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**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**

PART I: UNIVERSAL JURISDICTION IN INTERNATIONAL LAW

1. The concept of jurisdiction is integral to the sovereignty of States and is fundamental to the functioning of the international legal system. Judge Rosalyn Higgins, the President of the International Court of Justice describes jurisdiction as an allocation of competence to States, which is important for the avoidance of conflict of authority.ⁱ Jurisdiction in international law is essentially the competence of States to exercise lawful authority over persons, territory as well as events. Jurisdiction may be civil or criminal (regulatory) in nature. The typology of jurisdiction includes prescriptive jurisdiction (authority to make laws) and enforcement jurisdiction (authority to apply and enforce laws). There are different bases for the exercise of jurisdiction, including territoriality, nationality, protective, universality and the more controversial passive personality and effects principles.ⁱⁱ

2. This Report is concerned with the concept of universal jurisdiction as a basis for the exercise of jurisdiction by States in international law. The Report includes a comprehensive study of the concept of universal jurisdiction with a view to elucidating the origins, nature, scope, applicability and effects of the concept. It also seeks to address the concerns expressed by the meeting of AU Ministers of Justice and Attorneys General on the apparent abuse of the principle by some Non-African States.

ORIGIN AND NATURE

3. There is generally no agreed doctrinal definition of universal jurisdiction in customary and conventional international law.ⁱⁱⁱ However, this does not preclude any definition, which embodies the essence of the concept as the ability to exercise jurisdiction irrespective of territoriality or nationality.^{iv} Therefore, the concept of universal jurisdiction applies to a situation where “the nature of (an) act entitles a State to exercise its jurisdiction to apply its laws, even if the act has occurred outside its territory, has been perpetrated by a non-national, and even if (its) nationals have not been harmed by the acts.”^v The Princeton Principles on Universal Jurisdiction provide that universal jurisdiction pertains broadly to the power of States to punish certain crimes irrespective of the place committed and by whom committed (i.e. in the absence of other grounds for the exercise of jurisdiction).^{vi}

4. Universal jurisdiction is not without controversy and this extends to its history as well as its applicability. While authors like Henry Kissinger, The former Secretary of State of the United States of America, have challenged the principle of universal jurisdiction to be novel,^{vii} earlier indications of the principle go back to the international crime of piracy. Customary international law proscribes the crime of piracy and the exercise of universal jurisdiction by States over pirates is accepted in customary international law. Article 19 of the 1958 Geneva Convention on the High Seas and Article 105 of the 1982 United Nations Convention on the Law of the Sea codify this customary rule that,

“On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.”^{viii}

* The Commission acknowledges the input of Dr. Chaloka Beyani, Senior lecturer London School of Economics, towards the preparation of this Paper.

5. Jurisdiction is imperative for the protection of rights and interests. However, certain fundamental rights cannot be adequately secured by a few States or through a “framework of bilateral relations” alone.^{ix} To ensure effective protection and enforcement of these international interests a mechanism that would involve the generality of the world community is sought to be achieved through universality. It has been argued that, “international law provides that certain offences may be punished by any State because the offenders are common enemies of all mankind and (as such) all nations have an equal interest in their apprehension and punishment”.^x The concept of universal jurisdiction is based on functionality in view of the decentralised nature of the international system; a feature that makes it difficult for the system to enforce its fundamental laws.^{xi}

6. The exercise of jurisdiction by States on grounds of universality of interest has been likened to the principle of *actio popularis* in Roman Law which gave every member of the public the right to take legal action in defence of public interest, whether or not one was affected.^{xii}

7. Usual notions regarding the nature of universal jurisdiction is that it applies to acts which are so heinous that every State has a legal interest in the enforcement of these acts, largely because they violate obligations owed to the international community as a whole (obligations *erga omnes*). The term, ‘obligations *erga omnes*’, which is commonly used with regard to the concept of universal jurisdiction was introduced into mainstream international legal language by the International Court of Justice in the *Case Concerning the Barcelona Traction, Light and Power Company Limited* (Belgium v. Spain).^{xiii} The Court stated that,

“...an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State... By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”

8. The Court further gave what it considered to be examples in contemporary international law of acts that attract this type of obligations, and they include acts of aggression, genocide, the basic rights of the human person, including protection from slavery and racial discrimination.^{xiv} However, the fact that an act is in breach of an obligation *erga omnes* does not mean that universal jurisdiction extends to such an act.

SCOPE AND APPLICABILITY

9. The controversy surrounding the concept of universal jurisdiction is not whether the concept validly exists as a basis for jurisdiction in international law but rather the scope of its applicability. Universal jurisdiction does not apply to all international crimes, but rather to a very limited category of offences.^{xv} Universal jurisdiction over acts of piracy is well established in international law. The fact that pirates were regarded as Stateless persons coupled with the fact that acts of piracy were committed on the high seas outside the territorial jurisdiction of States would have meant that pirates were completely outside the ambit of the law. That States would have not have had the right to exercise jurisdiction over pirates necessitated a means of asserting some sort of universal jurisdiction over them as common enemies of mankind.

10. It seems common place in contemporary times and discourse to assume that international crimes like slavery, slave trade, genocide, war crimes, crimes against humanity, apartheid, torture, terrorism and hijacking attract universal jurisdiction because of the moral

heinousness of these crimes. Moral heinousness however, is not to be equated with universal jurisdiction.^{xvi} . The issue of whether there exists universal jurisdiction over a crime is dependent on general international law and the subtleties of international rule-making. However, the categorisation or proscription of an act as an international crime is not enough to ascribe universal jurisdiction to States for the proscribed act.

11. It is comm.

on to find general and expansive assertions including a wider range of international crimes, than is actually the case, within the remit of universal jurisdiction. For instance, the Third Restatement of the Law: The Foreign Relations Law of the United States mentions the offences of piracy, slave trade, genocide, war crimes, attacks on or hijacking of aircrafts, and presumably certain acts of terrorism as falling within the scope of the concept of universal jurisdiction.^{xvii} It is also not uncommon to find some commentators, especially within the field of international relations,^{xviii} and human rights organisations and NGOs adopting this expansive view of universal jurisdiction.^{xix}

12. The issue of universal jurisdiction over the international crime of slavery and slave trading, contrary to commonly held opinion is not as straightforward as the crime of piracy.^{xx} It has also been contended that the recognition of universal jurisdiction over slavery and slave trading can be traced to the Geneva Convention on the High Seas, the United Nations Convention on the Law of the Sea, the 1926 Convention To Suppress the Slave Trade and Slavery and its Protocol in 1953 and Supplementary Convention in 1956.^{xxi} However, there is nothing in the text of these provisions conferring States with universal jurisdiction, indeed most of the provisions direct its obligations to the High Contracting Parties; obligations which the parties contractually agreed to and can denounce.^{xxii} Professor Kontorovich argues that,

“At most, international treaties on slave trading created “delegated jurisdiction” whereby several nations conveyed to one another the right to exercise some of their jurisdictional powers with respect to a particular offence, effectively making each State an agent of the others. Since such arrangements rest on State consent and the traditional jurisdiction of each State party to the agreements, they in no way...can be considered as examples of universal jurisdiction”.^{xxiii}

13. Proponents of universal jurisdiction over slavery and slave trading, like Kenneth Randall concede that the international instruments on slavery do not explicitly confer universal jurisdiction, however they assert that such universal jurisdiction exists in customary international law. They argue that customary international law as seen in the extensive efforts to abolish slavery, even in the absence of explicit provisions in international instruments on slavery providing for universal jurisdiction, sustains universal jurisdiction over these crimes.^{xxiv} However, it is doubtful if customary law sustains this assertion because to the extent that the requirements for a rule to emerge as custom in international law include State practice in support of the rule together with *opinio juris*, no State practice exists where States have assumed universal jurisdiction over slavery and slave trade.

14. The Statutes of the Tribunals established after the World War in 1945 in Nuremberg and in the Far East (Tokyo) did not provide that universal jurisdiction exists for crimes against humanity, neither do the trials conducted under the Statutes and the various war crimes trials conducted in the aftermath of the War support universal jurisdiction for war crimes. This is because the trials were part of the terms of surrender of the vanquished States to the victorious Allied Powers. However, it would seem that universal jurisdiction arguably extended

in the wake of World War II to crimes against humanity as evident in the trial of Adolf Eichmann in Israel in 1961.^{xxv} Eichmann, an official in the German Reich, who was implicated in the Holocaust was kidnapped from Argentina and brought to trial in Israel. While States like Argentina objected to the violation of its territorial sovereignty and the manner of securing the presence of Eichmann in Israel, there were no objections to the grounds on which Israel asserted jurisdiction, which included universal jurisdiction. Further to this, the United States, in the case of *Demjanyuk*, accepted that a person implicated in the Holocaust could be extradited to Israel which could exercise jurisdiction over persons accused of perpetrating the Holocaust.^{xxvi}

15. Universal jurisdiction has also been argued to have extended to certain crimes where multilateral treaties codifying these crimes such as the Rome Statute of the International Criminal Court stipulate that States within whose territory persons guilty of such crimes are found are under a duty to prosecute or extradite (*aut dedere, aut judicare/ punire*) such persons.^{xxvii} International instruments on genocide, war crimes, hijacking, torture and terrorism contain provisions obligating States to exercise jurisdiction over certain acts or extradite accused persons to other States for trial.

