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# CURBING THE MANIPULATION OF UNIVERSAL JURISDICTION

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## INTRODUCTION

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In the past decade Israeli officials have been bombarded by both criminal and civil lawsuits for their political activities in the Israeli government and/or their military activities in the Israel Defense Forces. Examples of this are the criminal complaints that were filed in Belgium in 2001 against former Prime Minister Ariel Sharon and in the United Kingdom in August 2005 against Major General (res.) Doron Almog, as well as the arrest warrant that was issued in New Zealand in 2006 against former Chief of Staff Moshe Ya'alon. The most recent instance was the arrest warrant issued in the United Kingdom against Israeli opposition leader Tzipi Livni for alleged war crimes committed during Israel's Gaza Operation when she was Israel's foreign minister. Similar civil suits have also been launched in the U.S. against, for example, Avi Dichter, the former Director of the Israel Security Agency.

Israel's supporters have pointed to these legal acrobatics as a clear abuse of the principle of universal jurisdiction, a new tool in the toolbox of Israel's detractors and critics. Advocates of the Jewish state have coined the term "lawfare" to describe this situation. They define lawfare as "a strategy of using or misusing law as a substitute for traditional military means to achieve military objectives."<sup>1</sup>

While sounding far-fetched to the neutral observer and hysterical to those wary of claims of international anti-Semitism masked as anti-Israel sentiment, warnings of the possible abuse of the principle of universal jurisdiction pre-date these Israeli claims. For instance, in an article published in *Foreign Affairs* in 2001 entitled "The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny," former U.S. Secretary of State and Nobel Laureate Henry Kissinger commended advocates of universal jurisdiction for their commitment to bringing to justice human rights violators, but warned of "pushing the effort to extremes" and risking "substituting the tyranny of judges for that of governments."<sup>2</sup>

*In the early 1960s, Israel was one of the first states to invoke the principle of universal jurisdiction in its groundbreaking trial against Adolf Eichmann, the "architect of the Holocaust."*

Indeed, even the judges of the International Court of Justice (the ICJ), which is no friend of the State of Israel, warned against the possible abuse of the principle of universal jurisdiction in the *Yerodia* case in 2002,<sup>3</sup> stating: "If, as we believe to be the case, a State may choose to exercise a universal criminal jurisdiction *in absentia*, it must also ensure that certain safeguards are in place. They are absolutely essential to prevent abuse and to ensure that the rejection of impunity does not jeopardize stable relations between States."<sup>4</sup>

Israel is a state that is dedicated to human rights, civil liberties, and democratic principles. It is a state that, in the early 1960s, was one of the first to invoke the principle of universal jurisdiction in its groundbreaking trial against Adolf Eichmann, the “architect of the Holocaust.”<sup>5</sup> How is Israel to support genuine instances of universal jurisdiction directed at bringing to justice human rights violators, while at the same time rejecting the abuse of the principle of universal jurisdiction against this background of lawfare and possible abuse?

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## WHAT IS UNIVERSAL JURISDICTION?

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The term “jurisdiction” is a legal term commonly used to describe a state’s authority to give effect to legal interests.<sup>6</sup> There are three traditional forms of jurisdiction, each of which corresponds to a particular state interest: legislative, judicial, and executive.<sup>7</sup> This study is only concerned with one of these forms: judicial jurisdiction, the ability of a state’s legal system to adjudicate the cases that come before it.

Traditionally a state enjoys judicial jurisdiction over offences committed within the territory of that state.<sup>8</sup> This makes both legal and common sense, for – as discussed by then ICJ President Judge Guillaume in the *Yerodia* case – it is in that territory where evidence of the offence can most often be gathered, where the offence generally produces its effects, and where the punishment that is imposed can most naturally serve as an example to others.<sup>9</sup>

However, this is not where a state’s judicial jurisdiction ends. Classical international law has identified specific instances where a state’s courts can exercise judicial jurisdiction over offences that were committed abroad. For example, a state may exercise jurisdiction over an act performed abroad by a national of that state (the active personality principle, also known as the nationality principle),<sup>10</sup> over an act performed abroad where the victim of the act is a national of that state (the passive personality principle),<sup>11</sup> or over an act which poses a threat to vital state interests such as counterfeiting a state’s currency – even if the counterfeiter is a foreigner who is acting in a foreign state (the protective jurisdiction principle).<sup>12</sup>

Universal jurisdiction is the most controversial form of judicial jurisdiction. A state can exercise universal jurisdiction over an act that was performed by a foreigner against a foreigner abroad when the act is so universally condemned that the state has an interest in exercising jurisdiction to combat the act in question.<sup>13</sup> Acts that would be subject to universal jurisdiction include crimes against humanity, war crimes, and genocide.

There are two types of universal jurisdiction. The first arises as a result of the fact that the offender enters a state’s territory or is held in a state’s custody. In this form of universal jurisdiction it is the presence of the offender that grants the state

jurisdiction.<sup>14</sup> An example of this form of universal jurisdiction is the legal proceedings surrounding the request by Spain for the UK to extradite the former president of the Republic of Chile, General Augusto Pinochet, on the grounds of widespread human rights abuses. The request was made when Pinochet was present in the UK after having undergone surgery in London in 1997.

This type of universal jurisdiction is more often than not mandated by international covenants and agreements, which impose an obligation on the states party to them to prosecute or extradite individuals who are in their territory and suspected of the commission of relevant offences.<sup>15</sup> For example, Article (2)5 of the *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* specifically states that “each state party shall...take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him.”<sup>16</sup>

The second form of universal jurisdiction is universal jurisdiction *in absentia*. This exercise of jurisdiction is purely universal – the person being tried has no connection to the state, and is not present in the state.<sup>17</sup>

While the first form of universal jurisdiction is an obligation imposed on states by various international documents, universal jurisdiction *in absentia* is totally permissive – a state may or may not choose to draft legislation providing for universal jurisdiction *in absentia* – and therefore, as noted by the ICJ, it is subject to abuse.<sup>18</sup>

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## WHAT ARE THE BENEFITS OF UNIVERSAL JURISDICTION?

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Universal jurisdiction can play a crucial role in the international legal system and in the pursuit of international justice. It ensures that those who have committed the most heinous offences – such as war crimes, crimes against humanity, genocide, torture, etc. – are not safe anywhere and can find a harbor nowhere. The objective is to guarantee the apprehension and prosecution of those who have committed “offences against all mankind” and are therefore *hostis humani generis*.<sup>19</sup>

This objective was far more relevant in the days preceding the creation of the International Criminal Court (ICC). At that time, one could point to the absence of a permanent international tribunal and the skittishness of the UN Security Council in erratically creating international *ad hoc* criminal tribunals following only some armed conflicts, and argue that the involvement of municipal courts in pursuing international justice was essential if justice was to be achieved.<sup>20</sup>

*Universal jurisdiction was far more relevant in the days preceding the creation of the International Criminal Court (ICC). With its advent, there is now a permanent court to address the very crimes that would be the subject of universal jurisdiction claims.*

With the advent of the ICC, before which even non-member states can be prosecuted (as is the case with Sudan's President Omar al-Bashir),<sup>21</sup> the argument for municipal court involvement in international affairs was somewhat weakened. Since there is now a permanent court established to address the very crimes that would be the subject of universal jurisdiction claims, these municipal claims are no longer crucial for ensuring that justice is achieved and that perpetrators are not immune from trial. However, while the significance of universal jurisdiction claims has been weakened by the creation of the ICC, it has not been extinguished.

