lived in Germany before the war in the former Yugoslavia. He was sentenced to life imprisonment. On 21 February 2001, the *Bundesgerichtshof* (BGH), Federal Supreme Court, confirmed the judgment.<sup>79</sup> For the discussion of any judicially created link, see Chapter Four, Section II.

· **Ghana:** Ghanaian courts can exercise universal jurisdiction over genocide. Article 56 (4) (e) of the Courts Act, 1993 reads:

“Any person (whether a citizen of Ghana or not) is liable to be tried and punished in Ghana for the respective offence if he does an act which if done within the jurisdiction of the courts of Ghana would have constituted any of the following offences -  
(e) genocide[.]”

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<sup>77</sup> The description of this case is based on the account in the press release describing the decision by the Federal Supreme Court affirming the judgment (see following footnote).

<sup>78</sup> *Sokolovi\_ case*, Judgment, Federal Supreme Court, 21 February 2001 [*Bundesgerichtshof, Urteil vom 21. Februar 2001 - 3 StR 372/00*]. The case is summarized in: *In addition to the prosecution of genocide, German courts also competent for the prosecution of other atrocities committed during “ethnic cleansing” in Bosnia-Herzegovina*, Press release, No. 11/2001, Federal Supreme Court, Karlsruhe, 21 February 2001 (English translation by Amnesty International) (*Deutsche Gerichte neben der Verfolgung von Völkermord auch für die Verfolgung anderer Greuelthaten während der “ethnischen Säuberungen” in Bosnien-Herzegwina zuständig, Mitteilung der Pressestelle, Nr. 11/2001*). See also Helmut Kerscher, *BGH stärkt Verfolgung von Kriegsverbrechern, Die Süddeutsche Zeitung*, 22 February 2001 (obtainable from: <http://www.suddeutsche.de>).

<sup>79</sup> BGH 3 StR 244/00 - Beschluss v. 21. Februar 01.

Ghana is a party to the Genocide Convention. It is also a party to the Rome Statute, but as of 1 September 2001 had not yet enacted any implementing legislation.<sup>80</sup> However, it is expected that drafting implementing legislation will include universal jurisdiction over genocide and other crimes within the Court's jurisdiction. In addition, Article 49A of the Criminal Code, 1960 defines genocide as a crime under Ghanaian law.<sup>81</sup>

· **Honduras:** Honduran courts may exercise custodial universal jurisdiction over genocide. Article 5 (5) of the *Código Penal* (Penal Code) (See Chapter Four Part B) states that national courts have custodial universal jurisdiction over crimes committed outside the country when it is permitted by international treaties or when the crime is in grave violation of universally recognised human rights (for the text and scope, see Chapter Four, Section II).

Honduras has ratified the Genocide Convention. It has signed the Rome Statute, but it had not yet ratified it as of 1 September 2001. Article 319 of the Penal Code provides that genocide is a crime.<sup>82</sup>

· **Hungary:** There are two provisions permitting Hungarian courts to exercise universal jurisdiction over genocide (for the text, see Chapter Four, Section II above). First, Article 5 (a) of the Hungarian Criminal Code of 1961 permits national courts to exercise universal jurisdiction over crimes under Hungarian law committed abroad when they are crimes under the law of the place where they were committed. Second, Article 5 (b) provides that Hungary can exercise universal jurisdiction over crimes defined in Chapter X (Crimes against Peace and Humanity) of the Code. Hungary is a party to the Genocide Convention. It has signed the Rome Statute, but as of 1 September 2001, it had not yet

<sup>80</sup> Although the Rome Statute does not expressly *authorize* states parties to exercise universal jurisdiction over crimes within the Court's jurisdiction, the states parties recognize in the Preamble that it is "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".

<sup>81</sup> Criminal Code, 1960, Act 29. The definition is similar to the definition in Article II of the Genocide Convention and Article 6 of the Rome Statute. According to one source, Prevent Genocide International, Article 49A has been replaced, at least in part, by Section 1 of the Criminal Code (Amendment) Act, 1993, which keeps the same text (*obtainable from* <<http://preventgenocide.org/law/domestic/ghana.htm>>). It has not been possible to confirm the amendment.

<sup>82</sup> Spanish text reads: "*Se sancionará con reclusión de dieciséis (16) a veinte (20) años, más inhabilitación absoluta por igual tiempo a quien con el propósito de destruir total o parcialmente a un grupo nacional étnico o religioso, realiza alguno de los hechos siguientes:*

- 1) *Dar muerte a cualquier miembro del grupo;*
- 2) *Lesionar gravemente la integridad física o mental de cualquiera de los miembros del grupo;*
- 3) *Someter el grupo a condiciones de existencia susceptibles de producir su destrucción física o causarle un daño moral grave;*
- 4) *Adoptar medidas encaminadas a impedir el nacimiento de niños en el seno del grupo; y*
- 5) *Trasladar en forma compulsiva a menores de dieciocho (18) años de un grupo a otro.*

*La reclusión no será inferior a veinte (20) años cuando los responsables del delito de genocidio sean funcionarios o empleados públicos civiles o militares.*

*La proposición y la conspiración se penarán con reclusión de ocho (8) a doce (12); la instigación directa se sancionará con la pena aplicable al autor y la indirecta se castigará con reclusión de cinco (5) a ocho (8) años."*

(*Código Penal. Decreto 144-83. La Gaceta No. 24.264 lunes 12 de marzo 1984. As Amended by Decreto No. 191-96*)



ratified it. Genocide is a crime under Article 137 in Chapter X, so Hungarian courts may exercise jurisdiction over this crime even if not a crime in the place where it occurred.<sup>83</sup>

· ***Israel:*** Israeli courts can exercise universal jurisdiction over genocide.

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<sup>83</sup> Hungarian Criminal Code of 1961, Art. 137 (Genocide) (defining the crime in terms similar to the definition in Article II of the Genocide Convention and Article 6 of the Rome Statute).

Section 5 of the Crime of Genocide (Prevention and Punishment) Act of 29 March 1950 states that “a person committing outside Israel an act which is an offence under this Act may be prosecuted and punished in Israel as if he had committed the act in Israel.”<sup>84</sup> This act, which is prospective only, is supplemented by the Nazi and Nazi Collaborators (Punishment) Law, 5710/1950, which gives courts jurisdiction over genocide and related acts, when the victims were Jews, no matter when or where they were committed.<sup>85</sup>

Israel is a party to the Genocide Convention. It has signed the Rome Statute, but had not yet ratified it as of 1 September 2001. Statutes of limitation do not apply to genocide as defined in the Crime of Genocide (Prevention and Punishment) Law.<sup>86</sup>

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<sup>84</sup> Articles 1 and 3 of the Crime of Genocide (Prevention and Punishment) Law, 5710-1950) define genocide and ancillary crimes in a manner which is similar to that in Articles II and III of the Genocide Convention and Article 5 of this law provides: “A person who has committed outside Israel an act which is an offence under this Law may be prosecuted and punished in Israel as if he had committed the act in Israel.” 9 Laws of the State of Israel (5710-1949/50) (Authorized Translation from the Hebrew, Prepared at the Ministry of Justice). In addition, Article 1 of Penal Law (Offences Committed Abroad) (Consolidated Version), 5733-1973, provides in part: “The courts in Israel are competent to try a person who committed abroad an offence under any of the following: (1) the Crime of Genocide (Prevention and Punishment) Law, 5710-1950)[.]” 27 Laws of the State of Israel (5733-1972/73) (Authorized Translation from the Hebrew Prepared at the Ministry of Justice).

<sup>85</sup> Article 1 (b) of the Nazi and Nazi Collaborators (Punishment) Law, 5710/1950 defines crimes against the Jewish people as

“any of the following acts, committed with intent to destroy the Jewish people in whole or in part:

- (1) killing Jews;
- (2) causing serious bodily or mental harm to Jews;
- (3) placing Jews in living conditions calculated to bring about their physical destruction;
- (4) imposing measures intended to prevent births among Jews;
- (5) forcibly transferring Jewish children to another national or religious group;
- (6) destroying or desecrating Jewish religious or cultural assets or values;
- (7) inciting to hatred of Jews[.]”

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

<sup>86</sup> Crimes against Humanity (Abolition of Prescription) Law, 5726-1966, adopted by the Knesset on 14 February 1966 and published on 23 February 1966.

In the *Eichmann* case, Israel exercised universal jurisdiction over the accused based on conduct which constituted genocide under a statute which defined the crime of [crimes against the Jewish people] in terms which were similar to those in the Genocide Convention. The District Court stated that “the reference in article 6 [of the Genocide Convention] to territorial jurisdiction is not exhaustive. Every sovereign state may exercise its existing powers within the limits of customary international law.”<sup>87</sup>

· **Italy:** Under Article 10 of the Italian Penal Code, courts have custodial universal jurisdiction over common crimes committed abroad against foreigners or against foreign states if the crime is one for which the penalty is not less than three years (for the text and scope, see Chapter Four, Section II above). In addition, Article 7 (5) of the Penal Code (for the text and scope, see Chapter Four, Section II above), courts have jurisdiction over a foreign national for crimes committed abroad where there is a specific law or treaty which establishes the applicability of Italian criminal law.

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<sup>87</sup> *Attorney General of Israel v. Eichmann*, 36 Int'l. L. Rep. 277. Eichmann was not charged with genocide under the Crime of Genocide (Prevention and Punishment) Act of 29 March 1950 because that legislation only applied prospectively. However, William A. Schabas has stated that “[t]he Israeli courts, in the *Eichmann* case, attempted to manoeuvre around the obstacle of article VI [of the Genocide Convention], but their reasoning was unconvincing.” Schabas, *supra*, n. 29, 548. Another sceptic is Roger S. Clark, who expressed some doubts about the reasoning of the courts in this case. For a discussion of why the reasoning of the Israeli courts was correct, see Chapter Seven, Section II.

Italy is a party to the Genocide Convention and it has enacted a number of provisions to implement the Convention in national law. A 1967 ordinary law (*legge ordinaria*) (not a constitutional law) provides that genocide is a crime under national law.<sup>88</sup> Therefore, it appears that Italian courts could exercise universal jurisdiction pursuant to Article 10 of Penal Code, if not Article 7 (5), since the genocide law would constitute one of the “special legal provisions” envisaged in that paragraph.<sup>89</sup> Proposals to make universal jurisdiction over genocide express in Italian law have been introduced in Parliament.<sup>90</sup>

Italy has ratified the Rome Statute, but as of July 2001 had not yet enacted implementing legislation.

· **Kazakhstan:** At least one legislative provision permit national courts to exercise universal jurisdiction over genocide, although it is possible that a second provision may do so as well (for the text and scope of these provisions, see Chapter Four, Section II).

First, Article 7 (1) of the Penal Code permits national courts to exercise universal jurisdiction over stateless persons suspected of a crime committed abroad which is also a crime under the law of the territorial state. Second, it is possible that Article 7 (4) of the Penal Code may give jurisdiction over genocide in some cases. However, it is not entirely clear whether national courts may exercise universal jurisdiction over foreigners suspected of genocide under this provision. Article 7 (4) of the Penal Code of gives courts universal jurisdiction over offences committed abroad “in cases foreseen by international treaties of the Republic of Kazakhstan, if they have not been tried in another state and are prosecuted on the territory of Kazakhstan”. It is not certain whether the term “cases foreseen” refers

<sup>88</sup> Law No. 962 of 9 October 1967. Law No. 153 of 11 March 1952 contains an *ordine di esecuzione* authorizing ratification of the Genocide Convention. Constitutional law (*legge costituzionale*) no. 1 of 21 June 1967 provides that genocide is not a political crime for the purposes of extradition. In addition, the draft bill implementing the Rome Statute will provide that “criminal provisions should be introduced to make all the criminal offences referred to in the Statute punishable under national law”. Draft Bill for the Ratification of the Statute Establishing the International Criminal Court, introduced by the Italian Cabinet, 23 October 1998, Art. 2 (*obtainable from* <http://www.npwj.it>), unofficial translation by No Peace Without Justice).