16. With regard to the so-called treaty-based universal jurisdiction (*aut dedere, aut judicare*), resort is to be had to the language of the specific treaties. The Convention on the Prevention and Punishment of the Crime of Genocide 1948 does not contain an express provision mandating State parties to assume jurisdiction over crimes of genocide by prosecuting accused persons or to extradite such persons. The Genocide Convention does not impose an obligation to prosecute or extradite, rather it expressly provides that trials are to be by

“a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”^{xxviii}

The Convention also provides in Article VII that,

“Genocide ...shall not be considered as political crimes for the purpose of extradition. The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.”

17. The logical interpretation of these provisions can only, therefore, either be that proceedings for genocide may be brought by States, which are obligated to exercise jurisdiction where there is a territorial jurisdictional link, or that proceedings may be brought before a competent international criminal court. Where genocide has been committed and extradition is sought, parties to the Convention cannot qualify the genocide as a political offence for which there can be no extradition but rather to grant the extradition in accordance with its own national laws; extradition being dependent on the existence of a treaty or agreement in the absence of which there is no obligation to extradite.^{xxix} However, these provisions of the Genocide Convention have been progressively interpreted as including a “*potential*” for universal jurisdiction”.^{xxx}

18. International instruments regarding war crimes and torture are more explicit in their provisions regarding the issue of ‘treaty-based universal jurisdiction’. Articles 49, 50, 129 and

146 of the first,^{xxxvi} second,^{xxxvii} third^{xxxviii} and fourth^{xxxix} of The Geneva Conventions 1949, provide that,

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

19. It is easily assumed that there is universal jurisdiction for war crimes. A leading expert on war crimes and international criminal law writes that there are no specific provisions within the Conventions for universal jurisdiction, but that it is implicit in the penal duty to enforce the grave breaches of the Convention that Parties exercise universal jurisdiction under their national laws.^{xxxv} He posits that universal jurisdiction over war crimes is fuelled by the writings of academics and experts, rather than the Conventions. The Conventions require States to pass domestic legislation to facilitate jurisdiction, but unfortunately many States are yet to do this. The Conventions hold pride of place as multilateral international agreements because of the near universality of participation of States who have ratified the Conventions. Universality in the scope of Conventions does not automatically mean that the Convention provides for universal jurisdiction, however if the near universal ratification of the Conventions is backed by the enactment of national legislations in States as required, then it becomes difficult to argue against universal jurisdiction for war crimes.

20. With regards to hijacking of aircrafts, the Tokyo Convention on Offences and Certain Other Acts Committed On Board Aircraft 1963 is clear in its provisions. The Convention does not provide for universal jurisdiction but rather it provides for jurisdiction on grounds of registration of the aircraft. In the absence of registration jurisdiction can then be founded on effects in territory, nationality or residence of affected persons, violation of security of the State or violation of its laws and obligations under any multilateral international agreement.^{xxxvi} Both the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970 and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 extend the grounds of jurisdiction contained within the Conventions and provide that,

“The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.”^{xxxvii}

21. The provisions of the Montreal and Hague Conventions seem to embody universal jurisdiction, however Judge Higgins strongly refutes this arguing that,

“..[I]t is still *not* really universal jurisdiction *stricto sensu*, because in any given case only a small number of contracting States would be able to exercise jurisdiction on the basis of Articles 2, 4, and 7. All that is ‘universal’ is the requirement that all States parties do whatever is necessary to be able to exercise jurisdiction *should the relatively limited bases* of jurisdiction arise in the circumstances. Contrary to the views sometimes expressed elsewhere, this is not treaty-based universal jurisdiction (and so the question of such treaty basis ‘passing into’ general international law does not arise.”^{xxxviii}

22. Similarly, the International Convention on the Suppression and Punishment of the Crime of Apartheid 1973 contains an undertaking by Parties in Article 4 to adopt legislative, judicial and administrative measures for the exercise of jurisdiction over persons accused of apartheid, irrespective of territoriality and nationality.^{xxxix}

23. The Convention on Prevention and Punishment of Crimes against Internationally Protected Persons 1973 provides for States to exercise territorial, nationality and flag jurisdictions.^{xl} Article 7 of the Convention further provides that,

“The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.”

24. There is nothing in the text of the Convention, which expresses any form of universal jurisdiction. Unlike the Hague and Montreal Conventions, and indeed other international multilateral agreements which have adopted the standard formulation in Article 7 of the Hague and Montreal Conventions, the Convention on Prevention and Punishment of Crimes against Internationally Protected Persons does not obligate States to extradite alleged offenders, it only obligates States to exercise jurisdiction, *if* the alleged offender is not extradited. This is clear from a comparative reading of the Conventions.

25. The International Convention against the Taking of Hostages 1979,^{xli} provides in Article 5 that States parties are to exercise jurisdiction on the basis of territoriality, habitual residence (for Stateless persons), nationality of offender and victim, and where the unlawful act was done to compel the State to do or to abstain from doing an act. Like Article 7 of the Convention on Prevention and Punishment of Crimes against Internationally Protected Persons, Article 8 of the Convention against taking of Hostages again obligates States to exercise jurisdiction, *if* the alleged offender is not extradited.

26. In *United States v. Yunis*,^{xlii} the courts of the United States exercised jurisdiction over a Lebanese national and resident who was charged for the hijacking of a Jordanian civil aircraft in the Middle East in 1985 involving some nationals of the United States. The case has been celebrated as “a resounding acceptance of universal and passive personality principles as sufficient bases under international law for a State to assert jurisdiction over an extra-territorial crime...”^{xliii} However, the Hostages Convention provided expressly for the exercise of jurisdiction on grounds of nationality of victim.

27. The Convention on Physical Protection of Nuclear Material 1980 does not include universal jurisdiction, rather it provides for the exercise of jurisdiction under the Convention on grounds of territoriality or aboard a ship or aircraft registered in the State (flag) and nationality of the offender.^{xliv} It mandates parties to exercise jurisdiction where the offender is within its territory, *and* it does not extradite the alleged offender.^{xlv}

28. In addition to providing for jurisdiction, in Article 5, on nationality and territorial grounds, the Convention against Torture and other Cruel, Inhuman or Degrading Punishment 1984 expressly contains the expansive obligation of States to either prosecute or extradite (*aut dedere, aut judicare*) alleged offenders. Article 7 of the Convention provides that if a State party in whose territory a person accused of torture is found shall extradite him or submit the matter to its competent authorities for prosecution.^{xlvi} The decision of the House of Lords of the United Kingdom in the case of *Pinochet* was focused on the obligations of Chile, Spain

and the United Kingdom under the Torture Convention rather than on whether the Convention provided for universal jurisdiction for acts of torture.^{xlvii} The extradition request sought by Spain did not arise from any claims as to universal jurisdiction, rather it arose from the obligation assumed by Spain under the Convention against Torture.

29. The United States have asserted expansive civil jurisdiction in relation to torture under Alien Torts Claims Act. In *Filartiga v. Pena Irala*,^{xlviii} jurisdiction was assumed at the instance of two citizens of Paraguay over wrongful death resulting from acts of torture carried out in Paraguay by a police official against a Paraguayan citizen. The court of first instance dismissed the case for lack of jurisdiction. Upon appeal, the Court of Appeals held illegal the acts of torture, which violated the prohibition on torture, a norm of customary international law. In that case, the Judge likened the torturer to "...the pirate and slave trader before him; *hostis humanis generis*, an enemy of all mankind".^{xlix}

30. International efforts at the enlargement of jurisdiction extends to terrorist acts. The International Convention for the Suppression of Terrorist Bombings 1998 provides in Article 6 for the exercise of jurisdiction on grounds of territoriality, flag, nationality (of offender as well as victim), habitual residence in the case of stateless persons, commission of terrorist acts against a State or government facilities abroad (including embassies), compelling a State to do or abstain from an act or onboard any aircraft operated by a State.ⁱ Article 6(4) further provides that parties to the Convention are to take measures to establish jurisdiction where an alleged offender is present in its territory *and* it does not extradite the offender. The International Convention for the Suppression of the Financing of Terrorism 1999 and the International Convention for the Suppression of Acts of Nuclear Terrorism 2005 provide for the exercise of jurisdiction on the same grounds as the Convention of Suppression of Terrorist Bombings 1998.ⁱⁱ