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## WHAT ARE THE DISADVANTAGES OF UNIVERSAL JURISDICTION?

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While universal jurisdiction may still play an important role in the pursuit of international justice, there are several considerations which proponents of universal jurisdiction should bear in mind before instituting their next criminal or civil proceeding.

The first consideration is the burden posed to the home state by both civil and criminal trials that are instituted on the basis of universal jurisdiction. This burden can be measured in terms of the financial and legal resources that are expended on these high-profile trials and which therefore postpone, if not impede, the realization of local justice in lower-profile matters.

The burden is also felt at a political level, where the executive arm of a state is required to justify on the international stage the activities of its judicial arm; and to maintain cordial ties with foreign states whose officials may be in the process of being prosecuted in its courts. Indeed, if not successfully negotiated by the executive wing of a state, trials based on universal jurisdiction could ironically foster future inter-state conflicts while attempting to resolve past ones.

A second and related issue raised by universal jurisdiction is that of the inviolability of the sovereign state. As recognized by the UN Charter, Article 2(1), all states enjoy "sovereign equality"<sup>22</sup> – that is, all states are equal members of the international community of states, and are to be treated accordingly. Universal jurisdiction, by its

very nature, violates sovereign equality of states by allowing one state to judge the actions of the officials of another state. The principle therefore disregards one of the precepts of modern international law.

Added to this is the possibility, if remote, of judicial chaos arising out of the implementation of universal jurisdiction. If many courts, in various countries, were to pursue the principle of universal jurisdiction, the result would not be justice, but disarray. Indeed, this possibility, while slim, was warned against by the ICJ in *Yerodia*, which stated that to confer jurisdiction upon the courts of every state in the world to prosecute the authors of certain crimes would “risk creating total judicial chaos.”<sup>23</sup>

These considerations may appear to the proponents of universal jurisdiction as a means to impunity for violators of some of the most heinous international crimes. Yet, when pursuing justice through universal jurisdiction, these proponents may wish to bear in mind a further consideration which mitigates against the automatic resort to universal jurisdiction claims: there is a difference between justice and peace, retribution and reconciliation.

In many instances, the offences that are the subject of a universal jurisdiction claim are alleged to have been committed within the framework of a greater conflict, be it a civil war, an international war, an asymmetric conflict fought against armed groups, a war on terror, a guerrilla war, etc. When these conflicts come to an end, it is crucial to decide on a way forward. Retribution, while perhaps comforting victims of previous offences, does not pave the way towards a brighter future, and sterile-like trials set abroad do not necessarily bring resolution to the relevant conflict zone. Indeed, in many such instances, alternative forms of reconciliation are opted for (e.g., the Truth and Reconciliation Commission in South Africa following the end of apartheid).

*Having one’s courts judge the officials of another state may significantly impede one’s involvement in international peace initiatives, as seen in the case of the UK arrest warrant issued against former Israeli Foreign Minister Tzipi Livni.*

In addition, having one’s courts judge the officials of another state may significantly impede one’s involvement in international peace initiatives. This phenomenon was recently experienced by the UK, whose Foreign Office, in light of the arrest warrant issued against former Israeli Foreign Minister Tzipi Livni, stated: “The UK is determined to do all it can to promote peace in the Middle East and to be a strategic partner of Israel. To do this, Israel’s leaders need to be able to come to the UK for talks with the British government. We are looking urgently at the implications of this case.”<sup>24</sup>

Ironically, the noble pursuit of justice using universal jurisdiction might actually hinder reconciliation efforts in such cases. As stated by Henry Kissinger: “The role of a statesman is to choose the best option when seeking to advance peace and justice, realizing that there is frequently a tension between the two.”<sup>25</sup>

Finally, hand-picking those cases that are to be subjected to universal jurisdiction status is both sanctimonious and disingenuous. As Kissinger eloquently stated with respect to the Pinochet debacle (in which Spain requested the extradition of General Pinochet from the UK on several criminal grounds): “One would have thought that a Spanish magistrate would have been sensitive to the incongruity of a request by Spain, itself haunted by transgressions committed during the Spanish Civil War and the regime of General Francisco Franco, to try in Spanish courts alleged crimes against humanity committed elsewhere.”<sup>26</sup>

Indeed, one can well understand how the selective use of universal jurisdiction is perceived as a new form of colonialism, a paternalistic attitude towards the “less civilized” nations among us. This is even more pronounced when one considers that most of those countries that can afford to expend resources on universal jurisdiction claims are generally wealthy and developed.

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## HOW TO REMEDY THE ABUSE OF UNIVERSAL JURISDICTION

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### A. COUNTRIES THAT HAVE LIMITED UNIVERSAL JURISDICTION

Recognizing that universal jurisdiction can be a useful, important tool in the pursuit of justice while bearing in mind that it is not a perfect one, it is essential to curb enthusiasm regarding universal jurisdiction and thereby prevent its abuse. Several countries, having been overwhelmed by claims under newly-enacted universal jurisdiction legislation, have recently done just this.

*Several countries, having been overwhelmed by claims under newly-enacted universal jurisdiction legislation, have recently limited the application of universal jurisdiction to help prevent its abuse.*

These countries help prevent the abuse of the lofty principles of universal justice and human rights by voluntarily limiting the scope of their universal jurisdiction in several ways: stipulating the offences that would give rise to universal jurisdiction, requiring prior approval of state officials before claims can be instituted, and insisting on at least some nexus between their state and the alleged offence in question.

1. France, for example, has opted to limit its universal jurisdictional reach to a closed list of infractions that include torture, terrorism, nuclear smuggling, naval piracy, and airplane hijacking.<sup>27</sup>
2. Canada has adopted a slightly different tack. While boasting a very broad piece of legislation implementing universal jurisdiction, Canada requires, under Sections 9(3) and 9(4) of that legislation, that all claims based on universal jurisdiction first be personally approved by the attorney general or deputy attorney general before they can be introduced in any court.<sup>28</sup>

Adopting a slightly different approach, both Belgium and Spain have significantly amended their universal jurisdiction legislation by insisting on the existence of a nexus or connection between the claim and the country where the case has been filed.

3. Thus, a recently-voted amendment in Spain, while reaffirming the principle of universal jurisdiction, requires that cases can only be brought forth if:
  - » Spaniards are victims
  - » There is a relevant link to Spain
  - » The alleged perpetrator is in Spain.<sup>29</sup>
4. Similarly, in 2003 Belgium repealed its 1993 legislation which granted Belgian courts extensive universal jurisdiction, and incorporated more restrictive provisions in the Belgian Code Pénal and Titre Préliminaire du Code de Procédure Pénale. Today, Belgian courts only have jurisdiction over international crimes if either:
  - » The accused is Belgian
  - » The victim is Belgian
  - » Belgium is required by treaty to exercise jurisdiction over the case.<sup>30</sup>

Direct access to Belgian courts is also severely restricted by the amendment to the law, which, for example, affords the Federal Prosecutor the discretion to not pursue a suit under certain listed circumstances.<sup>31</sup>

## B. LEGAL ARGUMENTS THAT CAN BE RELIED UPON TO PREVENT ABUSE OF UNIVERSAL JURISDICTION

Despite these recent developments, there are still several countries, like the UK, in which universal jurisdiction claims can be abused. It is therefore important to note that several legal arguments exist which are useful in restricting the abuse of universal jurisdiction.