<sup>89</sup> A recent commentary appears to agree with this conclusion. It states that “One could also consider that Article 7 (5), which also makes reference to ‘special legal provisions’, does not refer to the Convention itself, but to the internal norms concerning the subject which have been adopted in implementing the Convention. These provisions do not make any reference to the nationality of the suspects or the victims or the *locus commissi delicti* [place where the crime was committed].” Salvatore Zappalá, *Le Point sur la Législation Italienne en Matière de Crimes Internationaux*, unpublished draft manuscript submitted for discussion to the *Etude Comparée des Critères de Compétence Juridictionnelle en Matière de Crimes Internationaux*, Paris, 2 to 3 July 2001 (English translation by Amnesty International). The original French text reads:

*On pourrait aussi penser que l'article 7, al. 5, qui fait aussi référence à ‘speciali disposizioni di legge’, ne renvoie pas à la Convention elle-même mais aux normes internes en la matière qui ont été adoptées en exécution de la Convention. Ces dispositions ne font aucune référence à la nationalité des coupables ou des victimes ni au locus commissi delicti.*

<sup>90</sup> According to Zappalá, two reports on this question by a ministerial commission have been published in *Documenti Giustizia*, 9-12 (*Settembre-dicembre*) 1999 and 3 (*maggio-giugno*) 2000.

to jurisdiction or to the definition of the crime, although it may refer to the former, in which case courts could not rely on Article 7 (4).

Kazakhstan is a party to the Genocide Convention. It has defined genocide as a crime under national law.<sup>91</sup>

· **Kyrgyzstan:** There are at least two possible bases for national courts to exercise universal jurisdiction over genocide.

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<sup>91</sup> Penal Code of 1997, Art. 160 (Genocide). The definition is similar to the definition in Article II of the Genocide Convention and Article 6 of the Rome Statute.

First, national courts may exercise universal jurisdiction over stateless persons suspected of committing genocide abroad who are permanent residents. Paragraph 1 of Article 6 (Action of Criminal Law with Regard to Persons who have Committed a Crime outside the Borders of the Kyrgyz Republic) of the Criminal Code provides for jurisdiction over crimes committed abroad by citizens and by stateless persons who are permanent residents and it appears that this provision would apply to crimes committed before they acquired citizenship or permanent residence (for the text and scope of this provision, see Chapter Four, Section II). Genocide is a crime under national law.<sup>92</sup> Although the Criminal Code of Kyrgyzstan does not give its courts universal jurisdiction over non-citizens temporarily in its territory accused of crimes under national law, Article 6 (3) of the Criminal Code provides for extradition of foreigners and stateless persons (but not citizens) for crimes committed abroad.

Second, Article 1 (1) of the Criminal Law states that the criminal law of the state includes the norms of international treaties ratified by Jogorku Kenesh of the Kyrgyz Republic (for the text, see Chapter Four, Section II). It is possible that this provision would appear to permit national courts to exercise universal jurisdiction over genocide, to the extent that the general principle of law of *aut dedere aut judicare* over this crime is recognized by national courts as a jurisdictional norm of international law. However, it has not been possible to obtain any jurisprudence or authoritative commentary concerning the scope of Article 1 (1).

Kyrgyzstan is a party to the Genocide Convention. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. It appears that statutes of limitations do not apply to genocide.

Article 72 (6) of the Criminal Code provides that “[p]rescription shall not be applicable to crimes against peace and security of mankind when expressly provided for by the laws of the Kyrgyz Republic.”<sup>93</sup> Although Article 373 does not contain an exemption from the statutes of limitations in the Criminal Code, Kyrgyzstan is a successor state to the USSR, which was a party to the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and the prohibition of statutes of limitation is now recognized as a general principle of law which would qualify under Article 1 (1) of the Criminal Code as a norm of an international treaty ratified by Kyrgyzstan.

· ***Lao People’s Democratic Republic:*** There are two provisions permitting national courts to exercise universal jurisdiction in Laos over certain conduct abroad amounting to genocide, such as murder (for the text and scope of these provisions, see Chapter Four, Section II).

First, paragraph 2 of Article 4 (The enforcement of the criminal code outside the territory of the Lao People’s Democratic Republic) of the Criminal Code provides that aliens and non-citizens (apparently, stateless persons) who reside in Laos can be held criminally responsible for conduct abroad which constitutes a crime under national law. Second, paragraph 3 of that article provides that foreigners can be held criminally responsible for conduct abroad that constitutes a crime under national law.

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<sup>92</sup> Kyrgyzstan Criminal Code, Art. 373. The definition is similar to that in Article II of the Genocide Convention and Article 6 of the Rome Statute.

<sup>93</sup> Criminal Code, Art. 72 (6).

Laos has ratified the Genocide Convention. It has not signed the Rome Statute and as of 1 September 2001 it had not yet ratified it. It has not defined genocide as a crime, so a prosecution would only be able to be brought for ordinary crimes, such as murder, when they constituted genocide.

· **Latvia:** There is one legislative provision authorizing Latvian courts to exercise universal jurisdiction over genocide (for the origins, text, scope, see Chapter Four, Section II).

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

Latvia is a party to the Genocide Convention. Genocide is a crime under national law.<sup>94</sup> Statutes of limitation do not apply to genocide.<sup>95</sup>

· **Lebanon:** National courts can exercise universal jurisdiction over certain conduct abroad amounting genocide.

Article 23 of the Penal Code (*Code pénal*) provides that Lebanese law applies to every foreigner found in Lebanese territory who has committed abroad a crime in the cases not covered by the articles granting protective or active personality jurisdiction, subject to a number of conditions (for the history, text and scope of the relevant provision, see Chapter Four, Section II).

Lebanon is a party to the Genocide Convention. It has signed the Rome Statute, but it had not yet ratified it as of 1 September 2001. Genocide is not defined as a crime under national law, so a prosecution for genocide would have to be brought for ordinary crimes, such as murder.

· **Lithuania:** Lithuanian courts can exercise universal jurisdiction over genocide. The relevant legislative provisions are reinforced by Articles 135 and 138 of the Constitution. Article 135 provides in part:

In conducting foreign policy, the Republic of Lithuania shall pursue the universally recognized principles and norms of international law, shall strive to safeguard national security and

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<sup>94</sup> *Ibid.*, § 71 (Genocide). The list of prohibited acts in the definition is similar to that in Article II of the Genocide Convention and Article 6 of the Rome Statute, but the protected groups include groups identifiable by social class and those defined by a collective belief or faith:

“For a person who commits genocide, that is, commits intentional acts for purposes of the destruction in whole or in part of any group of people identifiable as such by nationality, ethnic origin, race, social class or a defined collective belief or faith, by killing members of the group, inflicting upon them physical injuries hazardous to life or health or causing them to become mentally ill, intentionally causing conditions of life for such people as result in their physical destruction in whole or in part, utilising measures the purpose of which is to prevent the birth of children in such group, or transferring children on a compulsory basis from one group of people into another,

the applicable sentence is life imprisonment or deprivation of liberty for a term of not less than three and not exceeding twenty years.

<sup>95</sup> *Ibid.*, § 27 (4) (“A person who has committed an offence against humanity, an offence against peace, a war crime or has participated in genocide, shall be punishable irrespective of the time when such offence was committed.”).

independence as well as the basic rights, freedoms and welfare of its citizens, and shall take part in the creation of sound international order based on law and justice.

Article 138 states in relevant part that “[i]nternational agreements which are ratified by the Seimas [Parliament] of the Republic of Lithuania shall be the constituent part of the legal system of the Republic of Lithuania. In addition, the Law on International Treaties of the Republic of Lithuania provides in Article 12 that “[i]nternational treaties of the Republic of Lithuania shall have the force of law on the territory of the Republic of Lithuania” and Article 13 states that “[t]he Government of the Republic of Lithuania shall fulfill obligations assumed in international treaties of the Republic of Lithuania”.<sup>96</sup>

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

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

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

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

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

“A person who has committed a criminal offence abroad shall not be charged under criminal law if:

- 1) He fully served a sentence passed by a foreign court of law;
- 2) He was acquitted by a court in a foreign country and this court ruling has come into force, or was exempted from serving a sentence or a penalty was not given because of statute of limitations or on basis of other legal provisions of that country.”

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<sup>96</sup> Law on International Treaties of the Republic of Lithuania, Arts 12 & 13 (English translation obtainable from <<http://www.litlex.lt/Litlex/Eng/Frames/Laws/Documents/82.HTM>>).



Genocide is a crime under the current Criminal Code.<sup>97</sup>

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

“Citizens of the Republic of Lithuania and other persons permanently resident in Lithuania shall be held responsible for the crimes committed abroad in accordance with this Code.”<sup>98</sup>

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

“The persons shall be held responsible in accordance with this Code, regardless of their nationality and place of residence and regardless of whether their deed is punishable under the law of the territory where the crime has been committed, when they commit crimes responsibility for which is provided for by international treaties.

1. Crimes against humanity and war crimes (Articles 99 to 113). . . .”<sup>99</sup>

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

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

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

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<sup>97</sup> Criminal Code of Lithuania, Art. 71 (genocide). It has not been possible to obtain a copy of a translation of this article to determine the extent to which the definition coincides with the definition in Article II of the Genocide Convention and Article 6 of the Rome Statute.

<sup>98</sup> Criminal Code of Lithuania, entry into effect, 1 January 2003, Art. 5. English translations of the new Criminal Code are by Amnesty International.

<sup>99</sup> *Ibid.*, Art. 7.

“2. A person who has committed a criminal offence stipulated by Articles 5, 6 and 7 of the Criminal Code of the Republic of Lithuania, shall not be held responsible under this code if that person:

- 1) Has served a sentence given by a court in the foreign country;
- 2) Serving of the whole sentence given by a court in the foreign country or part thereof was waived;
- 3) Was acquitted by a court of law of a foreign country or exempted from criminal responsibility or a penalty or penalties were not given because of statute of limitations or on basis of other legal provisions of that country.”

Lithuania is a party to the Convention against Torture. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. As stated above, genocide is a crime under the current Criminal Code. After that 1 January 2003, genocide will continue to be a crime under the new Criminal Code.<sup>100</sup>

· **Luxembourg:** National courts can exercise universal jurisdiction over genocide.

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<sup>100</sup> New Criminal Code, Art. 99.

Article 6 of the Law of 8 August 1985 Concerning the Repression of Genocide provides for universal jurisdiction over persons suspected of the crime of genocide, as defined in Article II of the Genocide Convention, as well as certain forms of ancillary crimes, who are found in the territory, in an enemy country or are extradited to Luxembourg.<sup>101</sup> Articles 1 to 4 define genocide and ancillary crimes.<sup>102</sup> However, Article 5 of that law provides that it is subject to all the provisions of the Penal Code, except for Article 70.<sup>103</sup> Luxembourg is a party to the Genocide Convention. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it.

· **Macedonia, Former Yugoslav Republic of:** Macedonian courts may exercise universal jurisdiction over crimes under national law, such as genocide, pursuant to Article 119 (2) of the Criminal Code of the Republic of Macedonia when they are crimes under the law of the territorial state (for the text and scope, see Chapter Four, Section II). Moreover, it is possible, according to an authoritative government opinion, that national courts may do so even if genocide is not criminal under national law in the place where it occurred. The former Yugoslav Republic of Macedonia is party to

<sup>101</sup> Law of 8 August 1985 Concerning the Repression of Genocide, Art.6. It provides:

“Any foreign national who, either as perpetrator or accomplice, commits one of the offences laid down in articles 1, 2, 3 and 4 of this Act outside the territory of the Grand Duchy, may be prosecuted and tried under Luxembourg law, if he is found in the Grand Duchy, or in an enemy country, or if the government obtains his extradition.”