31. It is doubtful whether the provisions in multilateral conventions as highlighted above which have been regarded as treaty-based forms of universal jurisdiction are in fact universal jurisdiction in stricto sensu. The basis for the exercise of the expanded jurisdiction (beyond the accepted territorial and nationality grounds) proceeds from the agreement of States which are party to the conventions and do not apply to non-party States. Judge Higgins comments that,

"...none of them [the conventions], properly analysed, provides for universal jurisdiction. They provide for various bases of jurisdiction coupled with the *aut dedere aut punire* principle- that is, that a State party to the treaty undertakes to try an offender found on its territory, or to extradite him for trial."ⁱⁱⁱ

32. There is no evidence of established State practice in international law with regard to universal jurisdiction over international crimes as a whole. President Guillaume of the International Court of Justice in the *Arrest Warrant* case found support with Lord Slynn of Hadley in *Pinochet II* that there is no universality of jurisdiction with regard to international crimes and he further asserted that only piracy is subject, truly, to universal jurisdiction in international law.ⁱⁱⁱⁱ

33. From the study of customary international law and treaty law undertaken in this Report, it is evident that universal jurisdiction as a concept of international law exists in relation to acts of piracy, crimes against humanity, war crimes, torture under the Torture Convention, and, *potentially*, genocide under the Genocide Convention. However, the practice of the matter would be dependent on the extent to which States are bound by the various sources of international law (customary or treaty law) providing for universal jurisdiction.

34. The International Court of Justice clearly states that,

“the writings of eminent jurists...important and stimulating as they may be, cannot of themselves and without reference to the other sources of international law, evidence the existence of a jurisdictional norm. The assertion that certain treaties and court decisions rely on universal jurisdiction, which in fact they do not, does not evidence an international practice recognized as custom...That there is no established practice in which States exercise universal jurisdiction, properly so called, is undeniable...Virtually all national legislation envisages links of some sort to the forum State; and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction.”^{liv}

EFFECTS

35. The categorisation of an act as an international crime, likewise the designation of a norm as peremptory in international law (*jus cogens*)^{lv} does not mean that universal jurisdiction is applicable to such acts. Also the existence of an obligation *erga omnes* regarding the protection of international interest or standard does not mean that States can exercise universal jurisdiction.

36. The fact that universal jurisdiction may exist with regard to a crime does not mean that this disentitles State officials, including Heads of State, from the jurisdictional immunities obtainable in international law. The International Court of Justice sums up the matter by asserting as follows,

“It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers of Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.”^{lvi}

37. Judges Higgins, Kooijmans and Buergenthal, in their Joint Separate Opinion in the ICJ decision in the *Arrest Warrant Case*, upon considerations of the various national legislations and case-law in the United Kingdom,^{lvii} Australia,^{lviii} Austria,^{lix} France,^{lx} Germany,^{lxi} Netherlands^{lxii} and the United States^{lxiii}, observed that though there may have been efforts to adjudicate over extra-territorial crimes, especially war crimes, there has been no clear instance of an assertion of universal jurisdiction where there has been no other jurisdictional link, with the exception of Belgium, as evident in the instance before the Court that there cannot be said to be an *established* practice of the exercise of universal jurisdiction by States in international law.^{lxiv}

38. Due to political pressure from the United States, the controversial universal jurisdiction legislation of Belgium has been amended.^{lxv} This amendment was done in the aftermath of the International Court of Justice decision in the *Arrest Warrant* and is in line with the Rome

Statute of the International Criminal Court.^{lxvi} Article 27 of the Rome Statute is to be read together with Article 98 of the Statute, and they both provide, respectively, that,

“This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.”

and that,

“ The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.”

39. Furthermore, an inherent effect of the concept, especially when misused, is that there is potential for disruption in international relations between States as well as the deprivation of rights and harassment of individuals (especially State officials) and the abuse of legal process.^{lxvii}

CONCLUSION

40. Moral reprehensibility cannot be equated to universal jurisdiction. The scope, applicability and even the effects of the concept of universal jurisdiction in international law is less than what proponents of the concept advocate it to be. This Report has undertaken an analysis of international law, customary and treaty, which shows that universal jurisdiction exists as a concept in international law and is not a new introduction into the body of international law. It has also highlighted the limited cases in which this type of jurisdiction can be exercised. The expansive approach that has been adopted by proponents of the jurisdiction is policy-oriented and not legally-oriented; and this policy approach may be reflective of a desire of law, *de lege ferenda* (law as it ought to be), and not law, *de lege lata* (law as it is). States jealously guard their sovereignty and as such are hesitant to expand the scope of universal jurisdiction, and with international law being primarily the domain of States, it is States that would determine the scope, applicability and future of the concept. Finally, because of the potentially disruptive effect of universal jurisdiction, it is imperative that disciplines be established regarding regulation of the concept.

PART II: ANALYSIS OF RESOLUTIONS OF THE GENERAL ASSEMBLY AND DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE ON UNIVERSAL JURISDICTION

41. In this part, the Report provides a critical analysis of relevant resolutions of the United Nations General Assembly and/or decisions of the International Court of Justice on the concept of universal jurisdiction.

THE GENERAL ASSEMBLY

42. The concept of universal jurisdiction is yet to be substantively deliberated upon by the General Assembly of the United Nations. The involvement of the Assembly in international rule-making through multilateral conventions, which incorporate what has been referred to as treaty-based universal jurisdiction, under the auspices of the United Nations cannot be considered to be involvement in the development of the concept in international law. This is because the issue of jurisdiction has been ancillary in international conventions and the so-called treaty-based universal jurisdiction has been shown earlier in this report) to be contractual expansion of jurisdiction by the contracting States beyond territoriality and nationality to include the international law principle of *aut dedere, aut judicare/punire* (extradite or punish).

43. There is discernible practice of the General Assembly to expand jurisdiction of contracting States in international conventions to include the principle of *aut dedere, aut judicare* over certain international crimes. This practice is evident in the Genocide Convention adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948, Apartheid Convention adopted by General Assembly Resolution 3068 (XXVIII) of 30 November 1973, Torture Convention adopted by General Assembly Resolution 39/46 of 10 December 1984, Hostages Convention adopted by General Assembly Resolution 34/146 of 17 December 1979, Convention on Internationally Protected Persons adopted by General Assembly Resolution 3166 (XXVIII) of 14 December 1973, and the Convention on Suppression of Terrorism Financing which was adopted by General Assembly Resolution 54/109 of 9 December 1999.

44. In Resolution 95 (1) of 11 December 1946, the Assembly affirmed the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal. The Charter of the Nuremberg Tribunal did not contain any provision ascribing universal jurisdiction to the Tribunal established under the Charter and neither did the proceedings under the Charter rely on universal jurisdiction. Based on this, United Nations General Assembly Resolution 95 (1) of 11 December 1946 cannot affirm what was not established under the Charter of the Nuremberg Tribunal.

45. It has been argued that the Princeton Principles on Universal Jurisdiction and supporting materials “have been translated into five languages and distributed as a document of the General Assembly of the United Nations.”^{lxviii} However, the Princeton Principles are merely guiding general principles compiled by some academics and jurists which, though may be relied upon by the General Assembly, did not originate from the General Assembly or indeed any body of the United Nations organisation.

THE INTERNATIONAL COURT OF JUSTICE

46. The issue of universal jurisdiction has come before the International Court of Justice only once, in the *Case Concerning the Arrest Warrant of 11 April 2000 (The Democratic Republic of Congo v. Belgium)*.^{lxix} In that case, the Democratic Republic of Congo challenged the legality of an international arrest warrant issued by a Belgian court for the arrest of Mr Yerodia Ndombasi, the former Foreign Affairs Minister of the Republic of Congo, for crimes against humanity. Belgium had asserted universal jurisdiction based on a Law of 1993, as amended by the Law of 1999 ‘Concerning the Punishment of Serious Violations of International Humanitarian Law’.