The first is the common law notion, used in everyday legal matters, that there is a more convenient forum or more appropriate forum in which the matter should be heard than the one in which it has been brought – *forum non conveniens*.<sup>32</sup> This argument goes to the heart of the matter: courts where the alleged crimes occurred are better positioned to hear the claim as, for example, evidence is easily accessible (or at the very least easier to access) and the effects of the crime are more likely to have been felt there. Such an argument in no way avoids justice, but in fact seeks justice in the place where justice is most desperately needed, which is generally the place where the crime was committed.

While limiting the scope of universal jurisdiction, an argument based on *forum non conveniens* is subject to the discretion of the court in question. Often the more appropriate forum is unlikely or unable to assert jurisdiction, as would be the case with respect to a court system destroyed by war. In such a case, universal jurisdiction is clearly not abused, but is employed to ensure justice for those whose national courts are unable to enforce it.

A second legal argument that can be used in the face of an abused universal jurisdiction claim is that of the international legal requirement to exhaust local remedies. This basic legal argument requires that before a claimant can assert a claim in a foreign forum, that claimant must have exhausted all local remedies available to it in its domestic legal system.<sup>33</sup> This rule of customary international law stems from the principle of international comity. It affords a state where a violation has occurred the opportunity to redress the violation that occurred by its own means, within the framework of its own legal system. This principle has been codified by, for example, the Rome Statute which created the ICC, as a prerequisite for the admissibility of claims before the ICC.<sup>34</sup>

*There is an international legal requirement to exhaust local remedies before a claimant can assert a claim in a foreign forum. The principle of universal jurisdiction should only be available in the event that the domestic justice system in question is unwilling or unable to address the violations under discussion.*

Thus, the claim for the need to exhaust local remedies should be a clear bar to the abuse of universal jurisdiction and the principle of universal jurisdiction should only be available in the event that the domestic justice system in question is unwilling or unable to address the violations under discussion.

A final though imperfect response to a claim of universal jurisdiction is the defense of immunity. State immunity is imperfect in that it does not extend to all state officials and does not protect all state officials equally. It is therefore a rather limited defense. However, for those officials to whom state immunity does apply – including heads of states, foreign ministers, and diplomatic representatives, among others – the claim of state immunity can be an effective legal tool in combating claims that abuse universal jurisdiction.

For some, such as a head of state or an ambassador, immunity is complete, rendering them immune from all actions or prosecutions that do or do not relate to their performance as state officials. Such immunity is said to be granted *ratione personae*.<sup>35</sup> For others, such as foreign ministers, immunity is said to be granted *ratione materiae*.<sup>36</sup> This is a limited immunity which only encompasses acts performed in relation to official acts in pursuit of their official positions.<sup>37</sup>

While protecting state officials, immunity by no means grants impunity: a state official will not, for instance, be immune from prosecution for acts of torture; acts which could in no way be viewed as part of their official role (as decided in the case of Pinochet).<sup>38</sup> Thus, relying on immunity may prevent an abuse of universal jurisdiction, but it in no way constitutes an abuse of political position or legal standing.

Finally, in the event that an abusive universal jurisdiction claim slips through the judicial cracks, judges should not hesitate to award heavy legal costs in favor of the wronged state or state official. Not only will such costs be a step towards redressing the injustice done to such individuals – in time lost, reputation harmed, and legal expenses – but will also deter future abusive claimants.

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## CONCLUSION

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The principle of universal jurisdiction has been, and continues to be, an important tool in the legal practitioner's tool box and an essential means for achieving justice for international crimes. Unfortunately, the principle has also become a political device employed for far more cynical means and far less noble purposes.

The principle abuse is not limited to attempts to delegitimize Israel, to indict Israeli officials, or even to impede their travel. In fact, the principle has also been misused against U.S. officials, including former U.S. President George W. Bush. It was misused in both Germany and France against former U.S. Secretary of Defense Donald Rumsfeld (who is now unable to travel at all for fear of arrest),<sup>39</sup> and in Spain against former White House staffers.<sup>40</sup> Similarly, former UK Prime Minister Tony Blair has been the subject of a record number of petitions against him in the ICC.<sup>41</sup>

These universal jurisdiction claims (against both Israeli and other officials) should not be dismissed as trivial. They do not just hinder the comings and goings of frequent travelers; they interfere broadly with international diplomatic affairs and international business, constitute a publicity coup for those instituting the claims (regardless of the outcome), drain legal resources, and mire truly lofty principles in political opportunism.

*“Any universal system should contain procedures not only to punish the wicked but also to constrain the righteous. It must not allow legal principles to be used as weapons to settle political scores.” – Henry Kissinger, “The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny,” Foreign Affairs, 2001.*

Given these concerns, we would be wise to adhere to the caveat of Henry Kissinger: “Historically, the dictatorship of the virtuous has often led to inquisitions and even witch-hunts,” and therefore, “any universal system should contain procedures not only to punish the wicked but also to constrain the righteous. It must not allow legal principles to be used as weapons to settle political scores.”<sup>42</sup> We need to curb enthusiasm for universal jurisdiction.

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## APPENDIX I:

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### BELGIUM – LAW ON GRAVE VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW – 5 AUGUST 2003

#### UNOFFICIAL TRANSLATION

Chapter III: Amendments to the Law of 17 April 1878 containing the Preliminary Title of the Code of Criminal Procedure.

Art. 13. There shall be inserted in Chapter 1 of the Preliminary Title of the Code of Criminal Procedure, Article 1*erbis*, which shall read as follows:

Art. 1*erbis*.

1. In accordance with International Law, no suit shall be instituted against:
  - » foreign heads of state, heads of government, and foreign affairs ministers during the period that they exercise their functions, as well as against any other persons who benefit from a legal immunity recognized under International Law;
  - » any persons who benefit from a legal immunity, total or partial, based on a treaty with Belgium.
2. In accordance with International Law, no restraining measure which pertains to the exercise of public force shall be taken during the time of their stay, against any person having been officially invited to stay in the Kingdom's territory by the Belgian authorities or having been invited by an international organization which is established in Belgium and which has entered into a headquarters agreement with Belgium.

Art. 14. In Article 6 of the same Preliminary Title, as modified by the Laws of 4 August 1914, 12 July 1932, and 4 April 2001, the following amendments shall be made:

1. the terms “any Belgian” shall be replaced by “any Belgian or any person having his principal residence on the Kingdom's territory”;
2. between paragraphs 1° and 2° there shall be inserted paragraph 1°bis which shall read as follows:

“1°bis. of a serious violation of international humanitarian law as defined in Book II, Title I°bis, of the Criminal Code.”