The original French text of Article 6 reads:

“*Tout étranger qui hors d territoire du Grand-duché se rend coupable, soit comme auteur soit comme complice, de l'une des infractions prévues aux articles 1er, 2, 3 et 4 de la présente loi peut être poursuivi et jugé d'après les dispositions des lois luxembourgeoises, s'il est trouvé soit dans le Grand-Duché, soit en pays ennemi, ou si le Gouvernement obtient son extradition.*”

*Loi du 8 août 1985 portant répression du génocide (Mém. A N° 52 du 2 septembre 1985, p. 966), art. 6.*

<sup>102</sup> *Ibid.*, Arts 1 to 4. These articles provide:

“Art. 1. A person shall be guilty of genocide who, with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such, commits any of the following acts:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group or members of 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.

Art. 2. A conspiracy formed to commit genocide shall be punished by ten to fifteen years' forced labour if any act has been committed to prepare the execution thereof, otherwise by extended imprisonment. Conspiracy exists when several people have taken a decision to act.

Art. 3. Without prejudice to the application of articles 66 and 67 of the Criminal Code, the order, proposal or offer, even when no effect is given thereto, to commit one of the offences laid down in article 1, as well as the acceptance of such a proposal or offer, shall carry a sentence of extended imprisonment.

Art. 4. Also punishable by extended imprisonment shall be anyone who, having knowledge of orders given with a view to committing one of the offences laid down in article 1, or of acts which instigate such commission, and being in a position to prevent completion of the offence or put a stop to it, does not act within the limits of this possibility.”

<sup>103</sup> *Ibid.*, Art. 5.

the Genocide Convention. It has signed the Rome Statute, but, as of 1 September 2001, it had not yet ratified it. Article 403 of the Criminal Code provides that genocide is a crime.<sup>104</sup>

· **Mexico:** Mexican courts can exercise universal jurisdiction over the crime of genocide and a Mexican court has approved the extradition of a person suspected of genocide and other crimes to another country.

(1) **Legislation.** Article 6 of the *Código Penal Federal* (Federal Penal Code) of 1931, as amended in 2000,<sup>105</sup> provides that courts have jurisdiction to try crimes under international treaties providing that the conduct is a crime. That article provides:

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<sup>104</sup> Criminal Code, Art. 403 (Genocide) (defining genocide in terms similar to the definition in Article II of the Genocide Convention and Article 6 of the Rome Statute).

<sup>105</sup> See Chapter Four Section II.

“When an act is committed which is not an offence under this Code but is an offence under a special law or under an international treaty to which Mexico is a party, the respective law or treaty shall apply, taking into account the provisions of Book I of this Code and, if applicable, the subsequent provisions of Book II.”<sup>106</sup>

Mexico has ratified the Genocide Convention. Mexico has signed the Rome Statute, but had not yet ratified it as of 1 September 2001. Book II includes Article 149-bis (Genocide), although the definition of genocide differs in some respects from the definition in Article II of the Genocide Convention and Article 6 of the Rome Statute.<sup>107</sup> There are no provisions in the Penal Code excluding statutes of limitations for genocide, but Mexico has signed the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and, therefore, is bound not to defeat the object and purpose of the treaty pending a decision whether to ratify the Convention.

**(2) Jurisprudence and executive action.** A Mexican court has held that a foreigner suspected of genocide abroad and other crimes can be extradited to a third state seeking to exercise universal jurisdiction over these

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<sup>106</sup> *Código Penal, Art. 6.* “Cuando se cometa un delito no previsto en este Código, pero si en una ley especial o en un tratado internacional de observancia obligatoria en Mexico, se aplicaran estos, tomando on cuenta las disposiciones del libro primero del presente Código, y en su caso, las conducentes del libro segundo.

*Quando una misma materia aparezca regulada por diversas disposiciones, la, especial prevalecera sobre la general.*” (English translation by Amnesty International) For a discussion on the scope of this article see Chapter IV. Part B.

<sup>107</sup> Federal Penal Code, Book II, Third Title, Chapter II (Genocide), Art. 149-bis. The first paragraph of that article defines the crime of genocide as the certain acts committed with the intent to destroy in whole or in part one or more national or ethnic, racial or religious; crimes against the life of its members; attacks against its physical integrity or health; imposition of massive sterilisation with the purpose of preventing the reproduction of the group; transfers either by physical force or coercion of children under sixteen to other communities; deliberately infliction on the group of conditions of life calculated to bring about, either totally or partially, its physical destruction.

The original text in Spanish reads:

“ARTICULO 149-BIS.- COMETE EL DELITO DE GENOCIDIO EL QUE CON EL PROPOSITO DE DESTRUIR, TOTAL O PARCIALMENTE A UNO O MAS GRUPOS NACIONALES O DE CARACTER ETNICO, RACIAL O RELIGIOSO, PERPETRASE POR CUALQUIER MEDIO, DELITOS CONTRA LA VIDA DE MIEMBROS DE AQUELLOS, O IMPUSIESE LA ESTERILIZACION MASIVA CON EL FIN DE IMPEDIR LA REPRODUCCION DEL GRUPO.

POR TAL DELITO SE IMPONDRAN DE VEINTE A CUARENTA AÑOS DE PRISION Y MULTA DE QUINCE MIL A VEINTE MIL PESOS.

SI CON IDENTICO PROPOSITO SE LLEVAREN A CABO ATAQUES A LA INTEGRIDAD CORPORAL O A LA SALUD DE LOS MIEMBROS DE DICHAS COMUNIDADES O SE TRASLADAREN DE ELLAS A OTROS GRUPOS MENORES DE DIEZ Y SEIS AÑOS, EMPLEANDO PARA ELLO LA VIOLENCIA FISICA O MORAL, LA SANCION SERA DE CINCO A VEINTE AÑOS DE PRISION Y MULTA DE DOS MIL A SIETE MIL PESOS. SE APLICARAN LAS MISMAS SANCIONES SEÑALADAS EN EL PARRAFO ANTERIOR, A QUIEN CON IGUAL PROPOSITO SOMETA INTENCIONALMENTE AL GRUPO A CONDICIONES DE EXISTENCIA QUE HAYAN DE ACARREAR SU DESTRUCCION FISICA, TOTAL O PARCIAL.

EN CASO DE QUE LOS RESPONSABLES DE DICHOS DELITOS FUERAN GOBERNANTES, FUNCIONARIOS O EMPLEADOS PUBLICOS Y LAS COMETIEREN EN EJERCICIO DE SUS FUNCIONES O CON MOTIVO DE ELLAS, ADEMAS DE LAS SANCIONES ESTABLECIDAS EN ESTE ARTICULO SE LES APLICARAN LAS PENAS SEÑALADAS EN EL ARTICULO 15 DE LA LEY DE RESPONSABILIDADES DE LOS FUNCIONARIOS Y EMPLEADOS DE LA FEDERACION.”

On 24 August 2000, a Mexican newspaper published a report that Ricardo Miguel Cavallo, a representative of an Argentine firm in charge of vehicle registration in Mexico, had been alleged by Argentine nationals in the country to be really a former Argentine naval officer named Miguel Angel Cavallo in charge of a centre and to have been responsible for torture and murder of persons detained at the Argentine Navy School of Mechanics during the 1976-1983 military government.<sup>108</sup> He denied that he was the Miguel Angel and the following day he boarded a plane to Buenos Aires, announcing that he planned to clear his name. When the plane stopped at Cancún, Mexico on 25 August 2000 on the way to Argentina, he was arrested at the request by the public prosecutor, pursuant to Article 16 of the Constitution, which permits the public prosecutor “in urgent cases, when it is a matter of a grave crime, so evaluated by the law, and before the justified risk that the accused could evade the action of justice” to detain a person for up to 48 hours without a warrant, at which point the suspect must be released or placed under judicial supervision.<sup>109</sup> The same day, the Office of the Attorney General of Mexico inquired of the 177 members of INTERPOL whether there were outstanding arrest warrants against the suspect or if he had a criminal record. After learning of the presence of the suspect in Mexico, Judge Garzón in Spain issued an international arrest warrant on 25 August 2000, alleging that the suspect was responsible for genocide, “terrorism” and torture, and the Attorney General received it the same day, before the 48-hour limit expired, and presented the suspect to a judge to determine if he should be extradited.

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<sup>108</sup> The account of this case is based largely upon the article by Juan E. Méndez and Salvador Tinajero-Esquivel, *The Cavallo Case: A New Test for Universal Jurisdiction*, 8 Hum. Rts Brief 5 (Spring 2001), and a number of press reports, including: *International warrant issued against Argentine held in Mexico*, AFP, 25 August 2000; *Spain seeks to extradite alleged Argentine torturer from Mexico*, AFP, 25 August 2000; *Mexico to hold Argentine 60 days pending petition*, 26 August 2000; *Mexico prepares to extradite alleged Argentine torturer to Spain*, 26 August 2000; Morris Thompson, *Argentine detained in Mexico*, *Miami Herald*, 27 August 2000; *L’Argentin Cavallo dispose de 20 jours pour préparer sa défense et éviter son extradition*, AFP, 27 August 2000; *Alleged torturer defence to center on ‘wrong’ name*, Reuters, 28 August 2000; *Garzón pedira extradición de Cavallo antes que acabe el plazo*, EFE, 28 August 2000.

<sup>109</sup> Constitution of Mexico of 5 February 1917, as amended to 20 March 1997, Art. 16 (English translation in *Supplement*, in Gisbert H. Flanz, ed., *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications, Inc. June 1998) (Release 98-4 Reka Koerner trans.).

On 11 January 2001, Judge Jesus Guadalupe Luna Altamirano, Sixth District Judge for Federal Criminal Trials in the Federal District (*Juez Sexto de Distrito de Procesos Penales en el Distrito Federal*), a Federal court, issued a lengthy judgment deciding that the suspect could be extradited to face charges of genocide and “terrorism”, but not for torture, because the statute of limitations had run.<sup>110</sup> The court held that Spain had jurisdiction under Article 23 of the Organic Law of Judicial Power. It also concluded that the Mexico-Spain extradition treaty applied because the Spanish investigating judge had established both that crimes of genocide, torture and “terrorism” committed by kidnappings, forced disappearances, elimination of detainees, reduction to servitude, appropriation of children, falsification of documents and operations in foreign countries and the suspect’s probable responsibility for these crimes.

The court also held that neither of Argentina’s amnesty laws, the *Obediencia Debida* (Due Obedience Law) nor the *Punto Final* (Full Stop Law) were binding on Mexico because they were contrary to international law (see Chapter Fourteen, Section VII). Article 6 of the Federal Penal Code, enacted after the alleged crimes, was not a prohibited retroactive law, because the crimes were crimes under international law at the time they were committed. Moreover, Article 6 was procedural, not substantive. In conclusion, the court stated:

“IT IS PROPER TO GRANT THE INTERNATIONAL EXTRADITION OF ARGENTINIAN CITIZEN RICARDO MIGUEL CAVALLO KNOWN AS ‘MIGUEL ANGEL CAVALLO’ AS WELL AS BY THE ALIASES ‘SERPICO’ AND ‘MARCELO’, sought by the Attorney-General of the Republic in response to a request from the Embassy of the Kingdom of Spain submitted in the name of the government of that country, so that he can be tried for his probable responsibility in committing the crimes of GENOCIDE AND TERRORISM; but it is not proper for the person in question to be extradited to stand trial for the offence of TORTURE because it is subject to a statute of limitations.”<sup>111</sup>

Under Articles 29 and 30 of the *Ley de Extradición Internacional* (International Extradition Law), after a court authorizes the extradition, the Foreign Minister decides whether to extradite, taking into consideration applicable treaties, the record of the case, the legal reasoning of the court and prudential considerations concerning foreign policy. On 2 February 2001, Jorge Castañeda, the Foreign Minister, decided that the suspect should be extradited, not only to face charges of genocide and “terrorism”, but also torture (see discussion of this part of the case in Chapter Ten, Section II). See also Chapter Four- Part B for quotation of the Ministry of Foreign Affairs decision to extradite.