47. The Republic of Congo claimed before the International Court that the universal jurisdiction asserted by Belgium was a violation of the sovereignty of the Republic of Congo and that the non-recognition of the international law immunity of its Minister of Foreign Affairs was a violation of the diplomatic immunity to which the Republic of Congo and its officials were entitled to in international law. Unfortunately, the International Court did not consider the question of universal jurisdiction in its judgment because the parties decided that universal jurisdiction was not in contention between them. The Court decided that it was restricted to the pleadings submitted before it.^{lxx}

48. However, in their respective separate and dissenting opinions some of the judges considered the concept of universal jurisdiction and its applicability in international law. President Guillaume stated that piracy was the only true case of universal jurisdiction and that certain international conventions provide for the establishment of “subsidiary universal jurisdiction” where an offender is within national territory of States and is not extradited to another State for trial. He concluded that apart from piracy and instances of “subsidiary universal jurisdiction” under international conventions that “international law does not accept universal jurisdiction; still less does it accept universal jurisdiction *in absentia*.”^{lxxi}

49. The controversial and unsettled scope of the concept was accepted by the various judges in their opinions. Judge Oda was of the view that universal jurisdiction is controversial and has increasingly been recognised for the international crimes of terrorism and genocide. He supported the Majority Decision in refraining from addressing universal jurisdiction in its judgment because of the undeveloped state of the law with regard to the concept and also because the International Court was not requested to make a decision on the issue.^{lxxii} The likelihood and potential for abuse of the concept was highlighted by Judge *ad hoc* Bula Bula in his critique and description of universal jurisdiction as “a ‘variable geometry’ jurisdiction selectively exercised against some States to the exclusion of others.” The Judge argued that even if universal jurisdiction were established in international law that it did not apply to exclude the international law immunities applicable to Mr Ndombasi, irrespective of the crimes alleged against him.^{lxxiii}

50. The decision of the majority of the International Court of Justice not to address the issue of universal jurisdiction in the judgment of the Court disregarded the fact that immunities arise in a jurisdictional context and that immunity is not an independent principle of international law but is preceded by the existence of jurisdiction. In their Joint Separate Opinion, Judges Higgins, Kooijmans and Buergenthal correctly asserted that immunity is not “free-standing” but is “inextricably linked” to jurisdiction.^{lxxiv}

51. Judge Al-Khasawneh did not consider the issue in his dissenting opinion while Judge Ranjeva in his Declaration supported the decision of the International Court by declining to address the issue of universal jurisdiction. Judge Rezek briefly considered the issue and stated that the Geneva Conventions of 1949 best exemplify universal jurisdiction and concluded that the Belgian courts lacked jurisdiction to initiate criminal proceedings against an official of the Republic of Congo “in the absence of any basis of jurisdiction other than the principle of universal jurisdiction.”^{lxxv}

52. Among the judges, there was no settled category of international crimes for which universal jurisdiction applied. The most expansive category was adopted by Judge Koroma who stated that,

“The Judgment cannot be seen either as a rejection of the principle of universal jurisdiction, the scope of which has continued to evolve, or as an invalidation of that principle. In my considered opinion, today, together with piracy, universal jurisdiction is available for certain crimes, such as war crimes and crimes against humanity, including the slave trade and genocide.”^{lxxvi}

53. Judge *ad hoc* van den Wyngaert was of the view that international law does not prohibit universal jurisdiction for war crimes and crimes against humanity but clearly permits it. The Judge also argued that there is no rule of conventional international law or customary international law prohibiting the exercise of universal jurisdiction *in absentia*.^{lxxvii}

54. An analysis of customary international law and international conventions, as shown in Part I of this Report 1, shows that universal jurisdiction applies to piracy, war crimes under the Geneva Conventions, and *potentially* to genocide. The so-called ‘treaty-based universal jurisdiction’ is not universal jurisdiction *per se* but “really an obligatory territorial jurisdiction over persons in relation to acts committed elsewhere.”^{lxxviii}

55. In the most detailed analysis of universal jurisdiction in the *Arrest Warrant Case*, Judges Higgins, Kooijmans and Buergenthal, upon considerations of the various national legislations and case-law in the United Kingdom,^{lxxix} Australia,^{lxxx} Austria,^{lxxxi} France,^{lxxxii} Germany,^{lxxxiii} Netherlands^{lxxxiv} and the United States^{lxxxv}, observe that though there may have been efforts to adjudicate over extra-territorial crimes, especially war crimes, there has been no clear instance of an assertion of universal jurisdiction where there has been no other jurisdictional link, with the exception of Belgium.^{lxxxvi} The Judges stated that there cannot be said to be an established practice of the exercise of universal jurisdiction by States in international law because national legislations envisage some sort of link to the forum State. The Judges went further to state that the fact that the practice of universal jurisdiction by States was not established does not necessarily mean that such an exercise would be unlawful.^{lxxxvii}

CONCLUSION

56. Universal jurisdiction is yet to substantively come into the deliberations of the United Nations General Assembly. As yet, there are no existing Resolutions of the Assembly dealing with the concept. The uncertainty over the scope of universal jurisdiction resonates in any related discourse, and it was unfortunate that the International Court of Justice side-stepped the opportunity to consider the question of universal jurisdiction as it related to the *Arrest Warrant case* despite the fact that the question was necessary to the findings of the Court.^{lxxxviii} It is hoped that such an opportunity presents itself before the International Court of Justice once again and that the Court rises to the occasion through an incisive, well-considered and well-informed elucidation of universal jurisdiction in international law, as is customary of the Court. It is also further hoped that the International Law Commission of the United Nations takes up the concept of universal jurisdiction so as to assist its developments, as the Commission has done concerning other areas of International Law, including State responsibility.

PARTII: INTERNATIONAL ABUSE OF THE CONCEPT OF UNIVERSAL JURISDICTION

57. The concept of universal jurisdiction is premised on functionality, especially in view of the decentralised nature of the international legal system. Universal jurisdiction enables a far-reaching enforcement and protection of international norms and standards and it also ensures that individuals are not beyond the reach of law and enforcement. It is inherent in the nature of the concept that the sovereignty of States will be implicated by the exercise of jurisdiction by one State over the acts of another, and as such there is a wide scope for abuse of the concept. A leading commentator and international criminal law expert advocates that,

“Unbridled universal jurisdiction can cause disruptions in world order and deprivation of individual human rights when used in a politically motivated manner or for vexatious purposes. Even with the best of intentions, universal jurisdiction can be used imprudently, creating unnecessary frictions between States, potential abuses of legal processes, and undue harassment of individuals prosecuted or pursued for prosecution under this theory. Universal jurisdiction must therefore be utilized in a cautious manner that minimizes possible negative consequences, while at the same time enabling it to achieve its useful purposes.”^{lxxxix}

58. This Part of the Report considers whether and to what extent the concept of universal jurisdiction has been abused by some non-African States. Appropriate recommendations shall consequently be made to the Executive Council with regards to possible redress by Member States in cases of abuse of universal jurisdiction in international law. With regards to State practice on this score, Belgium and Spain have been in the forefront of assertion of universal jurisdiction and as such the jurisprudence of the Belgian and Spanish courts will form the core of this part of the Report.

BELGIUM

59. In 1993 Belgium enacted the Law Relative to the Repression of Serious Violations of the International Conventions of Geneva of 1949, and of the Protocols I and II of 1977. This Law permitted individuals, irrespective of their nationality, to file a criminal complaint in a Belgian court against any person for international crimes in violation of the Geneva Conventions and their additional Protocols, even when the acts were perpetrated outside Belgium by non-Belgian nationals against non-Belgians, and outside of Belgium. This law empowered an investigative magistrate to issue an international arrest warrant against the alleged offender. The Law was later renamed the Law Relative to Serious Violations of International Humanitarian Law in 1999 and was extended to include acts of genocide and crimes against humanity.

60. By this legislation, Belgium arrogated to itself universal jurisdiction over persons accused of violations of international humanitarian law irrespective of any jurisdictional link it would otherwise have required.^{xc} Article 7 of the Belgian Law 1993 provided that Belgian courts shall have jurisdiction in respect of the offences contained in the Law wherever the offences may have been committed. Under this Law, many cases were brought against the Israeli Prime Minister Ariel Sharon, the then- Iraqi President Saddam Hussein, Mauritanian President Maaouya ould Sid’Ahmed Taya, Laurent Gbagbo of Ivory Coast, Paul Kagame of Rwanda, Fidel Castro of Cuba, Ange-Felix Patassé of Central African Republic, Denis Sassou Nguesso of Republic of Congo, Yassir Arafat of the Palestinian Authority, Former President Hissène Habré of Chad, former President Augusto Pinochet of Chile, former President Hashemi Rafsanjani of Iran and former Minister of the Interior Driss Basri of Morocco.^{xcii}

Complaints were also filed against certain officials of the United States including President George Bush and Colin Powell, the then U.S. Secretary of State in 2003.

61. Colin Powell, in his capacity as Secretary of State, in 2003 highlighted the problem of harassment, risk and difficulty for public officials to carry out their duties in the face of such intrusive legislation. Due to political pressure from the United States, the controversial universal jurisdiction legislation of Belgium was amended twice in 2003.^{xcii} The amendments were done in the aftermath of the International Court of Justice decision in the Arrest Warrant case ^{xciii} and are in line with the Rome Statute of the International Criminal Court.^{xciv}

62. The first amendment to the Law came in April 2003 and limited the ability of victims to file complaints directly only where there exists a link between Belgium and the offensive act, for instance where the alleged offender is within Belgian territory, if the act occurred within Belgian territory or if the victim of the act is of Belgian nationality or has resided in Belgium for a period of at least three years.

