

# UNIVERSAL JURISDICTION

STRENGTHENING THIS  
ESSENTIAL TOOL OF  
INTERNATIONAL JUSTICE

**AMNESTY**  
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# I. INTRODUCTION

This paper is the fourth published by Amnesty International in advance of the annual discussion in the United Nations (UN) Sixth (Legal) Committee of the General Assembly of universal jurisdiction. As with the three previous papers,<sup>1</sup> it suggests steps that should be taken at the international level to strengthen universal jurisdiction with regard to crimes under international law (such as genocide, crimes against humanity, war crimes torture, extrajudicial executions and enforced disappearances). In particular, these are steps to be taken in the Sixth Committee, both as part of the annual discussion of this topic (Section II.A) and with regard to other items on its agenda, including the work of the International Law Commission (Section III.A and B) and the UN Commission on the Prevention of Crime and Criminal Justice (Section III.C). Three years later, the pressing necessity for states to develop and implement a global action plan to end impunity, as Amnesty International recommended in its first paper in 2009, has become even clearer.

In addition to measures that should be taken at the international level, the paper identifies concrete measures states should take to strengthen this essential tool of international justice at the national level through improved legislation regarding crimes under international law, vigorous investigations and prosecutions in fair trials without the death penalty and increased cooperation between states regarding such crimes through extradition and mutual legal assistance (Section II.B). As in previous papers, to assist states in their discussion of universal jurisdiction, this paper brings to their attention numerous positive and some negative developments in the year since the previous discussion (Sections IV and V). As part of this contribution, Amnesty International has simultaneously published an updated version of the third paper, *Universal jurisdiction: A preliminary survey of legislation around the world – 2012 update*.<sup>2</sup>

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<sup>1</sup> Amnesty International, *Ending impunity: Developing and implementing a global action plan using universal jurisdiction*, Index: IOR 53/005/2009, 1 October 2009 (<http://www.amnesty.org/en/library/info/IOR53/005/2009/en>); \_\_\_\_\_, *Universal Jurisdiction: UN General Assembly should support this essential international justice tool*, Index: IOR 53/015/2010, 5 October 2010 (<http://www.amnesty.org/en/library/info/IOR53/015/2010/en>); \_\_\_\_\_, *Universal jurisdiction: A preliminary survey of legislation around the world*, Index: IOR 53/004/2011 Amnesty International October 2011 (<http://www.amnesty.org/en/library/asset/IOR53/004/2011/en/d997366e-65bf-4d80-9022-fcb8fe284c9d/ior530042011en.pdf>).

<sup>2</sup> Amnesty International, *Universal jurisdiction: A preliminary survey of legislation around the world – 2012 update*, Index: IOR 53/019/2011 Amnesty International October 2011.

As a preliminary note, to place the annual discussion in perspective, it is worth recalling that this year marked the fiftieth anniversary of the judgment of the Supreme Court of Israel in the *Eichmann* case. To mark this occasion, Amnesty International published a short paper analyzing the continuing relevance of this landmark universal jurisdiction judgment for national jurisprudence today, as well as noting aspects of the judgment that have not stood the test of time, such as the approach the Supreme Court took to the illegal abduction of the suspect and the imposition of the death penalty.<sup>3</sup>

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<sup>3</sup> *Eichmann Supreme Court Judgment 50 years on, its significance today*, Index: IOR 53/013/2012, June 2012 (<https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/ior530132012en?CMD=VEROBJ&MLKOB=31720875858>).

## II. ENSURING THAT THE ANNUAL DISCUSSION OF UNIVERSAL JURISDICTION IN SIXTH COMMITTEE HELPS THE FIGHT AGAINST IMPUNITY

At the international level, to ensure that the annual discussion of universal jurisdiction in the Sixth Committee helps advance the cause of international justice, Amnesty International is urging states to take three steps.

- First, states should **reaffirm their commitment to universal jurisdiction** by continuing to make positive statements regarding this essential tool and responding to claims by certain states that universal jurisdiction is being abused and needs to be restricted.
- Second, they should **adopt a draft resolution** for adoption by the General Assembly that **strengthens its support of the use of universal jurisdiction** as an essential tool of international justice and does not include calls to develop guidelines or a non-judicial supervisory mechanism.
- Third, they should **decide that the meetings of the Working Group** on universal jurisdiction are **opened to civil society participation**.

The Sixth Committee has discussed the scope and application of the principle of universal jurisdiction every year since 2009 at the initiative of the African group under the agenda item: “*The scope and application of the principle of universal jurisdiction*” (for a brief description of the origin of the annual discussion and the discussions at the first two sessions in 2009 and 2010, see Annex II).

### A. THE ANNUAL DISCUSSION IN THE SIXTH COMMITTEE

After briefly reviewing below in this section the discussion of universal jurisdiction at the 2011 session in the Sixth Committee, Amnesty International makes a number of more specific suggestions regarding how states should support universal jurisdiction during the annual discussion at the 2012 session. It then suggests a number of practical steps that states should take at the national level to strengthen universal jurisdiction, which should then be communicated to other members of the Sixth Committee in their interventions and in the annual report by the UN Secretary-General.

## 1. The discussion in 2011

As described below in this subsection, the discussion of universal jurisdiction at the 2011 session took place first in public meetings on 12 October 2011. Subsequent discussions, however, took place in closed meetings of the Working Group that excluded civil society.

Many states made positive contributions in the public meetings on a range of topics and almost every state that intervened reaffirmed that international law permits and, in some instances, requires states to exercise universal jurisdiction over crimes under international law (these statements are quoted or cited in Annex I). In the public meetings, a number of states rejected calls for a moratorium on the use of universal jurisdiction, found no need to draft guidelines on how it should be exercised and opposed the proposal to establish a political mechanism to monitor or regulate universal jurisdiction. Unfortunately, a few other states still support these proposals.

It is disappointing that many states asserted that there was a risk that universal jurisdiction could be “abused”, without explaining what in the nature of universal jurisdiction made it more susceptible to abuse than territorial jurisdiction or other forms of extraterritorial jurisdiction. Indeed, it is somewhat implausible that national police, prosecutors and judges would be more likely to abuse their powers to investigate and prosecute persons suspected of crimes under international law that had no connection with the forum than in cases where there were close connections to the forum. Indeed, almost every single case of abusive investigations and prosecutions that Amnesty International depressingly documents every year is a case where national courts are exercising territorial or active personality jurisdiction. A small number of states asserted that universal jurisdiction had actually been abused, but only one state actually cited an example – without identifying the court or forum state – and that case appears to be based largely or exclusively on passive personality jurisdiction, not universal jurisdiction.

It is also a matter of regret that some states claimed that universal jurisdiction was being used by courts in the North against suspects in the South. However, states making this claim failed to note that the only reason that law enforcement authorities in countries in the North exercised universal jurisdiction over persons in the South was because victims in the South were unable to obtain justice at home. This problem is illustrated by the failure of Senegal for more than two decades to investigate allegations that a former President of Chad was responsible for crimes under international law until ordered to do so by the International Court of Justice (see Section IV.C.1 and IV.C.2.i below) and, most recently, by Ethiopia, Tanzania and Zambia to do the same when a former President of the USA alleged to be responsible for torture visited those countries (see Section V.A, F and H below).

There were a number of disappointing interventions on other topics. Many states made sweeping statements concerning claims by current and serving officials to immunity from prosecution in foreign courts for crimes under international law without either citing the uniform conclusions of the International Law Commission for more than half a century that such officials and former officials should not be



able to assert such claims successfully or referring to the current study of this topic by the International Law Commission. Several states suggested that universal jurisdiction over crimes under international law was inconsistent with state sovereignty, without noting that such crimes were crimes against the entire international community, not just against the victims in a particular state, and that, therefore, when states were exercising such jurisdiction they were not enforcing their own national law, but were acting as agents of the international community. As the Supreme Court of Israel explained in the *Eichmann* case half a century ago:

*Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed.*<sup>4</sup>

A few states, without citing any authority, contended that states where the crimes under international law were committed (territorial states) or states of the suspect's nationality should have priority over states seeking to exercise universal jurisdiction. This claim, however, ignores the primary reason that police investigate such crimes and prosecutors prosecute them based on universal jurisdiction. The reason is that almost invariably neither the territorial state nor the suspect's state (if different) have fulfilled their responsibility to investigate or prosecute the crimes or that such investigations or prosecutions have been shams or ineffective. Indeed, police and prosecutors are generally reluctant to investigate or prosecute crimes based on universal jurisdiction and, in practice, in most instances they act only when it is clear that neither the territorial state or suspect's state is taking any action or effective action.

Several states expressed some doubts concerning the range of crimes subject to universal jurisdiction, without citing any of the extensive documentation of state practice in this regard, including by Amnesty International (see Section II.A.2 below), which leaves no uncertainty on this point. Others insisted that the definition of universal jurisdiction was not clear, without noting that the International Law Commission has been using an uncontroversial definition in its own work for years that is one used by others, such as the International Law Association (see Section II.A.2 below).

Subsequent discussions of the topic took place in closed meetings of the Working Group that excluded the participation of other actors, such as non-governmental organizations. The Sixth Committee subsequently made this decision applicable to the 2012 session in a draft resolution, adopted by the UN General Assembly as

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<sup>4</sup> *Attorney-General of the Government of Israel v. Eichmann* (Israel Sup. Ct. 1962), Int'l L. Rep., vol. 36, pp. 277, 304, 1968 (English translation).

Resolution 66/103.<sup>5</sup> In particular, this meant that non-governmental organizations with extensive experience in the field, including Amnesty International, have never received official access to the two informal compilations prepared by the UN Secretariat, one comprising multilateral and other instruments and the other consisting of decisions of international courts; to the non-paper presented by Chile intended to facilitate discussions;<sup>6</sup> the non-paper presented by the Chair comprising informal working notes; or the working paper prepared by the Working Group spelling out the methodology agreed by the Working Group.

This exclusion of civil society from access to extensive and essential documentation and to attending the meetings of the Working Group is contrary to the normal practice of the Sixth Committee to discuss matters in public meetings. It is also contrary to the precedent of extensive participation by civil society in working groups and informal meetings during the drafting of the Rome Statute of the International Criminal Court and supplementary instruments. As has been universally recognized, including by states, such participation was crucial to the successful outcome of this landmark international justice initiative. It would facilitate the ability of civil society, as well as scholars, to assist states in the annual discussion if they had access to this documentation as soon as it is made available to states and to observers and if organizations with ECOSOC consultative status were permitted to attend meetings of the Working Group.

## 2. The issues for discussion in 2012

The delegation of Costa Rica, as chair of the Sixth Committee Working Group, prepared an informal paper on universal jurisdiction, which will be discussed during 67<sup>th</sup> session on 17 and 18 October 2012. This brief document, which has never been made public, is summarized by the Chair of the Working Group in the summary records published six weeks after the Working Group finished its discussions in 2011. According to that summary, the informal paper contains a list of issues for discussion and also agreement on methodology.

The working paper enumerated **three clusters of issues** to be discussed: the definition of the concept of universal jurisdiction, the scope of universal jurisdiction and the application of universal jurisdiction.

- With regard to **the definition**, the most appropriate definition is that universal jurisdiction is the ability of the court of any state to try persons for crimes committed outside its territory that are not linked to the state by the nationality of the suspect or the victims or by harm to the state's own national interests.<sup>7</sup>

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<sup>5</sup> U.N. G.A. Res. 66/103, 9 December 2011 ([http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/66/103](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/103)).

<sup>6</sup> U.N. Doc. A/C.6/66/WG.3/DP.1.

<sup>7</sup> This is the definition used by the International Law Commission. Preliminary report on the

- With regard to ***the scope of the crimes subject to universal jurisdiction***, as demonstrated by extensive state practice in the form of both legislation and jurisprudence, customary international law permits national courts to exercise universal jurisdiction over crimes under international law (such as genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances), crimes under national law of international concern (such as hijacking and hostage taking) and ordinary crimes under national law.<sup>8</sup>
- With regard to ***application***, it is instructive that although a number of states expressed a concern during the annual discussion in 2011 about the possibility of “abuses” of universal jurisdiction or even claimed that it had occurred, none cited any specific examples of universal jurisdiction cases that constituted an abuse.<sup>9</sup> In the absence of any convincing evidence that national police, prosecutors, investigating judges or judges are “abusing” universal jurisdiction, there is, of course, no need to develop guidelines. However, the Working Group correctly recognized that the application of universal jurisdiction involved matters relating to international cooperation and mutual assistance (see Section III.C below discussing the proposal to draft a state cooperation treaty).

The working paper also spelt out the methodology agreed by the Working Group, including the following:

- the ***conduct of discussions*** within the Sixth Committee, focusing on specific issues (see General Assembly Resolution 65/33), and taking into account the potential role of the International Law Commission, as appropriate;
- the adoption of ***a step-by-step approach***;

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‘Obligation to extradite or prosecute (‘aut dedere aut judicare’), A/CN.4/571, by Zdzislaw Galicki, Special Rapporteur, International Law Commission, Fifty-eighth session, Geneva, 1 May-9 June and 3 July- 11 August 2006, para. 19. In addition, the same definition is used in the International Bar Association’s Report of the Task Force on Extraterritorial Jurisdiction, 2008, p.151 ([http://www.ibanet.org/Publications/publications\\_books.aspx](http://www.ibanet.org/Publications/publications_books.aspx)). See also Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation*, AI Index: IOR 53/003/2001, September 2001, Ch. One (Definitions), p. 11.

<sup>8</sup> See Amnesty International, *Universal jurisdiction: A preliminary survey of legislation around the world – 2012 update*, Index: IOR 53/019/2011 Amnesty International October 2011. See also Amnesty International’s earlier study of state practice in approximately 125 states: *Universal jurisdiction: The duty of states to enact and implement legislation*, Index: IOR 53/002 – 018/2001, September 2001.

<sup>9</sup> As noted above in Section II.A.1, one state during the 2011 discussion cited a specific example - without naming the court or country – that appears to be largely or exclusively based on passive personality jurisdiction. Similarly, on other occasions, certain states have cited specific examples of so-called “abuses” by states exercising passive personality jurisdiction (jurisdiction over crimes committed abroad by foreigners against nationals of the state exercising jurisdiction). The possibility of “abuse” – or the perception of “abuse” - when a state is exercising passive personality jurisdiction is greater when law enforcement officials are dealing with crimes committed against fellow nationals than when they are exercising universal jurisdiction, where neither the suspect nor the victim is a fellow national and where there is no specific harm to the national interest of the state exercising universal jurisdiction.

- the framing of discussions within **reasonable limits**;
- the exploration of **matters of context**, overlapping and/or interaction among different issues, as appropriate;
- an emphasis on **legal matters**; and
- the consideration of issues on the light of **various frameworks and sources**.

This is a useful list. It is particularly important that the working paper calls upon states to take into account the potential role of the International Law Commission, as appropriate, and that the discussion emphasize legal – as opposed to political – matters.

The annual discussion of universal jurisdiction in the Sixth Committee and the expert studies by the International Law Commission serve different, equally valuable and mutually reinforcing functions. The annual discussion of universal jurisdiction in the Sixth Committee is an opportunity for states to discuss the latest developments regarding this essential tool of international justice within the legal framework of international law, rather than in a more politicized forum. The International Law Commission's long-term detailed study of the status under international law of the rule of *aut dedere aut judicare* and the study of the related, but separate, rule of international law permitting and, in some cases, requiring states to exercise universal jurisdiction over crimes under international law (see discussion below in Section III.A) can lead to useful international instruments, such as draft articles or principles, that will aid states in exercising universal jurisdiction. The annual discussion of universal jurisdiction in the Sixth Committee provides a useful state perspective to the International Law Commission and, in turn, the annual reports of the International Law Commission provide helpful information for that discussion on the status of two important related subjects in international law.

### 3. Key messages to convey during the annual discussion in 2012

At the international level, the following are **key messages** that Amnesty International urges states to deliver during the annual discussion on 17 and 18 October 2012 to reinforce the fight against impunity:

- It is vital that all states **uphold their commitment to universal jurisdiction**, a long-established rule of international law, and **reaffirm the duty of every state to exercise its jurisdiction over crimes under international law** (including war crimes, crimes against humanity, genocide, torture and enforced disappearances, including crimes of sexual violence and other gender-based crimes) regardless where they have been committed and the nationality of suspects and victims.<sup>10</sup>

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<sup>10</sup> The UN Security Council has repeatedly emphasized for more than a decade the responsibility of all states to

- Under the related obligation to extradite or prosecute (*aut dedere aut judicare*), a state is required either **to exercise jurisdiction** (which would necessarily include exercising universal jurisdiction in certain cases) over a person suspected of certain categories of crimes or to **extradite the person** to a state able and willing to do so, or **to surrender the person to an international criminal court** with jurisdiction over the suspect and the crime.
- The **vast majority of states** – including many African states - **have already enacted legislation providing for universal jurisdiction** and, in particular, as part of implementing the Rome Statute at the national level, most states parties, in fulfilling their internal law obligations, have provided for universal jurisdiction as a tool to fight impunity for crimes under international law.
- There is **no compelling evidence** that national authorities conducting investigations and prosecutions based on universal jurisdiction of persons suspected of crimes under international law have **“abused” such jurisdiction**, so there is **no need to impose a moratorium** on its use or and **no need to develop guidelines** for exercising such jurisdiction.
- States must **guarantee the independence and impartiality of law enforcement authorities** investigating and prosecuting cases based on universal jurisdiction. Therefore, there should be **no political mechanism established**, whether at the international or national level, to review decisions made by national authorities to investigate or prosecute persons suspected of crimes under international law.
- States which have not done so already must **enact effective legislation** ensuring that they can investigate crimes under international law, including crimes of sexual violence and other gender-based crimes, and prosecute those against whom there is sufficient admissible evidence; they must then **implement such legislation vigorously**.
- The **official capacity** as head of state or government or as member of a government or parliament **does not and should not grant him or her impunity** from prosecution for genocide, crimes against humanity, war crimes, enforced disappearances, torture, genocide and extrajudicial executions.
- States must **eliminate any obstacles** to the exercise of universal jurisdiction,

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prosecute those responsible for genocide, crimes against humanity, and war crimes, including sexual and gender-based crimes, and stressed the need to exclude these crimes from amnesty provisions. In paragraph 11 of Resolution 1325, the Security Council emphasized

*the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard stresses the need to exclude these crimes, where feasible from amnesty provisions[.]*

The Security Council has consistently reiterated this commitment. See, for example, S.C. Res. (2008), 1888 (2009), 1889 (2009) and 1960 (2010).

ensuring cooperation and mutual legal assistance between states for crimes under international law.