<sup>110</sup> *Cavallo* case, Judgment, Resolution 5/2000, Sixth District Judge in Criminal Matters of the First Circuit, 11 June 2001 [*Expediente de extradición 5/2000 Juez Sexto de distrito de Procesos Penales en el Distrito Federal, 11 enero 2001*]. See also AFP, *Le Mexique accepte d’extrader un ex-militaire argentin*, *Le Monde*, 13 janvier 2001.

<sup>111</sup> Text of the conclusions reached by the Judge responsible for ruling on the possible extradition of Miguel Angel Cavallo to Spain, Final para. 7 (English translation by Amnesty International). The original text in Spanish reads: “*ES PROCEDENTE CONCEDERLA EXTRADICION INTERNACIONAL DEL CIUDADANO ARGENTINO RICARDO MIGUEL CAVALLO CONOCIDO COMO "MIGUEL ANGEL CAVALLO" Y LOS ALIAS "SÉRPICO" Y "MARCELO", solicitada por el Procurador General de la República, a petición de la Embajada del Reino de España, a nombre del gobierno de su país, para su enjuiciamiento por su probable responsabilidad en la comisión de los delitos de GENOCIDIO Y TERRORISMO; sin que proceda la extradición del reclamado para ser enjuiciado por el ilícito de TORTURA por encontrarse prescrito este delito.*”

However, the suspect has challenged the decision in a petition for a writ of amparo (*demanda de amparo*) in a Federal district court and a subsequent claim (*queja*) which has been passed over to a higher instance. The extradition is being delayed but a final decision was expected in late 2001. Meanwhile, Mexico refused an extradition demand made by Argentina on the grounds that the extradition had already been granted to Spain.

· **Monaco:** There are three legislative provisions that permit the courts of Monaco to exercise universal jurisdiction over certain conduct that may amount to genocide, such as murder (for the text and scope of these provisions, see Chapter Four, Section II).

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

Second, Article 9 (2) provides for universal jurisdiction over any foreigner who has committed a felony or a misdemeanour abroad who is found in Monaco in possession of objects acquired by means of the crime. Given the widespread looting and seizure of property that often accompanies genocide, this provision could help ensure that a person responsible does not completely escape criminal responsibility, and would permit the authorities to act immediately if a suspect was in the state, while other states with more comprehensive legislation could prepare extradition requests.

Third, Article 8 (3) permits courts to exercise universal jurisdiction over certain conduct against minors that may amount to genocide, such as trafficking, enforced prostitution, sexual slavery or other forms of sexual violence.

Monaco has ratified the Genocide Convention. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it.

· **Mongolia:** There are two legislative and one constitutional provision which provide Mongolian courts with universal jurisdiction over genocide (for the text, see Chapter Four, Section II). First, paragraph b of Article 3 of the Criminal Code provides that stateless persons in the territory who have committed crimes abroad, if found in Mongolia be subject to criminal responsibility and punishment under the Criminal Code. Second, paragraph c of Article 3 provides that foreign citizens who have committed crimes abroad shall be subject to criminal responsibility according to the Criminal Code when provided for by international agreements. Paragraph c is strengthened by Article 10 (3) of the Constitution, which provides that treaties to which Mongolia is a party become effective as domestic legislation upon the entry into force of the laws on their ratification or accession.

Independently of these two legislative provisions, it may be possible that Article 10 (1) of the Constitution of Mongolia, which requires that Mongolia “adhere to the universally recognized norms and principles of international law . . .”, permits the exercise of universal jurisdiction based on customary international law or general principles of law.

Mongolia is a party to the Genocide Convention. It has signed the Rome Statute, but it has not yet ratified the Rome Statute as of 1 September 2001.

· **Netherlands:** Section 5 (2) of the Genocide Convention (Implementation) Act of 1962 provides that a person who commits genocide abroad who subsequently becomes a Dutch national can



be prosecuted for that crime.<sup>112</sup> The Netherlands is a party to the Genocide Convention. It has signed the Rome Statute and it is expected to ratify it in 2001.

· **New Zealand:** New Zealand courts may exercise universal jurisdiction over genocide.

Article 9 of the International Crimes and International Criminal Court Act 2000 provides for universal jurisdiction over genocide within the jurisdiction of the International Criminal Court under Article 6 of the Rome Statute, ratified by New Zealand, occurring on or after 28 March 1979, the date New Zealand became a party to the Genocide Convention.<sup>113</sup>

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<sup>112</sup> Section 5 of the Genocide Convention (Implementation) Act of 1962 provides:

- “1. Dutch criminal law shall be applicable to the Dutch national who outside the Netherlands commits:
- (1) a criminal offence described in Sections 1 and 2 of this Act;
  - (2) the criminal offence described in Section 131 of the Penal Code, if the punishable offence or the criminal offence referred to in that Section is a criminal offence as referred to in Sections 1 and 2 of this Act.
2. The prosecution may also be conducted, if the suspect becomes a Dutch national after the commission of the offence.” Section 6 of the Criminal Law in Wartime Act (Act of 10 July 1952, *Bulletin of Acts and Decrees* 408) was amended by Section 6 of the Genocide Convention (Implementation) Act.

<sup>113</sup> International Crimes and International Criminal Court Act 2000, Art. 8 (Jurisdiction in respect of international crimes) provides:

- “(1) Proceedings may be brought for an offence---
- (a) against section 9 or section 10, if the act constituting the offence charged is alleged to have occurred---
  - (i) on or after the commencement of this section; or
  - (ii) on or after the applicable date but before the commencement of this section; and would have been an offence under the law of New Zealand in force at the time the act occurred, had it occurred in New Zealand; and
  - (b) against section 11, if the act constituting the offence charged is alleged to have occurred on or after the commencement of this section; and
  - (c) against section 9 or section 10 or section 11 regardless of---
  - (i) the nationality or citizenship of the person accused; or
  - (ii) whether or not any act forming part of the offence occurred in New Zealand; or
  - (iii) whether or not the person accused was in New Zealand at the time that the act constituting the offence occurred or at the time a decision was made to charge the person with an offence.”

· **Nicaragua:** Article 16 (3) of the Penal Code of Nicaragua provides for universal jurisdiction over certain crimes listed in Title XIV of Book II of the Penal Code (for the text, see Chapter Four, Section II). These crimes include genocide (Article 549) and the organization of groups which have the objective of committing genocide and incitement of genocide (Article 550).<sup>114</sup> Nicaragua is a party to the Genocide Convention, but it has not signed the Rome Statute and as of 1 September 2001 it had not yet ratified it.

· **Panama:** Article 10 of the Panamanian Penal Code (for the text, see Chapter Four, Section II above) provides for custodial universal jurisdiction over crimes included in treaties ratified by Panama. The wording is broad enough to include treaties defining crimes, even if they do not expressly provide for universal jurisdiction.

Panama is a party to the Genocide Convention. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it.

· **Paraguay:** Article 8 (6) of the *Código Penal de la Republica del Paraguay, Ley No. 1.160, Edición Especial* (Penal Code of the Republic of Paraguay, Law No. 1.160, Special Edition) provides that the criminal law applies to genocide as provided in Article 319 of the Penal Code, committed outside Paraguay.<sup>115</sup>

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<sup>114</sup> Penal Code, Art. 549 (English translation by Amnesty International). The definition of genocide lists only two of the four protected groups. Article 549 provides:

“A person commits the offence of genocide and shall be liable to imprisonment for a period of fifteen to twenty years when he carries out acts or announces measures which are intended to destroy, in whole or in part, an ethnic or religious group; such acts or measures may include: attacks on the personal wellbeing of members of the group, mass deportations, the forcible transfer of children or adults to other groups, the imposition of conditions that make it difficult for them to survive, or the carrying out of operations and practices intended to prevent them from reproducing.”

The original text in Spanish provides:

“Comete el delito de genocidio y será penado con presidio de 15 a 20 años, el que realice actos o dicte medidas tendientes a destruir parcial o totalmente un grupo étnico o religioso, tales como ataques a la integridad personal de sus miembros, deportaciones en masa, desplazamiento violento de niños o adultos hacia otros grupos, imposición de condiciones que hagan difícil su subsistencia, o realización de operaciones o prácticas destinadas a impedir su reproducción.”

Article 550 provides: “The organizing of groups with intent to commit the offence of genocide and public incitement to genocide shall be punishable by imprisonment for a period of five to eight years.” The original text in Spanish provides: “La organización de grupos que tenga por objeto cometer el delito de genocidio y la incitación pública para el mismo, será sancionada con presidio de 5 a 8 años.”

<sup>115</sup> Penal Code, Art. 8 (6) (English translation by Amnesty International). That article provides: “Paraguayan penal law shall also be applied to the following acts committed in a foreign country: . . . (6) genocide as defined in Article 319.” The original text in Spanish reads: “1° La ley penal paraguaya se aplicará también a los siguientes hechos realizados en el extranjero: (...) 6. genocidio previsto en el artículo 319. Artículo 8(6) del Código Penal”

Article 319 (English translation in 1 Y.B. Hum. L. 621, 622-623 (1998)) defines genocide more broadly than in Article II of the Genocide Convention and Article 6 of the Rome Statute by protecting social communities and groups and defines prohibited acts somewhat differently. It reads:

“Anyone who, with the intention to destroy, in whole or in part, a national, ethnic, religious or social community or group:

1. kills or seriously harms members of the group;
2. inflicts on the community inhuman treatment or conditions of life that could cause its destruction in whole or in part;

- 
3. forcibly or by means of intimidation, transfers children or adults to another group or places other than its habitual domiciles;
  4. Impedes the exercise of religion or the practice of custom;
  5. Imposes measures intended to prevent births within the group, and
  6. forces the dispersion of the community,
- shall be punished for no less than five years.”

The original text reads:

*“El que con la intención de destruir, total o parcialmente, una comunidad o un grupo nacional, étnico, religioso o social:*

*matara o lesionara gravemente a miembros del grupo;*  
*sometiera a la comunidad a tratamientos inhumanos o condiciones de existencia que puedan destruirla total o parcialmente;*

*trasladara, por fuerza o intimidación a niños o adultos hacia otros grupos o lugares ajenos a los de su domicilio habitual;*

*imposibilitara el ejercicio de sus cultos o la práctica de sus costumbres;*

*impusiera medidas para impedir los nacimientos dentro del grupo; y*

*forzara a la dispersión de la comunidad,*

*será castigado con pena privativa de libertad no menor de cinco años.”*

*Código Penal, Art. 319 (Genocidio).*

Paraguay has signed the Genocide Convention, but as of 1 September 2001 it had not yet ratified it. It has ratified the Rome Statute, but as of 1 September 2001 it had not yet enacted implementing legislation.

· **Philippines:** It appears that Philippine military courts and commissions, when authorized to do so by the President, can exercise universal jurisdiction over conduct abroad amounting to genocide. It is also possible that civilian courts can exercise such jurisdiction - either directly under international law or when genocide also constitutes an ordinary crime under national law, such as murder, kidnapping, assault or rape.

Generally accepted principles of international law are part of the law of the Philippines. Section II of Article 2 of the 1987 Constitution, which is based on a similarly worded provision in the 1935 Constitution, provides that the Philippines “adopts the generally accepted principles of international law as part of the law of the land”.

As explained above in Chapter Four, Section II, the Philippine Supreme Court gave this concept a broad reading in the *Kuroda* case more than half a century ago to include crimes against humanity, some of which overlap with genocide.

The Philippines has ratified the Genocide Convention. It has signed the Rome Statute but, as of 1 September 2001, it had not yet ratified it. However, the Philippines has not yet defined genocide as a crime under national law.