Art. 15. In Article 7, § 1, of the same Preliminary Title, as replaced by the Law of 16 March 1964, the terms “any Belgian” shall be replaced by the terms “any Belgian or any person having his principal residence on the Kingdom's territory.”

Art. 16. In Article 10 of the same Preliminary Title, as amended by the Laws of 12 and 19 July 1932, 2 April 1948, 12 July 1984, and 13 March 2002, the following amendments shall be made:

1. The introductory sentence of the Article shall be replaced by: “Except for such cases as are provided in Articles 6 and 7, § 1, a suit may be instituted in Belgium against a foreigner who has committed outside the territory of the Kingdom:”.
2. A new paragraph 1°bis shall be inserted between paragraphs 1° and 2°, which shall read as follows:

1°bis. A serious violation of international humanitarian law as provided under Book II, Title I°bis of the Criminal Code, committed against a person who, at the time of the facts, is a Belgian national, or is a person who, during the last three years at least, has been legally residing in Belgium on an effective and regular basis.

Any criminal suit, including the examination procedure (*instruction*) may only be instituted at the request of the federal prosecutor who rules on all potential complaints. There is no right of appeal against such decision.

If a complaint is lodged pursuant to the foregoing paragraphs, the federal prosecutor shall request the examining judge (*juge d’instruction*) to examine the complaint, except if:

1. the complaint is manifestly unfounded; or
2. the facts raised in the complaint do not correspond and may not be qualified as an offence listed under Book II, Title I°bis, of the Criminal Code; or
3. a criminal suit which is admissible at law may not result from this complaint; or
4. the factual circumstances of the case dictate that for the purposes of the good administration of justice and in furtherance of the international obligations of Belgium, the case should be brought before an international jurisdiction or before the State jurisdiction where the offence was committed, or before the State jurisdiction of which the perpetrator is a national or where the perpetrator may be found, and provided that such jurisdiction shows the required characteristics of impartiality, independence, and fairness, as such may namely appear from the international obligations which bind such State to Belgium.

If the Federal Prosecutor decides to close the case, he shall notify the Minister of Justice and specify which point(s), as listed in the foregoing paragraph, serve(s) as the basis for his decision.

If the closing of the case is based only on points 3° and 4° above or only on point 4° above and where the offence was committed after 30 June 2002, the Minister of Justice shall inform the International Criminal Court of the facts of the offence.

(NOTE: By its decision n° 62/2005 of 23-03-2005 (M.B. 08-04-2005, p. 14835-14838), the Arbitration Court annulled article 16, 2°.)

Art. 17. In Article 12, first paragraph, of the same Preliminary Title, as modified by the Law of 14 July 1951, the terms “Article 6, 1° and, 10, 1° and 2°” are replaced by the terms “Article 6, 1°, 1°bis and 2°, Article 10, 1°, 1°bis and 2°, and Article 12bis”.

Art. 18. In Article 12bis of the same Preliminary Title, as inserted by the Law of 17 April 1986 and as replaced by the Law of 18 July 2001, the following amendments are made:

1. The terms “The Belgian Courts shall have jurisdiction” shall be replaced by the terms “Except for the cases mentioned in Articles 6 to 11, the Belgian Courts shall also have jurisdiction”.
2. The terms “international treaty” shall be replaced by the terms “a rule of international treaty or customary law”.
3. The terms “this treaty” shall be replaced by the words “this rule”.
4. The following paragraphs shall be added to the said article:

Any criminal proceedings, including the examination procedure (*instruction*) may only be instituted at the request of the federal prosecutor who rules on all potential complaints. There is no right of appeal against such decision.

If a complaint is lodged pursuant to the foregoing paragraphs, the federal prosecutor shall request the examining judge (*juge d’instruction*) to examine the complaint, except if:

1. the complaint is manifestly unfounded; or
2. the facts raised in the complaint do not correspond and may not be qualified as an offence listed under Book II, Title I°bis, of the Criminal Code; or
3. a criminal suit which is admissible at law may not result from this complaint; or
4. the factual circumstances of the case dictate that for the purposes of the good administration of justice and in furtherance of the international obligations of Belgium, the case should be brought before an international jurisdiction or before the State jurisdiction where the offence was committed, or before the State jurisdiction of which the perpetrator is a national or where the perpetrator may be found, and provided that such jurisdiction shows the required characteristics of impartiality, independence and fairness, as such may namely appear from the international obligations which bind such State to Belgium.

If the Federal Prosecutor decides to close the case, he shall notify the Minister of Justice and specify which point(s) as listed in the foregoing paragraph serve(s) as the basis for his decision.

If the closing of the case is based only on points 3° and 4° above or only on point 4° above and where the offence was committed after 30 June 2002, the Minister of Justice shall inform the International Criminal Court of the facts of the offence.

(NOTE: By its decision n° 62/2005 of 23-03-2005 (M.B. 08-04-2005, p. 14835-14838), the Arbitration Court annulled Article 18, 4°.)

Art. 19. In Article 21, first paragraph of the same Preliminary Title, as replaced by the Law of 30 May 1961 and as amended by the Law of 24 December 1993, the terms “The time limitation for initiating criminal proceedings” shall be replaced by the terms “Except for the offences mentioned in Articles 136bis, 136ter, and 136quater of the Criminal Code, the time limitation for initiating criminal proceedings shall be”.

#### CHAPTER VII - Transitional Provisions and Effective Date

##### Art. 29

§ 3. The cases pending and which are still at the gathering of information stage at the date of the coming into force of this Law and which concern offences mentioned in Title I°bis, Book II of the Criminal Code shall be closed by the Federal Prosecutor within thirty days of the coming into force of this Law if they do not meet the criteria mentioned in Articles 6, 1°bis, 10, 1°bis and 12bis of the Preliminary Title of the Code of Criminal Procedure.

The cases pending which have reached the examination stage (*instruction*) at the date of coming into force of this Law and which concern offences mentioned in Title I, Art. 29bis, Book II of the Criminal Code, are transferred by the Federal Prosecutor to the General Prosecutor of the Supreme Court (*Cour de cassation*) within thirty days of the coming into force of this Law, except for such cases in which a measure of examination (*acte d’instruction*) has already been taken at the date of coming into force of this Law, provided that at least one of the plaintiffs was a Belgian national (or a recognized refugee in Belgium and having his principal residence there, pursuant to the Geneva Treaty of 1951 concerning refugee status and its additional Protocol) at the time of initiating the criminal proceedings, or at least one of the purported authors of the offence had his principal residence in Belgium at the date of coming into force of this Law. <L 2006-05-22/37, art. 4, 003; Effective date: 31-03-2006>

Within the same time period, the Federal Prosecutor shall furnish a report concerning each of the transferred cases, in which he shall indicate the relevant point(s) of lack of conformity with the criteria mentioned in Articles 6, 1°bis, 10, 1°bis and 12bis of the Preliminary Title of the Code of Criminal Procedure.

Within fifteen days after the said transfer, the General Prosecutor shall request that the Supreme Court declare within a thirty-day period that the Belgian Courts decline jurisdiction after having heard the Federal Prosecutor, and if they so request, after having heard the plaintiffs and the persons charged with a criminal offence by the Examining Judge in charge of the case. The Supreme Court shall make its decision on the basis of the criteria mentioned in Articles 6, 1°bis, 10, 1°bis and 12bis of the Preliminary Title of the Code of Criminal Procedure.