## B. ESSENTIAL STEPS FOR STATES TO TAKE AT THE NATIONAL LEVEL

At the national level, Amnesty International urges states to take the following steps to ensure that their courts can effectively exercise universal jurisdiction over crimes under international law and then to inform other members of the Sixth Committee of these steps in their interventions and in the annual report by the UN Secretary-General:

- **Enact legislation or amend existing legislation to define crimes under international law**, including genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances, including crimes of sexual violence and other gender-based crimes under international law, defined in accordance with the strictest definitions in international law.<sup>11</sup>
- Include in national law **principles of individual criminal responsibility** in accordance with the highest standards required by international law.
- **Exclude in national law any defences**, such as superior orders, **which are prohibited** with respect to crimes under international law, and any defences, such as duress or necessity, **which are not appropriate** for such crimes, although they may be factors that can be taken into account in mitigation of punishment.
- Provide that police, prosecutors and investigating judges may, as part of the shared responsibility of states to investigate crimes under international law wherever they have been committed, open an investigation of such crimes wherever they have been committed, regardless of the nationality of the suspect or the victim, **even when the suspect is not yet present** in the state and **to seek the extradition of the suspect** to face a fair trial in his or her presence, without the possibility of the death penalty.
- **Provide that national courts can exercise jurisdiction** over persons suspected of crimes under international law, **wherever they have been committed**, regardless of the nationality of the suspect or victim and regardless whether any specific interest of the state has been harmed.

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<sup>11</sup> See Amnesty International's papers, *International Criminal Court: Updated checklist for effective implementation*, Index: IOR 53/009/2010, May 2010 (<http://www.amnesty.org/en/library/info/IO53/009/2010>); *No impunity for enforced disappearances: Checklist for effective implementation of the International Convention for the Protection of All Persons from Enforced Disappearance*, Index: IOR 53/006/2011, October 2011 (<http://www.amnesty.org/en/library/info/IO51/006/2011/en>).

- **Provide effective training** to police, prosecutors, investigating judges and other judges in universal jurisdiction under both international and national law.
- **Ensure that obstacles to prosecution** based on universal jurisdiction of persons suspected of crimes under international law, including the following, **do not exist in law or practice**:
  - **double criminality** requirements (including requirements that the requested state have extraterritorial jurisdiction over crimes when the requesting state is seeking to exercise such jurisdiction);
  - **ne bis in idem prohibitions** that prevent a retrial when the foreign trial was sham or unfair;
  - **bars on retrospective criminal legislation** when the conduct was a crime under international law when committed;
  - **statutes of limitations**;
  - **giving effect to foreign amnesties** and other measures of impunity, including amnesties for crimes of sexual violence and other gender-based crimes under international law; and
  - recognition of claims by officials and former officials to **immunity** for genocide and other crimes under international law.

# III. THREE RELATED UNIVERSAL JURISDICTION TOPICS THAT ARE LIKELY TO BE DISCUSSED SEPARATELY BY THE SIXTH COMMITTEE

In addition to considering universal jurisdiction in the annual discussion scheduled to take place from 17 to 18 October 2012, and subsequently in the Working Group, the Sixth Committee will be considering three closely related topics. At some point during its consideration of the work of the International Law Commission from 29 October 2012 to 7 November 2012, the Committee will consider the progress of the Commission's study of *aut dedere aut judicare* (extradite or try), a separate, but often overlapping concept, and its study of claims by current and former officials to immunity from prosecution in foreign courts. In addition, it is likely that the Sixth Committee will be considering a proposal by the Netherlands, Belgium and Slovenia to request the UN Commission on the Prevention of Crime and Criminal Justice to begin drafting a treaty to improve state cooperation in extradition and mutual legal assistance regarding crimes under international law.

## A. INTERNATIONAL LAW COMMISSION STUDY OF *AUT DEDERE AUT JUDICARE*

Since 2004, the International Law Commission has been studying the topic, the obligation to extradite or prosecute (*aut dedere aut judicare*), as part of its long-term programme of work. The Special Rapporteur Zdzislaw Galicki, submitted four reports between 2006 and 2011 addressing a range of matters, including whether the obligation *aut dedere aut judicare* exists as a matter of customary international law.<sup>12</sup> In addition, twenty-eight states have replied so far to the invitation

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<sup>12</sup> See Preliminary report on the obligation to extradite or prosecute ("*aut dedere aut judicare*") by Mr. Zdzislaw Galicki, Special Rapporteur, U.N. Doc. A/CN.4/571, 6 June 2006 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/379/01/PDF/N0637901.pdf?OpenElement>); Second report on the obligation to extradite or prosecute (*aut dedere aut judicare*) by Zdzislaw Galicki, Special Rapporteur, U.N. Doc. A/CN.4/585, 11 June 2007 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/375/60/PDF/N0737560.pdf?OpenElement>); Second report on the obligation to extradite or prosecute (*aut dedere aut judicare*) by Zdzislaw Galicki, Special Rapporteur, Corrigendum, U.N. Doc. A/CN.4/585/Corr.1, 18 July 2007 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/430/22/PDF/N0743022.pdf?OpenElement>); Third report on the obligation to extradite or prosecute (*aut dedere aut judicare*) by Zdzislaw Galicki, Special Rapporteur, U.N. A/CN.4/603, 10 June 2008 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/375/23/PDF/N0837523.pdf?OpenElement>); Fourth report on the obligation to extradite or prosecute (*aut dedere aut judicare*) by Zdzislaw Galicki, Special Rapporteur, U.N. Doc. A/CN.4/648, 31 May 2011 ([http://daccess-dds-](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/375/01/PDF/N1137501.pdf?OpenElement)



contained in several General Assembly resolutions to provide information to the International Law Commission on international treaties to which they were bound (containing the obligation to extradite or prosecute), domestic legal regulations concerning the obligation, judicial practice and whether the state considers the obligation to extradite or prosecute as an obligation under customary international law. In 2008, a Working Group was established by the International Law Commission under the chairmanship of Alain Pellet, who has been succeeded this year by Kriangsak Kittichaisaree. It is believed that the new Chairman has been requested to prepare a working paper, to be considered in 2013, particularly taking into account the International Court of Justice's judgment of 20 July 2012 in *Belgium v. Senegal*, as well as in the Working Group of the Sixth Committee.

In 2009, Amnesty International made public its own study of the obligation to extradite or prosecute,<sup>13</sup> which shows that over the past decade many states have provided for the obligation to extradite or prosecute when implementing the Rome Statute or amending their criminal legislation, even for crimes where treaties do not contain such a provision (such as genocide and some war crimes which do not amount to grave breaches), or crimes which are not covered by any treaty. In addition, several decisions by national courts, as reported in the 2009 paper during the same period, seem to confirm that the existence of an obligation regarding *aut dedere aut judicare* under customary international law or its beginning could reasonably be presumed, at least regarding crimes under international law, such as genocide, crimes against humanity, war crimes, torture, enforced disappearances and extrajudicial executions.

Amnesty International urges the Sixth Committee to draft a resolution for adoption by the UN General Assembly recommending that the Commission consider taking the following steps in order to reach a conclusion on the nature and scope of the obligation to extradite or prosecute:

- **Seek information** concerning state practice, not only from states and international organizations, but also from **other experts on international law, including nongovernmental organizations**, with relevant information.
- Examine **the state practice and opinio juris of all 193 member states** regarding the scope of this obligation.
- Ensure that **Article 9 of the Draft Code of Crimes against the Peace and Security of Mankind and its commentary are the foundation** when formulating the International Law Commission's final document at the completion of its study and that they are **not weakened** in any way.

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ny.un.org/doc/UNDOC/GEN/N11/358/84/PDF/N1135884.pdf?OpenElement).

<sup>13</sup> Amnesty International, *International Law Commission: The obligation to extradite or prosecute*, Index::IOR 40/2009/2009, February 2009, (English) (<http://www.amnesty.org/en/library/info/IO40/001/2009/en>) and (Spanish) (<http://www.amnesty.org/en/library/asset/IO40/001/2009/en/1bcc3e24-a8cd-4f9e-a361-6a1e2e097b10/IO4000109spa.pdf>).

## B. INTERNATIONAL LAW COMMISSION STUDY OF CLAIMS BY CURRENT AND FORMER OFFICIALS TO IMMUNITY FROM PROSECUTION FOR CRIMES IN FOREIGN COURTS

In 2006, the International Law Commission identified the topic “Immunity of State officials from foreign criminal jurisdiction” for inclusion in its long-term programme of work and appointed Roman Kolodkin as Special Rapporteur in 2007. He submitted three reports for the consideration of the International Law Commission,<sup>14</sup> but it was as early as his second report – the report that suggests a radical change in the International Law Commission’s uniform position since 1950 - that he reached the conclusion that “the various rationales for exceptions to the immunity of officials from foreign criminal jurisdiction prove upon close scrutiny to be insufficiently convincing”.<sup>15</sup> In that report, he also stated that he was “proceeding on the assumption that [immunity *ratione personae*] is enjoyed by the so-called threesome (Head of State, Head of Government and minister for foreign affairs), as well as by certain other high-ranking State officials”,<sup>16</sup> thus expanding further the wrong conclusion of the International Court of Justice in the *Arrest Warrant* case.<sup>17</sup> The Special Rapporteur was also of the incorrect view that “until now attempts to exercise universal jurisdiction that have been successful have just taken place in cases where the State concerned consented”.<sup>18</sup>

In 2012, a new Special Rapporteur, Concepción Escobar Hernández, was appointed and soon afterwards she submitted her first report, in which she proposed a workplan for the next five years.<sup>19</sup>

As Amnesty International said in a letter to the chair of the International Law Commission on 7 May 2011, although it is commonly accepted that state officials are immune in certain circumstances from the jurisdiction of foreign states with respect to ordinary crimes under national law, as well as with respect to certain crimes under national law of international concern, the Commission has repeatedly concluded since 1950, without exception, that such immunities do not

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<sup>14</sup> Preliminary report on immunity of State officials from foreign criminal jurisdiction, Roman Anatolevich Kolodkin, Special Rapporteur, U.N. Doc. A/CN.4/601, 29 May 2008 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/357/15/PDF/N0835715.pdf?OpenElement>); Second report on immunity of State officials from foreign criminal jurisdiction By Roman Anatolevich Kolodkin, Special Rapporteur, A/CN.4/631, 10 June 2010, (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/395/75/PDF/N1039575.pdf?OpenElement>) (Second Report); Third report on immunity of State officials from foreign criminal jurisdiction, Roman Anatolevich Kolodkin, Special Rapporteur, U.N. Doc. A/CN.4/646, 24 May 2011 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/353/54/PDF/N1135354.pdf?OpenElement>).

<sup>15</sup> Second Report, para. 90.

<sup>16</sup> *Ibid.*, para. 35.

<sup>17</sup> Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Judgment, ICJ Rep. (2002).

<sup>18</sup> *Ibid.*, para. 16.

<sup>19</sup> Preliminary report on the immunity of State officials from foreign criminal jurisdiction, Ms. Concepción Escobar Hernández, Special Rapporteur, U.N. Doc. A/CN.4/654, 31 May 2012 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/357/18/PDF/N1235718.pdf?OpenElement>).

apply – either in a foreign national court or an international criminal court - when the official is suspected of responsibility for crimes under international law.

For example, in 1954 the Commission adopted the Draft Code of Offences against the Peace and Security of Mankind (1954 Draft Code), which declared aggression, genocide, crimes against humanity and war crimes criminal under international law. The 1954 Draft Code provides that:

*The fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code.*<sup>20</sup>

In explaining the scope of application of the 1954 Draft Code, the Commission took note

*[o]f the action of the General Assembly in setting up a special committee to prepare draft conventions and proposals relating to the establishment of an international criminal court. Pending the establishment of a competent international criminal court, a transitional measure might be adopted providing for the application of the code by national courts. Such a measure would doubtless be considered in drafting the instrument by which the code would be put into force.*<sup>21</sup>

This wording demonstrates that the Commission wanted the 1954 Draft Code to apply to national courts until an international criminal court was able to exercise jurisdiction over all prosecutions of officials suspected of responsibility for crimes under international law; there is nothing in this commentary to suggest that the Commission would have wanted the Code to cease applying to national courts if - as, sadly, it turned out to be the case - international criminal courts were unable to exercise jurisdiction over all such persons. The 1954 Draft Code was designed to end impunity, not to reinforce it. Indeed, the subsequent action by the Commission demonstrates that the Commission always intended that the Draft Code was to apply to national courts whenever international courts were unable to exercise jurisdiction over officials.

In 1996, the Commission adopted the Draft Code of Crimes against the Peace and Security of Mankind (1996 Draft Code), which provided:

*The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.*<sup>22</sup>

The 1996 Draft Code included a provision which made clear that the Commission

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<sup>20</sup> 1954 Draft Code, Y.B. Int'l L. Comm'n, vol. II, 1951, p. 137, art. 3. This particular article had been adopted in 1951.

<sup>21</sup> *Ibid.*, Commentary, para.58 (d).

<sup>22</sup> 1996 Draft Code, Y.B. Int'l L. Comm'n, vol. II, Part Two, art.7 (Official position and responsibility).

intended the exclusion of any immunity for crimes under international law to apply to both national and international courts:

*Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17 [genocide], 18 [crimes against humanity], 19 [crimes against United Nations and associated personnel] and 20 [war crimes] irrespective of where or by whom those crimes were committed.*<sup>23</sup>

Likewise, the Commission, through its commentary, reaffirmed that such a rule is not “conceptually related to the idea of an international criminal jurisdiction”. It stated:

*Article 8 establishes two separate jurisdictional regimes: one for the crimes set out in articles 17 to 20 and another for the crime set out in article 16. The first regime provides for the concurrent jurisdiction of national courts and an international criminal court for the crimes set out in articles 17 to 20, namely, the crime of genocide, crimes against humanity, crimes against United Nations and associated personnel and war crimes. The second regime provides for the exclusive jurisdiction of an international criminal court with respect to the crime of aggression set out in article 16 subject to a limited exception. The Commission decided to adopt a combined approach to the implementation of the Code based on the concurrent jurisdiction of national courts and an international criminal court for the crimes covered by the Code with the exception of the crime of aggression, as discussed below.*<sup>24</sup>

In its commentary, the Commission explained why the rule that heads of state and state officials may be held criminally responsible – in national or international criminal courts - when they commit crimes under international law is an essential part of the international legal system:

*[c]rimes against the peace and security of mankind often require the involvement of persons in positions of governmental authority who are capable of formulating plans or policies involving acts of exceptional gravity and magnitude. These crimes require the power to use or to authorize the use of the essential means of destruction and to mobilize the personnel required for carrying out these crimes. A government official who plans, instigates, authorizes or orders such crimes not only provides the means and the personnel required for carrying out the crime, but also abuses the authority and power entrusted to him. He may, therefore, be considered to be even more culpable than the subordinate who actually commits the criminal act. It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the [Draft Code of Crimes against the Peace and Security of Mankind] to*

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<sup>23</sup> *Ibid.*, art. 8.

<sup>24</sup> *Ibid.*, Commentary, p. 28.

*invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security.*<sup>25</sup>

Therefore, the Commission, when it concluded in 1950, 1954 and 1996 that immunity was not enjoyed by heads of state or government or ministers of foreign affairs or any other state official with regard to crimes under international law – genocide, crimes against humanity and war crimes –, did so in the explicit understanding that such a rule should be applied by national courts.

The reasons why the Second Report suggests a radical change in the uniform position,<sup>26</sup> which was aimed at codifying a rule under customary international law, are not stated and, in any event, there is no reason to make such a regressive – rather than progressive – development of international law.

As expressed in its 7 May 2011 letter, Amnesty International urges the Sixth Committee to draft a resolution for adoption by the UN General Assembly recommending that the Commission consider taking the following steps:

- Reaffirm and, where necessary, progressively develop its past work and, in particular, the conclusions reached in 1950, 1954 and 1996 that they were to be applied by national or international criminal courts or both;
- Review state practice, based on all relevant sources, including government reports, on national legislation and case law, with special attention to crimes under international law;
- Review the practice of those states which have exercised universal jurisdiction to determine whether or not consent is a pre-requisite to initiate investigations on crimes under international law.

## C. REQUEST TO THE UN COMMISSION ON THE PREVENTION OF CRIME AND CRIMINAL JUSTICE TO A DRAFT STATE COOPERATION TREATY

Amnesty International welcomes the initiative of the Netherlands, Belgium and Slovenia urging states to address the gap in the international legal framework concerning extradition and mutual legal assistance with regard to crimes under

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<sup>25</sup> *Ibid.*, pp. 26-27.

<sup>26</sup> Paola Gaeta, 'Official Capacity and Immunities', in A. Cassese, P. Gaeta & J. Jones, eds., *The Rome Statute of the International Criminal Court*, Oxford, Vol. I, p.985 ("The International Law Commission has taken the opposite view. It has authoritatively stated that 'the absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity or defense'. The Commission has based this proposition on logical grounds. It has asserted that 'it would be paradoxical to prevent an individual from invoking his official position to avoid responsibility for a crime only to permit him to invoke this same consideration to avoid the consequences of this responsibility'").

international law by having the UN General Assembly request the UN Commission on the Prevention of Crime and Criminal Justice to begin drafting a new multilateral convention (State Cooperation Convention) at its next session in April 2013.<sup>27</sup> As noted below, if properly drafted, such a treaty could eliminate or substantially reduce obstacles to extradition and mutual legal assistance while, at the same time, providing essential human rights safeguards.

## 1. The initiative

This initiative calling for the drafting of a State Cooperation Convention was launched at a meeting in The Hague on 22 November 2011 and at a side meeting at the Assembly of States Parties in New York in December 2011.<sup>28</sup> Amnesty International has been calling for states to draft such a treaty for years.<sup>29</sup>

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<sup>27</sup> At the UN High Level Meeting on the Rule of Law in September 2012, the Netherlands jointly pledged the following with Belgium and Slovenia:

*in the context of the principle of complementarity to support effective investigation and prosecution at the national level of the most serious crimes of concern to the international community, in particular war crimes, crimes against humanity and crimes of genocide, by improving the international framework on mutual legal assistance and extradition through the negotiation and adoption of a new comprehensive international instrument.*

These three states have invited all other UN member states also to adopt this pledge and to circulate it at the High Level Meeting.

<sup>28</sup> The states proposing the initiative circulated a useful non-paper, *A Legal Gap? Getting the evidence where it can be found: Investigating and prosecuting international crimes, Report of the expert meeting*, The Hague, 22 November 2011, that identifies many of the current obstacles to extradition and mutual legal assistance with regard to crimes under international law and also contains a number of possible solutions that could be consulted when drafting the State Cooperation Convention.

<sup>29</sup> See, for example, Amnesty International, *Universal jurisdiction: The challenges for police and prosecuting authorities*, 13 June 2007, AI Index: IOR 53/007/2007 (a longer version of the Amnesty International statement delivered by Christopher Keith Hall, Senior Legal Adviser, International Justice Project, at the Second International Expert Meeting on War Crimes, Genocide and Crimes against Humanity, 16 June 2005, Interpol, Lyon) (<http://www.amnesty.org/en/library/info/IOR53/007/2007>); \_\_\_\_\_, *European Union: Using universal jurisdiction as a key mechanism to ensure global accountability*, 1 May 2007, AI Index: IOR 61/013/2007 (Amnesty International statement to the Joint Hearing of the Committee on Civil Liberties, Justice and Home Affairs and the Subcommittee on Human Rights (Fostering an EU approach to serious international crimes), European Parliament, Brussels, 20 November 2006) (<http://www.amnesty.org/en/library/info/IOR61/013/2007>); \_\_\_\_\_, *Universal jurisdiction: Improving the effectiveness of state cooperation*, 13 June 2007, AI Index: IOR 53/006/2007 (A shorter version of this Amnesty International statement was delivered by Christopher Keith Hall, Senior Legal Adviser, International Justice Project at the Third International Expert Meeting on War Crimes, Genocide and Crimes against Humanity of Interpol in Ottawa, Canada, 5 to 6 June 2007) (<http://www.amnesty.org/en/library/info/IOR53/006/2007>).