· **Poland:** Article 110 (2) of the Penal Code provides for custodial universal jurisdiction over aliens who have committed crimes abroad which have no link with Poland when the crime would have been subject to a penalty of two years’ imprisonment if committed in Poland, but Article 111 requires that the conduct have been punishable in the place where it occurred (double criminality) (for the full text and scope of all the relevant provisions, see Chapter Four, Section II).

Poland has ratified the Genocide Convention. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. Poland has provided in Article 118 of Chapter XVI (Offences against peace, and humanity, and war crimes) of the Special Part of the Penal Code that genocide is a crime under national law.<sup>116</sup> Statutes of limitation do not apply to genocide.<sup>117</sup>

· **Portugal:** Portuguese courts can exercise universal jurisdiction over genocide.

Paragraph 1 (b) of Article 5 (Acts committed outside Portuguese territory) of the (*Código Penal Português* (Portuguese Penal Code) of 1999 states in relevant part:

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<sup>116</sup> The Special Part applies to civilians, as well as to the military. In contrast, the Military Part applies only to the military. Article 118 defines genocide to include some of the elements of Article II of the Genocide Convention and Article 6 of the Rome Statute.

<sup>117</sup> Penal Code, Art. 105 (1) (“The provisions of Articles 101 through 103 [statutes of limitation] shall not be applied to crimes against peace, crimes against humanity or war crimes.”). Since Article 118 falls within Chapter XVI (Offences against peace, and humanity, and war crimes), Article 105 (1) necessarily applies to genocide.

“Unless any international treaty or agreement is to the contrary, Portuguese criminal law shall also apply to acts committed outside national territory:

....

(b) When they constitute crimes defined in . . . paragraph 1 of Article 239 . . . , if the suspect is found in Portugal and it is not possible to extradite the suspect.”<sup>118</sup>

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<sup>118</sup> Portuguese Penal Code of 1999, Art. 5 (1) (b) (all English translations of the 1999 Code by Amnesty International). The original Portuguese text states in full:

*“1. Salvo tratado ou convenção internacional em contrário, a lei penal portuguesa é ainda aplicável a factos cometidos fora do território nacional:*

....

*(b) Quando constituírem os crimes previstos nos artigos 159.º, 160.º, 169.º, 172.º, 173.º, 176.º e 236.º a 238.º, no n.º 1 do artigo 239.º e no artigo 242.º, desde que o agente seja encontrado em Portugal e não possa ser extraditado[.]”*

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

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

Portugal has ratified the Genocide Convention. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. Portugal has defined genocide as a crime under national law in Article 239.<sup>119</sup> However, ancillary crimes of genocide are not included within the scope of jurisdiction provided in Article 5 (1) (b) of the Penal Code.

· **Romania:** Romanian courts can exercise universal jurisdiction over genocide.

Article 6 of the Romanian Criminal Code of 1988 (for the text and scope of this and other relevant provisions, see Chapter Four, Section II above) gives national courts custodial universal jurisdiction over crimes specified in the Criminal Code by foreigners and stateless persons committed abroad, provided that the conduct was criminal in the place where it occurred and there are no bars to prosecution under the law of that place. In addition, Article 4 of the Criminal Code provides for universal jurisdiction over stateless persons residing in Romania.

Article 7 of this Code states that “[t]he provisions included in Articles 5 and 6 shall only apply if international agreements do not otherwise provide.” As demonstrated above, nothing in the Genocide Convention provides that states parties may not exercise universal jurisdiction over genocide.

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<sup>119</sup> Under Title III (Crimes against Peace and Humanity), Chapter II (crimes against humanity) of the Portuguese Penal Code, Article 239 (Genocide) provides:

“1) Who, with intention to destroy, in all or part, national, ethnic, racial or religious group, as such, carries out:

- a) Homicide of members of the group;
- b) Offence to serious the physical integrity of members of the group;
- c) Subjection of the group cruel, degrading or inhuman treatment, susceptible the conditions of existence or the handlings capsizes to provoke its destruction, partial total or;
- d) Forcibly transfers children from one group to another group; or
- e) Prevents procreation or births in the group;

it is punished with penalty of arrest of 12 the 25 years.

2) whoever, public and directly, incites genocide is punishable with a sentence of imprisonment of 2 to 8 years.

3) the agreement with the aim of carrying out genocide is punishable with a sentence of imprisonment of 1 to 5 years.”

The original text in Portuguese reads:

“1) *Quem, com intenção de destruir, no todo ou em parte, grupo nacional, étnico, racial ou religioso, como tal, praticar:*

- a) *Homicídio de membros do grupo;*
- b) *Ofensa à integridade física grave de membros do grupo;*
- c) *Sujeição do grupo a condições de existência ou a tratamentos cruéis, degradantes ou desumanos, susceptíveis de virem a provocar a sua destruição, total ou parcial;*
- d) *Transferência por meios violentos de crianças do grupo para outro grupo; ou*
- e) *Impedimento da procriação ou dos nascimentos no grupo;*

*é punido com pena de prisão de 12 a 25 anos.*

2) *Quem, pública e directamente, incitar a genocídio é punido com pena de prisão de 2 a 8 anos.*

3) *O acordo com vista à prática de genocídio é punido com pena de prisão de 1 a 5 anos.”*

*Código Penal, Título III - Dos Crimes Contra a Paz e a Humanidade Capítulo II - Dos crimes contra a humanidade, Artigo 239º - Genocídio.* The original text is obtainable from: <<http://www.preventgenocide.org>>.

Article 357 of the Criminal Code defines genocide as a crime.<sup>120</sup> Romania is a party to the Genocide Convention. It has signed the Rome Statute, but as of 1 September 2001 had not yet ratified it. Statutes of limitation do not apply to genocide (see Chapter Four, Section II).

· **Russian Federation:** Article 12 (3) of the Russian Criminal Code gives Russian courts universal jurisdiction over foreign citizens and stateless persons not permanently resident in the Russian Federation for crimes under Russian law where a treaty provides for prosecution for such conduct, as long as the suspects have not been convicted of such conduct in another state (for the text of that provision, see Chapter Four, Section II above). Article 357 of the Criminal Code provides that acts amounting to genocide under the Genocide Convention are a crime. The Russian Federation is a party to the Genocide Convention as a successor to the USSR. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. Although Article VI of the Genocide Convention expressly provides for prosecution by the territorial state, nothing in the wording of Article 12 (3) limits the scope to cases where the treaty expressly provides for prosecution on the basis of universal jurisdiction. Thus, Article 12 (3) may give Russian courts universal jurisdiction over genocide under the Genocide Convention. However, there is no jurisprudence on this question.

· **Slovak Republic:** There are two bases for courts in the Slovak Republic to exercise universal jurisdiction over conduct amounting to genocide (for the text and scope of the relevant jurisdictional provisions not quoted, see Chapter Four, Section II).

First, Section 19 of the Penal Code provides in relevant part:

“This Act shall also be used to determine criminal liability for criminal offences of . . . genocide (section 259), . . . if such a criminal offence was committed abroad by a foreign national or a stateless person who does not have permanent residency on the territory of the Slovak Republic.”<sup>121</sup>

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

The Slovak Republic is a party to the Genocide Convention. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it. Genocide is a crime under Slovak law.<sup>122</sup>

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<sup>120</sup> Criminal Code, Art. 357 (defining genocide in terms similar to the definition in Article II of the Genocide Convention and Article 6 of the Rome Statute).

<sup>121</sup> Penal Code of 1961, as amended, § 19 (unofficial English translation provided by the government).

<sup>122</sup> Penal Code, § 259 (Genocide) (defining the crime in terms similar to the definition in Article II of the Genocide Convention and in Article 6 of the Rome Statute). It includes participation in genocide as a crime, but does not list the other forms of ancillary criminal responsibility.

· **Slovenia:** Article 123 (2) of the Penal Code of Slovenia (for the text, see Chapter Four, Section II above) provides that the Penal Code applies to foreigners found in the territory who have committed crimes abroad against another country or any of its citizens, provided that the offence is punishable by at least three years' imprisonment under the Penal Code. Article 373 of the Penal Code (Genocide) prohibits genocide, including genocidal acts against a social or political group, and Article 378 (Association and Incitement to Genocide and War Crimes) prohibits incitement to such acts. Both articles provide for punishments in excess of three years. Slovenia is a party to the Genocide Convention. It has signed the Rome Statute, but as of 1 September 2001 it had not yet ratified it.

· **South Africa:** Although South Africa has not yet provided for universal jurisdiction over genocide, it intends to do so.

The draft implementing legislation for the Rome Statute, which was introduced in Parliament on 18 July 2001, provides for universal jurisdiction over genocide as defined in Article 6 of the Rome Statute. Section 4 (2) of the draft bill states:

“In order to secure the jurisdiction of any court referred to in section 166 (c) to (e) of the Constitution for purposes of this Act, any person who commits a crime contemplated in subsection (1) [genocide, crimes against humanity or war crimes as defined in the Rome Statute] outside the territory of the Republic if

. . . .

(b) that person is not a South African citizen, but is ordinarily resident in the Republic; or  
(c) that person, after the commission of the crime, is present in the territory of the Republic. . . .”<sup>123</sup>

However, this provision does not appear to provide for universal jurisdiction over the ancillary crimes of genocide in Article III of the Genocide Convention or as covered by Article 25 of the Rome Statute.

South Africa has ratified the Genocide Convention and the Rome Statute.

· **Spain:** There are two legislative provisions permitting Spanish courts to exercise universal jurisdiction over genocide.<sup>124</sup>

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<sup>123</sup> Republic of South Africa, International Criminal Court Bill, as introduced on 18 July 2001, § 4 (2) (b) & (c). The full text of the bill is obtainable from <http://www.polity.org.za/govdocs/legislation/index.htm>. The memorandum accompanying the draft bill states: “A person who commits such a crime outside of the Republic is deemed to have committed that crime in the Republic if he or she is a South African citizen or is ordinarily resident in the Republic, if he or she is in the Republic after the commission of the crime . . .” Memorandum on the Objects of the International Criminal Court Bill, 2001.

<sup>124</sup> In addition to the other sources on Spain cited in the bibliography (Annex I), the following unpublished papers were used in drafting the entries on Spain in this memorandum: Valentine Bück, *Rapport Espagnol*, unpublished manuscript submitted for discussion to the *Etude Comparée des Critères de Compétence Juridictionnelle en Matière de Crimes Internationaux (Crimes Contre l'Humanité, Génocide, Torture, Crimes de Guerre, Terrorisme)*, Paris, 2 to 3 July 2001; Luc Reydam, *Spain*, a chapter in his book, *Universal Jurisdiction in International Law* (Oxford: Oxford University Press) (forthcoming).



**(1) Legislative provisions.** First, Article 23.2 of the Organic Law of the Judicial Power of 6/1985 of 1 July 1985 (*Ley Orgánica del Poder Judicial. Boletín Oficial del Estado, No. 157*) provides that Spanish courts may exercise universal jurisdiction over ordinary crimes committed abroad by aliens who subsequently become Spanish nationals, provided that the act was punishable under the law of the place where it occurred and the suspect has not been acquitted, convicted or pardoned.

Article 23.4 of the 1985 Organic Law of the Judicial Branch permits courts to exercise jurisdiction over crimes “committed by Spanish or foreign persons outside of national territory and capable of being proven under Spanish law, such as the following crimes: (a) Genocide . . .”.

Spain is a party to the Genocide Convention. It has ratified the Rome Statute and, although it had not yet enacted implementing legislation as of 1 September 2001. Genocide is defined as a crime under national law and it has been interpreted more broadly than the definition in Article II of the Genocide Convention and Article 6 of the Rome Statute.<sup>125</sup> Article 131 (4) of the Penal Code provides that statutes of limitation do not apply to genocide.