63. In the absence of the links stated above, the amendment of April 2003 provided that cases can be brought by the State Prosecutor unless the complaint is manifestly without merit, or the complaint does not allege a violation of the Law, does not fall within the competence of the Belgian courts, or in the interests of justice and respect for the international obligations of Belgium, the case should be transferred to another court, so long as that jurisdiction upholds the right of the accused to a fair trial. Effectively, the 2003 amendment provided that jurisdiction was to be on the traditional grounds of territoriality or nationality. The amendment of the Law also provides for the power of the government to refer certain cases out of Belgium and also for Belgian courts to cooperate with the International Criminal Court.

64. Despite these amendments, some nationals of Iraq and Jordan filed a criminal complaint in Belgium against a General of the U.S. Army for alleged war crimes during the 2003 invasion of Iraq by the Coalition forces. The Belgian government referred the case to the U.S. but the U.S was dissatisfied with the Law and threatened that the continued existence of the Law had dire consequences for Belgium's continued status as the host State of the North Atlantic Treaty Organization. Belgium further amended the Law in August 2003, after a criminal complaint was filed against President Bush and Prime Minister Tony Blair of the United Kingdom for the use of force in Iraq in 2003.

65. As the Law currently stands, complaints can only be filed based on nationality or residence of the offender or the victim. It also gives the State Prosecutor the discretion to initiate proceedings based on respect for the existing international obligations of Belgium. The Law rules out complaints being filed against State Officials, including Heads of State and Foreign Ministers, who are entitled to jurisdictional immunities; and also prohibits enforcement against persons present in Belgium at the official invitation of the Government of Belgium or in connection with an international organisation in Belgium pursuant to a headquarters agreement.^{xcv}

66. However before the amendment of the Law, an investigating Magistrate in Belgium issued an international arrest warrant on 11 April 2000 through the Interpol against the then incumbent Minister of Foreign Affairs of the Democratic Republic of Congo, Mr Yerodia Ndombasi, alleging crimes against humanity and breaches of the Geneva Conventions of 1949 and its Additional Protocols. The Congo instituted proceedings before the International Court of Justice contending that Belgium had, by issuing and circulating the arrest warrant, violated the sovereignty and sovereign equality of the Congo as well as violated the diplomatic

immunity of its senior State official.^{xcvi} The International Court of Justice noted that the Democratic Republic of Congo claimed that, “ the universal jurisdiction that the Belgian State attributes to itself under Article 7 of the Law in question constituted a violation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations.”^{xcvii}

67. Unfortunately, the Court came to its decision on grounds other than universal jurisdiction and found that Belgium had failed in its international obligation to the Congo by not respecting the sovereignty of the Congo and the jurisdictional immunity of its Foreign Minister. The parties to the case decided that universal jurisdiction was not in contention between them and the Court’s actual decision on the merits was therefore restricted to the pleadings submitted before it.^{xcviii}

68. Despite the decision of the International Court in the Arrest Warrant Case and the amendment of the scope of the 1993 Law, a Belgian judge in September 2005 issued an arrest warrant against the former President of Chad, Hissene Habre.^{xcix} A group of victims, including three Belgian nationals, alleging torture by Habré in Chad filed a criminal complaint against him in Belgium. Although, Belgium discontinued cases against President Bush, U.S. officials and other cases, it decided to retain the pending cases against Habre of Chad, officials of Rwanda and Guatemala. In September 2005, a Belgian court issued an international arrest warrant against Habré and sought his extradition from Senegal. Habre was subsequently arrested by Senegalese officials but the request for his extradition to Belgium was not granted by the Senegalese courts. The Senegalese President referred the matter to the African Union.

69. The African Union in January 2006, established a Committee of Eminent African Jurists which was given the mandate to consider the aspects and implications of the case against Habré and option for his trial.^c The Committee decided on an ‘African option’ as the solution whereby Senegal, Chad or any African Union member could exercise jurisdiction over the accused person or an ad hoc tribunal could be established in any Member State to try the accused.^{ci} Based on the recommendations of the Committee of Eminent African Jurists, the African Union decided that the matter fell within the competence of the Union and mandated Senegal to prosecute and ensure the trial of Hissène Habré on behalf of Africa.^{cii}

SPAIN

70. Spain has come into the forefront of international law over the issue of universal jurisdiction. Under Article 23 (4) of the Ley Orgánica del Poder Judicial (Judicial Power Organization Act (LOPJ)), Spain has jurisdiction over crimes committed by Spanish or foreign citizens outside Spain, including genocide, terrorism and other crimes in international treaties that Spain is party to.^{ciii} An extradition request by Spain, in 1998, led to the very famous case against Augusto Pinochet of Chile. The Pinochet case was not decided on grounds of universal jurisdiction, but rather jurisdiction over the case was based on the United Nations Convention against Torture and Cruel, Inhuman or Degrading Punishment 1984.^{civ}

71. In the Spanish Guatemalan Genocide case, complaints were filed with the Audiencia Nacional for gross human rights violations and the matter was brought in Spain by Rigoberta Menchu, the Nobel Peace Prize winner, and other persons against several Guatemalan officials, including former Heads of State Gral Efraín Ríos Montt, Oscar Humberto Mejías Victores and Fernando Romeo Lucas García for acts of terrorism, genocide and torture

against the Guatemalan Mayan indigenous people and their supporters.^{cv} The investigating judge accepted the complaint.

72. Upon appeal, the Spanish Supreme Court held by a very slim majority (8:7), in 2003, that Spanish national interests (a jurisdictional link) had to be affected and solely with regard to the crime of torture for Spanish courts to exercise jurisdiction in the matter. The Court found that the exercise of territorial and international criminal jurisdiction under the Genocide Convention 1948 was not exclusive; and any other criminal jurisdiction capable of being exercised is subsidiary to the provision of Convention.^{cvii} The Majority noted that the Genocide Convention does not provide for universal jurisdiction, and argued that the Convention also does not prohibit it.^{cviii}

73. The Majority of the Spanish Supreme Court took into consideration the decision of the International Court of Justice in the Arrest Warrant case,^{cix} although the International Court did not decide on universal jurisdiction. However, like in the Spanish Guatemalan Genocide case what was at stake was the sovereignty of another State. Article VIII of the Genocide Convention provides that a party may call upon the competent organs of the United Nations to take such action under the United Nations Charter as may be appropriate for the prevention and suppression of the acts of genocide. The Majority argued that Article VIII rendered the jurisdiction of Spanish courts effective.^{cix} This is not a provision for the exercise of universal jurisdiction by States, indeed the Convention contains no such provision. Furthermore, the judges in the Minority misinterpreted the decision of the House of Lords of the United Kingdom in the Pinochet case to the effect that under international law, crimes of jus cogens, including genocide, are punishable by any State. The Pinochet decision, as earlier stated, was based on the Convention against Torture, which Spain, Chile and the United Kingdom were all party to and had contractually agreed to the exercise of jurisdiction under the Convention. The effect of the designation of a norm as jus cogens, does not mean that it can confer a court with jurisdiction which it does not have under international law.

74. The Spanish Constitutional Court, in 2005, reversed the decision of the Supreme Court and held that Spain could investigate crimes of genocide, torture, murder and illegal imprisonment committed in Guatemala between 1978 and 1986 and that the principle of universal jurisdiction was not dependent on the existence, or otherwise, of national interests.^{cx} The Constitutional Court was of the view that,

75. “The Convention’s silence on alternative jurisdictions beyond territorial and international tribunals cannot be read as an implicit limitation. Rather, Article VI of the Convention simply establishes the minimal obligations on States. The obligations to avoid impunity found in customary international law are incompatible with such a limited reading of the Convention and would, perversely, place more stringent limits on the actions of States parties to the Convention than those that applied to non-parties, which could rely on a universal jurisdiction founded in customary international law.”^{cxii}

76. The Constitutional Court effectively re-instated the criminal complaints and in 2006, an international arrest warrant against those involved in the Guatemalan Genocide.

77. In another case, asserting universal jurisdiction by the Spanish courts, an Argentine naval officer, Adolfo Scilingo, was charged with torture, illegal detention and killing prisoners by throwing them out of air planes.^{cxiii} Scilingo was convicted and sentenced to 640 years imprisonment.^{cxiii}

78. The action of Spain as it concerns universal jurisdiction cannot form the basis of customary international law on the matter, as one instance is not enough to create a rule of custom. A body of practice and *opinio juris* of the generality of States is required for the formation of a rule of customary international law on universal criminal jurisdiction for genocide and crimes against humanity.^{cxiv}

POTENTIAL FOR ABUSE

79. The importance of the concept of universal jurisdiction in international law in ensuring that individuals are within the ambit of the law is not to be taken for granted. Likewise, the potential for abuse of the concept is not to be taken for granted. A likely consequence of the abuse of universal jurisdiction would be the problem of judicial chaos that would arise due to a proliferation of litigation and the erosion of the principle of the sovereign equality of States.