A decade and a half ago, Amnesty International documented the flawed extradition and mutual legal assistance framework with regard to crimes under international law and urged those drafting the Rome Statute of the International Criminal Court not to replicate these impediments to state cooperation when drafting the surrender

A State Cooperation Convention would be a concrete step in implementing the calls by the UN General Assembly four decades ago for states to cooperate in the investigation of war crime and crimes against humanity.<sup>30</sup> It would also fulfil the affirmation by states parties to the Rome Statute of the International Criminal Court (Rome Statute) “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”.<sup>31</sup> In the light of the long history and experience in the field of drafting international instruments concerning criminal justice of the UN Commission on the Prevention of Crime and Criminal Justice and its predecessor bodies, asking it to undertake the task of addressing the serious law enforcement gaps in the current international legal framework of extradition and mutual legal assistance with respect to crimes under international law makes eminent sense.

## 2. Obstacles to state cooperation with regard to crimes under international law

Amnesty International has noted with concern for more than a decade that the absence of effective national legislation and bilateral and multilateral treaties impedes or prevents state cooperation through extradition and mutual legal assistance with regard to crimes under international law, including genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances. These obstacles to state cooperation pose particularly serious problems with regard to investigations and prosecutions based on universal jurisdiction. In particular, it has documented inappropriate bars to such state cooperation, including:

- political control over the making and granting of state cooperation requests;
- prejudice to a state’s sovereignty, security, *ordre public* or other essential interests;
- slow, antiquated and cumbersome legislation;

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and international assistance provisions of that treaty. *International Criminal Court: Making the Right Choices: Part III - Ensuring effective cooperation*, November 1997, AI Index: IOR 40/013/1997 (<http://www.amnesty.org/en/library/info/IO40/013/1997/en>).

<sup>30</sup> UN G.A. Res. 3074 (XXVIII), 1973; U.N. G.A. Res. 2840 (XXVI), 18 December 1971; U.N. G.A. Res. 2712 (XXV), 15 December 1970.

<sup>31</sup> Rome Statute of the International Criminal Court, Preamble.

- double criminality requirements (including requirements that the requested state have extraterritorial jurisdiction over crimes when the requesting state is seeking to exercise such jurisdiction);
- prohibition of extradition of nationals;
- political offence exceptions, to the extent that they apply to crimes under international law;
- *ne bis in idem* prohibitions (even when the foreign trial was a sham or unfair);
- bars on retrospective criminal legislation when the conduct was a crime under international law when committed;
- statutes of limitations;
- giving effect to foreign amnesties and other measures of impunity; and
- recognition of claims by officials and former officials to immunity for genocide and other crimes under international law.

It is true that treaties impose upon states parties an *aut dedere aut judicare* (extradite or try) obligation with respect to grave breaches of the Geneva Conventions and Protocol I, torture and enforced disappearances. It is also increasingly considered that there is a customary international law *aut dedere aut judicare* obligation with respect to these crimes and with respect to other war crimes, crimes against humanity and extrajudicial executions (see Section III.A above). However, the sad truth is that even when states have a treaty obligation to submit cases to their authorities for the purposes of prosecution when they fail to extradite suspects, they rarely do so. This failure is the result both of a lack of political will and the problem that many of the obstacles to extradition listed above are also obstacles to prosecution in the state where the suspect is present.

Other legal and practical obstacles exist in national law and in bilateral and multilateral treaties, including:

- The absence of effective mutual legal assistance provisions;
- The lack of effective tracing, freezing, seizing or forfeiting assets provisions;
- The absence of effective provisions to:
  - protect victims and witnesses;
  - support victims and witnesses;
  - provide victims with notice of their rights;



- give victims timely notice of developments during the proceedings;
- permit victims to participate in proceedings;
- ensure victims have legal representation during proceedings;
- guarantee the right to reparation; and
- enforce reparation awards;
- The lack of effective direct law enforcement cooperation provisions, including joint investigations, special investigative techniques and training and technical assistance programs; and
- The lack of standardized extradition and mutual legal assistance request forms.

### **3. The absence of effective human rights safeguards in current instruments**

In addition to the serious problem of obstacles to extradition with regard to crimes under international law, Amnesty International has also noted that much national legislation and many bilateral and multilateral treaties also have inadequate human rights safeguards, including the absence of bars on assistance when it would lead to:

- the death penalty;
- torture or other cruel, inhuman or degrading treatment or punishment;
- unfair trial; or
- other human rights violations.

## IV. POSITIVE DEVELOPMENTS REGARDING UNIVERSAL JURISDICTION SINCE OCTOBER 2011

There have been a number of positive developments regarding universal civil and criminal jurisdiction since the commencement of the annual discussion of this topic in Sixth Committee in October 2011, including government support for universal civil jurisdiction, enactment of legislation and investigations and prosecutions.

### A. SUPPORT FOR UNIVERSAL CIVIL JURISDICTION TO ENFORCE THE RIGHT TO REPARATION

Argentina submitted an *amicus curiae* brief in a universal civil jurisdiction case before the United States Supreme Court in the *Kiobel* case (see discussion below in Section V.G) vigorously defending this essential tool for victims of crimes under international law to obtain reparation. It declared:

*Reconsideration by the United States Supreme Court of the use of the Alien Tort Statute in cases like Filartiga because the cause of action arose in the territory of a sovereign outside the United States places at risk an important contribution by the United States to the cause of international human rights. Filartiga represented a step against impunity when no other remedies were available, and its loss as a precedent would undermine the international system for the protection of human rights that the foreign policy of the Argentine Republic seeks to uphold.<sup>32</sup>*

This state submission makes clear that the use of universal civil jurisdiction to obtain reparation for torts under international law, which include crimes under international law, is not merely fully consistent with international law, but strengthens the very fabric of international law. The submission is also consistent with state practice since many states provide for universal civil jurisdiction and, as noted below in Section IV.C.2.g with regard to the Netherlands, courts in states other than the USA award reparation to victims based on universal jurisdiction in civil, as well as criminal, cases.<sup>33</sup> For the most recent interpretation by the

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<sup>32</sup> *Kiobel v. Royal Dutch Petroleum Co.*, Brief for the Government of the Argentine Republic as *Amicus Curiae* in Support of Petitioners, 13 June 2012, 2 - 3.

<sup>33</sup> Amnesty International, *Universal Jurisdiction: The scope of universal civil jurisdiction*, Index: IOR 53/008/2007, July 2007 (<http://www.amnesty.org/en/library/info/IOR53/008/2007>) (discussing universal civil jurisdiction in at least 25 states, a small portion of the total number of states around the world authorizing their

Committee against Torture of the scope of the obligation of states parties under the Convention against Torture to provide for universal civil jurisdiction to victims of torture, see Section IV.D.1 below.

## B. LEGISLATION

Two states, Comoros and Luxembourg, adopted legislation since 2011 providing for universal jurisdiction over crimes under international law.

On 4 February 2012, Comoros enacted legislation implementing the Rome Statute of the International Criminal Court (Rome Statute) defining genocide, crimes against humanity and war crimes, in accordance with the definitions in the Rome Statute, as crimes under national law.<sup>34</sup> That legislation provides the courts of Comoros with universal jurisdiction over these crimes under international law.<sup>35</sup>

In implementing its complementarity obligations under the Rome Statute, Luxembourg expanded the scope of its criminal jurisdiction to include genocide, crimes against humanity and war crimes. Articles 136bis to 136quater of its *Code penal* (Criminal Code) now define these crimes in accordance with the definitions in the Rome Statute.<sup>36</sup> Article 7-4 of its *Code d'instruction criminelle* (Code of Criminal Investigation) provides that Luxembourg courts can exercise universal jurisdiction over these crimes.<sup>37</sup>

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courts to exercise such jurisdiction).

<sup>34</sup> *Président de l'Union, Décret No. 12-022 PR, 4 février 2012, Portant promulgation de la loi 11-022/au du 13 décembre 2011, portant du Mise en oeuvre du Statut de Rome, arts. 17 – 20* ([http://www.iccnw.org/documents/0025\\_001.pdf](http://www.iccnw.org/documents/0025_001.pdf)).

<sup>35</sup> *Ibid.*, art. 15. That article reads:

*Les juridictions comoriennes sont compétents pour des crimes visés par la présent loi, indépendamment du lieux ou ceux-ci auront été commis, de la nationalité de leur auteur ou celle de la victime, lorsque la personne lorsque la personne est present dans la territoire.*

The requirement of presence unfortunately limits the ability of Comoros, as part of its shared responsibility to investigate and prosecute crimes under international law, to open an investigation before a suspect arrives in Comoros, in particular, when that suspect is known to be coming shortly before a brief visit or to change planes in transit.

<sup>36</sup> *Loi du 27 février 2012 portant adaptation du droit interne aux dispositions du Statut de Rome de la Cour pénale internationale, approuvé par une loi du 14 août 2000 portant approbation du Statut*

*de Rome de la Cour pénale internationale, fait à Rome, le 17 juillet 1998, art. 1* (modifying, in particular, articles 136bis to 136quater of the Criminal Code) ([http://iccdb.webfactional.com/documents/implementations/pdf/Luxembourg\\_Law\\_modifying\\_CC\\_Jan2012.pdf](http://iccdb.webfactional.com/documents/implementations/pdf/Luxembourg_Law_modifying_CC_Jan2012.pdf)).

<sup>37</sup> *Ibid.*, art. 5. That article reads:

*Art. 5. L'article 7-4 du Code d'instruction criminelle est remplacé par la disposition suivante:*

*«Art. 7-4. Lorsqu'une personne qui se sera rendue coupable à l'étranger d'une des infractions prévues par les articles 112-1, 135-1 à 135-6, 135-9, 135-10, 136bis à 136quinquies, 260-1 à 260-4, 379, 382-1, 382-2, 384 et 385-2 du Code pénal, pourra être poursuivie et jugée au Grand-Duché,*

Further information about this legislation, plus information recently received concerning legislation adopted before October 2011 in Mauritius providing its courts with universal jurisdiction over genocide, crimes against humanity and war crimes,<sup>38</sup> as well as a clarification that courts in Ghana can exercise universal jurisdiction over war crimes in both non-international armed conflict and in international armed conflict,<sup>39</sup> is available in Amnesty International's paper, *Universal jurisdiction: A preliminary survey of legislation around the world – 2012 update*.<sup>40</sup>

That paper confirms that as of 1 September 2012, at least 166 (approximately 86%) of the 193 UN member states, have defined one or more of four crimes under international law (war crimes, crimes against humanity, genocide and torture) as crimes under national law and 147 (approximately 76.2%) out of 193 UN member states have provided their courts with universal jurisdiction over one or more of these crimes. In addition, courts in at least 16 others (approximately 8.29%) out of 193 UN member states can exercise universal jurisdiction over conduct amounting to a crime under international law, but only as ordinary crimes. Thus, a total of 163 states (approximately 84.46%) of all UN member states can exercise universal jurisdiction over one or more crimes under international law, either as such crimes or as ordinary crimes under national law.

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*lorsqu'une demande d'extradition est introduite et que l'intéressé n'est pas extradé.»*

Regrettably, however, Luxembourg courts can only exercise universal jurisdiction over a suspect when it has received a request for extradition and it has rejected that request. This approach is a recipe for impunity as states, particularly territorial states and states of the suspect's nationality, rarely seek extradition of persons suspected of crimes under international law who are abroad.

<sup>38</sup> The International Criminal Court Act 2011, Act No. 27 Of 2011, Mauritius, Acts 2011, 436, art. 4 (1) (defining genocide, crimes against humanity and war crimes as crimes under national law, as defined in the Rome Statute) and (3) (providing the courts of Mauritius with universal jurisdiction over these crimes) (<http://www.iccnw.org/documents/ICCact2711.pdf>). Article 4 (3) reads:

Where a person commits an international crime outside Mauritius, he shall be deemed to have committed the crime in Mauritius if he – . . .

(b) is not a citizen of Mauritius but is ordinarily resident in Mauritius;

(c) is present in Mauritius after the commission of the crime[.]”

The requirement of presence when the suspect is not a resident of Mauritius unfortunately limits the ability of Mauritius, as part of its shared responsibility to investigate and prosecute crimes under international law, to open an investigation before a suspect arrives in Mauritius, in particular, when that suspect is known to be coming shortly before a brief visit or to change planes in transit.

<sup>39</sup> Ghana Geneva Conventions Act 2009, 708th Act of Parliament, 6th January 2009, s. 1 (4). That provision reads:

Where a person commits an offence under this section [including a breach of common Article 3 of the Geneva Conventions or of Protocol II] outside the country, the person may be tried and punished as if the offence were committed inside this country.”

<sup>40</sup> See footnote 2, *supra*.

## C. INVESTIGATIONS AND PROSECUTIONS

There were a number of important positive developments regarding investigations and prosecutions based on universal jurisdiction, including a landmark judgment by the International Court of Justice on the duty of states to investigate and prosecute crimes under international law and concrete steps taken by law enforcement authorities, including courts, to investigate and prosecute such crimes. In addition, there have been two significant developments regarding investigation and prosecution of crimes under international law that have the potential to be positive developments with regard to universal jurisdiction that deserve mention here: the establishment of a centre to store information regarding crimes under international law being committed in Syria and the announcement by the United Kingdom of the intention to establish country investigation teams with respect to crimes of sexual violence in armed conflict.

### 1. International courts

On 20 July 2012, the International Court of Justice issued its judgment in *Belgium v. Senegal*. It held that Senegal, a party to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, had violated its obligation under that treaty to submit the case of Hissène Habré, the former President of Chad, who had been given refuge in Senegal for more than two decades, to its authorities for the purpose of prosecution.<sup>41</sup> It also held that “the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)”.<sup>42</sup> The Court unanimously found that “the Republic of Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him.”<sup>43</sup> Four days after the judgment, Senegal formally reached an agreement with the African Union to put Hissène Habré on trial (see Section IV.C.2.i and IV.D.3 below).

### 2. National law enforcement action, including court decisions

Law enforcement officials, including police, prosecutors, investigating judges and trial courts, in Argentina, Canada, Denmark, Finland, France, Germany, Netherlands, Norway, Senegal, South Africa, Spain, Sweden, United Kingdom

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<sup>41</sup> *Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)*, Judgment, International Court of Justice, 20 July 2012, para. 102 (<http://www.icj-cij.org/docket/files/144/17064.pdf>).

<sup>42</sup> *Ibid.*, para. 99.

<sup>43</sup> *Ibid.*, dispositive para. 6.

took concrete, positive steps using universal jurisdiction to investigate and prosecute crimes under international law. What is particularly significant about such developments in the past year has been the increasing number of investigations and prosecutions in the South, in particular, in Argentina, Senegal and South Africa, as well as the outstanding offer made almost a year ago by Rwanda to exercise universal jurisdiction over a former head of state of Chad.<sup>44</sup> It was also encouraging that states, such as Rwanda, continued to provide mutual legal assistance to states exercising universal jurisdiction.<sup>45</sup> In addition, a court in the Netherlands awarded reparation in a universal civil jurisdiction case – the second in Europe and the third outside the USA – to a victim of torture abroad.

#### *a. Argentina*

An Argentine judge has sought mutual legal assistance from Spain based on complaint filed on 14 April 2010, by 50 relatives of victims alleging that Spanish suspects were responsible for genocide and crimes against humanity during the Spanish civil war in the 1930s through 1977.<sup>46</sup> Under Argentina's universal jurisdiction law, Judge María Servini de Cubría opened an investigation, and at the end of 2011 she sent a request to Spanish authorities asking for the names of high-ranking Spanish officials and their current whereabouts, although many of them are now likely to be dead. She has met with victims' groups in Argentina, and announced plans to travel in August 2012 to Spain to continue her investigations. It is not yet known if Spanish authorities will cooperate with the judge.<sup>47</sup>

In Argentina, a positive judgment in another case holding that the court could exercise universal jurisdiction over foreign officials was vitiated by a claim that it could not proceed because the case was supposedly being investigated by a Spanish court (see discussion of this case below in Section IV.A).

#### *b. Canada*

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<sup>44</sup> 'Chad: State Can Judge Habre, Kagame Says', Hironelle News Agency, 12 October 2011 (<http://allafrica.com/stories/201110140503.html>).

<sup>45</sup> Rwanda has provided such assistance in universal jurisdiction cases since 1994, including assisting criminal investigations on its territory, to law enforcement officials from countries such as Belgium, Canada, Finland, France, Germany and Norway.

<sup>46</sup> For a copy of the complaint, see *Promueven querrela criminal por la comisión de los delitos de genocidio y/o de lesa humanidad que tuvieron lugar en España en el período comprendido entre el 17 de Julio de 1936 y el 15 de Junio de 1977* (<http://www.elclarin.cl/images/pdf/argentinaquerrela.pdf>). See also Diane Marie Amann, 'Turning tables, Latin America sues Spain', 15 April 2010 (<http://www.intlawgrls.com/2010/04/turning-tables-latin-america-sues-spain.html>).

<sup>47</sup> Naomi Roht-Arriaza (<http://www.intlawgrls.com/2012/05/universal-jurisdiction-rises-from.html>).

Canada commenced its third universal jurisdiction case on 28 May 2012.<sup>48</sup> Jacques Mungwarere, 39, a former school teacher, was accused of leading or participating in mass killings of Tutsi at Mugonero Hospital, Murambi Adventist Church, Gitwe Catholic Church and in Bisesero, Rwanda in 1994. He had arrived in Canada in 1998 and obtained refugee status in 2002. The accused was arrested by the Royal Canadian Mounted Police (RCMP), in Windsor on 6 November 2009, in cooperation with Rwanda's Genocide Fugitive Tracking Unit (GFTU). He pleaded not guilty to one count of genocide and one count of crimes against humanity. The trial is taking place in a court in Ottawa before, at his choice, a judge, rather than a judge and jury.<sup>49</sup>

*c. Denmark*

In April 2012, the Supreme Court of Denmark held that T. (a pseudonym), a school inspector and teacher who allegedly acted as the head of a death squad in Rwanda in 1994 that was responsible for the death of many Tutsis could be prosecuted on the primary charge against him of genocide. T. had fled to Denmark, where he was arrested in December 2010 after a three-year investigation.