For the cases which are not closed on the basis of paragraph 1 of § 3 of the present article or concerning which jurisdiction has not been declined on the basis of the foregoing paragraph, the Belgian Courts shall continue to have jurisdiction.

...

(NOTE: By its decision n° 104/2006 of 21-06-2006, the Arbitration Court annulled in Article 29, §3 of the Law of 5 August 2003 concerning Serious Violations of International Humanitarian Law, paragraphs 2, 3 and 4, as well as in paragraph 5, the following terms “and concerning which jurisdiction has not been declined on the basis of the foregoing paragraph”;

- definitively maintains, among the legal effects resulting from the provisions later annulled, the effects which lead the Belgian Courts to decline jurisdiction when neither of the plaintiffs was a recognized refugee in Belgium at the time the criminal proceedings were initiated.)

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## APPENDIX II:

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### CANADA – RELEVANT PROVISIONS OF CRIMES AGAINST HUMANITY AND WAR CRIMES ACT; ARTICLES 6-14, CRIMES AGAINST HUMANITY AND WAR CRIMES ACT, 2000, C. 24

[Assented to June 29th, 2000]

An Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other Acts.

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

#### OFFENCES OUTSIDE CANADA

Genocide, etc., Committed Outside Canada

6. (1) Every person who, either before or after the coming into force of this section, commits outside Canada

- (a) genocide,
- (b) a crime against humanity, or
- (c) a war crime,

is guilty of an indictable offence and may be prosecuted for that offence in accordance with section 8.

#### CONSPIRACY, ATTEMPT, ETC.

(1.1) Every person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) is guilty of an indictable offence.

#### PUNISHMENT

(2) Every person who commits an offence under subsection (1) or (1.1)

- (a) shall be sentenced to imprisonment for life, if an intentional killing forms the basis of the offence; and
- (b) is liable to imprisonment for life, in any other case.

## DEFINITIONS

(3) The definitions in this subsection apply in this section.

“crime against humanity”

« *crime contre l’humanité* »

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

“genocide”

« *génocide* »

“Genocide” means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

“war crime”

« *crime de guerre* »

“War crime” means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

## INTERPRETATION – CUSTOMARY INTERNATIONAL LAW

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

## INTERPRETATION – CRIMES AGAINST HUMANITY

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

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

## BREACH OF RESPONSIBILITY BY MILITARY COMMANDER

7. (1) A military commander commits an indictable offence if

- (a) the military commander, outside Canada,
  - (i) fails to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 4, or
  - (ii) fails, before or after the coming into force of this section, to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 6;
- (b) the military commander knows, or is criminally negligent in failing to know, that the person is about to commit or is committing such an offence; and
- (c) the military commander subsequently
  - (i) fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or
  - (ii) fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.

## BREACH OF RESPONSIBILITY BY A SUPERIOR

(2) A superior commits an indictable offence if

- (a) the superior, outside Canada,
  - (i) fails to exercise control properly over a person under their effective authority and control, and as a result the person commits an offence under section 4, or

- (ii) fails, before or after the coming into force of this section, to exercise control properly over a person under their effective authority and control, and as a result the person commits an offence under section 6;
- (b) the superior knows that the person is about to commit or is committing such an offence, or consciously disregards information that clearly indicates that such an offence is about to be committed or is being committed by the person;
- (c) the offence relates to activities for which the superior has effective authority and control; and
- (d) the superior subsequently
  - (i) fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or
  - (ii) fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.

### CONSPIRACY, ATTEMPT, ETC.

(2.1) Every person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) or (2) is guilty of an indictable offence.

### JURISDICTION

(3) A person who is alleged to have committed an offence under subsection (1), (2) or (2.1) may be prosecuted for that offence in accordance with section 8.

### PUNISHMENT

(4) Every person who commits an offence under subsection (1), (2) or (2.1) is liable to imprisonment for life.

### APPLICATION BEFORE COMING INTO FORCE

\*(5) Where an act or omission constituting an offence under this section occurred before the coming into force of this section, subparagraphs (1)(a)(ii) and (2)(a)(ii) apply to the extent that, at the time and in the place of the act or omission, the act or omission constituted a contravention of customary international law or conventional international law or was criminal according to the general principles of law recognized by the community of nations, whether or not it constituted a contravention of the law in force at the time and in the place of its commission.

## DEFINITIONS

(6) The definitions in this subsection apply in this section.

“military commander”

« *chef militaire* »

“Military commander” includes a person effectively acting as a military commander and a person who commands police with a degree of authority and control comparable to a military commander.

“superior”

« *supérieur* »

“Superior” means a person in authority, other than a military commander.

\* [Note: Section 7 in force October 23, 2000, see SI/2000-95.]

## JURISDICTION

8. A person who is alleged to have committed an offence under section 6 or 7 may be prosecuted for that offence if

- (a) at the time the offence is alleged to have been committed,
  - (i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity,
  - (ii) the person was a citizen of a state that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a state,
  - (iii) the victim of the alleged offence was a Canadian citizen, or
  - (iv) the victim of the alleged offence was a citizen of a state that was allied with Canada in an armed conflict; or
- (b) after the time the offence is alleged to have been committed, the person is present in Canada.

## PROCEDURE AND DEFENSES

### PLACE OF TRIAL

9. (1) Proceedings for an offence under this Act alleged to have been committed outside Canada for which a person may be prosecuted under this Act may, whether or not the person is in Canada, be commenced in any territorial division in Canada and the

person may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.

### PRESENCE OF ACCUSED AT TRIAL

(2) For greater certainty, in a proceeding commenced in any territorial division under subsection (1), the provisions of the *Criminal Code* relating to requirements that an accused appear at and be present during proceedings and any exceptions to those requirements apply.

### PERSONAL CONSENT OF ATTORNEY GENERAL

(3) No proceedings for an offence under any of sections 4 to 7 of this Act, or under section 354 or subsection 462.31(1) of the *Criminal Code* in relation to property or proceeds obtained or derived directly or indirectly as a result of the commission of an offence under this Act, may be commenced without the personal consent in writing of the Attorney General or Deputy Attorney General of Canada, and those proceedings may be conducted only by the Attorney General of Canada or counsel acting on their behalf.

### CONSENT OF ATTORNEY GENERAL

(4) No proceedings for an offence under section 18 may be commenced without the consent of the Attorney General of Canada.  
2000, c. 24, s. 9; 2001, c. 32, s. 59.

### EVIDENCE AND PROCEDURE

\*10. Proceedings for an offence alleged to have been committed before the coming into force of this section shall be conducted in accordance with the laws of evidence and procedure in force at the time of the proceedings.

\* [Note: Section 10 in force October 23, 2000, *see* SI/2000-95.]

### DEFENSES

11. In proceedings for an offence under any of sections 4 to 7, the accused may, subject to sections 12 to 14 and to subsection 607(6) of the *Criminal Code*, rely on any justification, excuse or defense available under the laws of Canada or under international law at the time of the alleged offence or at the time of the proceedings.