**(2) Criminal investigations.** There have been several criminal investigations opened based on universal jurisdiction over allegations of genocide abroad.

<sup>125</sup> The original text in Spanish of Article 607 reads:

*“1. Los que, con propósito de destruir total o parcialmente a un grupo nacional, étnico, racial o religioso, perpetraren alguno de los actos siguientes, serán castigados:*

*1) Con la pena de prisión de quince a veinte años, si mataran a alguno de sus miembros.*

*Si concurrieran en el hecho dos o más circunstancias agravantes, se impondrá la pena superior en grado.*

*2) Con la prisión de quince a veinte años, si agredieran sexualmente a alguno de sus miembros o produjeran alguna de las lesiones previstas en el artículo 149.*

*3) Con la prisión de ocho a quince años, si sometieran al grupo o a cualquiera de sus individuos a condiciones de existencia que pongan en peligro su vida o perturben gravemente su salud, o cuando les produjeran algunas de las lesiones previstas en el artículo 150.*

*4) Con la misma pena, si llevaran a cabo desplazamientos forzosos del grupo o sus miembros, adoptaran cualquier medida que tienda a impedir su género de vida o reproducción, o bien trasladaran por la fuerza individuos de un grupo a otro.*

*5) Con la de prisión de cuatro a ocho años, si produjeran cualquier otra lesión distinta de las señaladas en los números 2. y 3. de este apartado.*

*2. La difusión por cualquier medio de ideas o doctrinas que nieguen o justifiquen los delitos tipificados en el apartado anterior de este artículo, o pretendan la rehabilitación de regímenes o instituciones que amparen prácticas generadoras de los mismos, se castigará con la pena de prisión de uno a dos años.”*

*Código Penal, Libro II, Título XXIV (Delitos contra la Comunidad Internacional), Capítulo II (Delitos de genocidio), Artículo 607.* The original text in Spanish is obtainable from <<http://www.preventgenocide.org>>.

**Crimes in Chile.** Among the crimes with which the former President of Chile was charged in October 1998 was the crime of genocide under Article 607. In upholding jurisdiction under Article 23.4 (a) of the Organic Law of the Judicial Branch over charges of genocide committed in a foreign country, the *Audiencia Nacional* declared that Article VI of the Genocide Convention did not exclude the possibility of courts with jurisdiction distinct from the jurisdiction of the courts of the territorial state or of an international tribunal.<sup>126</sup> The court explained:

“Article VI of the Convention does not rule out the possibility that there may be courts with the necessary jurisdiction other than those in the territory in which the crime was committed or an international court. Article VI of the Convention envisages an international penal court and makes it obligatory for State parties to ensure that genocide is prosecuted by the courts of the State in whose territory the offences were committed. But it would be contrary to the spirit of the Convention, which seeks a commitment from the contracting parties to use their own respective criminal laws to prosecute genocide as a crime under international law and ensure that there is no impunity for such a serious crime, to use Article VI of the Convention to put limits on jurisdiction by ruling out any other type than those it stipulates. The fact that there has been no agreement between the contracting parties that their own respective national courts do not have universal jurisdiction for the offence means that State parties are not prevented from establishing that type of jurisdiction for an offence which has such great significance for the whole world and which, as the Convention itself states, directly affects the international community and the whole of humanity. In no way should we see Article VI as a means of preventing State signatories from making use of their right to instigate prosecution as appropriate under their domestic legislation. It would be unthinkable if, by applying the Convention for the Prevention and Punishment of the Crime of Genocide and having complied with the requirements of article 23, paragraph two, of the Organic Law of the Judicial Power, Spain, for example, could not punish a perpetrator of genocide with Spanish nationality who had committed the offence outside of Spain and who was present in our country. At the same time, the terms of Article VI of the 1948 Convention do not mean that a State party, such as Spain, whose legal system allows extraterritoriality to be used for prosecuting genocide, should be prevented from punishing genocide through the action of its own courts.”<sup>127</sup>

Although that law was interpreted more broadly by the court than the definition in the Genocide Convention, those differences are not relevant to the decision that a national court, even in a state party, may exercise universal jurisdiction over the crime of genocide.

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<sup>126</sup> The text of the decision can be found under the following title (not the title of the decision): *Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena* (Ruling of the National Audience on Jurisdiction of Spanish Justice to Pursue Crimes of Genocide and Terrorism during the Chilean Dictatorship), Madrid, 5 October 1998 (the text of the decision and a summary in English are obtainable from <<http://www.derechos.org/nizkor/chile/juicio/audi.html>>, Section Two. The English translation of the quoted passage is by Amnesty International. Other English translations of this decision can be found in 2 Y. B. Int'l Hum. L. 505 (1999) and in Reed Brody & Michael Ratner, *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (The Hague/London/Boston: Kluwer Law International 2000).

<sup>127</sup> *Ibid.*

The court, however, imposed a judicially-created condition for the exercise of universal jurisdiction under Article 23.4 (a) over genocide that has no basis in the text of the Genocide Convention or its drafting history. This subsidiarity (or, more accurately, complementarity) test, if implemented in all cases, could permit territorial states to prevent Spanish courts from exercising universal jurisdiction simply by instituting criminal proceedings against a suspect without any intention of permitting the case to proceed. Indeed, problems with this test may well have led the court to limit the its scope in the *Ríos Montt* case a year and a half later (see below). The court defined its new test as follows:

“It should be recognized, considering the primacy of international law over domestic law (Article 96 of the Spanish Constitution and Article 27 of the Vienna Convention on the Law of Treaties, of 1969), that Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide makes the action of jurisdictions other than those provided for in Article VI subsidiary, so that a State must refrain from exercising jurisdiction over acts that constitute genocide where they are already being tried by the courts of the country in which they occurred or by an international penal tribunal.”<sup>128</sup>

***Crimes in Argentina.*** In a related case, an investigating judge issued arrest warrants for 97 Argentine military officers and one Argentine judge on the basis of charges including genocide (see discussion in Chapter Two, Section V.A above).<sup>129</sup>

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<sup>128</sup> *Ibid.*, (English translation in Brody & Ratner, *supra* n.126).

<sup>129</sup> The text of the decision in Spanish, together with a summary in English, can be found under the following title (not the title of the decision): *Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura argentina* (Ruling of the National Audience on Jurisdiction of Spanish Justice to Pursue Crimes of Genocide and Terrorism during the Argentine Dictatorship), Madrid, 4 October 1998 <<http://www.derechos.org/nizkor/arg/espana/audi.html>>, Section Two.

**Crimes in Guatemala.** On 2 December 1999, a complaint was filed by several Guatemalan and international non-governmental organizations and individuals against former Presidents of Guatemala Efraín Ríos Montt, Fernando Romeo Lucas García and Oscar Humberto Mejía Vítores and against five senior police officials in the *Audiencia Nacional* (Spanish Central Trial Court No. 1) alleging that they had been responsible for genocide, torture, “terrorism” and other crimes committed during the internal armed conflict in Guatemala.<sup>130</sup> On 13 January 2000, as in the *Pinochet* case, the Prosecutor argued that jurisdiction was inappropriate because Guatemala was investigating the alleged crimes.<sup>131</sup>

The *juez central de instrucción* (investigating judge), Ruiz Polanco, rejected this challenge on 27 March 2000, holding that the court had jurisdiction over the alleged acts.<sup>132</sup> According to an authoritative account of this decision, Judge Ruiz Polanco said that the complaint could be heard because Guatemalan courts were not investigating the allegations and that legal proceedings in Guatemala had been stalled or suspended without sufficient basis. He further held that in the absence of the efficient exercise by Guatemalan courts of their primary jurisdiction over the allegations, other courts, such as the Spanish courts, would be able to exercise universal jurisdiction over offences which were grave violations of fundamental human rights. He, therefore, decided to send an investigation mission to Guatemala to determine whether there were any pending proceedings concerning the allegations in the case, whether proceedings were stalled or suspended and, if so, the reasons for the delays.<sup>133</sup>

<sup>130</sup> Preliminary Proceedings, No. 331/99, Spanish Central Trial Court No. 1, Madrid, 2 December 1999 [*Juzgado Central de Instrucción No. 1. Audiencia Nacional. Diligencias Previas 331/99*]. The organizations initiating the proceedings included *Confederación Sindical de Comisiones Obreras* (Trade Union Confederation of Workers’ Commissions); *Asociación Libre de Abogados* (Free Lawyers Association), *Asociación Contra la Tortura* (Association against Torture), *Asociació d’Amistat amb el Poble de Guatemala* (Association for Friendship with the Guatemalan People), *Asociación Centro de Documentación y Solidaridad con América Latina y África* (Association and Centre of Documentation and Solidarity with Latin America and Africa), *Comite de Solidaridad Internacionalista de Zaragoza* (Zaragoza Internationalist Solidarity Committee) and the *Asociación Argentina de Derechos Humanos* (Argentinian Human Rights Association). The individuals were Rigoberta Menchú Tum and 16 others. At the appeal stage, on 28 November 2000, the *Asociación pro Derechos Humanos de España* (Spanish Human Rights Association) was added.

The account of this case is based in part on Michael Cottier, *Correspondents Reports: Spain - Cases: Decision of the Audiencia Nacional on whether Spain shall exercise universal jurisdiction over genocide and other crimes committed in Guatemala*, 3 Y. B. Int’l Hum. L. (2001) (forthcoming). See also, *What Relationship Between the Exercise of Universal and Territorial Jurisdiction? The Decision of 13 December 2000 of the Spanish National Court Shelving the Proceedings Against Guatemalan Nationals Accused of Genocide*, in Horst Fischer, Klaus Kreß and Sascha Rolf Lüder, eds, *International and National Prosecution of Crimes under International Law* (2000) (forthcoming).

<sup>131</sup> Opinion of the Prosecutor’s Office (Fiscal) alleging the incompetence of the Spanish jurisdiction, 13 January 2000.

<sup>132</sup> Decision (*Auto*) of Judge Ruiz Polanco confirming the jurisdiction of the Spanish Central Trial Court No. 1 over the alleged acts, 30 March 2000.

<sup>133</sup> Cottier, *supra* n.133

The Prosecutor's Office (*Ministerio Fiscal*) filed a *recurso de reforma* (an interlocutory appeal) on 30 March 2000.<sup>134</sup> While this interlocutory appeal was pending, a complaint was filed on 5 April 2000 against eight additional persons. Judge Ruiz Polanco rejected the interlocutory appeal on 27 April 2000.<sup>135</sup> The Prosecutor's Office (Fiscal) filed a *recurso de apelación* (appeal) on 4 May 2000 in the *Audiencia Nacional*, (National Court, Criminal Chamber).<sup>136</sup>

On 13 December 2000, that court, after hearing the case *en pleno* (in a plenary session of the full court) granted the appeal and declined to exercise Spain's subsidiary jurisdiction for the time being.<sup>137</sup>

The court stated that under Article 96 of the Spanish Constitution and Article 27 of the Vienna Convention on the Law of Treaties, treaties had priority over Spanish law and that under Article VI of the Genocide Convention, the courts of the territorial state had priority over those of other states, whose jurisdiction over genocide was subsidiary (*principio de subsidiaridad*) to that of the territorial state. Therefore, according to the court, "when acts amounting to genocide are subject to criminal proceedings in the courts of the country where they occurred or in an international criminal court, the courts in other states should cease to exercise jurisdiction".<sup>138</sup>

The court rejected the finding of the Investigating Judge that the Guatemalan courts had been inactive, thus permitting Spanish courts to exercise jurisdiction. It said that lack of activity by the courts of the territorial state could be the result of one of two reasons. First, it could be because "laws have been passed to shield the accused from prosecution so that the domestic courts are prevented by their own legislation from initiating proceedings against them, such as through amnesty laws or laws of oblivion (*leyes de amnistía y olvido*)". Second, "although it may be legally possible for proceedings to be opened, the domestic courts are subjected to pressures from the governing or *de facto* authorities which are such that it can be reasonably concluded that it is not feasible, in such a climate of government hounding or fear, for the judges to carry out their duties with the calmness and impartiality which they need to be able to reach a judgment".