T. had contended that Danish law does not allow for the prosecution of a person for genocide committed in another country by foreign nationals in 1994. Both the Court of Roskilde, on 31 May 2011, and the 6<sup>th</sup> Division of the Eastern High Court, on 26 October 2011, agreed, finding that Denmark lacked jurisdiction to try him for genocide. However, on 26 April 2012, the Supreme Court found that the 1955 Danish Genocide Act, adopted to implement Denmark's obligations under the Convention for on the Prevention and Punishment of the Crime of Genocide, has universal scope. The Supreme Court found,

*in accordance with the generally accepted international view, that the*

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<sup>48</sup> The first prosecution, against Imre Finta, failed. He was indicted in 1987 for war crimes and crimes against humanity; he was acquitted by the Court of Toronto in 1990. This verdict confirmed by the Ontario Court of Appeal in 1992 and by the Canadian Supreme Court on 24 March 1994. *R. v. Finta*, 28 C.R (4th) 265, 297 (1994). See Judith Hippler Bello & Irwin Cotler, *International Decisions: Regina v. Finta*, 90 Am. J. Int'l L. 460 (1996). The failure was widely seen as the result in part of a poorly worded universal jurisdiction provision. As a result, when Canada implemented the Rome Statute of the International Criminal Court in 2000 in its Crimes Against Humanity and War Crimes Act, it strengthened both the definitions of crimes under international law and the universal jurisdiction provisions. A prosecution of Desire Munyaneza for killings in Rwanda in 1994 under this new law led to his conviction on seven counts related to genocide, crimes against humanity and war crimes and a life sentence in 2009; see judgment of the Superior Court, Criminal Division, Canada, Province of Québec, District of Montréal (<http://www.cci.j.ca/programs/cases/munyaneza-judgment-en-2009-05-22.pdf>).

<sup>49</sup> Laurie Foster-MacLeod, 'Rwandan man pleads not guilty in Ottawa war crimes trial', CBC News, 28 May 2012 (<http://www.cbc.ca/news/canada/ottawa/story/2012/05/28/ottawa-war-crimes-trial-rwanda-genocide-jacques-mungwarere.html?cmp=googleeditorspick>); Trial Watch, Jacques Mungwarere (summarizing the legal proceedings so far) (<http://www.trial-ch.org/en/ressources/trial-watch/trial-watch/profils/profile/846/action/show/controller/Profile.html>).

*criminality of genocide has universal scope. Article VI of the Convention, which is concerned with the geographically limited obligation to prosecute genocide, does not provide a basis for any other understanding.*<sup>50</sup>

It then noted that

*[t]he legislative history of the Genocide Act, including the comments on the obligation to prosecute genocide under Article VI of the [Genocide] Convention, does not provide any basis for finding that the intention of the Act was to limit the scope of the criminality of genocide to the territory of Denmark.*<sup>51</sup>

Therefore, it reversed the High Court's order. T. was expected to face trial on charges of genocide in September 2012.<sup>52</sup>

#### *d. Finland*

On 30 March 2012, the Helsinki Court of Appeals affirmed a lower court judgment finding François Bazaramba, who sought asylum in Finland in March 2003, guilty of genocide in Nyakizu and Cyahinda, Rwanda in 1994. It sentenced him to life in prison. The District Court of Itä-Uusimaa had found him guilty of genocide on 11 June 2010, but both parties appealed the judgment to the Helsinki Court of Appeals. In the light of the large number of witnesses living outside Finland, the Helsinki Court of Appeals held some court sessions in Rwanda, Tanzania and in Zambia. François Bazaramba plans to seek leave to appeal the appellate court judgment to the Supreme Court.<sup>53</sup>

In September 2011 Helsinki Court of Appeals sent a 14-member team of judges, prosecutors, clerks and interpreters to Rwanda to visit crime scenes and hear witnesses. The team spent 35 days in that country, visiting Nyakizu in the former Butare Prefecture, where he resided, and areas referred to by witnesses including Birambo, Cyahinda, Nyagisozi, and Maraba. According to the head of the Rwanda Genocide Fugitives Tracking Unit (GFTU), John Bosco Siboyintore, François

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<sup>50</sup> For an English translation of the Supreme Court order see: (<http://www.asser.nl/upload/documents/20120614T104012-120426%20Danish%20Supreme%20Court%20on%20%20application%20of%20the%20Danish%20Act%20n%20Genocide%20EN.pdf>).

<sup>51</sup> *Ibid.*

<sup>52</sup> This brief description of the case is based on: Asser Institute, Cases ([http://www.asser.nl/Default.aspx?textid=40366&site\\_id=36&level1=&level2=15248](http://www.asser.nl/Default.aspx?textid=40366&site_id=36&level1=&level2=15248)); Trial Watch, François Bazaramba (summary of legal proceedings) (<http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/810/action/show/controller/Profile/tab/legal-procedure.html>). The judgment is available in Finnish. Helsinki Court of Appeals, Judgment No: 882, 30.3.2012, R 10/2555 - ).

<sup>53</sup> Rwandan genocide convict to seek Supreme Court ruling, 30 March 2012 ([http://yle.fi/uutiset/rwandan\\_genocide\\_convict\\_to\\_seek\\_supreme\\_court\\_ruling/5100937](http://yle.fi/uutiset/rwandan_genocide_convict_to_seek_supreme_court_ruling/5100937)).



Bazaramba would follow the proceedings in Rwanda from Finland by a video link made available through Rwandan courts and would be able to examine and cross-examine witnesses.<sup>54</sup>

*e. France*

France has established a special unit to investigate crimes under international law.<sup>55</sup> There are a number of universal jurisdiction cases now reportedly under investigation in France, such as investigations of Wenceslas Munyeshyaka, Laurent Bucyibaruta and about 18 others for genocide in Rwanda in 1994; Blaise Adoua, Commander of the Presidential Guard, known as the Republican Guard of Congo Brazzaville, Pierre Oba, Minister of the Interior, of Public Security and of Territorial Administration, and General Norbert Dabira, Inspector-General of the Armed Forces, in connection with enforced disappearances in the Congo (Brazzaville); and Abdelkader Mohamed and Hocine Mohamed, accused of torture and crimes against humanity in Algeria.<sup>56</sup> In July 2012, the new special unit sent an investigation team to Rwanda.<sup>57</sup> In all, France has sent investigation teams on approximately 20 occasions to Rwanda since January 2010.<sup>58</sup>

In the most recent universal jurisdiction investigation, on 16 December 2011, a court in Paris charged a Rwandan doctor, Sosthène Munyemana, who has lived in France since 1994, with genocide and crimes against humanity in Rwanda in 1994. He has been released, but has had to hand in his passport and has to report regularly to police. France in 2008 had rejected an asylum request by Sosthène Munyemana, who for the last decade has worked in a hospital at Villeneuve-sur-Lot in southwest France. In 2010, France rejected an extradition request for war crimes and genocide from Rwanda after Sosthène Munyemana's lawyers argued he could not receive a fair trial there.<sup>59</sup>

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<sup>54</sup> James Karuhanga, Finnish court returns for Bazaramba appeal, *New Times*, 26 June 2012 (<http://mail.newtimes.co.rw/news/index.php?i=15035&a=45056#>).

<sup>55</sup> FIDH, *Création du pôle judiciaire spécialisé dans les crimes contre l'humanité : l'interview de Patrick Baudouin sur RFI*, 30 décembre 2011 ([http://www.fidh.org/IMG/article\\_PDF/article\\_a11115.pdf](http://www.fidh.org/IMG/article_PDF/article_a11115.pdf)); *Lettre ouverte au Garde des Sceaux et au Ministre de l'Intérieur au sujet du pôle judiciaire spécialisé dans les crimes de guerre et crimes contre l'humanité*, 5 décembre 2011 (<http://www.fidh.org/Lettre-ouverte-au-Garde-des-Sceaux>).

<sup>56</sup> This information about the status of these proceedings is based on the description of the legal procedure in Trial Watch (<http://www.trial-ch.org/>). It is not necessarily completely up to date and it excludes cases based on passive personality jurisdiction.

<sup>57</sup> 'France/Rwanda – French« Genocide Unit » To Visit Rwanda', Hironde News Agency, 3 July 2012 (<http://www.hirondellenews.org/ictr-rwanda/410-rwanda-other-countries/33435-030712-francerwanda-french-genocide-unit-to-visit-rwanda>).

<sup>58</sup> *Ibid.*

<sup>59</sup> This brief account of the case is based in part on AFP, 'Rwanda doctor charged with genocide', 16 December 2011 (<http://www.news24.com/Africa/News/Rwanda-doctor-charged-with-genocide-20111216>).

#### *f. Germany*

Criminal proceedings are continuing in a court in Stuttgart concerning two Rwandan nationals, Ignace Murwanashyaka, the president, legal representative, and supreme commander of the Democratic Forces for the Liberation of Rwanda (Forces Démocratiques de Libération du Rwanda, FDLR), and Straton Musoni, the first vice president of the FDLR, for war crimes and crimes against humanity in the Democratic Republic of the Congo (DRC).<sup>60</sup> This prosecution is the first under the Code of Crimes against International Law, adopted in June 2002 to implement the Rome Statute.

The trial of another Rwandan national, Onesphore Rwabukombe, former mayor of a Rwandan community called Muvumba in the north-east of the country, on charges of genocide, murder and incitement to genocide and murder began on 18 January 2011, before the Higher Regional Court of Frankfurt. At the start of the trial, the prosecutor, Christian Ritscher, read from the charges: "Between April 11 and 15, 1994, the accused ordered and co-ordinated three massacres in which a total of at least 3,730 members of the Tutsi minority who had sought refuge in church buildings were killed." Onesphore Rwabukombe is also charged with having personally taken part in killings by Hutu militia. If convicted, he could be sentenced to life in prison. The trial has not yet come to an end.<sup>61</sup>

The German Federal Prosecutor's Office has, in accordance with German law, opened preliminary investigations into the situation in Syria and has already started hearing witnesses of crimes under international law. The preliminary investigations will contribute to preparations for future proceedings against those responsible for international crimes in Syria in national or international courts.<sup>62</sup>

#### *g. Netherlands*

On 21 March 2012, the civil section of the first instance regional court in The

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<sup>60</sup> For a brief description of the legal procedure in this case, see Trial Watch, Ignace Murwanashyaka (<http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/1025/action/show/controller/Profile.html>).

<sup>61</sup> The description of this case is based on a number of sources, including: Redress, Radio Netherlands Worldwide, 'Rwandan genocide trial opens in Germany', 18 January 2011 (<http://www.rnw.nl/international-justice/article/rwandan-genocide-trial-opens-germany>); P. Krocke, 'Universal jurisdiction in Germany: the Trial of Onesphore R. before the Higher Regional Court of Frankfurt', German Y.B. Int'l L., Vol. 54 (2011), p. 671; 'Rwandan mayor Rwabukombe tried for genocide in Germany' BBC, 18 January 2011 (<http://www.bbc.co.uk/news/world-europe-12215195>).

<sup>62</sup> European Centre for Constitutional and Human Rights, Newsletter No 24 (August 2012) ([http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=OCCMQFjAA&url=http%3A%2F%2Fwww.ecchr.de%2Fnewsletter.328.html%3Ffile%3Dtl\\_files%2FDokumente%2FPublikationen%2FECC%2FHR%2520Newsletter%252024%25202012%2520en.pdf&ei=-MJRUNTOFOawOAWF6ICAAw&usg=AFQjCNEolZuShVIfytr4Jt2d7bjph9bb5g](http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=OCCMQFjAA&url=http%3A%2F%2Fwww.ecchr.de%2Fnewsletter.328.html%3Ffile%3Dtl_files%2FDokumente%2FPublikationen%2FECC%2FHR%2520Newsletter%252024%25202012%2520en.pdf&ei=-MJRUNTOFOawOAWF6ICAAw&usg=AFQjCNEolZuShVIfytr4Jt2d7bjph9bb5g)).

Hague awarded Ashraf El-Hojouj one million euros in compensation for torture in Libya in a civil case based on universal jurisdiction, pursuant to Article (9) (c) and (d) of the Netherlands Code of Civil Procedure.<sup>63</sup> Those provisions permit a foreigner to sue another foreigner for a tort committed abroad when the victim would not otherwise be able to recover reparation. This judgment is the second known universal civil jurisdiction judgment in Europe after the *Plavšić* judgment in 2011 in France.<sup>64</sup> In addition to civil claims in civil cases, civil claims can and have been made in criminal cases pursuant to Article 51 (f) (1) of the Netherlands Code of Criminal Procedure based on universal jurisdiction.<sup>65</sup>

Pre-trial proceedings are continuing against Yvonne Ntacyobatabara Basebya, who was arrested in the Netherlands on 21 June 2010, after a four-year investigation by the Netherlands International Crimes Unit, based on allegations that she had led a group of Impuzamugambi and Interahamwe militias who killed Tutsis in Gikondo (Kigali) in 1994. The pre-trial investigation included a visit of a led a group of Impuzamugambi and Interahamwe militias who killed Tutsis in Gikondo (Kigali) in 1994. A Netherlands rogatory commission and Dutch police investigators have been sent to Rwanda. She is awaiting trial on charges of genocide, attempt to commit genocide, conspiracy to commit genocide, murder and war crimes crimes. On 19 June 2012, she was released from pre-trial detention pending trial, which is expected to begin in October 2012.<sup>66</sup>

#### *h. Norway*

The trial of Sadi Bugingo began on 25 September 2012, in Courtroom 250 at Oslo Central Court. The accused was arrested in Bergen, Norway on 3 May 2011, by the National Criminal Investigation Service, based on an international arrest warrant issued in January 2008. The prosecutor said that the Rwandan

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<sup>63</sup> The original text of the judgment in Dutch is available (<http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BV9748>). However, the judgment apparently has not yet been translated into English, Arabic, French or Spanish.

<sup>64</sup> *Kovač c. Plavšić, Jugement, Tribunal de Grande Instance Paris, 14 mars 2011* (awarding approximately 200,000 euros to victims of crimes against humanity); Dorothée Moisan, *Karadžić et Plavšić condamnés en France à indemniser des exilés bosniaques*, AFP, 13 mars 2011 (<http://www.google.com/hostednews/afp/article/ALeqM5gr43mrn-c937T7FkFInvlGps6iRA?docId=CNG.b62193306d756d2e87b2bb14df2d655f.3e1>).

<sup>65</sup> See, for example, *Joseph Mpambra* case, judgment, LJN: BR0686, Gerechtshof's-Gravenage, 22-0026 3-09, 212 (The Netherlands), 7 July 2011 (<http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR0686>) (awarding compensation for human rights violations).

<sup>66</sup> Thijs Bouwknecht, 'Pretty in Pink: Yvonne Basebya goes home—for now', Radio Netherlands Worldwide, 19 June 2012 (<http://www.rnw.nl/international-justice/article/pretty-pink-yvonne-basebya-goes-home%E2%80%94now>); 'Rwanda/Netherlands - Hague Court Extends Yvonne Basebya's Detention', Hirondele News Agency, 18 November 2011 (<http://www.hirondellenews.com/ictr-rwanda/410-rwanda-other-countries/25772-en-en-181111-rwandanetherlands-hague-court-extends-yvonne-basebyas-detention-1482314823>).

government of Rwanda had given his team of investigators free access to everyone they wanted, permitting them to do a thorough investigation without any interference. Sadi Bugingo is alleged to be responsible for killing people at the Economat Général of Kibungo Diocese and at Kibungo Baptist Church, as well as in other places in Birenga, Zaza, and Nyakarambi in Rwanda in 1994. In particular, he is alleged to have supervised killings, coordinated attacks and distributed food rations to Interahamwe militia. In all, he is alleged to have been responsible for killing approximately 2,000 persons.

Sadi Bugingo has been charged with ordinary crimes under national law, including murder, extermination and the formation, membership, leadership, and participation in an association of a criminal gang, whose purpose and existence was to do harm to people or their property. He has pleaded not guilty. Sadi Bugingo has not been charged with genocide since it was not a crime under Norwegian law in 1994. His trial is expected to last approximately three months and end on 21 December 2012. The court is scheduled to hear 106 witnesses, 80 called by the prosecution and 26 by the defence. At least 21 of the witnesses will be flown to Norway to testify and 80 are to testify through a video link at the Supreme Court in Kigali, Rwanda. He faces a maximum sentence of 21 years in prison, if convicted. As part of the investigation, investigators made several trips to Rwanda.<sup>67</sup>

#### *i. Senegal*

Following the judgment by the International Court of Justice on 20 July 2012 (see Section IV.C.1 above), Senegal agreed on 24 July 2012, after four days of talks in Dakar, to an African Union (AU) plan to try Hissène Habré before a special court in the Senegalese justice system, the Extraordinary African Chambers, with Senegalese and other African judges appointed by the AU (the formal signing of the agreement took place a month later on 22 August 2012).<sup>68</sup> The Minister of Justice, Aminata Touré, has stated: “We want that trial to start later this year”,

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<sup>67</sup> This account of the prosecution is based on a number of sources, including: Asser Institute, DomCLIC Database ([http://www.asser.nl/default.aspx?site\\_id=36&level1=15246&level2=15248&level3=&textid=39756](http://www.asser.nl/default.aspx?site_id=36&level1=15246&level2=15248&level3=&textid=39756)); ‘Bugingo pleads not guilty as genocide trial opens in Norway’, The Rwanda Focus, 26 September 2012 (<http://focus.rw/wp/2012/09/bugingo-pleads-not-guilty-as-genocide-trial-opens-in-norway/>); ‘Bugingo trial begins in Oslo’, The New Times, 26 September 2012 (<http://www.newtimes.co.rw/news/index.php?i=15127&a=58769>); Edwin Musoni, ‘Norway to try Genocide Suspect’, The New Times (Rwanda), 4 September 2012 (<http://www.newtimes.co.rw/news/index.php?i=15106&a=57917>); AFP, ‘Norway extends detention of Rwandan genocide suspect’, 20 June 2011 (<http://www.modernghana.com/news/335503/1/norway-extends-detention-of-rwandan-genocide-suspe.html>); ‘Norwegian Police Arrest Rwanda Genocide Suspect’, The New Age, 5 May 2012 ([http://www.thenewage.co.za/17227-1020-53-Norway\\_police\\_arrest\\_Rwanda\\_genocide\\_suspect](http://www.thenewage.co.za/17227-1020-53-Norway_police_arrest_Rwanda_genocide_suspect)); ‘Rwandan genocide trial opens in Norway’, AP, 25 September 2012 (<http://www.google.com/hostednews/ap/article/ALeqM5guH0H6cM8fTly6ok-V5U-fPyDOGQ?docId=98aa63bbea7645edb54c573149e97071>).

<sup>68</sup> International Federation for Human Rights, *Chad: After World Court Ruling, Plan to Try Chad's Ex-Dictator in Senegal With African Judges*, 25 July 2012 (<http://www.fidh.org/After-World-Court-Ruling-Plan-to>).

noting that President Macky Sall, had said publicly that he intends that Hissène Habré be prosecuted.<sup>69</sup>

If implemented in accordance with the above schedule, the agreement with the AU would have the chambers functioning by 31 December 2012.<sup>70</sup> The statute for the new chambers annexed to the agreement provides that extraordinary chambers within the Senegalese court system, with separate sections for investigations, trials and appeals, will have jurisdiction to try persons most responsible for genocide, some crimes against humanity, some war crimes and torture committed in Chad between 1982 and 1990.<sup>71</sup> The statute provides that amnesties for such crimes will not bar a prosecution.<sup>72</sup> It allows Senegalese prosecutors to prosecute “the most serious” crimes rather than all the crimes alleged to have been committed.<sup>73</sup> The statute also provides for three of the five forms of reparation to victims and it appears to recognize the right under Senegalese law of victims to participate as civil parties in the trial.<sup>74</sup> It also provides for trial proceedings to be recorded for broadcast in Chad and for public access to the trial by journalists and non-governmental organizations.<sup>75</sup>

#### *j. South Africa*

In May 2012, in an historic decision, a South African court ordered the national police and prosecutor to open an investigation based on universal jurisdiction of allegations of torture by Zimbabwean security officials.<sup>76</sup> The court ordered the National Director of Public Prosecutions, the Head of the Priority Crimes Litigation Unit and the National Commissioner of the South African Police Service to set aside their decision

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<sup>69</sup> Marlise Simons, ‘Senegal Told to Prosecute Ex-President of Chad’, New York Times, 20 July 2012 (<http://www.nytimes.com/2012/07/21/world/africa/senegal-to-prosecute-former-president-of-chad-hissene-habre.html>). It remains unclear, however, whether this deadline for starting the trial can be met.