### WHEN PREVIOUSLY TRIED OUTSIDE CANADA

12. (1) If a person is alleged to have committed an act or omission that is an offence under this Act, and the person has been tried and dealt with outside Canada in respect

of the offence in such a manner that, had they been tried and dealt with in Canada, they would be able to plead *autrefois acquit*, *autrefois convict* or pardon, the person is deemed to have been so tried and dealt with in Canada.

#### EXCEPTION

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

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

#### CONFLICT WITH INTERNAL LAW

13. Despite section 15 of the *Criminal Code*, it is not a justification, excuse or defense with respect to an offence under any of sections 4 to 7 that the offence was committed in obedience to or in conformity with the law in force at the time and in the place of its commission.

#### DEFENSE OF SUPERIOR ORDERS

14. (1) In proceedings for an offence under any of sections 4 to 7, it is not a defense that the accused was ordered by a government or a superior – whether military or civilian – to perform the act or omission that forms the subject-matter of the offence, unless

- (a) the accused was under a legal obligation to obey orders of the government or superior;
- (b) the accused did not know that the order was unlawful; and
- (c) the order was not manifestly unlawful.

#### INTERPRETATION – MANIFESTLY UNLAWFUL

(2) For the purpose of paragraph (1)(c), orders to commit genocide or crimes against humanity are manifestly unlawful.

#### LIMITATION – BELIEF OF ACCUSED

(3) An accused cannot base their defense under subsection (1) on a belief that an order was lawful if the belief was based on information about a civilian population or an identifiable group of persons that encouraged, was likely to encourage or attempted to justify the commission of inhumane acts or omissions against the population or group.

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## APPENDIX III:

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### FRANCE – RECENT NATIONAL LEGISLATION PASSED TO LIMIT THE ABUSE OF UNIVERSAL JURISDICTION

#### **Article 689**

*(Act no. 75-624 of 11 July 1975 art 11 Official Journal 13 July 1975, in force 1 January 1976)*

*(Act no. 92-1336 of 16 December 1992 art. 60 & 61 Official Journal of 23 December 1992 in force 1 March 1994)*

*(Act no. 99-515 of 23 June 1999 Article 30 Official Journal of 24 June 1999)*

Perpetrators of or accomplices to offences committed outside the territory of the Republic may be prosecuted and tried by French courts either when French law is applicable under the provisions of Book I of the Criminal Code or any other statute, or when an international Convention gives jurisdiction to French courts to deal with the offence.

#### **Article 689-1**

*(Act no. 75-624 of 11 July 1975 art 12 Official Journal 13 July 1975, in force 1 January 1976)*

*(Act no. 92-1336 of 16 December 1992 art. 60 & 61 Official Journal of 23 December 1992 in force 1 March 1994)*

*(Act no. 99-515 of 23 June 1999 Article 30 Official Journal of 24 June 1999)*

In accordance with the international Conventions quoted in the following articles, a person guilty of committing any of the offences listed by these provisions outside the territory of the Republic and who happens to be in France may be prosecuted and tried by French courts. The provisions of the present article apply to attempts to commit these offences, in every case where attempt is punishable.

#### **Article 689-2**

*(Act no. 85-1407 of 30 December 1985 art. 72-i & 94 Official Journal of 31 July 1985 in force 1 February 1986)*

*(Act no. 92-1336 of 16 December 1992 art. 60 & 61 Official Journal of 23 December 1992 in force 1 March 1994)*

*(Act no. 99-515 of 23 June 1999 Article 30 Official Journal of 24 June 1999)*

For the implementation of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York on 10th December

1984, any person guilty of torture in the sense of article 1 of the Convention may be prosecuted and tried in accordance with the provisions of article 689-1.

### **Article 689-3**

*(Act no. 87-541 of 16 July 1987 art. 1 Official Journal of 18 July 1987)*

*(Act no. 92-1336 of 16 December 1992 art. 60 & 61 Official Journal of 23 December 1992 in force 1 March 1994)*

*(Act no. 99-515 of 23 June 1999 Article 30 Official Journal of 24 June 1999)*

For the implementation of the European Convention on the Suppression of Terrorism, signed in Strasbourg on 27th January 1977, and the Dublin agreement of 4th December 1979, made between the member states of the European Communities concerning the implementation of the European Convention for the Suppression of Terrorism, any person guilty of any of the following offences may be prosecuted and tried in accordance with the provisions set out in article 689-1:

1. intentional offences against life, torture and acts of barbarity, violence which caused death, mutilation or permanent infirmity or, if the victim is a minor, total incapacity to work for more than eight days, abduction and sequestration punished by Book II of the Criminal Code, and also threats as covered by articles 222-17, paragraph 2, and 222-18 of that Code where the offence is committed against a person entitled to an international protection including diplomatic agents;
2. offences against freedom of movement defined in article 421-1 of the Criminal Code or any other felony or misdemeanor entailing the use of bombs, grenades, rockets, automatic fire weapons, booby-trapped letters or parcels, insofar as this use creates a danger for persons, where the felony or misdemeanor is in relation to an individual or collective undertaking aimed at seriously breaching public order by intimidation or terror.

### **Article 689-4**

*(Act no. 89-434 of 30 June 1989 Article 2 Official Journal of 1 July 1989)*

*(Act no. 92-1336 of 16 December 1992 art. 60 & 61 Official Journal of 23 December 1992 in force 1 March 1994)*

*(Act no. 99-515 of 23 June 1999 Article 30 Official Journal of 24 June 1999)*

For the implementation of the Convention on the Physical Protection of Nuclear Material, open for signature in Vienna and New York on 3 March 1980, any person guilty of any of the following offences may be prosecuted and tried in accordance with the provisions of article 689-1:

1. the misdemeanor set out by article 6-1 of law no. 80-572 of 25th July 1980, concerning the protection and control of nuclear substances;
2. the misdemeanors of unlawful appropriation set out by article 6 of the above mentioned law no. 80-572 of 25th July 1980, intentional assault against the life or physical integrity of a person, theft, extortion, blackmail, embezzlement, breach of trust, receiving stolen goods, destruction, defacement or damage or threat to commit an offence against persons or property, as defined by Books II and III of the Criminal Code, where the offence was committed with the use of nuclear materials falling within the scope of articles 1 and 2 of the Convention, or was committed in relation to these substances.

### **Article 689-5**

*(Act no. 90-1143 of 21 December 1990 Article 4 Official Journal of 26 December 1990)*

*(Act no. 92-1336 of 16 December 1992 art. 60 & 61 Official Journal of 23 December 1992 in force 1 March 1994)*

*(Act no. 99-515 of 23 June 1999 Article 30 Official Journal of 24 June 1999)*

For the implementation of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf signed in Rome on 10th March 1988, any person guilty of any of the following offences may be prosecuted and tried in accordance with the provisions set out in article 689-1:

1. felonies defined in articles 224-6 and 224-7 of the Criminal Code;
2. intentional offences against life or physical integrity, destruction, defacement or damage, threats to commit an offence against persons or property punished by books II and III of the Criminal Code, or the misdemeanors defined by article 224-8 of that Code and by article L. 331-2 of the Maritime Harbors Code, if the offence endangers or is liable to endanger the safety of maritime navigation or of a fixed platform on the continental shelf;
3. intentional offences against life, torture and acts of barbarity or acts of violence punished by Book II of the Criminal Code, if the offence is related either to the offence defined under point 1°, or one or more offences liable to endanger the safety of sea-lanes or of a platform specified under point 2°.