The court found that there were no legal obstacles to prosecuting acts of genocide in Guatemala. Although the report of the *Comisión para el Esclarecimiento Histórico* (Commission for the Clarification of Truth) of 25 February 1999 did not have any legal effect or attribute individual

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<sup>134</sup> Interlocutory appeal by Prosecutor's Office (Fiscal), 30 March 2000.

<sup>135</sup> Decision of Judge Ruiz Polanco rejecting the interlocutory appeal by the Prosecutor's Office (Fiscal).

<sup>136</sup> Appeal by the Prosecutor's Office (Fiscal), 4 May 2000.

<sup>137</sup> Decision of the National Court, Criminal Chamber, Plenary Session, Appeal Record No. 115/2000, Preliminary Proceedings 331/99, Central Court of Instruction No. 1, Madrid, 13 December 2000 (*obtainable from* <http://www.pangea.org/impunitat/> or <http://www.derechos.org/nizkor/guatemala/doc/espana.html>).

<sup>138</sup> As stated above, the meaning of this word is closer to principle of complementarity within the meaning of Articles 1 and 17 of the Rome Statute than to the principle of subsidiarity in the European Union context.

criminal responsibility, state institutions and individuals could take action based on its contents.<sup>139</sup> The court also cited the recommendation of the Commission:

“That the State should comply with and ensure that others comply with the Law of National Reconciliation in order to prosecute and bring to trial crimes such as genocide, torture and enforced disappearance, criminal liability for which is not extinguished as a result of this law.”

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<sup>139</sup> *Informe de la Comisión para el Esclarecimiento Histórico, Guatemala: Memoria del Silencio* (obtainable from <<http://hrdata.aaas.org/>>).

Article 8 of the National Reconciliation Law of 18 December 1996 provided that criminal responsibility was not extinguished for genocide, torture and forced disappearance, as well as any crimes that are not barred by a statute of limitations or for which domestic law or international treaties ratified by Guatemala do not allow criminal liability to be extinguished.<sup>140</sup> Therefore, the court concluded that “there is no reason why the Guatemalan justice system cannot prosecute the offence of genocide allegedly committed on the territory of that country”.

The court also found that it was not established that Guatemalan courts would not hear the case because of government or other pressure. First, it held that the findings by the Investigating Magistrate on this question related to an earlier period when, although the Guatemalan judiciary was not an accessory after the fact (*cómplice y encubridora*), a section of the judiciary was subject to intimidation. The court said, however, that “what has not been demonstrated is that the Guatemalan judges of today would refuse to take action if the complaint and supplementary lawsuits presented to the First Central Magistrate’s Court were presented to the relevant Guatemalan courts with jurisdiction over the offence of genocide and the other related offences”. In this connection, it noted that the report of the Commission had been issued on 25 February 1999 and the complaint in this case had been made in the Spanish court on 2 December 1999. Therefore, in contrast to the situations in Argentina and Chile, it was not possible to say that “given the number of years which had passed since the military dictatorships had ended, [and] that by virtue of the length of time which has passed, there has been no judicial action”.

On the basis of the above reasoning, the court concluded that it “does not accept that it is currently necessary for the Spanish courts to resort, on grounds of subsidiarity, to assuming universal jurisdiction for the offence of genocide”. However, in allowing the appeal by the Public Prosecutor, it did not foreclose a renewal of proceedings in Spanish courts if the Guatemalan courts failed to act on the allegations in the complaint. Instead, the court declared “that it is not appropriate at the present time for the Spanish courts to pursue the prosecution of the acts in question and that the Investigating Magistrate must therefore shelve the Preliminary Proceedings on the above-stated grounds of lack of jurisdiction”.

The court did not address the question whether it had jurisdiction over the other crimes in the complaint, such as torture. As far as is known, there has been no attempt to have the decision of the *Audiencia Nacional* reviewed by cassation.

· **Sweden:** Swedish courts may exercise universal jurisdiction over genocide in several situations.

The first provision, Section 2 of Chapter 2 of the Swedish Penal Code of 1962, entered into force 1965, provides for custodial universal jurisdiction over aliens domiciled in Sweden and over aliens found in the territory suspected of committing crimes abroad which are crimes under Swedish law punishable by more than six months, provided that they are crimes in the state where committed.

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<sup>140</sup> Law of National Reconciliation of 18 December 1996, Decree No. 145-96 (*Ley de Reconciliación Nacional*).

The second, Section 3 of Chapter 2 of the Penal Code, provides universal jurisdiction over crimes carrying a penalty of four years under Swedish law which are crimes under international law. Section 6 of Chapter 22 provides that

“[a] person guilty of a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognized principle or tenet relating to international humanitarian law concerning armed conflicts shall be sentenced for crime against international law (*folkrättsbrott*) to imprisonment for at most four years.”

Section 3 then contains an illustrative list of crimes, all of which take place in armed conflict, so it is not clear if persons “guilty of a serious violation of a treaty or agreement with a foreign power” must have committed the crime during armed conflict or if this part of the section includes crimes during time of peace.

Sweden is a party to the Genocide Convention. It has signed and ratified the Rome Statute, but as of 1 September 2001 it had not yet enacted implementing legislation, although it was conducting a review of national legislation (see Chapter Four, Section II). Genocide is a crime under Swedish law.<sup>141</sup>

· **Switzerland:** Since 15 December 2000, Swiss courts have been able to exercise universal jurisdiction over persons suspected of genocide found in the national territory who cannot be extradited. Previously, a Swiss military court had concluded that it could not exercise universal jurisdiction over this crime, at least in peacetime.<sup>142</sup>

<sup>141</sup> *LagboKen* (1964), § 169 (*folkmord*) (original Swedish text obtainable from <http://www.preventgenocide.org/se/lag169.htm>). The following unofficial translation is by Hakan Friman:

“1. A person who commits a crime, for which the law prescribes imprisonment for four years or more, against a national, ethnical, racially determined or religious group, with intent to destroy the group, in whole or in part, shall be sentenced for genocide to imprisonment for a fixed term of not less than four and at most ten years, or for life.

2. Attempt, preparation or conspiracy to commit genocide, and any failure to reveal such a crime, shall be adjudged in accordance with the provisions of Chapter 23 of the Penal Code.”

<sup>142</sup> On 30 April 1999, one year before Switzerland ratified the Genocide Convention and enacted implementing legislation, a military court held that, even if Switzerland had an obligation under customary international law to repress genocide, the court did not have jurisdiction under the Swiss Military Penal Code over charges against a Rwandan of genocide committed in Rwanda. *Fulgence Niyonteze, jugement (Tribunal militaire de Division 2, 30 avril 1999)*, 13. It explained that

“*même si l'on admettait que la Suisse a, en vertu du droit international coutumier, une obligation de réprimer les crimes contre l'humanité et de crime de génocide où qu'ils aient été commis, cela ne signifie pas encore nécessairement qu'en l'absence de toute disposition légale, le Tribunal de céans puisse exécuter cette obligation ;*

*Qu'en effet, en application du principe nulla poene sine lege (art. 1er CPM), un juge pénal ne peut condamner que celui qui a commis une infraction prévue par la loi et ne peut prononcer qu'une peine ou une mesure également prévue par la loi ;*

*Que les notions de crimes contre l'humanité et de crime de génocide ne se confondent pas en Suisse avec des normes précises qu'un juge peut directement appliquer pour prononcer une sanction, contrairement aux situations invoqués par l'auditeur et existant dans de nombreux autres pays ;*

*Que la Convention de 1948 sur le génocide n'est pas applicable en Suisse à ce jour, à défaut de ratification par notre pays ;*



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*Que le message du Conseil fédéral promulgué en faveur d'une prochaine ratification n'attribue pas la compétence de juger un génocide ou un crime contre l'humanité aux tribunaux militaires ;*

*Que le message démontre que la non-ratification de la convention constitue une lacune qui n'est pas encore comblée ;*

*Que l'obligation universelle de réprimer les génocides et les crimes de guerre serait assurément plus contraignante en cas de vide juridique qui rendrait les actes incriminés non poursuivables ;*

.....

*Que'en conséquence, même s'il admettait sa compétence, le Tribunal de céans ne pourrait pas forcément condamner l'accusé à une peine pour crimes contre l'humanité et crime de génocide en l'absence de base légale suffisante et qui plus est de sanction pénale[.]”*

*Ibid.*, 11-12.

However, on appeal, the First Military Appeals Court is reported to have stated in a still unpublished decision as of 1 May 2001 that Article 109 of the Military Penal Code might cover, in addition to violations of international humanitarian law, acts of genocide, at least to the extent that they were committed in connection with an armed conflict. Cottier, *supra*, n. 133, 227. For further discussion of this case with regard to jurisdiction over war crimes, see Chapter Four, Section II; and with regard to jurisdiction over crimes against humanity, see Chapter Six, Section II.

The government explained the background and purpose of the legislation making genocide a crime under the Penal Code (*Code Pénal*) in a message on 31 March 1999.<sup>143</sup> In its message, the government stated that the prohibition of genocide was a rule of *jus cogens* subject to obligations *erga omnes*.<sup>144</sup> The legislation amends the Penal Code, the Military Penal Code and the Administration of Federal Criminal Law.<sup>145</sup> Paragraph 1 of Article 264 of the Penal Code, as part of a new Title 12bis (Crimes against the Interests of the International Community) (*Délits contre les intérêts de la communauté internationale*), makes genocide a crime punishable by ten years to life imprisonment.<sup>146</sup> Paragraph 2 of that article states that Swiss courts may exercise universal jurisdiction over a person found in Switzerland suspected of genocide abroad who cannot be extradited and states that Article 6bis of the Penal Code (giving Swiss civilian courts jurisdiction over acts which a treaty obliges the state to prosecute (for the text and scope, see Chapter Four, Section II)).<sup>147</sup> The government stated that the inability to extradite could be based

<sup>143</sup> Message of the Federal Council of 31 March 1999 concerning the Genocide Convention on the Prevention and Punishment of the Crime of Genocide and on the corresponding Revision of the Criminal Law (*Botschaft des Bundesrates betreffend das Übereinkommen über die Verhütung und Bestrafung des Völkermordes soie die entsprechende Revision des Strafrechts/Message du Conseil fédéral relatif à la Convention pour la prévention et la répression du crime de génocide, et révision correspondante du droit pénal*). It is published in the official journal at *BB1 (Bundesblatt)* 1999 5327, 5336/FF (*Feuille Fédérale*), No. 28, 20 juillet 1999, 4911, 4919 (obtainable from <http://www.ch/ch/f/ff/1999/4911.pdf>).

For a scholarly analysis of the scope of this legislation, see Michael Cottier, *The Case of Switzerland*, in Claus Kress & Flavia Lattanzi, eds, 1 *The Rome Statute and Domestic Legal Orders: General Aspects and Constitutional Issues* 219, 227-232 (2000).

<sup>144</sup> *Message du Conseil*, n. 143, 4917-4918 (“*On a rapidement reconnu aux dispositions matérielles de la Convention le caractère de règles de droit coutumier. En outre, la règle fondamentale de l’interdiction de génocide revêt impérative ayant une portée erga omnes. . . . Dans la mesure où l’interdiction du génocide est une règle impérative du droit des gens (jus cogens), les Etats ne peuvent pas convenir de l’écarter*”) (footnotes omitted).