<sup>70</sup> *Accord entre le gouvernement de la République du Sénégal et l'Union africaine sur la création des chambres africaines extraordinaires au sein des juridictions sénégalaises*, 22 Août 2012, et *Annexe: Statut des Chambres africaines extraordinaires au sein des juridictions sénégalaises pour la poursuite des crimes internationaux commis au Tchad durant la période du 7 juin 1982 au 1er décembre 1990*.

<sup>71</sup> *Statut*, arts. 1, 2, 4, 5, 6, 7 et 8.

<sup>72</sup> *Ibid.*, art. 20.

<sup>73</sup> *Ibid.*, art. 3 (2).

<sup>74</sup> *Ibid.*, arts. 27 – 28.

<sup>75</sup> *Ibid.*, arts. 33 et 36.

<sup>76</sup> *Southern African Litigation Centre v. National Director of Public Prosecutions*, Judgment, Case Number: 77150/0, High Court of South Africa (North Gauteng High Court), 8 May 2012 (<http://www.saflii.org/za/cases/ZAGPPHC/2012/61.html>).

*refusing and/or failing to accede to the [Southern African Litigation Centre]'s request dated 16 March 2008 that an investigation be initiated under the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, into acts of torture as crimes against humanity committed by certain named perpetrators in Zimbabwe.*<sup>77</sup>

The court added that “[t]he relevant decisions to refuse such a request are declared to be unlawful, inconsistent with the Constitution and therefore invalid” and that the request “must be assessed by the [defendants], having regard to South Africa’s international law obligations as recognised by the Constitution”.<sup>78</sup> The court ordered the Head of the Priority Crimes Litigation Unit “to render all possible assistance to the [the National Commissioner of the South African Police Service] in the evaluation of the request by the [South African Litigation Centre] for the initiation of an investigation” and “to manage and direct such investigation as provided for in terms of the applicable Presidential Proclamation and the NPA Act as amended”.<sup>79</sup>

The Priority Investigation Unit was further required, “in accordance with s205 of the Constitution, and in so far as it is practicable and lawful, and with regard to the domestic laws of the Republic of South African and the principles of international law, [to] do the necessary expeditious and comprehensive investigation of the crimes alleged in the torture docket”.<sup>80</sup> The Priority Crimes Investigation Units was also ordered, “without undue delay [to] communicate all findings to the [South African Litigation Centre]” and, after the investigation was completed, “to take a decision whether or not to institute a prosecution”.<sup>81</sup> Reportedly, the defendants have decided not to appeal this judgment and, therefore, are now implementing the order to conduct an expeditious investigation based on universal jurisdiction of allegations of torture committed in Zimbabwe.

A second dramatic development, no doubt a direct result of the decision by the High Court in May 2012, was the August 2012 report in the Sunday Times that the South African National Prosecuting Authority opened its first investigation based on universal jurisdiction concerning allegations that the former President of Madagascar, Marc Ravalomanana, was responsible for crimes against humanity for, among other acts, killings of approximately 40 demonstrators.<sup>82</sup> This report, if confirmed, will provide further evidence that law enforcement authorities in the South, not just in the North, exercise universal jurisdiction over crimes under

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<sup>77</sup> *Ibid.*, p. 93.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*, p. 94.

<sup>81</sup> *Ibid.*

<sup>82</sup> See Jocelyn Newmarch, ‘South Africa: Allegations Are False - Ravalomanana,’ All Africa, South Africa Press Association, 7 August 2012.

international law.

*k. Sweden*

On 20 January 2012, the Stockholm District Court sentenced a Serbian national to life imprisonment and to pay compensation in the amount of between 150,000 and 200,000 kronor (17,000-23,000 euros) to 10 of the 14 complainants in the case for aggravated crimes against humanity, including murder, attempted murder and aggravated arson in connection with his role in the killing of 40 people in the village of Cuska in Kosovo in 1999.<sup>83</sup> Milić Martinović, 34 years old, had been arrested in Sweden in April 2010. The court declared: "Anything less than life imprisonment is out of the question." However, people serving life sentences in Sweden have in recent years spent an average of around 21 years in prison. The court stated that once he has served his sentence, he will be expelled from Sweden and banned from returning.

Milić Martinović had been a member of the Special Police Unit (PJP) of the Ministry of the Interior of the Republic of Serbia that entered Cuska on 14 May 1999 in search of "terrorists". The court found that he was among the soldiers who took a large number of people captive, killed 29 of the 40 people murdered there that day, attempted to kill three others, burned down houses and manhandled civilians. "The accused is through his actions also guilty of serious violations of the Geneva Convention and common law," it added.

Although court documents do not establish that Milić Martinović personally pulled the trigger, they describe for instance how he repeatedly stood guard as his comrades shot and killed civilians and how he fired at the ground and forced residents to hand over gold and other valuables. "Milić Martinović participated in the operation with the understanding that the aim was to murder and rob civilian Kosovo Albanians," according to the court documents. Prosecutor Lars Hedvall told the TT news agency he was "pleased that the court has largely followed my views."

Defence attorney Bertil Schultz said that the evidence in the case was weak, and that he expected his client to appeal.

In another case, Prosecutor Magnus Elving informed the news agency AFP in September 2012 that a Rwandan man, who had been living in Sweden since 2007 would probably be charged in November 2012 with "the most serious crimes" – genocide and crimes against international law – and that the trial would probably last from November 2012 to May 2013. If convicted, he could be sentenced to life imprisonment. However, after serving ten years in prison, a person sentenced to life imprisonment can request the court to set a sentence with a specified number of years' imprisonment. To facilitate hearing of local

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<sup>83</sup> The judgment is not available in English. Therefore, the account here of this case follows closely the report of the case and the summary of the judgment in 'Kosovo: Life sentence for Serb in Sweden', 20 January 2012 (<http://www.rnw.nl/international-justice/article/kosovo-life-sentence-serb-sweden>), as well as AFP, 'Swedish court jails Serb over Kosovo war crimes', The Local, 21 January 2012 (<http://www.thelocal.se/38630/20120121/>).

witnesses, if the Rwandan authorities grant permission, part of the trial will take place in Kigali, Rwanda. This would be the first time that a Swedish court conducted part of a trial outside the country.<sup>84</sup>

### *I. Switzerland*

Switzerland, which has established a special unit to investigate and prosecute crimes under international law in the Federal Prosecutor's Office (Competence Centre Crimes against Humanity and War Crimes,<sup>85</sup> has decided in 2012, according to information received by Amnesty International, to increase the staff of the unit by the addition of two prosecutors and some forensic experts.

On 25 July 2012, a Swiss federal court ruled that Khaled Nezzar, a former Algerian defence minister, could not successfully claim immunity from prosecution in a foreign court for war crimes committed in Algeria. It stated that “immunities *ratione materiae* of former heads of state are no longer automatically guaranteed with respect to individual criminal responsibility, even for acts committed as part of their official activities”.<sup>86</sup> That preliminary ruling was delivered in proceedings initiated by a criminal complaint lodged by TRIAL, a Swiss non-governmental organization, and two victims of Algerian nationality, based on the Swiss Penal Code,<sup>87</sup> which provides for universal jurisdiction for serious crimes.<sup>88</sup>

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<sup>84</sup> The account of this case has been based on a number of sources, including, Amiel Nkuliza, ‘A Rwandan Citizen accused of genocide in Sweden to appear in court in November this Year’, Umuvugizi, 25 September 2012 (<http://www.umuvugizi.com/?p=6651&lang=en>); ‘Sweden readies for first-ever genocide trial’, The Local, 25 September 2012 (<http://www.thelocal.se/43442/20120925/>); ‘Sweden’s First Genocide Trial to open in November’, Hirondele News Agency, 26 September 2012 (<http://www.hirondellenews.org/ictr-rwanda/408-collaboration-with-states/collaboration-with-states-other-countries/33744-270912-rwandasweden-swedens-first-genocide-trial-to-open-in-november>).

<sup>85</sup> For a brief description, see the answer to a parliamentary question on this unit ([http://www.parlament.ch/f/suche/pages/g\\_eschaefte.aspx?gesch\\_id=20114168](http://www.parlament.ch/f/suche/pages/g_eschaefte.aspx?gesch_id=20114168)).

<sup>86</sup> *Décision, No. BB 20 11.140, Cour des plaints, 25 juillet 2012* (“[I]es immunités *ratione materiae* des anciens chefs d’Etat ne sont plus garanties automatiquement face à la responsabilité individuelle en matière pénale, même pour les actes commis durant leurs activités officielles”) ([http://www.trial-ch.org/fileadmin/user\\_upload/documents/affaires/algeria/BB.2011.140.pdf](http://www.trial-ch.org/fileadmin/user_upload/documents/affaires/algeria/BB.2011.140.pdf)) (unofficial translation). Gabriella Citroni, ‘Swiss Court Finds No Immunity for the Former Algerian Minister of Defence Accused of War Crimes: Another Brick in the Wall of the Fight Against Impunity’, EJIL: Talk!, 15 August 2012 (<http://www.ejiltalk.org/swiss-court-finds-no-immunity-for-the-former-algerian-minister-of-defence-accused-of-war-crimes-another-brick-in-the-wall-of-the-fight-against-impunity/>) See Trial, Landmark decision: no immunity for an Algerian former defence minister accused of war crimes (<http://www.trial-ch.org/en/about-trial/trial-acts/details/article/decision-historique-pas-dimmunité-pour-un-ancien-ministre-de-la-defense-algerien-poursuivi-pour-cr.html>).

<sup>87</sup> *Code pénal Suisse, art. 7 (crimes ou délits commis à l’étranger)* (<http://www.admin.ch/ch/fr/rs/3/311.0.fr.pdf>).

<sup>88</sup> See: Information and observations on the scope and application of the principle of universal jurisdiction, Switzerland, 26 April 2010



*m. United Kingdom*

Several allegations based on universal jurisdiction are currently being reviewed by the Metropolitan Police with a view to determining whether there is sufficient information to forward cases to the Crown Prosecution Service to decide whether to prosecute.

*n. United States of America*

Despite challenges to US universal civil jurisdiction legislation now pending in the US Supreme Court (see discussion in Section V.G below), on 28 August 2012, US Federal District Court Judge for the Eastern District of Virginia, Leonie Brinkema, ordered former Somali Prime Minister Mohamed Ali Samantar to pay \$21 million (approximately 16.39 million euros) in compensatory and punitive damages to seven Somalis. In an earlier hearing before Judge Brinkema on 23 February 2012, Mohamed Ali Samantar had accepted liability and responsibility for damages for torture, extrajudicial killing, war crimes and other human rights violations committed against the civilian population of Somalia during the Siad Barre government that ruled that country from 1969 to 1991.<sup>89</sup>

The District Court had originally dismissed this civil suit on 27 April 2007, because it found that the defendant was immune from a civil suit under the Foreign Sovereign Immunity Act (FSIA). However, on 8 January 2009, a panel of the US Court of Appeals for the Fourth Circuit reinstated the civil suit against Mohamed Ali Samantar.<sup>90</sup> The Fourth Circuit panel held, first, that the FSIA does not confer immunity on individual foreign government officials and, second, even if the FSIA did apply to individuals, it would only apply if they were officials at the time of the filing of the suit. The Fourth Circuit panel remanded the case to the District Court for further proceedings. The defendant petitioned for rehearing *en banc* by the entire Fourth Circuit Court of Appeals. However, on 9 February 2009, that petition was denied.

On 1 June 2010, the US Supreme Court upheld the decision by the US Court of Appeals for the Fourth Circuit panel, unanimously finding that he was not immune from suit in a US court under the FSIA for crimes under international law committed abroad, but leaving open the question to be decided on remand whether he was entitled to immunity under common law.<sup>91</sup>

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([http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri\\_StatesComments/Switzerland\\_E.pdf](http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Switzerland_E.pdf)).

<sup>89</sup> See Center for Justice and Accountability (<http://www.cja.org/section.php?id=85>); BBC News Africa, 'Ex-Somali PM Samantar ordered to pay torture damages', 29 August 2012 (<http://www.bbc.co.uk/news/world-africa-19409235>).

<sup>90</sup> *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009).

<sup>91</sup> *Samantar v. Yousuf*, 130 S.Ct. 2278 (2010).

On remand, after the US had filed a statement of interest stating that Mohamed Ali Samantar was not entitled to immunity,<sup>92</sup> the District Court held on 15 February 2011, that he was not entitled to common law immunity.<sup>93</sup>

### 3. Establishment of information centre on crimes under international law committed in Syria

In the summer of 2012, IREX, a US-based non-governmental organization, established the Syria Justice and Accountability Centre.<sup>94</sup>

According to its website, the Centre

*will collect, collate, receive, process, analyze, and securely store information and evidence, documentation and other materials relating to violations of humanitarian law and human rights in Syria. The SJAC will serve as a coordinating mechanism for organizations and individuals that are already engaged in the documentation of human rights abuses, providing an electronic repository for information as well as identifying and addressing crucial gaps. The purpose of these analyses is to identify patterns of events, articulate those who bear responsibility for crimes, and capture a historical record of victims' experiences in view of a broad range of future accountability and transitional justice processes.*<sup>95</sup>

The Centre, which is now being set up in Lyon, France,

*will consolidate essential information to build a foundation for a wide range of possible efforts, including: memorialisation, truth-telling, vetting, travel bans, seizure of assets, and prosecutions.*<sup>96</sup>

The Centre expressly mentions sharing the information it obtains with the UN Commission of Inquiry and that, in its final phase, it envisages “transfer[ing] its capabilities and functions to Syrian national/international/mixed accountability and transitional justice processes and mechanisms that meet international safeguards and standards”. However, nothing in its mandate appears to preclude the Centre from sharing its information with police, prosecutors and judges in

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<sup>92</sup> US State Department, Statement of Interest on behalf the United States of America, 14 February 2011 (<http://cja.org/downloads/Samantar Stmt of Interest.pdf>).

<sup>93</sup> *Yousuf v. Samantar*, Order, No. 1:04cv1360 (LMB/JFA), E.D. Va., 15 February 2011 (<http://cja.org/downloads/Samantar Order Denying Common Law Immunity.pdf>).

<sup>94</sup> The establishment of the Centre followed an expert meeting in Brussels from 4 to 5 May 2012 and a meeting of prospective government donors on 7 May 2012 at the Brussels office of No Peace Without Justice, an international non-governmental organization. Another meeting of potential donors was scheduled to take place on 14 September 2012.

<sup>95</sup> Syria Justice and Accountability Centre (<http://syriaaccountability.org/>).

<sup>96</sup> *Ibid.*

countries outside Syria investigating and prosecuting crimes under international law committed in that country. It is too early to assess the performance of this new entity, but it appears that it has the potential to provide effective assistance to investigation and prosecution of crimes under international law now being committed in Syria, including through investigations and prosecutions based on universal jurisdiction.

#### 4. Establishment of country investigation teams

On 29 May, William Hague, the United Kingdom Foreign Secretary, announced his government's *Preventing Sexual Violence Initiative*, (PSVI) on combating and preventing sexual violence in armed conflict, which included

*the establishment of a dedicated UK team devoted to combating and preventing sexual violence in conflict. This team will be able to be deployed overseas at short notice to gather evidence and testimony that can be used to support investigations and prosecutions.*<sup>97</sup>

He renewed this public commitment on 9 July 2012 and again on 25 September 2012 in his address to the UN General Assembly side event, Preventing sexual and gender-based crimes in conflict and securing justice for survivors.<sup>98</sup>

According to a statement by the Conflict Department of the United Kingdom's Foreign and Commonwealth Office regarding the investigation teams, the United Kingdom is now

- *setting up a new, dedicated UK team of experts devoted to combating and preventing sexual violence in armed conflict. This team will be able to deploy overseas at short notice to gather evidence and testimony that is admissible in international and domestic courts, and that can be used to support investigations and prosecutions.*
- *The team will be available to support UN and other international missions, and to provide training and mentoring to national authorities to help them develop the right laws and capabilities. It will also be able to work on the frontline with grass roots organisations, local peace builders and human rights defenders.*

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<sup>97</sup> Foreign Secretary announces UK initiative on preventing sexual violence in conflict, 29 May 2012 (<http://www.fco.gov.uk/en/news/latest-news?id=769621682&view=News>).

<sup>98</sup> Foreign Secretary Marks 10th Anniversary of the International Criminal Court, 9 July 2012 (<http://www.fco.gov.uk/en/news/latest-news?id=785885682&view=News>); Foreign Secretary pledges £1 million to tackle sexual violence in conflict, 25 September 2012 (<http://www.fco.gov.uk/en/news/latest-news?id=815183582&view=News>).

- *The team will be ready to deploy before the end of this year and will draw on the skills of doctors, lawyers, police, psychologists, social workers and gender advisers, forensic specialists and experts in the care and protection of victims and witnesses.*<sup>99</sup>

Members of the team are now being recruited and the Foreign and Commonwealth Office has been consulting civil society concerning the scope of the teams' mandate.<sup>100</sup> Although there is no express mention of universal jurisdiction in either the public statements of the Foreign Secretary or the Conflict Department, nothing in any of the documentation concerning the PSVI limits its ability to assist states, including the United Kingdom, in exercising universal jurisdiction over crimes of sexual violence in armed conflict. As a practical matter, given the failure of states where the crimes occurred (territorial states) and states of the suspect's nationality to investigate and prosecute such crimes, it is likely that a significant amount of the investigation teams' efforts will involve assisting states to exercise universal jurisdiction if they are to be successful in delivering the PSVI's mandate to tackle impunity for gender-based crimes. It is also not clear to what extent the investigation team will work in cooperation with investigation teams of other countries exercising universal jurisdiction, but, given the interest of police and prosecutors in the EU in working in joint investigation teams (see Section IV.D.4 before), it is to be hoped that the United Kingdom PSVI teams will work closely with national teams of other countries. As the investigation teams are not yet operational, it is too soon to assess how effective the initiative is likely to be, but Amnesty International will be closely monitoring its work.

Amnesty International welcomes commitments by states to increase efforts to end impunity for crimes of sexual violence and other gender-based crimes committed during armed conflict, or at any other time, which are consistent with repeated calls by the UN Security Council on states to ensure that there is no impunity for such crimes.<sup>101</sup> However, such unilateral efforts must not detract from, or duplicate existing initiatives at the international and national levels to prevent, investigate and prosecute crimes of sexual violence and gender-based violence in armed conflict. They must also follow established best practices,<sup>102</sup> and address the underlying, systemic causes for the commission of such crimes.

In addition, the UK Government should promote ending impunity for crimes of

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<sup>99</sup> Conflict Department, Foreign and Commonwealth Office, *The UK Preventing Sexual Violence in Conflict Initiative*, 28 June 2012.