80. The fact that States could use universal jurisdiction as an excuse to pursue citizens of other States should not be in lieu of the principle of the diplomatic protection of nationals abroad. Although this is a discretionary principle, the imperative that motivates a State to resort to universal jurisdiction should be considered to be of a sufficiently compelling factor in favour of invoking diplomatic protection. Under this principle, one State could bring a claim against another, upon exhausting local remedies or invoking exceptions to it, on grounds that such a State has committed a wrong, including the violation of human rights, against its citizens and has failed to provide an appropriate remedy. A case in point is that of *Amadou Sadio Diallo: Republic of Guinea v Democratic Republic of the Congo*.^{cxv} According to the facts of the case, on 28 December 1998, the Government of the Republic of Guinea instituted proceedings against the Democratic Republic of the Congo in respect of a dispute concerning 'serious violations of international law' allegedly committed against Mr. Ahmadou Sadio Diallo, a businessman of Guinean nationality. In its judgment on the preliminary objections raised by the Democratic Republic of the Congo, the Court declared unanimously that the application of the Republic of Guinea was admissible in so far as it concerned *the protection of Mr. Diallo's rights as an individual*.

81. Universal jurisdiction is subject to the principles of legality in international law, particularly as regards jurisdictional immunities, and where the alleged offender is outside the State, procedural requirements concerning the extradition (under a treaty) or lawful transfer of such persons, as well as mutual legal assistance where relevant, are applicable. Failure to abide by these would amount to an abuse and a violation of the right to a fair trial, which is a fundamental human right of an accused person enshrined in international treaties and in the constitutions of most countries.

82. To avoid abuse of jurisdiction, summons to Heads of States to appear in proceedings before the courts of another State must be subject to the consent of the Head of State concerned and diplomatic confidentiality must be kept. Obligations pertaining to these matters were pointed out more recently by the International Court of Justice in its decision on the preliminary objections to its exercise of jurisdiction in the case between Djibouti and France. According to the Court:

'The consent of the Head of State is expressly sought in this request for testimony, which was transmitted through the intermediary of the authorities and in the form prescribed by law.... This measure cannot have infringed the immunities from jurisdiction enjoyed by the Djiboutian Head of State. Moreover, the Court does not consider that there was an attack on the

honour or dignity of the President merely because this invitation was sent to him when he was in France to attend an international conference. *The Court observes again that if it had been proven by Djibouti that this confidential information had been passed from the offices of the French judiciary to the media, such an act could, in the context of the attendance of the Head of State of Djibouti at an international conference in France, have constituted not only a violation of French law, but also a violation by France of its international obligations.* However, the Court must again recognize, as it has already done regarding the summons of 17 May 2005 (see paragraph 175 of the judgment), that it has not been provided with probative evidence which would establish that the French judicial authorities were the source behind the dissemination of the confidential information at issue here.^{1CXVI}

83. The exercise of universal jurisdiction over State officials, including Heads of State and other senior officials, can result in harassment. This would, no doubt, adversely impact on the effective performance of the official functions of such persons. This harassment and interference could have international repercussions by embarrassing or limiting a State in its conduct of foreign relations which could in turn cause tensions between States or limit their participation in international affairs. The exercise of universal jurisdiction, as an analysis of the cases from Spain and Belgium have demonstrated, is not mandatory and this could lead to States which claim universal jurisdiction under their domestic laws employing it discriminately against nationals of certain States, especially less developed States. The instances of Spanish and Belgian jurisdiction over nationals of Guatemala, Argentina, Democratic Republic of Congo, and Chad point to this.

84. There is the added danger of forum-shopping where victims of international crimes as well as activists may seek to bring complaints against certain State officials hoping that a State will be able to institute criminal proceedings against these officials.^{1CXVII}

85. To safeguard abuse by way of harassment of *State officials and forum-shopping*, it is important for African States to take specific measures of immunity indicated by the *International Court of Justice in the Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*: 'The State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned. This would allow the court of the forum State to ensure that it does not fail to respect any entitlement to immunity and might thereby engage the responsibility of that State. Further, the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs.'^{1CXVIII}

86. However, it is important to note that the likelihood of abuse of a concept in international law does not nullify the existence of the concept or its applicability in the right circumstances. The potential for abuse is highlighted with a view towards a better understanding and regulation of the concept.

PART IV: RECOMMENDATIONS TO THE EXECUTIVE COUNCIL

87. In the event of abuse of the concept of universal jurisdiction, certain avenues for redress may be explored by an aggrieved State. Primarily, legal redress could be sought before the International Court of Justice challenging violation of sovereignty. This was the option that was adopted by the Democratic Republic of Congo against Belgium and the Court decided the case in favour of Congo. Although, the decision of the Court in the Arrest Warrant case was not based on universal jurisdiction for reasons earlier adduced in the Report, some of the Judges (Guillaume, Higgins, Kooijmans, and Buergenthal) in their reasoning and separate opinions state that there is no clear instance of universal jurisdiction in the absence of other existing jurisdictional grounds. It was also the option taken by Djibouti against France and the Court decided, on preliminary matters, in favour of Djibouti in relation to the admissibility of the case and the breach by France of its obligations towards Djibouti with regard to mutual legal assistance in the *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*.

88. However, the jurisdiction of the International Court of Justice is not automatic and is based on the consent of the parties to the suit.^{cxi} Furthermore, the parties to the suit can request the Court for an indication of provisional measures under Article 41 of the Statute of the Court so as to preserve the rights of the parties. The Democratic Republic of Congo made a request under Article 41 in the Arrest Warrant case on the same day that it filed an application instituting proceedings against Belgium.

89. States can also seek political or diplomatic redress through the use of its good offices. The United States through a policy of negotiation and threats succeeded in not only having cases against its officials discontinued in the Belgian courts but also in the amendment of the Belgian Law on universal jurisdiction. Likewise, African States can lodge diplomatic protests objecting to the abuse of universal jurisdiction by some States, especially where a right of diplomatic protection may be the more appropriate way to proceed in cases concerning nationals of the States concerned.

90. It is also recommended that the African Union makes use of the advisory jurisdiction of the African Court of Justice and Human Rights when this Court becomes operational. Such jurisdiction is provided for in the Statute of the Court and could be exercised along the same lines as the advisory jurisdiction of the International Court of Justice.^{cxi} While not a redress for abuse of universal jurisdiction, the advisory opinion of the proposed Court will no doubt contribute significantly to the discourse on universal jurisdiction and will also advise and guide members of the African Union on emerging trends concerning the scope and applicability of the concept.

91. It is important to mention the role of the International Criminal Court (ICC). The ICC as supranational court established under a multilateral agreement is well placed to address the concern of States over their sovereignty. Unlike the ICJ, the ICC has criminal jurisdiction over certain international crimes including genocide, crimes against humanity, war crimes and acts of aggression.^{cxi} It is recommended that States of the African Union can refer cases to the International Criminal Court, under Article 14 of the Rome Statute of the Court 1998. Referring cases to the ICC would check the excesses and whims of individual States as well as address some of the concerns of potential for abuse highlighted earlier in the Report. The Central African Republic has relied on the jurisdiction of the Court by referring cases for investigation and the Court recently arrested Jean-Pierre Bemba, the head of the Mouvement de Libération du Congo (MLC), an armed group in the Central African Republic.^{cxi} It is to be noted that the jurisdiction of the Court is prospective and does not relate to crimes committed before the entry into force of the Rome Statute of the Court.^{cxi}