### **Article 689-6**

*(Act no. 92-1336 of 16 December 1992 art. 60 & 61 Official Journal of 23 December 1992 in force 1 March 1994)*

*(Act no. 99-515 of 23 June 1999 Article 30 Official Journal of 24 June 1999)*

For the implementation of the Convention for the Suppression of Unlawful Seizure of Aircraft signed at the Hague on 16 December 1970, and of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed in Montreal on 23rd September 1971, any person guilty of the following offences may be prosecuted and tried in accordance with the provisions set out in article 689-1:

1. hijacking of an aircraft not registered in France and any other act of violence directed against the passengers or crew, and committed by the presumed perpetrator of the hijacking, when directly connected with this offence;
2. any offence concerning an aircraft not registered in France and listed among those enumerated by a), b) and c) of point 1° of article 1 of the above-mentioned Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.

### **Article 689-7**

*(Act no. 92-1336 of 16 December 1992 art. 60 & 61 Official Journal of 23 December 1992 in force 1 March 1994)*

*(Act no. 99-515 of 23 June 1999 Article 30 Official Journal of 24 June 1999)*

For the implementation of the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, signed at Montreal on 24th February 1988, as a complement to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation signed in Montreal on 23rd September 1971, any person guilty of the following offences committed with the use of a device, a substance or a weapon may be prosecuted and tried in accordance with the provisions set out in article 689-1:

1. if the offence breaches the safety or tends to breach the safety of an airport assigned to international civil aviation:
  - a) intentional attacks on life, torture and acts of barbarity, acts of violence causing death, mutilation or permanent infirmity or, if the victim is a minor, a total incapacity to work in excess of eight days, punished by book II of the Criminal Code, when the offence has been committed in an airport assigned to international civil aviation;
  - b) destruction, defacement and damage punished by book III of the Criminal Code, where the offence has been committed against the installations of an airport assigned to international civil aviation or an aircraft standing in the airport and not in use;
  - c) the misdemeanor set out in paragraph four (point 3°) of article L. 282-1 of the Civil Aviation Code, where the offence has been committed against the installations of an airport assigned to international civil aviation or an aircraft standing in the airport and not in use,

2. of the offence set out in paragraph 6 (point 5°) of article L. 282-1 of the Civil Aviation Code, where it has been committed against the services of an airport assigned to international civil aviation.

### **Article 689-8**

*(Act no. 2000-595 of 30 June 2000 art. 4 Official Journal of 1 July 2000)*

For the application of the Protocol to the Convention on the Protection of the Communities' Financial Interests made in Dublin on 27th September 1996 and of the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union made in Brussels on 26th May 1997, the following may be prosecuted and judged under the conditions provided for in article 689-1:

3. Any community civil servant working for one of the European Communities' institutions or for an organization created in accordance with the treaties instituting the European Communities and having its seat in France, who is guilty of the misdemeanor provided for in article 435-1 of the Criminal Code or of an offence which damages the financial interests of the European Communities, in the sense of the Convention on the Protection of the Communities' Financial Interests made in Brussels on 26th July 1995;
4. Any French person or any other member of the French civil service guilty of any of the misdemeanors provided for in articles 435-1 and 435-2 of the Criminal Code or of an offence which damages the financial interests of the European Communities in the sense of the Convention on the Protection of the Communities' Financial Interests made in Brussels on 26th July 1995;
5. Any person guilty of the misdemeanor provided for in article 435-2 of the Criminal Code or of an offence which damages the financial interests of the European Communities in the sense of the Convention on the Protection of the Communities' Financial Interests made in Brussels on 26th July 1995, where these offences are committed against a French national.

### **Article 689-9**

*(Inserted by Law no. 2000-516 of 15 June 2000 art. 138 Official Journal of 16 June 2000)*

For the application of the International Convention for the Suppression of Terrorist Bombings, opened for signature in New York on 12th January 1998, any person guilty of a felony or a misdemeanor constituting a terrorist act defined by articles 421-1

and 421-2 of the Criminal Code or of a misdemeanor of belonging to a terrorist group provided for by article 421-2-1 of the same Code, and where the offence was committed using an explosive or deadly device defined by article 1 of the aforesaid Convention, may be prosecuted and tried under the conditions provided for in article 689-1.

### **Article 689-10**

*(Inserted by Law no. 2001-1062 of 15 November 2001 art. 33 Official Journal of 16 November 2001)*

For the application of the International Convention for the Suppression of the Financing of Terrorism, opened for signature in New York on 10 January 2000, where this offence constitutes financing terrorist acts in the sense of article 2 of the aforesaid Convention, any person guilty of a felony or a misdemeanor defined by articles 421-1 to 421-2-2 of the Criminal Code may be prosecuted and judged under the conditions provided for in article 689-1.

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## APPENDIX IV:

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### SPAIN – COMMON LAW 1/2009 ARTICLE 23 SECTION 4

Unofficial Translation  
**Official State Bulletin**  
**General Dispositions**  
**Head of State**

*Common Law 1/2009, November 3rd, complimentary to the reformation of legislation for the implementation of the new judicial office, which modifies the Common Law 6/1985, July 1st, of Judicial Power.*

**Juan Carlos I**  
**King of Spain**

To everyone present that sees and understands.  
Know that the General Courts have approved and that I sanction the following Common Law.

#### **Preamble**

...

#### **III**

In observance of the mandate coming from the Chamber of Deputies (Lower Chamber of Spanish Parliament), through the resolution approved on May 19, 2009 with the state of the nation being the source of debate, a change has been realized in the treatment of what has come to be called “Universal Jurisdiction” through the modification of article 23 of the Common Law of Judicial Power. This was done in order to, on the one hand, incorporate types of crimes that weren’t included and whose prosecution is protected by the agreements and customs of International Law, such as crimes against humanity and war crimes. On the other hand, this reform allows for the adaptation and clarification of the ruling in agreement with the beginning of *subsidiarity* (subisidiariedad) and the doctrine coming from the Constitutional Court and the jurisprudence of the Supreme Court.

...

#### **V**

In the present law it is also regulated that a small deposit be made prior to the interposition of an appeal, whose principal end is to dissuade those that appeal some judgment without foundation, so that they do not improperly prolong the time it takes to reach a judicial resolution, thus damaging the right to effective judicial protection of others involved in the process.

## VI

...

### FIRST ARTICLE.

This modifies the Common Law 6/1985, from July 1, of the Judicial Power, in the following terms:

One. Sections 4 and 5 of article 23 are written in the following way:

4. Equally, the Spanish jurisdiction will be competent to know of the actions committed by Spaniards and foreigners outside of Spanish territory that are susceptible to being classified, according to Spanish Law, as one of the following crimes:

- (a) Genocide and crimes against humanity.
- (b) Terrorism.
- (c) Piracy and airplane hijackings.
- (d) Crimes related to prostitution and the corruption of minors and the handicapped.
- (e) Illegal trafficking of drugs that are psychoactive, toxic, and narcotic.
- (f) Illegal trafficking or clandestine immigration of people, whether or not they are workers.
- (g) Anything related to female genital mutilation, whenever those responsible are found within Spain.
- (h) Any other crime that, according to international treaties and agreements, in particular those pertaining to international humanitarian law and the protection of human rights, should be prosecuted in Spain.