<sup>100</sup> Amnesty International has provided advice to the Foreign and Commonwealth Office regarding the establishment of the teams.

<sup>101</sup> See footnote 10 above.

<sup>102</sup> For example, guidelines on interventions to prevent and respond to sexual violence in humanitarian or conflict settings and on interviewing survivors of sexual violence in these settings have been prepared by international agencies, including by the UN Inter-Agency Standing Committee's *Guidelines for Gender-based Violence Interventions in Humanitarian Emergencies: Focusing on Prevention and Response to Sexual Violence* (<http://bit.ly/eUPWIASC>), and the World Health Organisation's *Guidelines for medico-legal care for victims of sexual violence* ([http://www.who.int/violence\\_injury\\_prevention/publications/violence/med\\_leg\\_guidelines/en/](http://www.who.int/violence_injury_prevention/publications/violence/med_leg_guidelines/en/)).

sexual violence and gender-based crimes under international law by taking the lead in supporting and promoting a range of other complementary measures for the prevention and criminal prosecution of gender-based crimes committed in armed conflict.<sup>103</sup>

#### D. POSITIVE INTERGOVERNMENTAL ORGANIZATION ACTION

In addition to the encouraging developments at the Sixth Committee in 2011, there were positive steps taken by five other intergovernmental organization bodies, the Committee against Torture, the Committee on the Rights of the Child, the AU, the EU and Interpol.

##### 1. Committee against Torture

The Committee against Torture continued to emphasize the obligation of states parties to the Convention against Torture to exercise jurisdiction – including universal jurisdiction - over foreigners suspected of responsibility for torture present in their territory in line with Article 5 of the Convention.

For example, in November 2011, the Committee against Torture urged Germany “to observe article 5 of the Convention which requires that the criteria for exercise of jurisdiction are not limited to nationals of the State party.”<sup>104</sup> In addition, the Committee expressed its concern “at the absence of information from the State party whether Khaled El-Masri has received any remedies, including compensation, in accordance with article 14 of the Convention (arts. 5 and 14)” and it said that Germany “should also inform the Committee about the remedies, including adequate compensation provided, to Khaled El-Masri, in accordance with article 14 of the Convention.”<sup>105</sup>

At the same session, the Committee recommended that Sri Lanka should

*ensure that its domestic legislation permits the establishment of jurisdiction for acts of torture in accordance with article 5 of the Convention, including provisions to bring criminal proceedings under article 7 against non-Sri Lankan citizens who have committed acts of torture outside the territory of the State party, who are present in the*

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<sup>103</sup> Such measures should include using diplomatic and financial means to support: a robust and fully funded International Criminal Court; the rule of law, including guarantees of equality before the law and equal protection of the law; local and international non-governmental organizations and others which document gender-based crimes under international law, support survivors and campaign for investigations and prosecutions and preventive measures; and the right to reparation for harm suffered as required under international law.

<sup>104</sup> Committee against Torture, Concluding observations - Germany, U.N. Doc. CAT/C/DEU/CO/5, 12 December 2011, para. 28 ([http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.DEU.CO.5\\_en.pdf](http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.DEU.CO.5_en.pdf)).

<sup>105</sup> *Ibid.*

*territory and who have not been extradited.*<sup>106</sup>

Committee against Torture expressed its continuing concern that Canada had not yet implemented its recommendation seven years earlier in May 2005 to provide all victims of torture, regardless where committed, with a remedy. It stated:

*The Committee remains concerned at the lack of effective measures to provide redress, including compensation, through civil jurisdiction to all victims of torture, mainly due to the restrictions under provisions of the State Immunity Act (art. 14).*

*The State party should ensure that all victims of torture are able to access remedy and obtain redress, wherever acts of torture occurred and regardless of the nationality of the perpetrator or victim. In this regard, it should consider amending the State Immunity Act to remove obstacles to redress for all victims of torture.*<sup>107</sup>

The Committee against Torture is currently drafting a general comment on Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which guarantees victims of torture the right to a remedy and to reparation.

## 2. Committee on the Rights of the Child

The Committee on the Rights of the Child, a body of experts established under the Convention on the Rights of the Child, as part of its responsibilities to monitor implementation of the Optional Protocol to that treaty, issued several recommendations concerning the obligation of states to adopt extraterritorial jurisdiction and universal jurisdiction in the prosecution of the crimes related to the involvement of children in armed conflict.

For example, in February 2012 the Committee recommended that Thailand should

*provide explicitly, within the Penal Code or otherwise, for extra-territorial jurisdiction over acts prohibited under the Optional Protocol, including conscripting or enlisting children into armed forces or armed groups, or using them to participate actively in hostilities . . .*<sup>108</sup>

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<sup>106</sup> Committee against Torture, Concluding observations - Sri Lanka, U.N. Doc. CAT/C/LKA/CO/3-4, 8 December 2011, para. 26 ([http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.LKA.CO.3-4\\_en.pdf](http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.LKA.CO.3-4_en.pdf)).

<sup>107</sup> Committee against Torture, Concluding observations - Canada, U.N. Doc. CAT/C/CAN/CO6, 25 June 2012, para. 15 (<http://www2.ohchr.org/english/bodies/cat/cats48.htm>).

<sup>108</sup> Committee of the Rights of the Child, Concluding observations - Thailand, U.N. Doc. CRC/C/OPAC/THA/CO/1, 3 February 2012, para. 20 (<http://www2.ohchr.org/english/bodies/crc/crcs59.htm>).

At the same session, the Committee urged the Democratic Republic of Congo

*to ensure that its domestic legislation effectively enables it to establish and exercise universal jurisdiction over war crimes related to conscription, enlistment and use of children in hostilities . . .*<sup>109</sup>

### 3. African Union

Although the AU has opposed what it characterizes as the so-called “abuse” of universal jurisdiction (see discussion below in Annex II concerning the origin of the annual discussion in the Sixth Committee), it reached an agreement with Senegal on the establishment of extraordinary chambers in the Senegalese court system to exercise universal jurisdiction over a former head of state (see discussion above in Section IV.C.2.i).

### 4. European Union

The European Network of Contact Points in respect of persons responsible for genocide, crimes against humanity and war crimes held its eleventh (23 to 24 November 2011) and twelfth meetings (24 to 25 April 2012), both of which were very productive.<sup>110</sup> The European Network is a very useful way to improve the investigation and prosecution of crimes under international law as it brings together police, prosecutors and other law enforcement officials from members of the EU and observer states, as well as representatives of non-governmental organizations working for international justice. The European Network has put on the agenda for its thirteenth meeting (7 to 8 November 2012) a number of topics that are relevant to the exercise of universal jurisdiction, in particular, state cooperation, including:

- Enhancing cooperation between immigration authorities and law enforcement/prosecution services in investigating and prosecuting core international crimes;
- Possibilities to establish Joint Investigation Teams for investigation and prosecution of core international crimes; and
- Update on the Initiative for a new International Legal Framework (the proposal to draft a State Cooperation Convention).

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<sup>109</sup> Committee of the Rights of the Child, Concluding observations - Democratic Republic of Congo, U.N. Doc. CRC/C/OPAC/COD/CO/1, 7 March 2012, para. 37 (<http://www2.ohchr.org/english/bodies/crc/crcs59.htm>).

<sup>110</sup> For further information about this network, see Eurojust, Genocide Network (<http://www.eurojust.europa.eu/Practitioners/networks-and-fora/Pages/genocide-network.aspx>).

## 5. Interpol

A very important recent positive development is the decision by Interpol to resume its International Expert Meetings on genocide, crimes against humanity and war crimes.<sup>111</sup> The fifth meeting is scheduled to take place at Interpol's headquarters in Lyon from 20 to 22 November 2012 and its central theme - Information for Justice - is relevant to state cooperation regarding universal jurisdiction:

*It will emphasize the advantages and the need of exchanging internationally information concerning war crimes, war crimes investigations, and war crimes suspects. Various information collection, storage and exchange solutions, that are instrumental for the prevention, investigation, and prosecution of these heinous crimes, as well of the preservation of the legacy of International Tribunals, will be discussed.*

These expert meetings bring together police and other law enforcement officials from the 188 member states of Interpol and outside experts on international justice, including representatives of non-governmental organizations working on behalf of international justice. In the past, they have been the place where important initiatives, such as the State Cooperation Convention, proposed by Amnesty International seven years ago, have been launched (see discussion of the current status of this initiative in Section III.C above).

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<sup>111</sup> For a brief introduction to some of Interpol's work against crimes under international law, see Interpol, Law Enforcement Resources - Genocide and War Crimes (<http://www.interpol.int/INTERPOL-expertise/Training-and-capacity-building/IGLC2/INTERPOL-Global-Learning-Centre/Law-Enforcement-Resources2/Law-Enforcement-Resources-Genocide-and-War-Crimes>).



## V. SOME SETBACKS IN THE FIGHT AGAINST IMPUNITY THROUGH UNIVERSAL JURISDICTION

In the year since the Sixth Committee last discussed universal jurisdiction, several states, including Argentina, Australia, Canada, Ethiopia, France, Tanzania, the USA and Zambia, failed to fulfil their responsibilities under international law to exercise universal jurisdiction to investigate and prosecute crimes under international law.

### A. ARGENTINA

An Argentine court on 23 December 2010, ruled that it had universal jurisdiction over alleged crimes against humanity committed by the former President of China and a member of the Standing Committee of the Politburo of China against members of the Falun Gong. However, the court declined to exercise jurisdiction on the ground that the same case was being investigated by a Spanish investigating judge. That ruling is now being challenged in the Court of Cassation (*Corte de Casación*). Amnesty International has filed an *amicus curiae* brief in the Court of Cassation explaining why the Spanish investigation did not bar the Argentine court from proceeding.<sup>112</sup>

### B. AUSTRALIA

Australia took two retrograde steps in the fight against impunity for crimes under international law.

On 15 August 2012, the Australian High Court upheld a decision in 2011 by the Federal Court that Charles Zentai, a former Hungarian soldier, could not be extradited to Hungary to face trial for war crimes on the ground that war crimes were not defined as crimes under Hungarian law at the time they were committed in 1944, ensuring that he has a safe haven from prosecution.<sup>113</sup> Judge Heydon

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<sup>112</sup> For the decision now being challenged in the Court of Cassation, see Resolution, Federal Criminal High Court, Court I, C/No.44.196 “Luo Gan”, File No. 17.885/05, Buenos Aires, 23 December 2010 (English translation on file with Amnesty International).

<sup>113</sup> *Minister For Home Affairs Of The Commonwealth v. Charles Zentai*, [2012] HCA 28, 15 August 2012 (<http://www.austlii.edu.au/au/cases/cth/HCA/2012/28.html>).

dissented, pointing out that the suspect could also have been prosecuted for the ordinary crime of murder.<sup>114</sup> The suspect was charged in Hungary with beating a teenager to death in Budapest in 1944 for failing to wear a star identifying him as a Jew. The suspect, who moved to Australia in 1950 and subsequently became an Australian citizen, has denied the charges and has been contesting the extradition request since 2005.<sup>115</sup>

Even though the Australian court decision is inconsistent with international human rights law, which makes it clear that the prohibition of retrospective criminal law does not bar a national prosecutor from prosecuting a person for conduct that was criminal under international law when committed, Australian officials declined to seek a rehearing to correct the court's erroneous decision.<sup>116</sup> A spokesperson for Jason Clare, Australian Minister for Home Affairs, confirmed that Charles Zentai would not be surrendered to Hungary.<sup>117</sup> Indeed, it is astonishing that neither the majority nor the dissenting judge addressed this point. States have recognized for at least six decades since the adoption of the Universal Declaration of Human Rights that the prohibition of retroactive criminal law does not apply to national criminal legislation enacted after the relevant conduct became recognized as criminal under international law.<sup>118</sup> Article 15 of the International Covenant on Civil and Political Rights, which Australia and Hungary have both ratified, contains a similar prohibition.<sup>119</sup> Thus, nothing in

<sup>114</sup> *Ibid.*, paras. 87 – 88 (Heydon, J., dissenting).

<sup>115</sup> Associated Press, 'Australian court bars extradition in WWII case' 15 August 2012 (<http://www.google.com/hostednews/ap/article/ALeqM5gi-beUEzzV7B1ongyz2vVlr5YRiQ?docId=134a1586293346af925e24a3c6399fda>).

<sup>116</sup> Reuters, 'Nazi suspect in Australia wins extradition fight', Jerusalem Post, 15 August 2012 (<http://www.jpost.com/International/Article.aspx?id=281290>).

<sup>117</sup> *Ibid.*

<sup>118</sup> Article 11 (2) of the 1948 Universal Declaration of Human Rights declares:

*No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.*

<sup>119</sup> Article 15 of the ICCPR reads:

*1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.*

*2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.*

international human rights law prevents Australia from extraditing the suspect or Hungary from trying him for war crimes that were recognized as crimes under international law in 1944.

Arunachalam Jegatheeswaran (also known as Jegan Waran), had filed two charges of war crimes and one charge of crimes against humanity against Sri Lankan President Mahinda Rajapaksa on the eve of his arrival for the Commonwealth Heads of Government Meeting in Perth, Australia.<sup>120</sup> The complainant claimed to have witnessed intentional attacks by Sri Lankan military forces against civilian targets including a working hospital, killing patients and other civilians and he also alleged that the president ordered the unlawful detention of Tamil civilians. A Melbourne magistrate had given provisional approval for the private prosecution..

However, Attorney-General Robert McClelland then refused to authorize the private prosecution to proceed, contending that President Mahinda Rajapaksa was entitled to immunity. His spokesperson stated: "Continuation of the proceedings would be in breach of domestic law and Australia's obligations under international law."<sup>121</sup> As noted above in Section III.B, however, the International Law Commission for more than half a century has declared that current officials should not benefit from claims to immunity from prosecution for crimes under international law in foreign courts.

### C. CANADA

Despite the commencement of the third universal jurisdiction trial (see discussion above in Section IV.C.2.b), there were several setbacks to universal jurisdiction in Canada.

First, as of 23 September 2012, Canadian police and prosecutors continued to take no action on allegations that a former head of state who visited Canada in November 2011 was responsible for torture.<sup>122</sup>

Second, Canada has not yet implemented the May 2005 Committee against Torture recommendation to provide all victims in Canada, regardless where they

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<sup>120</sup> A week earlier, the Australian branch of the International Commission of Jurists had sent a report detailing alleged war crimes committed by the Sri Lankan government to the Australian Federal Police.

<sup>121</sup> The description of this case is based on a number of press reports and commentaries, including: Jamie Reese, 'Australia AG refuses to allow Sri Lanka war crimes case', *Jurist*, 25 October 2011 (<http://jurist.org/paperchase/2011/10/australia-ag-refuses-to-allow-war-crimes-case.php>); Paul Maley, 'War crimes charges against Sri Lankan leader quashed,' *The Australian*, October 26, 2011 (<http://www.theaustralian.com.au/national-affairs/war-crimes-charges-against-sri-lankan-leader-quashed/story-fnapmixa-1226176664652>).

<sup>122</sup> See, for example, Amnesty International, Canada urged to arrest and prosecute George W. Bush, 12 October 2011 (<http://www.amnesty.org/en/news-and-updates/report/canada-urged-arrest-and-prosecute-george-w-bush-2011-10-12>); Canadian Centre for International Justice, *Failure to Prosecute Bush for Torture Merits UN Reprimand, Attorneys Say - Human Rights Groups say Canada Violated Convention Against Torture Obligations*, 23 April 2012 ([http://www.cciij.ca/media/news-releases/2012/index.php?DOC\\_INST=4](http://www.cciij.ca/media/news-releases/2012/index.php?DOC_INST=4)).

were tortured, an effective remedy (which would necessarily require universal jurisdiction in certain cases), including a guarantee of the right to reparation (see discussion above in Section IV.D.1).

Third, in January 2012, Canada deported Léon Mugesera, suspected of genocide, despite a request by the Committee against Torture not to deport him pending completion by the Committee of its examination of his claim that he would be tortured on return to Rwanda.<sup>123</sup>

Canada has prosecuted only two persons for crimes under international law committed since the Second World War out of the thousands of persons suspected of such crimes present in Canada (see Section IV.C.2.b above) and it continues to pursue a policy of deporting such persons in preference to prosecuting them. The Committee against Torture expressed its concern about the low number of prosecutions and the preference for deporting suspects that continues to lead to impunity for the deported persons:

*[T]he very low number of prosecutions for war crimes and crimes against humanity, including torture offences, under the aforementioned laws raises issues with respect to the State party's policy in exercising universal jurisdiction. The Committee is also concerned about numerous and continuous reports that the State party's policy of resorting to immigration processes to remove or expel perpetrators from its territory rather than subjecting them to the criminal process creates actual or potential loopholes for impunity. According to reports before the Committee, a number of individuals who are allegedly responsible for torture and other crimes under international law have been expelled and not faced justice in their countries of origin. In that regard, the Committee notes with regret the recent initiative to publicize the names and faces of 30 individuals living in Canada who had been found inadmissible to Canada on grounds they may have been responsible for war crimes or crimes against humanity. If they are apprehended and deported, they may escape justice and remain unpunished (arts. 5, 7 and 8).<sup>124</sup>*

Therefore, the Committee against Torture recommended that Canada

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<sup>123</sup> 'UN Committee asks Canada to Suspend Mugesera Expulsion', Hirondele News Agency, 12 January 2012 (<http://www.hirondellenews.org/ictr-rwanda/410-rwanda-other-countries/29892-120111-rwandacanada-un-committee-asks-canada-to-suspend-mugesera-expulsion>). The next day, on 13 January 2012, a Canadian court suspended the deportation pending a hearing until 20 January 2012, on the suspect's claim that he faced torture on return. 'Canadian Judges Delay Mugesera Deportation to Rwanda' Hirondele News Agency, 13 January 2012 (<http://www.hirondellenews.org/ictr-rwanda/410-rwanda-other-countries/29899-130112-rwandacanada-canadian-judges-delay-mugesera-deportation-to-rwanda>). He was subsequently deported to Rwanda. 'Léon Mugesera Arrived in Kigali on a Special Flight', Hirondele News Agency, 24 January 2012 (<http://www.hirondellenews.org/ictr-rwanda/410-rwanda-other-countries/29932-240112-rwanda-canada-leon-mugesera-arrived-in-kigali-on-a-special-flight>). For further information about this case, see Canadian Centre for International Justice, CCIJ's Public Cases and Interventions ([http://www.cci-j.ca/programs/cases/index.php?WEBYEP\\_DI=3](http://www.cci-j.ca/programs/cases/index.php?WEBYEP_DI=3)).

<sup>124</sup> Committee against Torture, Canada: Concluding observations, U.N. Doc. CAT/C/CAN/CO/6, 25 June 2012, para. 14 (<http://www2.ohchr.org/english/bodies/cat/cats48.htm>).