END NOTES

- ⁱ Rosalyn Higgins, *Problems and Process: International Law and How We Use it*, (Oxford: Oxford University Press, 1994), p.56
- ⁱⁱ F.A. Mann, 'The Doctrine of Jurisdiction in International Law', (1964) *Recueil des Cours* 1
- ⁱⁱⁱ Dissenting Opinion of Judge ad hoc, Van den Wyngaert in *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, (2002) 41 *I.L.M.* 536, Paragraph 44; Claus Kreß, 'Universal Jurisdiction over International Crimes and the *Institut de Droit international*', (2006) 4 *Journal of International Criminal Justice* 561, at p.563
- ^{iv} Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept', (2004) 2 *Journal of International Criminal Justice* 735, at p. 745
- ^v Higgins, *op.cit.*, p.57
- ^{vi} Princeton Project on Universal Jurisdiction, available at http://lapa.princeton.edu/hosteddocs/unive_jur.pdf, last accessed 30/05/08. It is acknowledged that these Principles are of limited authority, however they only provide a useful guide to the matter.
- ^{vii} Henry A. Kissinger, 'Pitfalls of Universal Jurisdiction', *Foreign Affairs*, July/August 2001
- ^{viii} 1958 Convention, 450 *U.N.T.S.* 82; 1982 Convention, (1982) 21 *I.L.M.* 1261
- ^{ix} C. Schulte, 'The Enforcement of Obligations *Erga Omnes* before the International Court of Justice, Procedural Law and the East Timor Judgment' in Kalliopi Koufa (edited) *Thesaurus Acroasium, Vol. XXVIII, Might and Right in International Relations* (Athens: Sakkoulas Publications, 1999) p.534.
- ^x In matter of *Demjanyuk*, 603 F. Supp. 1468 (ND Ohio) affirmed in 776 F. 2d 571 (6th Cir. 1985), cited in Higgins, *op.cit.*, p.59
- ^{xi} Bartram S. Brown, 'The Evolving Concept of Universal Jurisdiction', (2001) 35 *New England Law Review* 383, at p.384
- ^{xii} Oscar Schachter, *International Law in Theory and Practice*, (Dordrecht: Martinus Nijhoff Publishers, 1991), p.209; M. Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', (2001-2002) 42 *Virginia Journal of International Law* 81, at p. 88; Egon Schwelb, 'The *Actio Popularis* and International Law', (1972) 2 *Israeli Yearbook on Human Rights* 46
- ^{xiii} (New Application: 1962), (2nd Phase), (1970) ICJ Reports 3, at Paragraph 33
- ^{xiv} *Ibid.*, at Paragraph 34
- ^{xv} Higgins, *op.cit.*, p.58; Kenneth C. Randall, 'Universal Jurisdiction Under International Law', (1988) 66 *Texas Law Review* 785, at p.788
- ^{xvi} Eugene Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation', (2004) 45 *Harvard International Law Journal* 183; Vaughan Lowe, 'Jurisdiction', in Malcolm D. Evans (ed.), *International Law*, 2nd edition, (Oxford: Oxford University Press, 2006), p.335, at p.348
- ^{xvii} ??
- ^{xviii} David Armstrong, Theo Farrell and Hélène Lambert, *International Law and International Relations*, (Cambridge: Cambridge University Press, 2007)
- ^{xix} 2001 Report by Amnesty International on 'Universal jurisdiction: The duty of states to enact and implement legislation', available at www.amnesty.org, last accessed 30/05/08
- ^{xx} Randall, *op.cit.*
- ^{xxi} *Ibid.*, p.798
- ^{xxii} Article 10 of the Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 (Slavery Convention of 1926), 60 *L.N.T.S.* 253
- ^{xxiii} *Op.cit.*, p.193
- ^{xxiv} Randall, *op.cit.*, p.791; Max Sørensen (edited) *Manual of Public International Law*, (New York: St. Martin's Press, 1968) 365; See also M. Cherif Bassiouni, 'Theories of Jurisdiction and Their Application in Extradition Law and Practice', (1974-1975) 5 *California Western International Law Journal* 1, at p.54
- ^{xxv} *Attorney General of Israel v. Eichmann*, 36 *ILR* 277
- ^{xxvi} Higgins, *op.cit.*
- ^{xxvii} Per Lord Millet in *R v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No.3)*, [1999] 2 *All E.R.* 97, [2000] 1 *A.C.* 147; M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere, Aut Judicare: The Duty to Extradite or Prosecute in International Law*, (The Netherlands: Martinus Nijhoff Publishers, 1995)
- ^{xxviii} Article VI
- ^{xxix} Anthony Aust, *Handbook of International Law*, (Cambridge: Cambridge University Press, 2005), p.264
- ^{xxx} Higgins, *op.cit.*, at p.62
- ^{xxxi} Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 *U.N.T.S.* 31
- ^{xxxii} Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 *U.N.T.S.* 85
- ^{xxxiii} Convention relative to the Treatment of Prisoners of War, 75 *U.N.T.S.* 135

- xxxiv Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287
- xxxv Bassiouni, *op.cit.*, p.117
- xxxvi Sections 3-4 of the Convention, 704 U.N.T.S. 219
- xxxvii Article 7 of both Conventions are *pari materia*. Hague Convention 1970, 860 U.N.T.S. 105; Montreal Convention 1971, 704 U.N.T.S. 177
- xxxviii Higgins, *op.cit.*, p.64
- xxxix General Assembly Resolution 3068 (XXVIII) 1973; 1015 U.N.T.S. 243
- xl Article 3 of the Convention, 1035 U.N.T.S. 167
- xli General Assembly Resolution 146 (XXXIV); 1316 U.N.T.S. 205
- xlii 681 F.Supp 896
- xliii Lynda M. Clarizio, 'United States v. Yunis, 681 F.Supp 896', (1989) 83 *AJIL* 94, at p.99
- xliv 1456 U.N.T.S. 246; Article 8(1) of the Convention
- xlvi Article 8(2)
- xlvi 1465 U.N.T.S. 85
- xlvi *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No. 3)*, *op.cit.*
- xlvi 630 F.2d 876 (2d Cir. 1980); 77 *ILR* 169
- xlvi *Ibid.*, at p. 184
- l 37 *I.L.M* 249
- li Article 7 of the International Convention for the Suppression of Financing of Terrorism, 39 *I.L.M* 270; and Article 9 of the International Convention for the Suppression of Acts of Nuclear terrorism, available at http://untreaty.un.org/English/Terrorism/English_18_15.pdf, last accessed 01/06/08
- lii *Op.cit.*, p.65
- liii Paragraph 12, Separate Opinion of President Guillaume in the *Arrest Warrant* case, *op.cit*
- lii *Arrest Warrant* case, Paragraph 44-45, Joint Separate Opinion, *op.cit.*
- lv A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character, see Article 53 of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331
- lvi *Arrest Warrant* case, Paragraph 59, *op.cit*
- lvii The decision in *Pinochet* was based on the Torture Convention and the technicality of the requirement of the double criminality rule in English Law.
- lviii In *Nulyarimma v. Thompson* [1999] *FCA* 1192; (2000) 39 *I.L.M.* 20 (regarding genocide), the Federal Court of Australia recognized certain international crimes attracting universal jurisdiction and further recognized that an enabling national legislation would be required for the exercise of such jurisdiction. This was confirmed in *Polyukhovich v. Commonwealth of Australia* [1991] *HCA* 32 (regarding war crimes).
- lix There is a requirement of double-criminality for the exercise of universal jurisdiction and in *Dusko Cvjetkovic*, the Austrian Supreme Court asserted jurisdiction over genocide on the grounds of lack of a functioning legal system in the State where the genocide was committed as well as the lack of an international criminal court in existence to exercise jurisdiction over the matter; see Paragraph 22 of Joint Separate Opinion in *Arrest Warrant* case; Axel Marschik, 'The Politics of Prosecution: European National Approaches to War Crimes', in Timothy L.H. McCormack & Gerry J. Simpson (eds) *The Law of War Crimes: National and International Approaches*, (The Hague: Kluwer Law International, 1997), p.79-81
- lx In *re Javor* it was held that the Genocide Convention does not provide for universal jurisdiction and though upon appeal the decision was reversed, it was done based on other grounds, 1996 Bull. Crim., No. 132, at p. 379, case note by Brigitte Stern, 'In *re Javor*, 1996 Bull. Crim., No. 132, at 379 In *re Munyeshyaka*, 1998 Bull. Crim. No.2, at 3', (1999) 93 *AJIL* 525; see Paragraph 22 of Joint Separate Opinion. Likewise, in the *Qaddafi* case, both the *Cour d'Appel* and the *Cour de Cassation* did not rely on universal jurisdiction but rather on passive personality and immunity, respectively; see Paragraph 22, *ibid.*
- lxi The Higher Regional Court of Bavaria has asserted universal jurisdiction over genocide where the accused was found in Germany; see Paragraph 22, *ibid.*
- lxii The Dutch Supreme Court provided for the additional jurisdictional links of nationality or presence within the Netherlands following from an earlier decision by the Amsterdam Court of Appeal in *Bouterse* that torture was a crime against humanity attracting extraterritorial jurisdiction; see Paragraph 22, *ibid*; Pita Schimmelpennick van der Oije and Steven Freeland, 'Universal Jurisdiction in the Netherlands- The Right Approach but the Wrong Case?: Bouterse and the 'December Murders'', 2001 *Australian Journal of Human Rights* 20; <http://hrw.org/reports/2006/ij0606/10.htm>, last accessed 30/05/08.
- lxiii Though relying more on passive personality, the United States has shown an inclination towards universal jurisdiction in response to terrorism, see *US v. Yunis*, 681 F.Supp 896 (1988) and *US v. Bin Laden*, 92 F. Supp (2d) 189 (2000). See Paragraph 22, *ibid*
- lxiv Paragraphs 20, 21, and 45 *Arrest Warrant* case, *ibid.* See the Australian War Crimes Act 1945 (amended in 1988), the United Kingdom War Crimes Act 1991 and the Criminal Code of Canada 1985