<sup>145</sup> Federal Act on Amending the Penal Code, the Military Penal Code and the Administration of the Federal Criminal Law (*Bundesgesetz über die Änderung des Strafgesetzbuches, des Militärstrafgesetzes und der Bundesstrafrechtspflege/Loi fédérale concernant la modification du code pénal, du code pénal militaire et de la procédure pénale fédérale*) (published in the official journal at *BB1* 1999 5358/FF 1999 4941); Federal Decree regarding the Approval of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bundesbeschluss betreffend die Genehmigung des Übereinkommens über die Verhütung und Bestrafung des Völkermordes/Arrêté fédéral portant approbation de la Convention pour la prévention et la répression du crime de génocide*) (published in the official journal at: *BB1* 1999 5358/FF 1999 4941; obtainable from <http://www.admin.ch/ch/f/as/2000/2725.pdf>). The debates and votes in the Federal Assembly are published in Official Bulletin of the National Council of 8 December 1999 and 24 March 2000; Official Bulletin of the Council of States of 9 and 24 March 2000.

<sup>146</sup> *Code Pénal*, art. 264, al. 1, as amended on 24 March 2000, in *Loi fédérale concernant la modification du code pénal, du code pénal militaire et de la procédure pénale fédérale, Recueil des lois fédérales*, No. 48, 5 décembre 2000. The definition is almost identical to the definition in Article II of the Genocide Convention and Article 6 of the Rome Statute. Article 260bis (1), amended in the same law, provides for punishment of ancillary criminal responsibility for genocide. Both provisions entered into force on 15 December 2000.

<sup>147</sup> *Code Pénal*, art. 264, al. 2 (“*Est également punissable celui qui aura agi à l’étranger, s’il se trouve en Suisse et qu’il ne peut être extradé. L’article 6bis, ch.2, est applicable.*”)

on legal or factual reasons.<sup>148</sup> There are a variety of reasons why Switzerland would not extradite someone for

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<sup>148</sup> *Message du Conseil, supra*, n. 143, *Feuille Fédérale* 1999, 4933 (“... le principe de l’universalité . . . à deux réserves près: il faut que l’accusé se trouve en Suisse et qu’il ne puisse être extradé pour des raisons juridiques u de fait.”).

genocide.<sup>149</sup> The government explained that the Genocide Convention did not prevent states parties from exercising universal jurisdiction over this crime.<sup>150</sup>

The Federal Council (*Conseil Fédéral*) stated in its 1999 Message that Article IV of the Genocide Convention (providing that responsible rulers and public officials must be punished for genocide and ancillary crimes) and Article VII (providing that the political exception in extradition proceedings does not apply to genocide) are self-executing obligations directly applicable in Switzerland.<sup>151</sup> In addition, it stated that existing legislation made it clear that statutes of limitation did not apply to genocide.<sup>152</sup>

Civilian courts will have primary jurisdiction over genocide. Paragraph 2 of Article 221 of the Military Penal Code (*Code Pénal Militaire*) now states that if a person is to be charged with genocide, even if only one of several other charges, civilian courts have jurisdiction.<sup>153</sup>

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<sup>149</sup> A commentary on this provision has stated that

“a request by a state that is unwilling or unable to genuinely prosecute the person concerned would not prevent the exercise of universal jurisdiction by Switzerland. Such a request would not only lack the reason for a request which, after all, is based on the requesting state’s willingness to prosecute the person to be extradited for the criminal offence for which the extradition is requested for. Allowing another state to shield a person responsible for genocide from his or her criminal responsibility by a request in bad faith, or by a sham trial, also would run counter to the objective to avoid gaps in the prosecution of genocide and the collective interests of the international community, as the new penal provisions intend to protect, and would disregard the objective of international justice and the obligation to punish genocide.

According to Swiss practice, a person in addition cannot be extradited if there is reason to believe that the proceeding in the requesting state is not in conformity with procedural principles of the European Convention on Human Rights or the International Covenant on Civil and Political Rights or that there are other serious shortcomings.”

Cottier, *supra*, n.133, 230 (footnotes omitted).

<sup>150</sup> *Message du Conseil, supra*, n. 143, *Feuille Fédérale* 1999, 4925-4926 (“*Aujourd’hui, en vertu de la qualité impérative (jus cogens) de l’interdiction du génocide, et de son effet erga omnes . . . , il ne fait aucun doute que la répression du crime de génocide repose en droit international sur le principe de l’universalité. En vertu de ce principe, les Etats peuvent - et doivent même - poursuivre ou extraditer les ressortissants étrangers ou leurs propres nationaux pour tout acte de génocide, que celui-ci ait été commis ou non sur leur territoire, sans que cela constitue une ingérence contraire au droit international dans les affaires intérieures d’un autre Etat.*”).

<sup>151</sup> *Message du Conseil, supra*, n. 143, *Feuille Fédérale*, 4927 (“*Les art. IV, VI et VII, . . . contiennent des obligations directement applicables.*”).

<sup>152</sup> *Ibid.*, 4928 (“*La législation suisse tient déjà partiellement compte des obligations prévues par la Convention. Ainsi, l’art. 75bis du code pénal et l’art. 56bis du code pénal militaire posent tous deux l’imprescriptibilité du crime de génocide.*”).

<sup>153</sup> *Code Pénal Militaire, art. 221*, as amended on 24 March 2000. A recent commentary has stated that “[t]his centralization of the investigation and prosecution of international crimes must be welcomed, as it permits [the authorities] to build up expertise regarding the particularities of investigating and prosecuting international crimes committed in a foreign country.” Cottier, *supra*, n. 133, 229.

Switzerland is a party to the Genocide Convention. It has signed the Rome Statute, but had not yet ratified it as of 1 September 2001, although it is expected to ratify it in 2001 and to keep universal jurisdiction over this crime.

· **Syrian Arab Republic:** It appears that two legislative provisions permit Syrian courts to exercise universal jurisdiction over certain conduct amounting to genocide committed abroad (for the text and scope of these provisions, see Chapter Four, Section II).

First, Article 20 of Title I (Competence), Section 3 (Personal Competence) of the Syrian Penal Code of 1949, as amended 1953 provides for jurisdiction over crimes in the Code committed by foreigners abroad. Second, Article 23 of Title I, Section 4 (Comprehensive Competency) provides for jurisdiction over crimes committed by foreign residents, without any territorial restriction, when extradition has either not been requested or has not been accepted.

Syria is a party to the Genocide Convention. It has signed the Rome Statute but as of 1 September 2001 it had not yet ratified it. The Penal Code does not provide that genocide is a crime under national law, so prosecutions based on universal jurisdiction would have to be brought for ordinary crimes, such as murder.

· **Tadjikistan:** There are two bases for exercising universal jurisdiction over genocide under the 1998 Criminal Code of the Republic of Tadjikistan.

First, Paragraph 1 of Article 15 of the Criminal Code provides for jurisdiction over stateless permanent residents who committed crimes under Tadjikistan law outside the country (for the text and scope, see Chapter Four, Section II above). Second, Article 15 (2) of the Criminal Code provides for jurisdiction over foreigners and stateless persons not resident in Tadjikistan who commit crimes under the Code when the crime is prohibited by norms of international law or treaties (for the text and scope, see Chapter Four, Section II above).

Tadjikistan has not ratified the Genocide Convention. It has signed the Rome Statute and has ratified it, but as of 1 September 2001 it had not yet enacted implementing legislation. However, it has defined genocide as a crime under national law in terms which are similar to the definition in the Genocide Convention.<sup>154</sup>

· **Turkey:** Article 6 (b) of the Penal Code (for the text, see Chapter Four, Section II above) provides for universal jurisdiction over crimes carrying a penalty of at least three years, provided that there is no extradition treaty with the territorial state or state of the suspect's nationality and the prosecution is authorized by the Minister of Justice. This article appears to be sufficiently broadly worded to include certain conduct which would amount to genocide when it would constitute ordinary crimes, such as murder.

Turkey is a party to the Genocide Convention. It has not signed the Rome Statute and as of 1 September 2001, it had not yet ratified it.

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<sup>154</sup> Criminal Code, Art. 398 (Genocide).

· **Turkmenistan:** There is at least one legislative provision, and, possibly, two such provisions permitting national courts to exercise universal jurisdiction over genocide (for the text and scope of these provisions, see Chapter Four, Section II).

First, Article 8 (1) of the Criminal Code of Turkmenistan provides for universal jurisdiction over permanent residents of Turkmenistan who have committed a crime abroad, provided that the act was a crime under the law of the place where it occurred and the suspect has not been previously convicted for the act.

Second, Article 8 (2) provides for universal jurisdiction over foreign nationals and stateless persons who are not permanent residents for crimes committed abroad in cases provided for in international treaties, if they have not been convicted in a foreign state and if criminal proceedings have been instituted against them in Turkmenistan. The wording of Article 8 (2) is ambiguous and it is not clear if it is intended to be restricted to the situations when the treaty provides for universal jurisdiction or simply provides for prosecution of the act constituting a crime.

Turkmenistan is a party to the Genocide Convention. It has not signed the Rome Statute and as of 1 September 2001 it had not yet ratified it. Genocide is a crime under national law.<sup>155</sup>

· **United States:** Legislation prohibiting genocide does not provide for universal jurisdiction.<sup>156</sup> However, in 1985, a Federal District Court authorized extradition to Israel for trial on the basis of universal jurisdiction of a person alleged to have committed acts in Poland which amounted to genocide and other crimes against humanity.<sup>157</sup> The United States is a party to the Genocide Convention. It has signed the Rome Statute and as of 1 September 2001 it had not ratified it.

· **Uzbekistan:** There is at least one basis for courts to exercise universal jurisdiction over certain conduct which may amount to genocide (for the text and scope of the relevant provisions, see Chapter Four, Section II).

The first unnumbered paragraph of Article 12 of the 1995 Uzbekistan Criminal Code provides that national criminal law applies to stateless persons who have committed a crime outside the national territory, provided that they have not served a sentence for the crime in the place where it was committed. The third unnumbered paragraph of Article 12 of the Criminal Code provides national courts with universal jurisdiction over foreign citizens and stateless persons not permanently resident in Uzbekistan for offences under the Criminal Code committed outside the country only when international treaties or agreements so provide, so it is unlikely to provide a basis for universal

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<sup>155</sup> Turkmenistan Criminal Code of 1997, entered into force 1 January 1998, Art. 168 (Genocide). The definition is almost identical to that in Article II of the Genocide Convention and in Article 6 of the Rome Statute and includes orders to commit an act of genocide. This article does not include other forms of ancillary crimes of genocide, but they may be covered by other parts of the Criminal Code.

<sup>156</sup> 8 U.S.C. § 1091 (1999) (providing only territorial and active personality jurisdiction).

<sup>157</sup> *In the matter of Demjanjuk*, 603 F. Supp. 1468 (N.D. Ohio), *aff'd*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 457 U.S. 1016 (1986) (See discussion of this case in Part Three, Section I above). In addition, the United States arrested a Rwandan national accused of genocide at the request of the Rwanda Tribunal and surrendered that person in March 2000 to the Tribunal.

jurisdiction over genocide, unless courts interpret Article I of the Genocide Convention to authorize such jurisdiction, as the *Audencia Nacional* did in the *Pinochet* case.

Uzbekistan is a party to the Genocide Convention. It has not signed the Rome Statute and as of 1 September 2001 it had not yet ratified it. Genocide is a crime under national law.<sup>158</sup>

· **Venezuela:** Venezuelan courts may exercise universal jurisdiction over genocide.

The Venezuelan Penal Code (Article 4 (9)) provides that courts have jurisdiction to try and punish piracy and “other crimes which international law defines as atrocities and crimes against humanity” committed abroad, by nationals or foreigners, when they are in Venezuelan territory (for the text and scope, see Chapter Four, Section II).

Venezuela is a party to the Genocide Convention and it has ratified the Rome Statute. It has also provided in Article 156 of the Penal Code that certain violations of principles of international law or of international humanitarian law are crimes under national law.

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<sup>158</sup> 1995 Uzbekistan Criminal Code, Art. 152 (Genocide).