*take all necessary measures with a view to ensuring the exercise of the universal jurisdiction over persons responsible for acts of torture, including foreign perpetrators who are temporarily present in Canada, in accordance with article 5 of the Convention. The State party should enhance its efforts, including through increased resources, to ensure that the “no safe haven” policy prioritizes criminal or extradition proceedings over deportation and removal under immigration processes.*<sup>125</sup>

Fourth, on 21 September 2012, Canada continued its policy preference of deporting persons suspected of crimes under international law rather than prosecuting them when it extradited Jorge Vinicio Sosa Orantes, a naturalized US citizen, for immigration fraud. He fled to Canada in 2010 after learning that he was being investigated for this offence and was arrested in Lethbridge in January 2011 by the Royal Canadian Mounted Police. Jorge Vinicio Sosa Orantes is accused of lying when he applied for his US citizenship in 2008 by failing to disclose that he was a former member of the Guatemalan armed forces and for denying that he had ever committed a crime for which he had not been arrested, namely his alleged responsibility as the commanding officer of a Guatemalan armed forces unit, the Kabiles, for killing at least 222 people in the village of Dos Erres, Guatemala on 7 December 1982, many of whom were first raped and then thrown alive down a well (see also the discussion of this case in Section V.G below).<sup>126</sup>

The Canadian decision has been severely criticized by civil society organizations working to further the cause of international justice. For example, Matt Eisenbrant, Legal Director of the Canadian Centre for International Justice, said the “Canadian government appears to be interested in simply sending the problem somewhere else rather than responding to the voices of survivors and families of victims who wanted Sosa tried for crimes against humanity.”<sup>127</sup> He added, “I think it’s a pretty clear sign the Canadian government wasn’t interested in full justice in this case.”<sup>128</sup>

There remains a possibility, however, that Jorge Vinicio Sosa Orantes may eventually face prosecution at some point in Guatemala. US authorities indicated that, if he were convicted of immigration fraud, which carries a maximum 15-year prison sentence, he would be deported to Guatemala or, if Guatemala requested

<sup>125</sup> *Ibid.*

<sup>126</sup> Stephane Massinon, ‘Accused war criminal Jorge Sosa extradited from Alberta to U.S. – Guatemalan accused in infamous Dos Erres slaughter flown to Los Angeles’, Calgary Herald, 22 September 2012 (<http://www.calgaryherald.com/news/crime-and-justice/Guatemalan+accused+crimes+extradited/7285099/story.html>).

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

<sup>128</sup> *Ibid.* For further information about this case, see Canadian Centre for International Justice, CCIJ’s Public Cases and Interventions - Jorge Sosa Orantes ([http://www.ccij.ca/programs/cases/index.php?WEBYEP\\_DI=16](http://www.ccij.ca/programs/cases/index.php?WEBYEP_DI=16)); Jason Kandel, ‘Ex-Guatemalan Army Commander Connected to Massacre Faces Charges’, NBC News Connecticut, 24 September 2012 (<http://www.nbcconnecticut.com/news/national-international/Ex-Guatemalan-Army-commander-massacre-charges-United-States-170916621.html>).

his extradition, extradited to that country.<sup>129</sup> However, if he is deported or extradited after a conviction, it will only be after he has served the US sentence. Therefore, the possibility of an effective trial, now almost two decades after the killings and rapes, would be even further delayed – possibly for another decade and a half - and evidence would be more difficult to locate and some surviving victims and witnesses might have died in the interim.<sup>130</sup>

#### D. ETHIOPIA

George Bush visited Ethiopia in December 2011. The Ethiopian authorities did not open a criminal investigation of allegations that he was responsible for torture when he served as President of the USA.<sup>131</sup>

#### E. FRANCE

In September 2012, the Paris Prosecutor (*le parquet de Paris*) dismissed a complaint by an association of victims in Morocco (*l'Association marocaine pour la protection de l'enfance et l'éveil de la conscience de la famille*) against President Bashar Al-Assad of Syria filed on 27 August 2012, alleging that he was responsible for the war crime of using children as human shields. The Paris Prosecutor reportedly declined to act on the ground that under French law no action could be taken because the suspect was not present in France.<sup>132</sup>

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<sup>129</sup> Nadia Moharib, 'Canadian justice watchdogs are disappointed to learn a suspected Guatemalan war criminal who's been in custody in Calgary was extradited to the U.S.', CNews, 23 September 2012 (<http://cnews.canoe.ca/CNEWS/Crime/2012/09/22/20222531.html>).

<sup>130</sup> Massione, *supra* note 126 (A US official, Jere Miles, a deputy special agent in charge of Homeland security investigations in Los Angeles, stated: "If his citizenship is revoked, he would be deported back to Guatemala after serving his prison sentence.").

<sup>131</sup> Amnesty International Urges Ethiopia, Tanzania, Zambia to Bring George W. Bush to Justice, 1 December 2011 (<http://www.amnestyusa.org/news/press-releases/amnesty-international-urges-ethiopia-tanzania-zambia-to-bring-george-w-bush-to-justice>); Tesfa-Alem Tekle, 'Ethiopia rejects calls for Bush arrest, honors him a prize', Sudan Tribune, 5 December 2011 (<http://www.sudantribune.com/Ethiopia-rejects-calls-for-Bush,40906>).

<sup>132</sup> 'La plainte contre Assad classée à Paris', *Libération*, 3 septembre 2012 ([http://www.liberation.fr/monde/2012/09/03/la-plainte-contre-assad-classee-a-paris\\_843489](http://www.liberation.fr/monde/2012/09/03/la-plainte-contre-assad-classee-a-paris_843489)); 'Plainte contre Al-Assad pour actes de torture sur des enfants syriens', *Libération*, 29 août 2012 ([http://www.liberation.fr/monde/2012/08/29/plainte-contre-al-assad-pour-actes-de-torture-sur-des-enfants-syriens\\_842570](http://www.liberation.fr/monde/2012/08/29/plainte-contre-al-assad-pour-actes-de-torture-sur-des-enfants-syriens_842570)).

## F. TANZANIA

George Bush visited Tanzania in December 2011. The Tanzanian authorities did not open a criminal investigation of allegations that he was responsible for torture when he served as President of the USA.<sup>133</sup>

## G. UNITED STATES OF AMERICA

There have been at least four setbacks with regard to universal jurisdiction in the USA.

First, on 5 March 2012, the US Supreme Court announced that it would rehear arguments in *Kiobel v. Royal Dutch Petroleum*. That case initially involved a challenge to the applicability of a two-century-old US law permitting Federal courts to entertain civil universal jurisdiction suits seeking reparation for torts under international law applied to corporations. The court originally took the case in October 2011 and heard arguments to determine whether three oil companies are exempt from US lawsuits under the Alien Tort Statute of 1789 for alleged torture and international law violations. It is disturbing that the US Supreme Court thought that there was any doubt about the applicability of the Alien Tort Statute abroad in the light of more than three decades of Federal court decisions in cases exercising universal civil jurisdiction in which this question had not been raised. In a brief order, the Supreme Court

directed [the parties] to file supplemental briefs addressing the following question: "Whether and under what circumstances the Alien Tort Statute ... allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."<sup>134</sup>

The Nigerian plaintiffs suing the foreign-based oil companies argued that domestic US common law permitted such suits against foreign corporations. The Federal government agreed and added that international law does not prohibit such suits. The oil companies contended that international, not US, law controlled and that international law did not recognize corporate responsibility, asserting, erroneously: "No other nation in the world permits its court to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the

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<sup>133</sup> Amnesty International Urges Ethiopia, Tanzania, Zambia to Bring George W. Bush to Justice, 1 December 2011 (<http://www.amnestyusa.org/news/press-releases/amnesty-international-urges-ethiopia-tanzania-zambia-to-bring-george-w-bush-to-justice>); Windsor Genova, 'Tanzania Ignores Arrest Call for George W. Bush, Welcomes Ex-President', Business and Health, 2 December 2011 (<http://au.ibtimes.com/articles/259880/20111201/tanzania-ignores-arrest-bush-george-w-jakaya.htm>); 'Tanzania welcomes Bush on African tour', AFP, 1 December 2011 (<http://www.google.com/hostednews/afp/article/ALeqM5hdYUSL2InnGwfKWswGxtib6G0gEw>).

<sup>134</sup> The 5 March 2012 order is available at: <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1491.htm>.

nation has no connection."<sup>135</sup> In making this unsupported assertion, the oil companies disregarded the recent judgments discussed above in Section IV.C.2.g of the Netherlands court in the *El-Hojouj* civil universal jurisdiction case and the French court in the *Plavšić* civil universal jurisdiction case awarding reparation for crimes under international law, as well as the legislation in at least 25 countries around the world permitting civil claims for reparation to be made in criminal proceedings.<sup>136</sup>

The case was reheard by the US Supreme Court on 1 October 2012.<sup>137</sup>

In a second setback to international justice in the USA, Federal prosecutors continued to implement their policy of seeking to deprive persons suspected of crimes under international law of their US citizenship (if they are naturalized citizens) and deport them (or simply to deport them if they are foreigners) – without any assurance that the case would be submitted to the prosecuting authorities to determine whether to prosecute the suspects – instead of opening a criminal investigation with a view to prosecuting the suspects if there is sufficient admissible evidence. This practice, which has been severely criticized earlier this year with regard to allegations of torture by the Committee against Torture (see Section IV.D.1 above), since it can lead to impunity for the worst imaginable crimes.<sup>138</sup>

In a recent example of this unfortunate policy, Federal prosecutors informed a court in Concord, New Hampshire, that they would not drop immigration fraud charges against Beatrice Munyenyezi, 41, whom they accused of helping to organize mass killings and rapes in the southern Rwandan town of Butare in 1994, and would seek a second trial, with additional witnesses, on these charges after a mistrial. The new trial, originally scheduled to begin in September 2012, has been postponed for five months to permit the defence to prepare for the cross-examination of 11 new prosecution witnesses.<sup>139</sup>

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<sup>135</sup> See Jaclyn Belczyk, 'Supreme Court to rehear arguments on corporate liability for human rights violations', *The Jurist*, 5 March 2012 (<http://jurist.org/paperchase/2012/03/supreme-court-to-rehear-arguments-on-corporate-liability-for-human-rights-violations.php>).

<sup>136</sup> See Amnesty International, *Universal Jurisdiction: The scope of universal civil jurisdiction*, Index: IOR 53/008/2007, July 2007 (<http://www.amnesty.org/en/library/info/IOR53/20008/2007>).

<sup>137</sup> For a link to the transcript of the reargument, see Julia Zebley, 'Supreme Court rehears arguments in corporate liability case from last term', *Jurist – Paper Chase*, 2 October 2012 (<http://jurist.org/paperchase/2012/10/supreme-court-rehears-arguments-in-corporate-liability-case-from-last-term.php>).

<sup>138</sup> The policy is, however, an improvement to the extent that the suspects are now at least prosecuted for immigration offences instead of simply deported, which was the former practice.

<sup>139</sup> The account of this case is based On A Number Of Sources, Including: Maddie Hanna, 'Genocide Trial Put Off 5 Months - FEDERAL JUDGE CITES 11 NEW WITNESSES, CONCORD MONITOR, 6 SEPTEMBER 2012 (<HTTP://WWW.CONCORDMONITOR.COM/ARTICLE/352745/GENOCIDE-TRIAL-PUT-OFF-5-MONTHS?SESS500B2EBF13A998ED9B08DB92EBB40631=GOOGLE&PAGE=FULL>); Jason McLure, 'US woman to be retried in Rwandan genocide case', *Reuters*, 31 March 2012



Although Beatrice Munyenyezi's husband and mother-in-law were convicted of genocide by the International Criminal Tribunal for Rwanda and sentenced to life imprisonment, USA granted her asylum in 1998 and citizenship in 2003 after she swore that she had never been involved in genocide. Federal prosecutors argue that this statement amounted to immigration fraud. If convicted, she could face up to 10 years in prison and the possible loss of her US citizenship, which would likely result in her being deported to Rwanda. The US authorities do not appear to have explained why she is being prosecuted for these relatively minor offences under national law, instead of genocide, even though the length and extent of the investigation for the purposes of immigration fraud was similar to what would have been required for an investigation for the purposes of prosecuting her for genocide, a crime under international law.

During the initial trial on immigration fraud charges, prosecution witnesses reportedly said that Beatrice Munyenyezi helped supervise a roadblock in front of a hotel owned by her mother-in-law, a minister in the interim Hutu government, to stop cars and separate Tutsis from Hutus to be killed. Witnesses are also reported to have said that she selected Tutsi women to be raped and one witness reportedly claimed that she shot a nun with a pistol.

A third setback to universal jurisdiction in the USA is represented by the first application of the 2008 Child Soldiers Accountability Act (CSAA) entrusting US courts with universal jurisdiction over the crimes related to the involvement of children in armed conflict. After a six-year-long investigation carried out by federal agents with the Buffalo office of US Immigration and Customs Enforcement (ICE), on 6 February 2012, an immigration judge ruled that the former leader of a Liberian armed group, George Boley, who was present on US territory, "abandoned his lawful permanent resident status" and could be deported to Liberia under both the 2008 CSAA for having recruited and used child soldiers and the charge of committing extrajudicial killings.<sup>140</sup> On 30 March 2012, George Boley was, therefore, deported back to Monrovia, Liberia, even though the length and extent of the investigation for the purposes of deportation was similar to what would have been required for an investigation for the purposes of prosecuting him for these crimes under international law. As far as Amnesty International is aware, no steps have been taken by Liberian authorities to investigate the allegations that he is responsible for the war crimes of recruiting and using child soldiers.

Fourth, in the most recent example of this preference for prosecuting persons suspected of crimes under international law for the far less serious offence under national law of immigration fraud, on 21 September 2012, US authorities obtained the extradition from Canada of a US national suspected of lying when applying for his US citizenship about his alleged responsibility as a member of the Guatemalan armed forces for killing at least 222 people in Guatemala (for the

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(<http://af.reuters.com/article/topnews/idafjoe82u01920120331>); 'witness list overhauled in genocide case', Concord Monitor, 4 August 2012 (<http://www.concordmonitor.com/category/tags/beatrice-munyenyezi>).

140 The description of this case is based on a number of sources, including TRIAL and T.J. Pignataro, 'War crimes suspect deported to Liberia. Boley as rebel leader recruited child soldiers', Buffalo News, 30 March 2012, (<http://www.buffalonews.com/city/police-courts/courts/article788348.ece>).

background to this case see the discussion regarding Canada in Section V.C above). US authorities indicated that, if he were convicted of immigration fraud, which carries a maximum 15-year prison sentence, he would be deported to Guatemala or, if Guatemala requested his extradition, extradited to that country.<sup>141</sup>

## H. ZAMBIA

George Bush visited Zambia in December 2011. Zambian police and prosecutors did not open an investigation of allegations that he was responsible for torture when he served as President of the USA.<sup>142</sup>

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<sup>141</sup> Nadia Moharib, 'Canadian justice watchdogs are disappointed to learn a suspected Guatemalan war criminal who's been in custody in Calgary was extradited to the U.S.', CNews, 23 September 2012 (<http://cnews.canoe.ca/CNEWS/Crime/2012/09/22/20222531.html>).

<sup>142</sup> [JohnThomas Didymus](http://digitaljournal.com/article/315512), 'We will not arrest Bush, says Zambian foreign minister', Digital Journal, 4 December 2011 (<http://digitaljournal.com/article/315512>); 'Ex US President George Bush helps renovate health center in Africa', *Health & Well-being*, 3 July 2012 (<http://www.faceofmalawi.com/2012/07/ex-us-president-george-bush-helps-renovate-health-center-in-africa/>).

# ANNEX I – POSITIVE STATEMENTS BY GOVERNMENTS AT THE SIXTH COMMITTEE DISCUSSION IN OCTOBER 2011

As noted above in Section II.A.1, there were numerous positive statements on a range of topics made by states and one observer about universal jurisdiction that were made in last year's discussion in the Sixth Committee, as well as in state reports to the UN Secretary-General this year, all of which lay a solid foundation for a constructive discussion this year. This annex singles out those statements – made by almost every state that intervened - that reaffirm that international law permits and, in some instances, requires states to exercise universal jurisdiction over crimes under international law. They fully support the statement of the Chair of the Working Group that “[n]o delegation had rejected the concept of universal jurisdiction” and that “[a] wide majority of delegations had acknowledged the importance of universal jurisdiction as a tool in the fight against impunity for the most serious crimes against humanity”.<sup>143</sup> The statements include statements made on behalf of groups of states, those made by individual states and one statement made by an observer, the International Committee of the Red Cross.

## A. GROUPS OF STATES

A number of states speaking on behalf of groups of states strongly supported universal jurisdiction. Australia, Canada and New Zealand, in a joint statement by Australia, declared:

*it was in the interests of all States to ensure suppression of the most serious crimes of international concern by exercising criminal jurisdiction over the individuals responsible, irrespective of where the conduct occurred, the nationality of the perpetrator and any other links between the crime and the prosecuting State. In that regard, the well-established principle of universal jurisdiction generally provided a permissive basis. . . . [U]niversal jurisdiction should be viewed as an important complementary mechanism for ensuring that persons accused of such crimes did not enjoy impunity where the territorial State was unable or unwilling to exercise*

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<sup>143</sup> Sixth Committee, Summary record of the 12th meeting, 12 October 2011, at 3 p.m., U.N. Doc. A/C.6/66/SR.17, 16 November 2011, para. 18 (<http://daccess-dds-un.un.org/doc/UNDOC/GEN/N11/558/54/PDF/N1155854.pdf?OpenElement>).

*jurisdiction*.<sup>144</sup>

Qatar, on behalf of the Arab Group, explained: “Universal jurisdiction was . . . important as a complementary mechanism for ensuring that persons suspected of [serious crimes, including genocide, war crimes and crimes against humanity,] did not escape prosecution in the event that they moved between countries and that the principle of territoriality was not brought to bear.”<sup>145</sup> Kenya, speaking on behalf of the Group of African States, said that, “as reflected in various African Union decisions, the African States recognized universal jurisdiction as a principle of international law.”<sup>146</sup>

## B. INDIVIDUAL STATES

Individual states also expressed strong support for universal jurisdiction. The following interventions are illustrative.

**Algeria** declared: “It was largely agreed that piracy qualified for inclusion on that basis, as did crimes against humanity, war crimes, genocide, slavery and torture.”<sup>147</sup>

**Argentina** recognized that “[a]ny impunity gap arising in circumstances where those States were unable or unwilling to prosecute could be significantly narrowed through use of the exceptional tool of universal jurisdiction.”<sup>148</sup>

**Belgium** noted that the information contained in the Secretary-General’s report “confirmed the generally agreed view among States that universal jurisdiction was to be exercised in the interests of the international community in order to end impunity for certain crimes under international law.”<sup>149</sup>

**Brazil** said that “the aim of universal jurisdiction was to deny impunity to individuals allegedly responsible for extremely serious crimes defined by international law that by their gravity shocked the conscience of all humanity and violated imperative norms of international law”.<sup>150</sup>

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<sup>144</sup> Sixth Committee, Summary record of the 12th meeting, 12 October 2011, at 10 a.m., U.N. Doc. A/C.6/66/SR.12, 16 November 2011, para. 6 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/541/11/PDF/N1154111.pdf?OpenElement>).

<sup>145</sup> *Ibid.* [12 October mtg., 10 a.m.], para. 9.

<sup>146</sup> *Ibid.* [12 October mtg., 10 a.m.], para. 12.

<sup>147</sup> *Ibid.*, [12 October mtg., 10 a.m.], para. 66.

<sup>148</sup> *Ibid.*, [12 October mtg., 10 a.m.], para. 71.