- ^{lxv} Sean D. Murphy, 'U.S. Reaction to Belgian Universal Jurisdiction Law', (2003) 97 *AJIL* 984, at p.986
- ^{lxvi} 37 *I.L.M.* 999
- ^{lxvii} Bassiouni, *op.cit.*, p.82
- ^{lxviii} Stephen Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*, (Pennsylvania: University of Pennsylvania Press, 2004), p.5
- ^{lxix} 41 *I.L.M.* 536
- ^{lxx} Judgment of 14 February 2002, Paragraphs 41-43
- ^{lxxi} Separate Opinion of President Guillaume, Paragraph 16
- ^{lxxii} Dissenting Opinion of Judge Oda, Paragraph 12
- ^{lxxiii} Separate Opinion of Judge *ad hoc* Bula Bula, Paragraphs 104 and 107
- ^{lxxiv} Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, Paragraph 3
- ^{lxxv} Separate Opinion of Judge Rezek, Paragraphs 7 and 10
- ^{lxxvi} Separate Opinion of Judge Koroma, Paragraph 9
- ^{lxxvii} Dissenting Opinion of Judge *ad hoc* van den Wyngaert, Paragraphs 54-55, 59
- ^{lxxviii} Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, Paragraph 41
- ^{lxxix} The decision in *Pinochet* was based on the Torture Convention.
- ^{lxxx} In *Nulyarimma v. Thompson* [1999] *FCA* 1192; (2000) 39 *I.L.M.* 20, the Federal Court of Australia recognized universal jurisdiction over certain international crimes and that an enabling national legislation would be required for the exercise of such jurisdiction; confirmed in *Polyukhovich v. Commonwealth of Australia* [1991] *HCA* 32
- ^{lxxxi} In *Dusko Cvjetkovic*, the Austrian Supreme Court asserted jurisdiction over genocide on the grounds of lack of a functioning legal system in the State where the genocide was committed as well as the lack of an international criminal court in existence to exercise jurisdiction over the matter.
- ^{lxxxii} In *re Javor* it was held that the Genocide Convention does not provide for universal jurisdiction and though upon appeal the decision was reversed, it was done based on other grounds, 1996 Bull. Crim., No. 132, at p. 379, case note by Brigitte Stern, 'In *re Javor*. 1996 Bull. Crim., No. 132, at 379 In *re Munyeshyaka*. 1998 Bull. Crim. No.2, at 3', (1999) 93 *AJIL* 525; likewise, in the *Qaddafi* case, both the *Cour d'Appel* and the *Cour de Cassation* did not rely on universal jurisdiction but rather on passive personality and immunity, respectively.
- ^{lxxxiii} The Higher Regional Court of Bavaria has asserted universal jurisdiction over genocide where the accused was found in Germany.
- ^{lxxxiv} The Dutch Supreme Court provided for the additional jurisdictional links of nationality or presence within the Netherlands following from an earlier decision by the Amsterdam Court of Appeal in *Bouterse* that torture was a crime against humanity attracting extraterritorial jurisdiction.
- ^{lxxxv} Though relying more on passive personality, the United States has shown an inclination towards universal jurisdiction in response to terrorism, *US v. Yunis*, 681 F.Supp 896 (1988) and *US v. Bin Laden*, 92 F. Supp (2d) 189 (2000).
- ^{lxxxvi} Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, Paragraphs 22-45
- ^{lxxxvii} Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, Paragraphs 45
- ^{lxxxviii} This is contrary to the opinion of Judge Koroma that the question was not indispensable in the arrival of a conclusion.
- ^{lxxxix} M. Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', (2001-2002) 42 *Virginia Journal of International Law* 81, at p.82
- ^{xc} See Act Concerning the Punishment of Grave Breaches of International Humanitarian Law (as amended in 1999) (1993) 38 *I.L.M.* 918; (as amended in 2003) (2003) 42 *I.L.M.* 749
- ^{xci} Available at <http://www.hrw.org/campaigns/icc/belgium-qna.pdf>, last accessed on 30/05/08
- ^{xcii} Sean D. Murphy, 'U.S. Reaction to Belgian Universal Jurisdiction Law', (2003) 97 *AJIL* 984, at p.986
- ^{xciii} *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, (2002) 41 *I.L.M.* 536
- ^{xciv} Rome Statute of the International Criminal Court, 37 *ILM* 999. Articles 27 and 98 of the Statute are to be read together.
- ^{xcv} Murphy, *op.cit.*, pp.985-987
- ^{xcvi} *Arrest Warrant* case, *op.cit.*
- ^{xcvii} *Arrest Warrant* case, *ibid.*, paragraph 17 of the Judgment of 14 February 2000
- ^{xcviii} *Ibid.*, paragraphs 41-43
- ^{xcix} Jurist Legal News and Research, 29 September 2005, available at <http://jurist.law.pitt.edu/paperchase/2005/09/belgium-issues-international-arrest.php>; and also <http://www.hrw.org/press/2003/08/belgium080103.htm> last accessed 30/05/08.
- ^c Assembly/AU/Dec.103 (VI), available at http://www.africa-union.org/root/au/Documents/Decisions/hog/AU6th_ord_KHARTOUM_Jan2006.pdf, last accessed 30/05/08

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- ^{ci} Report of the Committee of Eminent African Jurists on the Case of Hissène Habré, available at http://www.hrw.org/justice/habre/CEJA_Repor0506.pdf, last accessed 30/05/08
- ^{cii} Decision on the Hissène Habré case and the African Union Doc. Assembly/AU/3/ (VII), in Assembly/AU/Dec.127 (VII), available at http://www.africa-union.org/root/au/Conferences/Past/2006/July/summit/doc/Decisions_and_Declarations/Assembly-AU-Dec.pdf, last accessed 30/05/08
- ^{ciii} Luis Benavides, 'Introductory Note to the Supreme Court of Spain: Judgment on the *Guatemalan Genocide Case*', 42 *I.L.M.* 683
- ^{civ} 1465 U.N.T.S. 85
- ^{cv} 42 *I.L.M.* 686
- ^{cvi} *Ibid.*, p.695-698
- ^{cvi} *Ibid.*, p.697
- ^{cvi} Naomi Roht-Arriaza, '*Guatemalan Genocide Case*: Judgment No. STC 237/2005', (2006) 100 *AJIL* 207, at p.209
- ^{cix} *Op.cit.*, p.696
- ^{cx} Judgment No. STC 237/2005 (Tribunal Constitucional September 26, 2005), available at <http://www.tribunalconstitucional.es/jurisprudencia/Stc2005/STC2005-237.html>, last accessed 30/05/08, translation in Roht-Arriaza, *op.cit.*
- ^{cx} Roht-Arriaza, *ibid.*, p.210
- ^{cxii} Scilingo, No. 16/2005 (Audiencia Nacional (penal chamber, 3d section) Apr. 19, 2005).
- ^{cxiii} Roht-Arriaza, *op.cit.* p.213; see also <http://www.cnn.com/2005/WORLD/europe/04/19/spain.argentine/index.html>, last accessed 30/05/08
- ^{cxiv} Ian Brownlie, *Principles of Public International Law*, Sixth edition, (Oxford: Oxford University Press, 2003), p.7
- ^{cxv} Preliminary Objections, Judgment of the ICJ, 24th May 2007. See also *La Grand Case (Germany v USA)* ICJ Reports 2001 where, under a claim of diplomatic protection brought by Germany, the United States was held responsible for sentencing German nationals to death in breach of the Vienna Convention on Consular Relations 1963.
- ^{cxvi} *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, ICJ, Judgment of 4th June 2008, paras 179-180.
- ^{cxvii} This may be illustrated with the case of Peter Tatchell who has sought to have President Robert Mugabe of Zimbabwe arrested in Belgium, England and Australia, see http://news.bbc.co.uk/2/hi/uk_news/1204719.stm, last accessed 30/05/08
- ^{cxviii} *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, para. 196.
- ^{cxix} See generally Chapter II of the Statute of the ICJ dealing with the competence of the Court, especially Article 36(2). Text of the Statute is available at the website of the Court; www.icj-cij.org
- ^{cx} Article 65 of the Statute of the Court.
- ^{cx} Article 5 of the Rome Statute of the International Criminal Court 1998
- ^{cx} See the press release in the website of the Court, <http://www.icc-cpi.int/press/pressreleases/371.html>, last accessed 30/05/08
- ^{cx} Article 11 of the Rome Statute of the International Criminal Court 1998