Without prejudice as to what international treaties or agreements signed by Spain can provide, in order for Spanish Courts to acknowledge previous crimes it must be established that those presumed responsible for them are currently in Spain or that victims of Spanish nationality exist, or that some link with relevant connection to Spain is affirmed and, in any case, that in another competent country or within an International Court the process that assumes an investigation and effective prosecution has not been initiated, where relevant, of such punishable acts.

The penal process initiated before Spanish Jurisdiction will be provisionally dismissed when there is proof of the beginnings of other proceedings concerning the aforementioned acts in the country or by the court that meets the provisions set in the previous paragraph.

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## ABOUT THE AUTHORS

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Diane Morrison, Esquire, earned her Bachelor of Arts and her Bachelor of Laws degrees from the University of the Witwatersrand in South Africa. She received her LLM and her MA in International Legal Studies from New York University School of Law. Morrison was a legal clerk in the Tel Aviv-based law firm of Herzog, Fox & Ne'eman and joined the Israel Bar in 2008.

Justus Reid Weiner is an international human rights lawyer and a member of the Israel and New York Bar Associations. He received his *Juris Doctor* degree from the School of Law (Boalt Hall), University of California, Berkeley. Weiner's professional publications have appeared in prominent law journals, monographs, and intellectual magazines. He is currently a Senior Research Fellow of the Global Law Forum, a Scholar in Residence at the Jerusalem Center for Public Affairs, and an adjunct lecturer at The Hebrew University of Jerusalem. Weiner was formerly a Visiting Assistant Professor at the School of Law, Boston University. He also practiced law as a litigation associate in the international law firm White & Case and served as the Director of American Law and External Relations at the Israel Ministry of Justice specializing in human rights and other facets of public international law.

Weiner wishes to express his appreciation to Michael Sher and Alon Elhanan for their assistance.

## NOTES

- 1 Anne Herzberg, NGO "Lawfare," *Exploitation of Courts in the Arab-Israeli Conflict*, NGO Monitor Monograph Series (September 2008), p. 2.
- 2 Henry Kissinger, "The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny," *Foreign Affairs*, June/July 2001.
- 3 The *Yerodia* case concerned an international arrest warrant issued *in absentia* by a Belgian investigating judge against the Congo's then minister of foreign affairs, Mr. Abdulaye Yerodia Ndombasi, who was vacationing in Belgium. The warrant charged him as a perpetrator or co-perpetrator of offences constituting grave breaches of the Geneva Conventions of 1949 and the Additional Protocols thereto. The ICJ found that the issue and international circulation by Belgium of the arrest warrant of 11 April 2000 against Ndombasi failed to respect the immunity from criminal jurisdiction and the inviolability which he enjoyed under international law – and that Belgium must cancel the arrest warrant.
- 4 Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 I.C.J. 3 (February 14) (Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal).
- 5 Steiner et al, *International Human Rights in Context*, 3rd ed. (2008), pp. 1163-1167.
- 6 Damrosch et al, *International Law: Cases and Materials*, American Casebook Series, 4th ed. (2001), p. 1088.
- 7 The three forms of jurisdiction, each of which corresponds to a particular state interest, are: legislative, the ability of a state's legislative body to prescribe laws; judicial, the ability of a state's judicial system to decide cases that come before its courts; and executive, the ability of a state to enforce the laws of the state. Damrosch et al, *International Law*.
- 8 Damrosch et al, *International Law*.
- 9 Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) I.C.J. 2002 3 (February 14) (Separate Opinion of President Guillaume).
- 10 Damrosch et al, *International Law*.
- 11 *Ibid.*
- 12 *Ibid.*
- 13 *Ibid.*
- 14 Malcolm D. Evans, *International Law*, 2nd ed. (2006), pp. 348-351.
- 15 *Ibid.*
- 16 *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, Art. 5(2), opened for signature Dec. 10, 1984.
- 17 Evans, *International Law*, pp. 348-349.
- 18 Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) I.C.J. 2002 3 (February 14) (Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal).
- 19 This is Latin for "enemy of mankind." Originally, this referred specifically to pirates, who were subject to universal jurisdiction. However, it has since been extended in practice and theory to those who commit the most egregious crimes, crimes which are so egregious as to constitute crimes against all mankind. See [http://en.wikipedia.org/wiki/Hostis\\_humani\\_generis](http://en.wikipedia.org/wiki/Hostis_humani_generis).
- 20 Andrea Bianchi's piece, published in 1999 in the *European Journal of International Law*, is an example of this kind of argument. Andrea Bianchi, "Immunity Versus Human Rights: The Pinochet Case, Legal Proceedings in the UK: The Interaction of Municipal and International Law," *EJIL*, 1999.
- 21 Although Sudan is not a party to the Rome Statute (the document which created the ICC), Sudan's

- President, Omar Al-Bashir, was referred to the ICC by the UN Security Council under Article 13 of the Rome Statute. The ICC subsequently issued an arrest warrant for Al-Bashir on counts of crimes against humanity and war crimes in Darfur. See [http://en.wikipedia.org/wiki/Omar\\_al-Bashir](http://en.wikipedia.org/wiki/Omar_al-Bashir).
- 22 Art. 2(1) of the UN Charter reads as follows: “The Organization is based on the principle of the sovereign equality of its members.”
  - 23 Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) I.C.J. 2002 3 (February 14) (Separate Opinion of President Guillaume).
  - 24 Ian Black and Ian Cobain, “British Court Issued Arrest Warrant for Former Israeli Minister Tzipi Livni,” *The Guardian*, December 14, 2009, <http://www.guardian.co.uk/world/2009/dec/14/tzipi-livni-israel-gaza-arrest>.
  - 25 Henry Kissinger, “The Pitfalls of Universal Jurisdiction.”
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  - 36 r.m.=subject to matter jurisdiction.
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## GLOBAL LAW FORUM

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**[www.globallawforum.org](http://www.globallawforum.org)**

The Global Law Forum at the Jerusalem Center for Public Affairs was established in January 2008 in order to help counteract the diplomatic and media campaign against the State of Israel conducted on the battlefield of international law. The Global Law Forum carries on the struggle with a dual focus on in-depth analysis in the academic world of international law and on the fast-moving arena of public opinion.

In the academic arena, the Global Law Forum aims to change the academic approach to questions of international law; in both the academic and public arenas, the Forum works to produce high-quality, reasoned arguments to counter the political and legal biases against Israel. In order to establish and maintain the Forum's credibility and importance as a voice in international law, the Forum explores international law issues of concern to Israel using a highly professional, unbiased approach.

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The Jerusalem Center for Public Affairs is a leading independent research institute specializing in public diplomacy and foreign policy. Founded in 1976, the Center has produced hundreds of studies and initiatives by leading experts on a wide range of strategic topics. Dr. Dore Gold, Israel's former ambassador to the UN, has headed the Jerusalem Center since 2000.

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