<sup>149</sup> *Ibid.*, [12 October mtg., 10 a.m.], para. 52.

<sup>150</sup> *Ibid.* [12 October mtg., 3p.m.], para. 49.

**Burkina Faso** confirmed that, “[i]n common with all other African States, it was in favour of the principle of universal jurisdiction and was determined to combat impunity”.<sup>151</sup>

**Chile** stated that universal jurisdiction could “be applied on the basis of international law, especially treaty law, in order to prevent impunity for crimes against humanity, war crimes and genocide.”<sup>152</sup>

**Colombia** stated that

*[u]niversal jurisdiction existed for crimes established in either treaty law [citing apartheid] or customary law . . . Under customary law, the crimes of genocide, war crimes and crimes against humanity were covered by universal jurisdiction, as recognized by national and international courts and tribunals.*<sup>153</sup>

**El Salvador** said that universal jurisdiction applied

*in cases of serious violations of human rights and peremptory norms of international law. To deny it would be an invitation to arbitrary justice and violation of the most basic principles of human dignity; it was therefore an essential obligation of the international community.*<sup>154</sup>

**Ethiopia** declared that it

*was committed to ensuring that individuals who committed grave offences against the international community as a whole were brought to justice through application of the principle of universal jurisdiction, which was enshrined in the Ethiopian Criminal Code as a complementary instrument in the fight against impunity for such crimes.*<sup>155</sup>

**Finland** said that “that the principle of universal jurisdiction was an important tool for ensuring accountability” and that “[i]t was generally agreed that international customary law allowed for universal jurisdiction with regard to certain

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<sup>151</sup> *Ibid.* [12 October mtg., 3p.m.], para. 31.

<sup>152</sup> *Ibid.* [12 October mtg., 3p.m.], para. 21.

<sup>153</sup> *Ibid.* [12 October mtg., 10 a.m.], para. 27.

<sup>154</sup> *Ibid.* [12 October mtg., 10 a.m.], para. 30.

<sup>155</sup> *Ibid.*, [12 October mtg., 10 a.m.], para. 38.

international crimes”.<sup>156</sup>

**Greece** explained that “States seemed to be in agreement concerning the grave nature of the crimes over which universal jurisdiction should be exercised” that it enabled “States to exercise jurisdiction, on behalf of the international community, over the most serious crimes, irrespective of the place where the crimes had been committed, the nationality of the offenders and the victims, or any other link between the crime and the forum State” that “[t]he key rationale for universal jurisdiction was the need to combat impunity” and that “[u]niversal jurisdiction was an important complementary mechanism in the collective system of criminal justice.”<sup>157</sup>

**Guatemala** pointed out that

*International cooperation for the purpose of applying universal jurisdiction must be strengthened and harmonized, especially in view of the difficulties involved in finding and preserving evidence, issuing judgments in absentia, executing arrest warrants and conducting extradition proceedings.*<sup>158</sup>

**Indonesia** stated that

*the principle of universal jurisdiction was of great relevance to all Member States in their efforts to put an end to impunity for serious crimes under international law. The principle was based on the notion that some crimes were so harmful to international interests that States were entitled, and even obliged, to bring proceedings against their perpetrators*

and that “the principle of universal jurisdiction was recognized in treaties and customary international law”.<sup>159</sup>

**Ireland** noted “the reality that universal jurisdiction might often be the last defence against impunity”.<sup>160</sup>

**Israel** noted that “[t]he principle of universal jurisdiction was an important tool in strengthening the rule of law”.<sup>161</sup>

**Kenya** declared that “the principle of universal jurisdiction was a vital tool for

<sup>156</sup> *Ibid.* [12 October mtg., 3p.m.], paras. 27 – 28.

<sup>157</sup> *Ibid.* [12 October mtg., 3p.m.], para. 16.

<sup>158</sup> *Ibid.* [12 October mtg., 10 a.m.], para. 23.

<sup>159</sup> *Ibid.* [12 October mtg., 3p.m.], paras. 12 - 13.

<sup>160</sup> *Ibid.* [12 October mtg., 3p.m.], para. 41.

<sup>161</sup> *Ibid.*, [12 October mtg., 10 a.m.], para. 74.

achieving justice and combating impunity.<sup>162</sup>

**Malaysia** said that “[t]here was general agreement that the most serious crimes of international concern were subject to universal jurisdiction owing to their heinous nature”.<sup>163</sup>

**Mozambique** declared:

The institution of universal jurisdiction, understood as the power of States to punish certain crimes, regardless of where and by whom they had been committed, was in principle universally accepted. By strengthening the protection of human rights, the principle of universal jurisdiction could be seen as complementary to national protective mechanisms. The crimes that fell within international jurisdiction were

war crimes, genocide, crimes against humanity and aggression, all of which violated the international order.<sup>164</sup>

The **Netherlands** stated that

*universal jurisdiction was an important tool in the fight against impunity for the most serious crimes under international law. It contributed to the implementation of the principle of complementarity enshrined in the Statute of the International Criminal Court.*

**Norway** stated that “the importance of universal jurisdiction as a tool in combating impunity for the most serious crimes must be fully recognized.”<sup>165</sup>

**Peru** noted that universal jurisdiction was a complementary mechanism and that civil universal jurisdiction should not be overlooked.<sup>166</sup>

The **Republic of Korea** stated that

*universal jurisdiction in the strict sense was established only for piracy and war crimes. It could be exercised even where there was no treaty-based obligation to prosecute those crimes and was an essential mechanism in the fight against impunity.*<sup>167</sup>

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<sup>162</sup> *Ibid* [12 October mtg., 3p.m.], para. 34.

<sup>163</sup> *Ibid.*, [12 October mtg., 10 a.m.], para. 61.

<sup>164</sup> *Ibid* [12 October mtg., 3p.m.], para. 57.

<sup>165</sup> *Ibid.* [12 October mtg., 10 a.m.], para. 19.

<sup>166</sup> *Ibid.*, [12 October mtg., 10 a.m.], para. 33.

<sup>167</sup> *Ibid* [12 October mtg., 3p.m.], para. 58.

## The *Russian Federation*

*acknowledged the importance of universal jurisdiction in combating impunity for the gravest international crimes. In [the Russian Federation], the courts were authorized by international treaties, the rules of customary international law and, to some extent, national legislation to institute proceedings for acts of genocide, war crimes and piracy.*<sup>168</sup>

**Rwanda** said that it “was not opposed to the principle of universal jurisdiction, which was valuable as a subsidiary tool in countering impunity, particularly for crimes such as the genocide suffered by Rwanda”.<sup>169</sup>

**South Africa** explained that “the African Union had recognized the purpose of the principle as ensuring that those who committed grave offences did not do so with impunity” and that “[i]t was not the validity of the principle itself that was in question, but its scope and application.”<sup>170</sup>

**Spain** said that the reports by states to the Secretary-General “confirmed that the practice of universal jurisdiction was both widespread and generally accepted at the international level and was not associated exclusively with a particular regional group or legal system” and that “[u]niversal jurisdiction was an effective instrument in combating impunity for grave crimes of a particular kind”.<sup>171</sup>

**Sri Lanka** said that “the concept of universal jurisdiction had developed mainly as a means for maritime States to assert jurisdiction over piracy but had gradually been extended to other egregious acts such as crimes against humanity, war crimes, genocide and torture”.<sup>172</sup>

**Sweden** said that “the principle of universal jurisdiction was enshrined in international law and was an important tool in the fight against impunity for serious international crimes such as genocide, crimes against humanity, war crimes or torture”.<sup>173</sup>

**Switzerland** noted amendments expanding the scope of its national legislation providing for such jurisdiction.<sup>174</sup>

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<sup>168</sup> *Ibid.*, [12 October mtg., 10 a.m.], para. 41.

<sup>169</sup> *Ibid.*, [12 October mtg., 10 a.m.], para. 69.

<sup>170</sup> *Ibid* [12 October mtg., 3p.m.], para. 7.

<sup>171</sup> *Ibid.* [12 October mtg., 3p.m.], paras. 37 – 38.

<sup>172</sup> *Ibid.* [12 October mtg., 3p.m.], para. 1.

<sup>173</sup> *Ibid.* [12 October mtg., 3p.m.], para. 10.

<sup>174</sup> *Ibid.*, [12<sup>th</sup> mtg., 10a.m.], paras. 16 -18.



**Tunisia** explained that “[t]he principle of universal jurisdiction derived from the responsibility to protect a fundamental universal value, namely, to ensure that the most serious crimes of concern to the international community as a whole did not go unpunished.”<sup>175</sup>

The **United Kingdom** declared that universal jurisdiction “was an essential mechanism in the fight against impunity for the most serious international crimes”, applicable to “a small number of specific crimes, including piracy, grave breaches of the Geneva

Conventions and other war crimes” and that, given the limitations of international criminal courts, “prosecutions at the domestic level remained a vital component of the quest to achieve justice and ensure that the perpetrators of serious crimes could not evade it”.<sup>176</sup>

**Zambia** declared that “when used in good faith, the principle of universal jurisdiction was a powerful tool for preservation of the fundamental values of the international community, protection and promotion of the rule of law and human rights, and the effort to combat impunity”.<sup>177</sup>

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<sup>175</sup> *Ibid.* [12 October mtg., 3p.m.], para. 54

<sup>176</sup> *Ibid.* [12 October mtg., 3p.m.], para. 24.

<sup>177</sup> *Ibid.*, [12 October mtg., 10 a.m.], para. 54.

Significantly, no state or group of states suggested that international law prevented states from exercising universal jurisdiction over conduct amounting to crimes under international law.<sup>178</sup>

### C. OBSERVERS

The International Committee of the Red Cross made a lengthy statement of support for the use of universal jurisdiction to investigate and prosecute war crimes in international and non-international armed conflict. In particular, it said:

*State practice had also confirmed as a norm of customary international law the right of States to exercise universal jurisdiction over all war crimes other than grave breaches, including serious violations of common article 3 of the Geneva Conventions and Additional Protocol II, committed in non-international armed conflicts, and other war crimes such as those included in the Rome Statute of the International Criminal Court. ICRC was pleased to observe that many States had taken that approach when implementing at the domestic level the principle of complementarity underpinning the Rome Statute. It was also encouraging that numerous States had given effect to their obligations in their legislation. Several individuals had been prosecuted in national courts for grave breaches of the Geneva Conventions or other war crimes on the basis of some form of extraterritorial jurisdiction.*<sup>179</sup>

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<sup>178</sup> Even states that expressed reservations about the exercise of universal jurisdiction in certain cases accepted that universal jurisdiction was permitted under international law. See, for example, Sudan (noting that African leaders appreciated the importance of the principle of universal jurisdiction), [12<sup>th</sup> meeting], para. 37; Democratic Republic of the Congo (DRC) (which erroneously stated that “[o]nly a tiny minority of States had conferred universal jurisdiction on their national courts by law” and that the DRC courts did not have such jurisdiction over crimes under international law, acknowledged that “universal jurisdiction undeniably played a role in combating impunity for serious crimes”), *ibid.*, paras. 45 and 47.

<sup>179</sup> *Ibid.* [12 October mtg., 3p.m.], para. 62

# ANNEX II - A BRIEF NOTE ON THE ORIGIN OF THE ANNUAL DISCUSSION AND THE 2009 AND 2010 SESSIONS

The Sixth Committee has discussed the scope and application of the principle of universal jurisdiction every year since 2009 at the initiative of the African group under the agenda item: “*The scope and application of the principle of universal jurisdiction*”.

## 1. THE AFRICAN GROUP INITIATIVE

This initiative came after attacks by Rwanda on so-called “abusive” universal jurisdiction. In April 2008, the African Union (AU) Commission commissioned a study on universal jurisdiction. The AU study, submitted to the AU Conference of Ministers of Justice/Attorneys General in June 2008, concluded that universal jurisdiction “has never been discussed at the level of the United Nations” and, erroneously, that “there is no widespread State practice” on the matter, and, therefore, a thorough discussion at the UN General Assembly was needed.<sup>180</sup> However, in November that same year, the AU and European Union (EU) Troika established an *ad hoc* expert group that published a subsequent, more comprehensive and more accurate study in April 2009.<sup>181</sup> This expert group concluded, *inter alia*, that a majority of AU member states have universal jurisdiction legislation regarding crimes defined in treaties and customary international law; that 13 African states have abolished in national law, or have agreed to do so, provisions recognizing claims of immunity by state officials for crimes under international law; and that some of the cases that have been cited as an “abuse” of universal jurisdiction were not even based on universal jurisdiction.

The AU then decided to refer the issue to the UN General Assembly “with the view to establishing regulatory provisions for its application”.<sup>182</sup> The explanatory

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<sup>180</sup> Report of the Commission on the Use of the Principle of Universal Jurisdiction by Some Non-African States as Recommended by the Conference of Ministers of Justice/Attorneys General, Executive Council, 13th Ord. Sess. 24 – 28 June 2008, Sharm El-Sheikh, Egypt, EX.CL/411(XIII) ([http://internationaljusticeafrica.org/documents/EX.CL%20411\(XIII\)%20-%20Study%20on%20Universal%20Jurisdiction.doc](http://internationaljusticeafrica.org/documents/EX.CL%20411(XIII)%20-%20Study%20on%20Universal%20Jurisdiction.doc)).

<sup>181</sup> Council of Europe, The AU-EU Expert Report on the Principle of Universal Jurisdiction, 8672/09, Brussels, 16 April 2009 (<http://register.consilium.europa.eu/pdf/en/09/st08/st08672.en09.pdf>).

<sup>182</sup> Request for the inclusion of an additional item in the agenda of the sixty-third session - The scope and

memorandum accompanying the request made by Tanzania on 23 July 2009 acknowledged that the AU 2008 study “indicated that there was no dispute or controversy with the principle itself”.<sup>183</sup> However, when expressing its concerns about the supposed “ad hoc and arbitrary application, particularly towards African leaders”, of universal jurisdiction by some (unspecified) courts, the explanatory memorandum surprisingly made no reference to the more comprehensive and up-to-date joint AU-EU Troika *ad hoc* expert study published on 16 April 2009, three months earlier.<sup>184</sup>

It is disappointing that AU Summits have continued to contend that universal jurisdiction is being “abused”, without citing any specific cases or aspects of those cases that supposedly constitute “abuses”. Providing such examples would facilitate a constructive dialogue about the exercise of universal jurisdiction and help to rectify misunderstandings about the use of this essential tool of international justice. The most recent AU Summit, in July 2012 in Addis Ababa, urged members, among other steps, to raise concerns about the supposed “abuse” of universal jurisdiction by some non-African states, and reiterated its decision requesting that members not execute warrants that were an “abuse” of universal jurisdiction.<sup>185</sup> In Addis Ababa, the AU Executive Council also urged member states to adopt a restrictive universal jurisdiction model law that would seriously weaken this essential bulwark against impunity.<sup>186</sup>

## 2. THE DISCUSSION IN 2009

After the 2009 discussion in the Sixth Committee,<sup>187</sup> the General Assembly

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application of the principle of universal jurisdiction, Annex I: Explanatory memorandum, Scope and application of the principle of universal jurisdiction, U.N. Doc. A/63/237/Rev.1, 23 July 2009 (<http://daccess-ddsny.un.org/doc/UNDOC/GEN/N09/421/25/PDF/N0942125.pdf?OpenElement>).

<sup>183</sup> *Ibid.*, para. 4.

<sup>184</sup> *Ibid.*, para. 5.

<sup>185</sup> Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. EX.CL/731(XXI), Assembly of the African Union, 19<sup>th</sup> Ord. Sess., 15-16 July 2012, Addis Ababa, Ethiopia ([http://au.int/en/sites/default/files/Assembly%20AU%20Dec%20416-449%20\(XIX\)%20\\_E\\_Final.pdf](http://au.int/en/sites/default/files/Assembly%20AU%20Dec%20416-449%20(XIX)%20_E_Final.pdf)).

<sup>186</sup> Decision on the African Union Model National Law on Universal Jurisdiction over International Crimes, EX.CL/Dec.708 (XXI) , Doc. EX.CL/731(XXI)c, Executive Council, 21st Ord. Sess., 9- 13 July 2012

Addis Ababa, ETHIOPIA ([http://www.african-court.org/en/images/documents/Press\\_Docs/DECISIONS%20%20of%20the%20AU%2023th%20Executive%20Council.pdf](http://www.african-court.org/en/images/documents/Press_Docs/DECISIONS%20%20of%20the%20AU%2023th%20Executive%20Council.pdf)).

<sup>187</sup> Sixth Committee, Summary record of the 12th meeting, 20 October 2008, at 10 a.m., U.N. Doc. A/C.6/64/SR.12, 25 November 2009 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/568/65/PDF/N0956865.pdf?OpenElement>); Sixth Committee, Summary record of the 13th meeting, 21 October 2009, at 10 a.m., U.N. Doc. A/C.6/64/SR.13, 24 November 2009 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/570/44/PDF/N0957044.pdf?OpenElement>); Sixth

adopted at its 64<sup>th</sup> session Resolution 64/117 requesting the Secretary-General to invite member states to “submit... information and observations on the scope and application of the principle of universal jurisdiction” including “information on the relevant applicable international treaties, their domestic legal rules and judicial practice.”<sup>188</sup>

### 3. THE DISCUSSION IN 2010

In 2010, at the General Assembly’s 65<sup>th</sup> session, the Sixth Committee again considered universal jurisdiction.<sup>189</sup> The Committee had before it the report of the Secretary-General on the scope and application of the principle of universal jurisdiction (A/65/181) as requested by the General Assembly at the previous session.<sup>190</sup> In advance of the discussion, Amnesty International published a critique of the Secretary-General’s report and the state reports,<sup>191</sup> some of which omitted relevant legislation or contained errors. Statements were made by many states, as well as the International Committee of the Red Cross in its capacity as observer.

On 6 December 2010, the General Assembly in Resolution 65/33 decided that the Sixth Committee should continue its consideration of the topic and invited member states and, for the first time, relevant observers, as appropriate, to submit information and observations.<sup>192</sup> The resolution also decided that the Sixth Committee would establish a Working Group on the Scope and Application of the Principle of Universal Jurisdiction (Working Group).

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Committee, Summary record of the 25th meeting, 12 November 2009, at 10 a.m., U.N. Doc. A/C.6/64/SR.25, 30 December 2009 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/604/24/PDF/N0960424.pdf?OpenElement>).

<sup>188</sup> U.N.G.A. Res. 64/117 ([http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/64/117](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/64/117)).

<sup>189</sup> The Sixth Committee considered the item at its 10th, 11th, 12th, 27th and 28th meetings, on 13 and 14 October, as well as on 5 and 11 November 2010. Sixth Committee, Summary record of the 10th meeting, 13 October 2010, at 10 a.m., U.N. Doc. A/C.6/65/SR.10, 3 November 2012 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/578/93/PDF/N1057893.pdf?OpenElement>).

<sup>190</sup> Report of the Secretary-General prepared on the basis of comments and observations of Governments, U.N. Doc. A/65/181, 29 July 2010 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/467/52/PDF/N1046752.pdf?OpenElement>).

<sup>191</sup> Documentation for the 65<sup>th</sup> session (<http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri.shtml>).

<sup>192</sup> U.N. G.A. Res. 65/33, 6 December 2010 ([http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/65/33](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/65/33)).

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